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Report of the Human Rights Committee

Volume II

Eighty-eighth session
(16 October-3 November 2006)

Eighty-ninth session
(12-30 March 2007)

Ninetieth session
(9-27 July 2007)

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Note

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Annex VII

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. 1017/2001, *Strakhov v. Uzbekistan** Communication No. 1066/2002, *Fayzulaev v. Uzbekistan* (Views adopted on 20 July 2007, Ninetieth session)

Submitted by:	Ms. S. Strakhova, mother of Mr. Maxim Strakhov, and Mr. Asad Fayzullaev, on behalf of his son Nigmatulla (not represented)
Alleged victims:	Messrs. Maxim Strakhov and Nigmatulla Fayzullaev (both executed)
State party:	Uzbekistan
Date of communications:	29 September 2001 and 26 March 2002, respectively (initial submissions)
Subject matter:	Imposition of death sentence after unfair trial, resort to torture during preliminary investigation
Substantive issue:	Torture; unfair trial; arbitrary deprivation of life
Procedural issues:	Evaluation of facts and evidence; substantiation of claim
Articles of the Covenant:	6; 7; 10; 14; 15; 16
Article of the Optional Protocol:	2

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

Meeting on 20 July 2007,

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

Having concluded its consideration of communications Nos. 1017/2001 and 1066/2002, submitted to the Human Rights Committee on behalf of Messrs Maxim Strakhov and Nigmatulla Fayzullaev, under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1.1 The authors are Ms. S. Strakhova, an Uzbek resident of Russian nationality, and Mr. Asad Fayzullaev, an Uzbek national. They submit the communications on behalf of their sons, Maxim Strakhov (a Russian national, born in 1977) and Nigmatulla Fayzullaev (an Uzbek national, born in 1975), both executed, who, according to the authors when submitting their communications, were awaiting execution following death sentences imposed by the Tashkent City Court on 18 April 2001. The authors claim that their sons are victims of violations by Uzbekistan of their rights under article 6; article 7; article 10; article 14; article 15; and article 16 of the Covenant. They are unrepresented.

1.2 When registering the communications on 16 October 2001 and 26 March 2002, and pursuant to its rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party not to carry out the alleged victims' executions while their cases were under examination. On 21 October 2002, Ms. Strakhova informed the Committee that her son was executed on 20 May 2002. On 2 August 2005, the State party notified to the Committee that Strakhov's and Fayzullaev's death sentences had in fact been carried out before the registration of their cases by the Committee and the formulation of the request for interim measures. The State party does not provide the exact dates of execution, in spite of the fact that it was specifically requested to do so.

1.3 On 20 July 2007, during the 90th session of the Human Rights Committee, the Committee decided to join the consideration of these two communications.

Factual background

2.1 Both alleged victims were co-defendants in a criminal case. They were found guilty and sentenced to death on 18 April 2001 by the Tashkent City Court for stealing of a particularly important amount of money, unlawful acquisition and sale of foreign currency, robbery committed in an organized group, premeditated murder, on 29 September 2000, under aggravating circumstances of the members of one Luftddinov's family (consisting of four individuals including two minors), with particular violence, and pursuing selfish ends, and with the intention to conceal another crime. In addition, Fayzullaev was convicted for the rape of Mrs. Luftiddinova, accompanied by death threats. The death sentences were upheld by the Supreme Court on 13 September 2001. Both authors affirm that their sentence was disproportionably severe and unfounded.

Case of M. Strakhov

2.2 The first author, Ms. Strakhova, contends that the conviction of her son does not correspond to his personality. A written attestation in which his employer assessed him positively was submitted to the court in this respect. The court ignored that he had served in the Russian armed forces during the Chechen conflict. After his return to Uzbekistan, he developed the so-called "Chechen syndrome" (similar to the "Viet Nam syndrome"), and in his mind, he continued to fight. He could not sleep properly and woke up regularly, shouting. He could not walk on grass as he was afraid of land mines. He developed schizophrenia which affected his normal behaviour. The author claims that when a psychiatric expert examined her son to assess his situation in the context of the criminal proceedings against him, the examination was carried in unsatisfactory conditions, and he was not admitted for an appropriate stay in hospital, which would have permitted a proper assessment of his condition. In these circumstances, according to the author, the court should have concluded that he had acted in a state of affect.[1] The court rejected the request of the defence to conduct a complementary psychiatric examination to establish the real situation.

2.3 According to the author, in order to conceal that the investigators had acted incompetently, the judge refused to allow Strakhov's mother and his wife to testify on his behalf in court.

2.4 The author contends that her son was severely beaten and tortured after his arrest and forced to confess guilt. He confessed but could not provide a motive for the murder, because, according to the author, he was in a state of affect. Thus, he could not describe the crime weapon - a knife - nor the manner in which he himself was stabbed by one of his victims, Lutfiddinov.

2.5 The author affirms that according to a judgement of the Supreme Court of Uzbekistan of 1996, evidence obtained through unlawful methods is inadmissible. This was not respected in her son's case. The appeal court did not examine the case properly but simply confirmed the first instance verdict, in violation of article 463 of the Criminal Code.[2] In addition, at the beginning of the trial, her son and Fayzullaev were intimidated by the victims' families. One of the relatives of the murdered persons, Kurbanov, allegedly publicly stated that he would ensure that Strakhov would be raped before the end of the trial. The presiding judge did not take action to stop such intimidation.

2.6 According to the author, the above facts show that the courts' conclusions did not correspond to the circumstances of the case. In addition, the principle that it is not for the accused to prove his/her innocence, or that all remaining doubts should benefit the accused were, according to the author, not respected in her son's case. The verdict was based on material collected by the investigation but that was not confirmed during the trial.

2.7 The author contends that pursuant to article 22 of the Uzbek Criminal Procedure Code, evidence must be assessed in depth, comprehensively, objectively and exhaustively. In her son's case, however, the investigation and the court proceedings were conducted in an accusatory manner, and the examination of the case was superficial, incomplete, and biased.

2.8 On 21 October 2002, Ms. Strakhova informed the Committee that her son had been secretly executed. S He submits a copy of a death certificate issued on 28 June 2002, which shows 20 May 2002 as date of the execution. She claims that the execution took place,

notwithstanding that pursuant to the Criminal Code, death sentences may only be carried out once the President's administration has refused to grant a pardon. According to the author no replies to numerous requests for a presidential pardon were received in her son's case.

Case of Fayzullaev

2.9 Asad Fayzullaev contends that his son Nigmatulla was severely beaten after his arrest to force him to confess guilt, and was placed under moral and psychological pressure.[3] He refers to the 1996 judgement of the Supreme Court on the inadmissibility of evidence obtained unlawfully, and affirms that the court committed several procedural violations in order to validate the unlawful acts of the investigators who conducted the pre-trial investigation.

2.10 The author, his wife, and his son's wife were not allowed to testify on Fayzullaev's behalf in court. The court did not proceed to a comprehensive, full, and objective examination of all circumstances of the case. The presiding judge did not attach importance to the contradictions in the testimonies of different witnesses.[4]

2.11 With reference to article 463 of the Uzbek Criminal Procedure Code (see footnote 3 above), the author affirms that neither the trial nor the appeal court dispelled the outstanding doubts in his son's case. Instead, they simply ignored them.

2.12 The author claims that the investigators violated the principle that a person can only be prosecuted for acts for which his/her guilt can be proven beyond reasonable doubt, and prepared an indictment in which they described the author's son as a maniac and murderer, who, following a previously established plan with Strakhov, raped and then murdered an individual in a helpless situation, and then robbed her apartment. According to the author, his son had no intention to kill. In addition, the trial court wrongly concluded that his acts were committed with particular violence, because under Uzbek law, this qualification presupposes that, prior to the murder, the victim is subjected to torture or humiliating treatment, or suffers particular pain, which had not been the case.

2.13 According to the author, both the investigators and the court violated article 82 of the Uzbek Criminal Procedure Code,[5] because they failed to establish "the object of the crime, the nature and the extent of the prejudice, the existence of a causal link between the circumstances characterizing the personality of the accused and the injured party".

2.14 The author claims that his son was only examined by a psychiatrist in unsatisfactory conditions, and was not committed for a comprehensive examination to a psychiatric hospital. He contends that the crime was the result of a sudden state of deep emotion of his son, due to the victim's attempt to "blackmail and extort" him. According to him, the courts should have concluded that his son acted in a state of affect when committing the murder.

2.15 At the beginning of the trial, the accused were intimidated and threatened by the victims' relatives, but the presiding judge did not intervene. This demonstrates, according to the author, that the court failed in its duty of objectivity and impartiality.

2.16 The author claims that at the end of the trial, the presiding judge violated article 449 of the Criminal Code which regulates the conduct of the final stages of the criminal trial, and according to which the Prosecutor speaks first, then the injured parties, followed by the defence and,

ultimately, the accused. However, in the author's son's trial, after the prosecutor's statement, the accused individuals spoke, followed by defence counsel, and only then the floor was given to the injured parties. The accused could not object to the injured parties' statements.

2.17 According to the author, the Tashkent City Court merely explained that there were no mitigating circumstances, which demonstrated the formalistic and biased approach of the court, in the absence of a comprehensive assessment of all mitigating circumstances in the case. Article 55 of the Criminal Code enumerates as mitigating circumstances confessions that helped to elucidate a crime. The court refused to take into account the young age of the author's son, that he was taking care of his aging parents, of his two children and of his unemployed wife.

2.18 The author concludes that in light of the above facts, it becomes clear that the court's conclusions did not correspond to the factual circumstances of the case. All remaining doubts should have benefited his son. Instead, the conviction was based on elements that were unconfirmed in court. Pursuant to article 22 of the Criminal Procedure Code, all evidence must be assessed in depth, comprehensively, objectively and exhaustively. In this case, the investigation and the court proceedings were conducted in an accusatory manner, and the examination of the case was superficial, incomplete, and biased, and the principle of presumption of innocence was not respected. This resulted in an unfounded conviction and death sentence.

The complaints

3. Both authors contend that their sons are victims of violation by Uzbekistan of their rights under article 6; article 7; article 10; article 14; article 15; and article 16 of the Covenant.

State party's observations

4.1 On 2 August 2005, the State party argued that the death sentences of the alleged victims were carried out prior to the registration by the Committee of their cases and the formulation of the request for interim measures of protection. This is why it could not comply with the request. It reminds that death sentences are executed only after a careful examination of the cases by the Supreme Court of Uzbekistan, which pays particular attention to the legality and fairness of the verdict, and to all the case's substantive and procedural issues.

4.2 The State party recalls that Strakhov and Fayzullaev were sentenced to death on 18 April 2001 by the Tashkent Regional Court, for stealing a particularly important amount of money, unlawful acquisition and sale of foreign currency, robbery committed in an organized group, premeditated murder under aggravating circumstances of two or more individuals in a helpless state, with particular violence, and pursuing selfish ends, and with the intention to concealing another crime. In addition, Fayzullaev was convicted for rape accompanied by death threats. The death sentences were upheld by the Supreme Court on 13 September 2001.

4.3 Both alleged victims were found guilty of having robbed the apartment of one Luftiddinov, murdered him and his two minor sons (born in 1989 and 1991) and his wife (who was previously raped by Fayzullaev). The money and values robbed amounted to some 3 million 610 522 sum.[6]

4.4 According to the State party, no torture or resort to other unlawful means of investigation occurred during the investigation or during the trial. All investigation acts and the court trial

were carried in accordance with the legislation in force. Strakhov and Fayzullaev were represented by lawyers from the moment of their arrest, and all interrogations and acts of investigation were conducted in the presence of the lawyers.

4.5 The alleged victims' guilt was established by their confessions, testimonies of witnesses, and by the materials of the criminal case file and the court trial records, medical forensic experts' conclusions, ballistic evidence, and psychological and other experts' examinations. The court correctly determined the alleged victims' punishment, taking into account the aggravating circumstances under which the crime was committed.

Author's comments on the State party's observations

5. No comments were received from the authors, although the State party's observations were sent to them for comments and reminders were further addressed in this respect.

Non-respect of the Committee's request for interim measures

6.1 When submitting their communications, on 29 September 2001 and 26 March 2002 respectively, both authors affirmed that their sons were awaiting executions in Tashkent, that their requests for Presidential pardon were still pending, and that under the provisions of the national law, no execution could take place in the absence of a reply to such pardon requests. The State party contended, in 2005, that the executions of the victims in fact took place prior to the registration of the cases and the formulation of the Committee's requests under rule 92 of its rules of procedures, without however providing exact dates of the execution. The Committee notes that Ms. Strakhova has submitted a copy of a death certificate, establishing that her son was executed on 20 May 2002. The authenticity of the above certificate was not contested by the State party. In the circumstances, the Committee considers that the State party has failed to submit sufficient information that would show that the alleged victims' executions did not take place subsequently to the formulation of its request under rule 92.

6.2 The Committee recalls[7] that by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and article 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith, so as to enable it to consider such communications, and after examination to forward its Views to the State party and to the individual (article 5, paragraphs 1 and 4). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.

6.3 Apart from any violation of the Covenant found against a State party in a communication, a State party commits a grave breach of its obligations under the Optional Protocol if it acts to prevent or to frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In the present communication, both authors allege that their sons were denied rights under articles 6, 7, 10, 14, 15, and 16, of the Covenant. Having been notified of the communications, the State party breached its obligations under the Protocol by executing

the alleged victims before the Committee concluded consideration and examination of the case, and the formulation and communication of its Views. It is particularly inexcusable for the State to have done so after the Committee acted under rule 92 of its rules of procedure.

6.4 The Committee recalls that interim measures pursuant to rule 92 of the Committee's rules of procedure adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the Rule, especially by carrying out irreversible measures such as, as in the present case, the executions of Mr. Maxim Strakhov and Mr. Nigmatulla Fayzullaev, undermines the protection of Covenant rights through the Optional Protocol.[8]

Issues and proceedings before the Committee

Consideration of the admissibility

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

7.2 The Committee notes that the same matter is not being examined under any other international procedure, as required by article 5, paragraph 2 (a), of the Optional Protocol, and takes note that it remains uncontested that domestic remedies have been exhausted.

7.3 Both authors claim that in violation of article 14, paragraph 1, of the Covenant, in particular because the trial did not meet the basic requirements of fairness, the court was biased, and its assessment of facts was incorrect. The State party has rejected these allegations, by affirming that the court trial was carried in accordance with the legislation in force, and that the alleged victims were represented by lawyers from the moment of their arrest, and all interrogation acts were conducted in the presence of their lawyers. The Committee observes that the authors' allegations relate primarily to the evaluation of facts and evidence by the court. It recalls that it is generally for the courts of States parties to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice.[9] In the absence of other pertinent information that would show that evaluation of evidence suffered from such deficiencies in the present case, the Committee considers that this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.4 The authors claim that their sons' right to be presumed innocent under article 14, paragraph 2, was violated. These claims have not been substantiated by any other pertinent information. Even if they have not been specifically refuted by the State party, the Committee considers that these allegations have not been sufficiently substantiated, for purposes of admissibility, and thus this part of the communications is accordingly inadmissible under article 2 of the Optional Protocol.

7.5 The Committee considers that the claims under articles 15 and 16 have remained unsubstantiated, for purposes of admissibility, and therefore this part of their communications is accordingly inadmissible under article 2 of the Optional Protocol.

7.6 The Committee considers that the remaining part of the authors' allegations, raising issues under article 6; article 7; article 10; and article 14, paragraph 3 (g), has been sufficiently substantiated and declares them admissible.

Consideration of the merits

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

8.2 Both authors claimed that the alleged victims were beaten and tortured by investigators, and were forced to confess guilt. The State party has refuted this claim, by affirming that no torture or unlawful methods of investigation were used against the victims, that all acts of investigation and court proceedings were held in accordance with the law in force, and that both victims were represented by lawyers after their arrest. The Committee recalls that once a complaint about ill-treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially.[10] The case file contains copies of complaints about ill-treatment that were drawn to the attention of the State party's authorities, including a copy of a letter from Mr. Strakhov in which he informs his family about beatings he suffered in detention, and copies of Mr. Fayzullaev's description of the status of his son when he could see him during the early stages of his detention. The Committee considers that in these particular circumstances, the State party has failed to demonstrate in any other concrete way that its authorities adequately addressed the torture allegations advanced by the authors in a substantiated way, both in the context of the domestic criminal proceedings and in the context of the present communication. Accordingly, due weight must be given to the authors' allegations. The Committee concludes that the facts as presented disclose a violation of article 7, and article 14, paragraph 3 (g), of the Covenant.

8.3 In light of the above conclusion, the Committee does not find it necessary to examine separately the authors' claims under article 10 of the Covenant.

8.4 The Committee recalls[11] that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant. In the present case, the death sentences were passed in violation of the rights set out in article 7 and article 14, paragraph 3 (g), of the Covenant, and thus also in breach of article 6, paragraph 2.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the authors' sons' rights under article 7 and article 14, paragraph 3 (g), read together with article 6 of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors Ms Strakhova and Mr. Fayzullaev with an effective remedy, including compensation. The State party is also under an obligation to prevent similar violations in the future.

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

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

Notes

[1] A state of sudden deep emotion. Unlike the pathologic affect (that supposes a more lengthy psychical disorder), the physiologic affect (invoked by the author) is a short emotional state (rage, fear), that does not deprive the individual concerned of his/her capacity to realize, control his/her acts and behaviour, and to account for them. A crime committed in a state of physiologic affect does not exclude the engagement of a criminal liability, but in certain situations it may be seen as constituting a mitigating circumstance.

[2] Pursuant to this provision, a conviction must be based on established evidence, obtained as a result of a verification of all the circumstances of the crime, the clarification of all gaps, and after the elimination of all doubts and contradictions in the case.

[3] The author submits a copy of three letters from 2002 that he, his wife, and his son's wife have addressed to the Office of the President of Uzbekistan, in which they ask to have an investigation on the tortures and ill-treatment the author's son was subjected to during the preliminary investigation. For example, in her letter, Nigmatulla Fayzullaev's wife contends that when she was waiting with her father in law (i.e. the author) to meet with her husband after his arrest at the entry of the City Police Department of the Mirzo-Ulugbeksk District, they witnessed that an ambulance was arriving on several occasions. As they understood later, the ambulances were called by the police in order to have the author's son reanimated, because he was loosing conscience during the beatings. When later they were allowed to meet with him, Fayzullaev's face was swollen and bruised, he had pain to open his eyes and his vision focus was bleary. He had bruises on his neck as well, was hardly able to stand and could not talk but only whispered that he felt pain in the thorax area and the kidneys.

[4] The author refers to different testimonies given by witnesses in relation to the discovery of the bodies in an apartment on 29 September 2000. As they give different indications about the exact moment of the discovery, the author wonders who exactly discovered the bodies.

[5] "Basis for charging and sentencing".

[6] Equivalent to some 12,000 US dollars at the time of commission of the crime.

[7] See, inter alia, *Davlatbibi Shukurova v. Uzbekistan*, Views adopted on 17 March 2006, para. 6.1.

[8] See, inter alia, *Davlatbibi Shukurova v. Uzbekistan*, Views adopted on 17 March 2006, para. 6.3.

[9] See, inter alia, communication No. 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision adopted on 3 April 1995, para. 6.2.

[10] General comment on article 7, No. 20 [44], adopted on 3 April 1992, para. 14.

[11] See *Conroy Levy v. Jamaica*, communication No. 719/1996, and *Clarence Marshall v. Jamaica*, communication No. 730/1996.

B. Communication No. 1039/2001, *Zvozskov et al. v. Belarus** (Views adopted on 17 October 2006, Eighty-eighth session)

Submitted by:	Boris Zvozskov et al. (not represented by counsel)
Alleged victims:	The author
State party:	Belarus
Date of communication:	12 November 2001 (initial submission)
Subject matter:	Denial of registration of human rights association by State party's authorities
Substantive issues:	Equality before the law; prohibited discrimination; right to freedom of association; permitted restrictions
Procedural issues:	Inadmissibility *ratione personae*; lack of substantiation
Articles of the Covenant:	2; 22, paragraphs 1 and 2; 26
Articles of the Optional Protocol:	1; 2

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

Meeting on 17 October 2006,

Having concluded its consideration of communication No. 1039/2001, submitted to the Human Rights Committee by Boris Zvozskov in his own name and on behalf of 33 other individuals under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

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

1. The author of the communication is Boris Igorevich Zvozskov, born in 1949, an ethnic Russian residing in Minsk, Belarus. The communication is presented in his own name and on behalf of 33 other individuals of Belarusian, Polish, Russian, Latvian and Lithuanian nationalities, all residing in Belarus. He submits letters of authority from 23 out of 33 co-authors. The author alleges that all of them are victims of violations by Belarus[1] of article 2, paragraph 1; article 22, paragraphs 1 and 2; and article 26 of the International Covenant on Civil and Political Rights. He is not represented.

Factual background

2.1 On 12 November 2000, 114 individuals, including the author, held the constituent assembly of the non-governmental human rights public association "Helsinki XXI", established to help with the implementation of the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (the Declaration) in Belarus. On 11 December 2000, they applied to the Ministry of Justice for registration of the association. On 11 January 2001, the Ministry of Justice suspended the registration, as there were discrepancies between the number of members present at the constituent assembly, the number who participated in the voting and the list of founders submitted to the Ministry. The leadership of the association was invited to amend the application and to resubmit it for registration within a month.

2.2 On 9 February 2001, an amended application for registration was submitted to the Ministry of Justice. On 11 July 2001, the Ministry rejected the application, referring to paragraph 11 of the Regulations "On State Registration (Re-registration) of the Political Parties, Trade Unions and Other Public Associations" (the Regulations), approved by the Presidential Decree of 26 January 1999 (Presidential Decree), because: (1) one of the "Helsinki XXI" statutory activities was to represent and to defend the rights of third persons, which, according to the Ministry, was contrary to the Declaration, the Belarus Constitution and other laws;[2] (2) doubts existed as to the validity of the association's creation, the adoption of its statutes and other decisions at the constituent assembly, as there were 114 individuals listed in the minutes of the constituent assembly, whereas the number of those who voted varied between 98 and 109. On the first point, the Ministry specifically referred to paragraphs 2.2.1 (to promote and protect human rights and freedoms at national and international levels), 2.2.2 (to render free assistance and consultations on the issues of human rights protection), 2.3.3 (to provide free legal assistance to "Helsinki XXI" members, other citizens and associations that ask for help, by protecting their rights and interests in courts, before the state bodies and other organizations) and 2.4.5 (to represent and defend the rights and interests of its members and other citizens who asked for help in state, commercial and public institutions and organizations free of charge) of the "Helsinki XXI" statutes.

2.3 On 18 July 2001, the author and two other founders appealed the Ministry's decision of 11 July 2001 to the Supreme Court. They challenged the lawfulness of the decision on the grounds that: (1) contrary to the Ministry's assertion, the law of Belarus does not prohibit representing and defending the rights of third persons;[3] (2) the Regulations do not provide for refusal of registration because of "remarks on the submitted list of founders and other documents". On 20 August 2001, the Supreme Court disagreed with the Ministry's findings on

the invalidity of the association's creation and on the discrepancies in the list of founders. However it upheld the decision of the Ministry that the "Helsinki XXI" statutory activities on the representation and defence of the rights of third persons was not in conformity with article 22, paragraph 2, of the Law "On Public Associations" and article 72, part 2, paragraph 3, and article 86 of the Civil Procedure Code. The Court referred to paragraph 11 of the Regulations governing the refusal of registration of an association where its statutes[4] are not in conformity with legal requirements. The Court also quoted the opinion on the refusal to register "Helsinki XXI", issued on 7 June 2001 by the Commission on the Registration (Re-registration) of Public Associations, established by the Presidential Decree, and the Ministry of Justice decision on the same matter of 7 June 2001. The Supreme Court's refusal to register "Helsinki XXI" as a public association cannot be appealed.

The complaint

3.1 The author submits that the refusal to register "Helsinki XXI" that he formed jointly with other 33 co-authors, and the failure of Belarus courts to grant their appeal, amount to a violation of their rights under article 22, paragraph 1, of the Covenant.

3.2 The author contends that the requirements for registration of a public association established under the State party's laws are impermissible restrictions of his and the other 33 co-authors' right to freedom of association which do not meet the criteria of necessity to protect the interests of national security or public safety, order, health, or morals, or the rights and freedoms of others (art. 22, para. 2).

3.3 The author claims that several other non-human rights public associations were registered between 1991 and 1998 (and re-registered in 1999) by the State party's authorities, although their statutes included activities on the protection of rights, basic freedoms and lawful interests of third persons. At the same time, four other human rights associations were refused registration on the same grounds. The refusal of registration and its confirmation by the Supreme Court constitutes, according to the author, discrimination by the State party towards him and the other 33 co-authors, contrary to article 2 and article 26 of the Covenant.

State party's observations on admissibility and merits

4. On 6 March 2002 the State party recalled that, on 20 August 2001, the Supreme Court considered the appeal against the Ministry of Justice's decision to refuse to register the association "Helsinki XXI", submitted by the author and two other individuals. It submits that the Supreme Court did not find any grounds to quash the Ministry's decision, since the "Helsinki XXI" statutory activities on representation and defence of the rights of third persons were not in conformity with article 22, paragraph 2, of the Law "On Public Associations" and article 72, part 2, paragraph 3, and article 86 of the Civil Procedure Code. The State party invokes article 62 of the Belarus Constitution, guaranteeing everyone "the right to legal assistance to exercise and defend his rights and liberties, including the right to make use, at any time, of the assistance of lawyers and one's other representatives in court, other state bodies, bodies of local government, enterprises, establishments, organizations and public associations, and also in relation with officials and citizens". Articles 44, 46 and 56 of the Criminal Procedure Code enumerate the persons who can defend a person in criminal proceedings and stipulate that public associations are not included on this list. The State party quotes from the opinion on the refusal to register "Helsinki XXI", issued on 7 June 2001 by the Commission on the Registration

(Re-registration) of Public Associations and the Ministry of Justice decision on the same matter of 7 June 2001. The State party concludes that the Supreme Court did not prohibit the establishment of "Helsinki XXI", but merely pointed to the violations of domestic law in the registration process.

Author's comments on the State party's observations

5.1 On 3 May 2003 the author denied that the Supreme Court did not prohibit the establishment of "Helsinki XXI", but merely pointed to the violations of domestic law in the registration process. He referred to paragraph 3, part 6, of the Presidential Decree that outlaws the operation of unregistered public associations on the territory of Belarus.

5.2 The author contests the State party's assertion that domestic law was violated in the registration process. He refers to article 22, paragraph 2, of the Covenant, article 5, paragraph 3, of the Belarus Constitution and article 3 of the Law "On Public Associations" that list permitted restrictions on the establishment of public associations. He submits that none of these restrictions applies to the statutory activities of "Helsinki XXI". According to the author, the "Helsinki XXI" statutory activities on the provision of legal assistance to citizens who ask for help, as well as protection of their rights and freedoms (paragraph 2.2 above) do not contradict the legal requirements of the State party. As a result, the grounds to refuse registration of "Helsinki XXI" are not prescribed by law and the refusal itself is contrary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee has ascertained, as required under article 5, paragraph 2, of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement and notes that the State party did not contest that domestic remedies in the present communication have been exhausted.

6.3 On the question of standing, the Committee notes that the author has submitted the communication in his own name and on behalf of 33 other individuals but provided letters from only 23 out of 33 co-authors, authorizing him to act on their behalf before the Committee. In this regard, the Committee also notes that there is nothing in the material before the Committee concerning the claims brought on behalf of ten remaining individuals to show that they have authorized Mr. Zvozskov to represent them. The Committee considers that the author has no standing before the Committee required by article 1 of the Optional Protocol with regard to these ten individuals but considers that the communication is nevertheless admissible so far as the author himself and the other 23 members of "Helsinki XXI" are concerned.

6.4 As to the alleged violation of article 2 and 26 of the Covenant, in that the refusal of the State party's authorities to register "Helsinki XXI" was discriminatory, the Committee considers that these claims are insufficiently substantiated, for purposes of admissibility, and are thus inadmissible under article 2 of the Optional Protocol.

6.5 The author's remaining claim under article 22 is sufficiently substantiated, and the Committee thus declares it admissible.

Consideration of the merits

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

7.2 The key issue before the Committee is whether the refusal of the Belarus authorities to register "Helsinki XXI" unreasonably restricted the author and the other 23 co-authors' right to a freedom of association. The Committee observes that, in accordance with article 22, paragraph 2, any restriction on the right to freedom of association must cumulatively meet the following conditions: (a) it must be provided by law; (b) may only be imposed for one of the purposes set out in paragraph 2; and (c) must be "necessary in a democratic society" for achieving one of these purposes. The reference to "democratic society" in the context of article 22 indicates, in the Committee's opinion, that the existence and operation of associations, including those which peacefully promote ideas not necessarily favourably viewed by the government or the majority of the population, is a cornerstone of a democratic society.

7.3 In the present case, the restrictions placed on the authors' right to freedom of association consist of several conditions related to the registration of a public association. According to the Supreme Court's judgement of 20 August 2001, the only criterion which the "Helsinki XXI" statutes and, respectively, the authors' application for registration did not meet was a compliance with domestic law, under which public organizations do not have a right to represent and defend the rights of third persons. This restriction must be assessed in the light of the consequences which arise for the authors and their association.

7.4 The Committee firstly notes that the author and the State party disagree on whether domestic law indeed prohibits the defence of the rights and freedoms of citizens who are not members of a particular association (paragraphs 2.2, 2.3, 4, 5.2 above). Secondly, it considers that even if such restrictions were indeed prescribed by law, the State party has not advanced any argument as to why it would be necessary, for purposes of article 22, paragraph 2, to condition the registration of an association on a limitation of the scope of its activities to the exclusive representation and defence of the rights of its own members. Taking into account the consequences of the refusal of registration, i.e. the unlawfulness of operation of unregistered associations on the State party's territory, the Committee concludes that the refusal of registration does not meet the requirements of article 22, paragraph 2. The authors' rights under article 22, paragraph 1, have thus been violated.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses a violation by the State party of article 22, paragraph 1, of the Covenant.

9. Pursuant to article 2, paragraph 3(a), of the Covenant, the Committee considers that the authors are entitled to an appropriate remedy, including compensation and reconsideration of the authors' application for registration of their association in the light of article 22. It is also under an obligation to take steps to prevent similar violations occurring in the future.

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

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

Notes

[1] The Covenant and the Optional Protocol thereto entered into force for Belarus on 23 March 1976 and 30 December 1992 respectively.

[2] Reference is made to article 62 of the Constitution; article 72, part 2, para. 3, of the Civil Procedure Code; articles 44, 46 and 56 of the Criminal Procedure Code; article 22 of the Law "On Public Associations".

[3] Reference is made to article 73, part 1, of the Civil Procedure Code; article 62 of the Constitution; Decision of the Constitutional Court of 5 October 2000; Resolution of the Plenum of the Supreme Court of 25 March 1999; article 3 of the Law "On Public Associations". The latter provides for an exhaustive list of restrictions on the establishment of a public association: "it is prohibited to establish public associations aimed at overthrowing or forcefully changing the Constitutional order, violating the State's integrity and security, propaganda of war, national, religious and racial hatred, as well as to establish public associations that can negatively affect public health and psyche".

[4] Namely, the association's purposes, goals, method of work and its territorial application.

C. Communication No. 1041/2002, *Tulayganov v. Uzbekistan** (Views adopted on 20 July 2007, Ninetieth session)

Submitted by:	Mrs. Shevkhie Tulyaganova (not represented)
Alleged victims:	Refat Tulyaganov (the author's son, deceased)
State party:	Uzbekistan
Date of communication:	12 December 2001 (initial submission)
Subject matter:	Imposition of death sentence after unfair trial with and resort to torture during preliminary investigation
Substantive issue:	Torture; unfair trial; arbitrary deprivation of life
Procedural issues:	Evaluation of facts and evidence; substantiation of claim
Articles of the Covenant:	6; 7; 9; 14; 15; 16
Article of the Optional Protocol:	2

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

Meeting on 20 July 2007,

Having concluded its consideration of communication No. 1041/2001, submitted to the Human Rights Committee on behalf of Mr. Refat Tulyaganov, under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1.1 The author is Mrs. Shevkhie Tulyaganova, an Uzbek national born in 1955. She submits the communication on behalf of her son, Refat Tulyaganov (executed), who at the time of submission of the communication was awaiting execution following a death sentence imposed

* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

by the Tashkent City Court on 5 July 2001. She claims that her son is a victim of violations by Uzbekistan of his rights under article 6; article 9; article 14; article 15; and article 16, of the Covenant. She is unrepresented.

1.2 When registering the communication on 24 December 2001, and pursuant to rule 92 of its rules of procedures, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party not to carry out the author's son's execution while his case was under examination. On 27 September 2002, the author notified the Committee that she had been informed that her son was executed on 18 January 2002, despite the Committee's request.[1]

Factual background

2.1 On 7 January 2001, Mr. Tulyaganov was arrested in Tashkent, together with two friends, Kim and Urinov, as a murder suspect. All three were accused of having planned and murdered, acting in an organized group, one Temur Salikhov, and attempted to murder two other persons, Ruslan Salikhov and Ruslan Fayzrakhmanov, early the same day. According to the investigators, the motive was that in 1998, Temur Salikhov (then Tulyaganov's and Kim's classmate) had testified against both the author's son and Kim to the effect that they had attacked a taxi driver and had stolen his money, on which basis they were sentenced to 8 and 9 years' imprisonment, respectively. After serving their prison terms, according to the investigators, they decided to punish Temur Salikhov.[2]

2.2 On 6 January 2001, late in the evening, the three went to a dancing bar in Tashkent. Temur Salikhov was in the bar. At around 5 a.m. on 7 January 2001, the bar closed. Tulayganov, Kim and Urunov stood outside, waiting for Salikhov to come out. When Salikhov left, he was accompanied by his brother and an acquaintance Fayzrakhmanov. The author's son and Kim asked Temur Salikhov to explain the motive for testifying against them in 1998. At some point, Tulyaganov and Salikhov began a fight and Salikhov's brother tried to separate them. Tulyaganov stabbed him with a knife, as he did with Temur Salikhov's acquaintance, and then stabbed Temur Salikhov three times in the thorax area. According to the author, her son only attempted to protect himself because he was attacked.

2.3 Temur Salikhov was brought to a hospital emergency ward but could not be revived. According to the forensic expert's conclusion, he died from blood loss. The author claims that his death was in fact due to the inadequate and untimely intervention by the personnel of the hospital.

2.4 On 5 July 2001, the Tashkent City Court found all three accused guilty of premeditated murder under aggravated circumstances, and attempted murders, and sentenced Tulyaganov to death, and the others to 18 and 20 years' prison terms respectively. On 21 August 2001, the appeal instance of the Tashkent City Court examined Tulyaganov's appeal and upheld the death sentence. The criminal case was subsequently examined by the Supreme Court, under supervisory proceedings,[3] and the alleged victim's death sentence was confirmed.

2.5 The author contends that immediately upon arrest, her son was beaten and tortured and forced to confess guilt, and that he was placed under "moral and psychological" pressure. According to a Ruling of the Supreme Court of 20 February 1996, the use of evidence obtained by illegal methods of investigation such as physical coercion or psychological pressure is not

allowed. The author also claims that her son's lawyer submitted a request to the District Police Department to have her son examined by a medical doctor, so as to confirm that he was subjected to ill-treatment but the investigator in charge of the case refused to comply with the request.[4]

2.6 The author submits that the sentence of her son was particularly severe and unfounded. In substantiation, she submits the following:

(a) The punishment handed down does not correspond to her son's personality. After he served his sentence of 1998, he started work, enrolled at University, and led a normal way of life. This was attested in writing by University authorities, his employer, and his neighbours.

(b) The investigators and the court violated article 82 of the Uzbek Criminal Procedure Code,[5] because they failed to establish "the object of the crime, the nature and the size of the prejudice, the existence of a causal link between the circumstances characterizing the personality of the accused and the injured party". The court did not take into account that the murder was not premeditated but was the result of the sudden deep emotion of her son, because of the injuries and the humiliation caused by Temur Salikhov. The author refers to a medical record in the criminal case file, which established that her son suffered from heavy bodily injuries.

(c) Pursuant to the Ruling of the Supreme Court "On the court's practice in premeditated murders cases", the qualification, under article 97, part 2 (a) of the Criminal Code (CC), relates to situations of premeditated murder of two or more individuals, simultaneously, i.e. to circumstances different from the present case. Notwithstanding, the courts convicted her son under this provision.

(d) Her son was also convicted under article 97, part 2 (c) (murder of a person in the state of helplessness), notwithstanding that it was not established whether during the fight T.S. ever reached this state. The author maintains that her son's conviction under article 97, paragraph 2 (d) CC (murder with intention to prevent an individual to accomplish his/her professional or public duty) is unfounded. The courts did not establish at what point in time the author's son decided to murder the persons accompanying Salikhov.

(e) Contrary to the requirements of an exhaustive examination of evidence in murder cases,[6] premeditation was not established in her son's case. Several witnesses testified that the meeting of 7 January was coincidental. The court's conclusion that the three co-accused followed a master plan was thus unfounded. The first instance court based its conclusions on 20 counts of evidence spelled out in the judgement, but it failed to establish that the murder was premeditated.

(f) The courts qualified her son's acts inter alia under article 97, part 2 (g) CC (murder committed in a particular violent manner). "Particular violence" applies to

situations where, prior to deprivation of life, the victim is subjected to torture or humiliating treatment and suffers particular pain. In the present case however, the murder took place in the presence of the victim's brother and an acquaintance. If the murder had been premeditated, Tulyaganov should have been certain that his plan would succeed. According to the author, this count was refuted by the evidence materials[7] in the case file.

(g) During the initial stages of the trial, the author's son was intimidated and threatened in the court room by the victims' families. Salikhov's father publicly stated that he would ensure that before the end of the trial, Tulyaganov would be "raped". The same relatives also attacked the author herself. The presiding judge did not attempt to interrupt these incidents, and according to the author, this was because the court took the victims' side, thus failing in its duty of impartiality and objectivity. The author affirms that the evidence in the case was not examined fully and objectively, because both the investigation and the court trial were conducted in an accusatory manner.

(h) The judgement of the Tashkent City Court was contrary to the Supreme Court's Ruling "On the court judgement" of 2 May 1997. The court found no mitigating circumstances in her son's case, which confirms the formalistic and biased nature of the court's motivation. The author notes that repentance of the criminal who has helped to elucidate a crime is a mitigating circumstance under Uzbek law. She recalls that in the context of her son's previous criminal punishment, he was released early for good conduct, and was characterized positively both at work any by his neighbours.

(i) The crime was also imputable to the victims, given their prior conduct. The author affirms that the medical examination of her son and of the victims, reveal that it was not her son who started the fight. Thus, the acts of the Salikhov brothers and their acquaintance Fayzrakhmanov were wrongly qualified as self-defence and the criminal proceedings against them were wrongly terminated.

(j) The motive for the murder was, according to the author, "invented" by an investigator.[8]

The complaint

3. The author claims that the facts as submitted amount to a violation of her son's rights under article 6; article 9; article 14; article 15; and article 16, of the Covenant.

State party's observations

4. On 23 May 2002, the State party confirmed that the author's son was sentenced to death by the Tashkent City Court on 5 July 2001, for having committed premeditated murder by administering three stabs with a knife in the heart of a 20 years' old man, Temur Salikhov, under aggravating circumstances, and attempted to murder Ruslan Salikhov and Fayzrakhmanov. On 21 August 2001, the appeal instance of the Tashkent City Court confirmed the death

sentence. The case was also examined by the Supreme Court, which ultimately confirmed the death sentence. According to the State party, Tulyaganov's guilt was established by the evidence contained in the case file. In determining his guilt, the courts took into account that he had already been sentenced for crimes in the past.

Author's comments on the State party's observations

5.1 On 27 September 2002, the author presented further information and commented on the State party's observations. First, she submits a copy of a death certificate that shows that her son's execution by firing squad took place on 18 January 2002. She recalls that the State party did not give any explanation for its non compliance with the Committee's request for interim measures.[9]

5.2 The author notes that the State party deliberately misrepresents the facts of the case, because Temur Salikhov died from blood loss and lack of timely medical assistance, and not because of the wounds he received.

5.3 The author notes that the State party does not refer to the conclusions of the medical examination of her son, carried out during the preliminary investigation, and which disclose that he sustained heavy bodily injuries.

5.4 The State party's reply does not explain on what grounds her son was charged with the attempted murder of Ruslan Salikhov and Fayzrakhmanov. In this regard, the author affirms that according to the conclusions of the medical examinations of the individuals in question, their bodies disclosed only minor knife wounds, i.e. only light bodily injuries that represented no danger to their lives.

Non-respect of the Committee's request for interim measures

6.1 The author affirms that the State party executed her son despite the fact that his communication had been registered under the Optional Protocol and a request for interim measures of protection had been duly addressed to the State party. The Committee recalls[10] that by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (in the Preamble and in article 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith, so as to enable it to consider such communications, and after examination, to forward its Views to the State party and to the individual concerned (article 5, paragraphs 1 and 4). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its final Views.

6.2 Apart from any violation of the Covenant found against a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or to frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its

Views nugatory and futile. In the present case, the author alleges that her son was denied his rights under various articles of the Covenant. Having been notified of the communication, the State party breached its obligations under the Protocol by executing the alleged victim before the Committee concluded its consideration and examination of the case, and the formulation and communication of its Views.

6.3 The Committee recalls that interim measures under rule 92 of its rules of procedure adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the rule, especially by irreversible measures such as, as in this case, the execution of Mr. Refat Tulyaganov, undermines the protection of Covenant rights through the Optional Protocol.[11]

Issues and proceedings before the Committee

Consideration of the admissibility

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

7.2 The Committee notes, as required by article 5, paragraph 2 (a) and (b), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement, and that it is uncontested that domestic remedies have been exhausted.

7.3 The Committee has noted the author's claim that her son's rights, under article 9 of the Covenant, have been violated. In the absence of any other pertinent information in this regard, this part of the communication is deemed inadmissible, as insufficiently substantiated for purposes of admissibility, under article 2 of the Optional Protocol.

7.4 The Committee has noted that the author's allegations (see paragraph 2.6 above) about the manner the courts handled her son's case and qualified his acts, may raise issues under article 14, paragraphs 1 and 2, of the Covenant. It observes, however, that all these allegations relate primarily to the evaluation of facts and evidence by the State party's courts. It recalls that it is generally for the courts of States parties to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice.[12] Even if it would be within the Committee's competence to determine whether a trial was conducted in accordance with article 14 of the Covenant, in this case, the Committee considers that, in the absence, in the case file, of any court records, trial transcript, or expert conclusions, which would make it possible for the Committee to verify whether the trial in fact suffered from the alleged defects, the author has failed sufficiently to substantiate her claims under these provisions. In these circumstances, this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.5 The Committee further notes that the author has invoked a violation of her son's rights under articles 15 and 16 of the Covenant, without presenting any specific reasons why she

considers these provisions to be violated. In the circumstances it decides that this part of the communication is inadmissible under article 2, of the Optional Protocol, as insufficiently substantiated, for purposes of admissibility.

7.6 The Committee considers that other allegations which appear to raise issues under article 6; article 7; and article 14, paragraph 3 (g) of the Covenant, have been sufficiently substantiated, for purposes of admissibility, and declares them admissible.

Consideration of the merits

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

8.2 The author has claimed that her son was beaten and tortured by investigators to force him to confess guilt in the murder. According to her, and contrary to the requirements of a Ruling of the Uzbek Supreme Court of 20 February 1996, the Tashkent City Court used her son's confessions to establish his guilt and to convict him. The author also claims that her son's lawyer submitted a request to the District Police Department to have her son examined by a medical doctor, so as to confirm that he was subjected to ill-treatment but the investigator in charge of the case refused to comply with the request. These allegations were also brought to the attention of the Presidential administration when the author's son requested a Presidential pardon,[13] but no reply was ever received. The Committee recalls that once a complaint against ill-treatment contrary to article 7 is filed, a State party is duty bound to investigate it promptly and impartially.[14] In this case, the State party has not refuted the author's allegations nor has it presented any information, in the context of the present case, to show that it conducted any inquiry in this respect. In these circumstances, due weight must be given to the author's allegations, and the Committee considers that the facts presented by the author disclose a violation of her son's rights under article 7 and article 14, paragraph 3 (g), of the Covenant.

8.3 The Committee recalls[15] that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant. In the present case, the author's son's death sentence was passed in violation of the guarantees set out in article 7 and article 14, paragraph 3 (g), of the Covenant, and thus also in breach of article 6, paragraph 2.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the author's son's rights under article 7 and article 14, paragraph 3 (g), read together with article 6, of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mrs. Tulyaganova with an effective remedy, including compensation. The State party is also under an obligation to prevent similar violations in the future.

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

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

Notes

[1] During its seventy-sixth session (October 2002), the Committee deplored the State party's failure to comply with the Committee's request for interim measures. The State party was asked to provide explanations for its conduct. The State party did not present any observations in this relation, in spite of two reminders to this effect (sent in 2004 and 2006).

[2] Following the application to their cases of several Amnesty acts, the author's son and Kim were released in May 2000 and November 2000, respectively.

[3] Proceedings that permit to challenge entered into force decisions, on issues of law.

[4] The author submits a copy of a request for a Presidential pardon, where these allegations are presented. According to her, no reply was received.

[5] "Basis for charging and sentencing".

[6] The author refers to a Supreme Court Ruling "On the court practice in cases of premeditated murder".

[7] The author however does not specify what materials concretely could exclude the qualification of her son's acts under the above mentioned provision of the Criminal Code.

[8] No further explanation is given for this allegation.

[9] The Committee discussed the situation during its seventy-sixth session. It deplored the State party's failure to comply with its interim measures request and asked the State party, in a note verbale of 15 November 2002, to provide explanations for its conduct. In spite that it was reminded about this request on two occasions, no reply was received from the State party.

[10] See *Piandiong v. the Philippines*, communication No. 869/1999, Views adopted on 19 October 2000, paras. 5.1 to 5.4.

[11] See, inter alia, *Davlatbibi Shukurova v. Tajikistan*, communication No. 1044/2002, Views adopted on 17 March 2006, paras. 6.1-6.3.

[12] See, inter alia, communication No. 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision adopted on 3 April 1995, para. 6.2.

[13] A copy of the undated letter to President is provided by the author.

[14] General comment on article 7, No. 20 [44], adopted on 3 April 1992, para. 14.

[15] See, for example, *Conroy Levy v. Jamaica*, communication No. 719/1996, and *Clarence Marshall v. Jamaica*, communication No. 730/1996.

D. Communication No. 1043/2002, *Chikunova v. Uzbekistan** (Views adopted on 16 March 2007, Eighty-ninth session)

Submitted by:	Mrs. Tamara Chikunova (not represented by counsel)
Alleged victim:	Dimitryi Chikunov, author's son, deceased
State party:	Uzbekistan
Date of communication:	17 July 2000 (initial submission)
Subject matter:	Imposition of death sentence after unfair trial and absence of legal representation in capital case; duty to investigate allegations of ill-treatment; right to seek pardon
Substantive issue:	Torture; Unfair trial; Right to life
Procedural issues:	Evaluation of facts and evidence; substantiation of claim
Articles of the Covenant:	6; 7; 9, 10; 14; 16
Article of the Optional Protocol:	2

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

Meeting on 16 March 2007,

Having concluded its consideration of communication No. 1043/2002, submitted to the Human Rights Committee on behalf of Mr. Dimitryi Chikunov under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

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

1. The author is Mrs. Tamara Chikunova, a Russian national residing in Uzbekistan. She submits the communication on behalf of her son, Dimitryi Chikunov, born in 1971 and executed on 10 July 2000 pursuant to a death sentence pronounced by the Tashkent Regional Court on 11 November 1999. She claims that her son is a victim of violations by Uzbekistan of his rights under article 6; article 7; article 9; article 10; article 14; and article 16 of the Covenant.[1] She is unrepresented.

Factual background

2.1 On 17 April 1999, the author's son was arrested in relation to the double murder of his business partners Em and Tsai that occurred near Tashkent on 16 April 1999. He was accused of shooting them with an automatic pistol because he could not repay his debts to them. He was also charged with fraud and abuse of confidence, for having, in 1996, and together with another individual, S., prepared a false contract for a loan of 2 millions of Uzbek sums (divided between him and S.), on behalf of a Youth Centre "Em Matbuotchi", to the prejudice of the Social Insurance Fund.

2.2 During the first days following the arrest, the author's son was allegedly beaten and tortured by the investigators and was forced to confess his guilt. The author submits a copy of a letter from her son addressed to her on an unspecified date, in which he describes how he was treated. He affirms that immediately after his arrest, when placing him in the police car, the investigators violently pressed his head with the car's door against the chassis. In the Criminal Search Department premises, he was immediately beaten by several investigators with whatever item they found, including soda bottles. Afterward, as he refused to confess to the murders, he was called a pederast and threatened with rape, he was thrown on the floor, his trousers were removed and he was given severe kicks on his legs with a stone penis statue; he was not raped. Later, he was beaten to the point that he lost consciousness. He recovered consciousness when the investigators placed a gas-mask over his head and were obstructing the air valve to make him suffer. They also threatened him that they would bring his mother there and rape her in front of him. In the evening, he was brought to the place of the crime and one investigator allegedly called someone on his phone and gave him the order to "start" with Chikunov's mother. At this point, he agreed to confess guilt.

2.3 On 19 April 1999, the investigators asked the author to bring an extra set of clothes for her son. She did so, and a junior investigator, allegedly by mistake, gave her the old clothes. She affirms that the clothes were covered with spots of coagulated blood, and marks of shoes, allegedly resulting from her son's beatings.[2] She affirms that shortly after the receipt of the clothes, she was called by the investigators and asked to return them. An investigator came to her apartment and searched it, but could not find anything because, in the meantime, the author had given the clothes to relatives.

2.4 On 23 April 1999, the author complained about her son's indictment and torture to the President, the Parliamentary Ombudsman, the Prosecutor's Office, and the National Human

Rights Centre. Her complaints were allegedly transmitted to the chief investigator in her son's case, M., against whose acts she was in fact complaining[3]. She claims that she asked to see her son, but allegedly was told that she had first to return the clothes. She also asked to meet with M., in vain.

2.5 The author's son was interrogated without the presence of a lawyer[4] on 17, 18, 19 and 28 April and on 6 May 1999, when he confirmed the location of the weapon of the crime and was brought to the crime scene to give details about the sequence of the events. The investigators appointed an ex officio lawyer, Mrs. Rakhmanmerdieva (R.), for her son only on 19 April 1999. The lawyer met with her client only once, on 21 April 1999, but allegedly the author's son was unable to speak with her in private and he was terrified because the meeting was held in the presence of the investigators who had previously tortured him.

2.6 On 20 April 1999, the author learned that her son had been assigned a lawyer, but the investigators revealed the lawyer's identity to her only in May 1999. The author then met with R. and inquired about her son's criminal case; the lawyer told her that her son was a murderer. The author asked under which articles of the Criminal Code precisely he was accused, but the lawyer could not remember. When the author expressed fears that her son was tortured, the lawyer refused to comment. On 17 June 1999, the author retained a private lawyer, Mrs. S., but the latter was prevented from acting until the end of the investigation, on 13 August 1999. She was absent during investigation hearings held on 10, 15, 16, 19, and 28 July.

2.7 In court, the author's son retracted his confessions as they were extracted under torture. He affirmed that during the night of the crime, his business partners had a meeting with one Salikhov, living in Russia, who was supposed to transmit to them a quantity of heroin that they intended to sell. The author's son accompanied them, and when they arrived at the meeting point, Chikunov was asked to leave the car and wait. Shortly after, he heard shots and saw Salikhov leaving the crime scene. Chikunov explained that he took the pistol out of the car and hid it, because he had provided it to one of his business partners the same day. He did not inform anyone as he was terrified.

2.8 The court inquired about the ill-treatment allegations: (a) it interrogated as a witness Chikunov's previous lawyer, R., who affirmed that he had confessed his guilt freely and voluntarily, and that she had not noted any marks of beatings on his body; (b) it heard several investigators, including G. (chief of the Criminal Search Department), the investigators I., B., as well as others. All confirmed that Chikunov made the confessions voluntarily, without any coercion; he was not beaten, and "expressed his desire to show the place where he has hidden the crime weapon"[5]. The Court concluded that the initial confessions were voluntary, and the new version was given with the aim to avoid criminal liability.

2.9 The author notes that her son's initial lawyer R. was brought to court by car by one of the investigators. On an unspecified date, the author complained to the Ministry of Justice about R.'s acts. On 28 January 2000, the Ministry of Justice informed her that an internal inquiry was in process, and the author's allegations were confirmed. As a consequence, on 17 January 2000, the Legal Qualification Commission examined the case and withdrew R.'s practicing license, because of the "violation of the legal norms in force, and for breach of lawyer's ethics".

2.10 On 18 November 1999, the author's son's counsel filed a cassation appeal in the Supreme Court, challenging the judgement of 11 November 1999, affirming that her client's confessions had been extracted under torture, claiming several criminal procedure violations, and asking that the case to be sent back for further investigation. On 24 January 2000, the Supreme Court examined the case and found Chikunov's claims of innocence to be without merit, invented, and not borne out by the content of the case file. It observed that the trial court had examined and given reasoned answers to all the allegations presented by Chikunov and his lawyer. The Court concluded that Chikunov's acts had been correctly qualified in law. It upheld the first instance court judgement, thus confirming the author's son's death sentence.

2.11 On 4 July 2000, the author complained to the Supreme Court under the supervisory procedure. On 21 July 2000, she was informed that the court had examined her complaint and the criminal case file again, and found no grounds to quash the previous decisions.

2.12 The author also claims that her son was executed unlawfully, on 10 July 2000, because the law applicable prohibits execution prior to the receipt of a reply to a request for pardon filed by the condemned prisoner. In the present case, at the time of execution, neither she nor her son had been informed of the outcome of the request for a pardon sent to the Presidential administration on 26 January, 9 February, 26 May, and 30 June 2000. The author's son also submitted a pardon request to the Supreme Court on 6 March 2000.

The complaint

3. The author claims that her son is a victim of violations by Uzbekistan of his rights under article 6; article 7; article 9; article 10; article 14; and article 16.

State party's observations

4.1 The State party presented its observations on 1 July 2005. It recalls that on 11 November 1999, the Tashkent Regional Court found Chikunov guilty under articles 168 (4) (a) (fraud in a particularly important amount), 228 (2) (b) (elaboration of forged documents, stamps, seals, forms, their sale or deliberate use of false documents), 248 (3) (elaboration of forged documents, stamps, seals, forms, their sale or use), 164 (4) (a) (robbery in a particularly important amount), and 97 (2) (a), (i), (premeditated murder with aggravating circumstances of two or more individuals, for self-interested aims) of the Criminal Code. For the totality of these acts, he was sentenced to death. This decision was upheld by the Supreme Court on 24 January 2000.

4.2 According to the State party, in the evening of 16 April 1999, the author's son drove, together with his business partners, to a place outside Tashkent. At some point, the business partners threatened Chikunov that they would ask some well known local individual to "sort out his case". Chikunov asked them to stop the car, stepped out and threw a grenade inside, with the intention to kill them. The grenade did not explode. Chikunov climbed back into the car, the business partners continued to threaten him, and continued their journey. Chikunov, from the back of the car, shot his business partners in the head. He then escaped from the crime scene, and returned to Tashkent where he hid the crime weapon.

4.3 The State party contends that Chikunov's guilt in the murders was established on the basis of various testimonies, the conclusions of forensic examinations, including the examination of the bullets extracted from the bodies of the victims and the car's interior, and the confirmation that they originated from Chikunov's pistol. A psychiatrist also concluded that Chikunov was mentally responsible.

4.4 The State party notes that Chikunov's allegations about the use of unlawful methods of investigation after his arrest were examined and refuted during the trial itself. Thus, the court interrogated the officials of the Ministry of Internal Affairs. All of them testified that during the investigation, including during the verification of his deposition at the crime scene, the author's son voluntarily and without any coercion explained the circumstances of the murders and revealed the hiding place of the crime weapon.

4.5 According to the State party, Chikunov's guilt in the crimes was established on the ground of the multitude of collected objective evidence which was compiled over time in the case. His punishment was determined in view of the gravity of the acts committed and in the absence of extenuating circumstances.

Author's comments

5.1 In comments dated 13 April 2006, the author points out that although the presiding trial judge read out the conclusions of an expert according to which the grenade thrown into the car was not a military one and no attempts for its modification were made, this was not taken into account in the determination of her son's punishment.

5.2 The author claims that the court failed in its duty of objectivity. Notwithstanding that her son was accused of having fired several shots with a firearm, no examination was ever carried out to verify whether any gunpowder remained on his hands. Also, there were a number of blood marks in the back seat and on the carpet of the car in which the crime was committed. If her son was the murderer, according to the author, he should have splattered blood on his face, hair, and hands; however, no examination was ever conducted in this regard. The cover of the back seat of the car was also not examined, when its examination could have confirmed the exact position of the murderer.[6]

5.3 Mrs. Chikunova recalls her affirmation that her son's clothes did not disclose "any visible" marks of blood when they were seized and sealed by the police, in the presence of witnesses. It was only two weeks later, during a examination in the presence of several different witnesses, that an expert discovered a very small mark and small splashes of coagulated blood. The blood group corresponded to that of one of the business partners. The author claims that no DNA test was ever made in this respect.

5.4 The author recalls that when she complained about her son's torture, she was only referred to the investigator against whom she actually complained. Finally, the author reiterates her allegations about the violation of her son's right to a proper defence.

Issues and proceedings before the Committee

Consideration of the admissibility

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

6.2 The Committee notes that the same matter is not being examined under any other international procedure, as required by article 5, paragraph 2 (a), of the Optional Protocol, and notes that it is also uncontested that domestic remedies have been exhausted.

6.3 The Committee notes the author's allegation that her son is a victim of a violation of articles 9 and 16, but observes that these allegations have not in any way been substantiated. This part of the communication is inadmissible as insufficiently substantiated under article 2 of the Optional Protocol.

6.4 The Committee has noted the author's challenge to the manner in which the judges and investigators handled her son's case. It observes, however, that these allegations relate primarily to the evaluation of facts and evidence by the courts. It recalls that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice[7]. In the absence of other pertinent information that would show that the evaluation of evidence indeed suffered from such deficiencies in the present case, as well as in the absence of a copy of any trial transcripts, the Committee considers this part of the communication to be inadmissible under article 2 of the Optional Protocol.

6.5 The Committee considers that the author's remaining allegations that appear to raise issues under article 6; article 7; article 10; and article 14, paragraph 3 (b), (d) and (g), have been sufficiently substantiated, for purposes of admissibility, and declares them admissible.

Consideration of the merits

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

7.2 The author claims that her son confessed guilt under torture. During the preliminary investigation, she complained to the authorities about this, but all her complaints were to no avail. When her son retracted his confessions at the court as obtained under duress, the judge interrogated several witnesses and investigators who denied any use of coercion against him. The State party has only contended that the courts examined these allegations and found them to be groundless. The Committee recalls that once a complaint against maltreatment contrary to article 7 is filed, a State party must investigate it promptly and impartially.[8] In the present case, the author has presented documents with a detailed description of the torture allegedly suffered by her son. The Committee considers that the documents before it indicate that the State party's authorities did not react adequately or in a timely way to the complaints filed on behalf of the author's son. No information has been provided by the State party to confirm that a further inquiry or medical examination was conducted in order to verify the veracity of Mr. Chikunov's

torture allegations. In the circumstances of the case, the Committee concludes that the facts as presented disclose a violation of article 7, read together with article 14, paragraph 3 (g), of the Covenant.

7.3 In light of the above conclusion, the Committee does not consider it necessary to examine the author's claim under article 10.

7.4 The author has claimed that contrary to the requirements of national law, her son was only provided with a lawyer on 19 April 1999, i.e. two days after his arrest. He could meet with this lawyer only once, and in the presence of investigators. While the author's son had a privately hired lawyer since 17 June 1999, that lawyer was only allowed to act after 13 August 1999, once the preliminary investigation had ended. The State party has not presented comments on these allegations. In the circumstances, due weight must be given to the author's allegations. The Committee recalls[9] its jurisprudence that particularly in cases involving capital punishment, it is axiomatic that the accused is effectively assisted by a lawyer at all stages of the proceedings. In the circumstances of the present case, the Committee concludes that the author's son's rights under article 14, paragraph 3 (b) and (d), were violated.

7.5 The Committee recalls[10] its jurisprudence that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant. In this case, the sentence of death was passed in violation of the fair trial guarantees set out in article 14, paragraph 3 (b), (d) and (g), of the Covenant, and thus also in breach of article 6, paragraph 2.

7.6 The author has also claimed that her son's execution was carried out unlawfully, because under Uzbek law no death sentence can be executed prior to the examination of the condemned person's request for a pardon. In this case, several pardon requests were filed with the presidential administration, and no reply was received. The State party has not commented on this allegation. In the circumstances, due weight must be given to the author's allegations. Accordingly, the Committee considers that the material before it disclose a violation of article 6, 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 before it disclose a violation of the author's son's rights under article 6, paragraph 4; article 7; and article 14, paragraph 3 (b), (d) and (g), read together with article 6, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mrs. Chikunova with an effective remedy, including compensation. The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a

violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

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

Notes

[1] The Optional Protocol entered into force for the State party on 28 December 1995.

[2] The author submits photographs of the clothes.

[3] The author submits however a reply to "her complaints of 23 April, 12 and 13 May 1999" by the Tashkent Regional Prosecutor's Office. The Prosecutor's Office informs her that her son's criminal case was grounded, that "as she was previously informed", the case was placed under the monitoring of the Prosecutor's Office leadership, the investigation is being conducted objectively, in the absence of criminal procedure violations, and after the end of the preliminary investigation, the case will be transmitted to court. The Prosecutor's Office also informs the author that her allegations, that her son was subjected to unlawful methods of investigation i.e. he was beaten by the investigators, were not confirmed.

[4] In this regard, the author affirms that article 51 (4) of the Criminal Code requires the compulsory presence of a lawyer in relation to persons that risk death sentences.

[5] The judgement contains the following paragraph in relation to the alleged torture: "The expert of the Ministry of Internal Affairs Makhmatov explained to the court that when he recorded on video tape the interrogation of Chikunov in the evening of 17 April 1999, the beginning of the interrogation was recorded properly". However, "when Chikunov was confessing his guilt in the double murder, the video camera, which was obsolete and often blocked, stopped". Makhmatov also contends that during his stay in the office on 17 April (at night time) and during the day of 18 April 1999, no one had beaten the author's son, and the latter confessed his guilt voluntarily. The court also examined the issue of the clothes with blood marks: "Confirming the version of her son, the mother of Chikunov has brought in court a shirt with blood marks and trousers, allegedly belonging to her son, and affirmed that her son was beaten to force him confess guilt in the murder." First, it is unclear whether these clothes belong to Chikunov, and when were they stained, secondly, from the testimonies of Chikunov, Ilin, the investigation officials of the Criminal Search Department, it appears that Chikunov and Ilin had a fight in the corridor, when Chikunov tried to testify that Ilin was equally present at the crime scene during the murder. The fact that the fight took place was confirmed both by Chikunov and Ilin, during a confrontation. The court also interrogated witnesses who took part in the seizure of the crime weapon; they all affirmed that Chikunov designated the place where the pistol was hidden and gave details of the circumstances of the crime under no coercion.

[6] According to the author, her son's lawyer asked the investigator Grigoryan in court to explain why the cover was not examined by an expert, and received the reply that it was "all impregnated of blood and was all in worms" when the evidence was sent for examination two weeks after the seizure. The author claims that the investigation had destroyed important evidence on purpose. The court refers to this evidence with the following formulation: "when examining the cover of the back side, it was discovered that…". According to the author, this constitutes a falsification of evidence and a "free interpretation of the conclusions of the forensic medical expert".

[7] See, inter alia, communication No 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision adopted on 3 April 1995, para. 6.2.

[8] General comment on article 7, No. 20 [44], adopted on 3 April 1992, para. 14.

[9] See for example *Aliev v. Ukraine*, communication No. 781/1997, Views adopted on 7 August 2003, para. 7.2.

[10] See *Conroy Levy v. Jamaica*, communication No. 719/1996, and *Clarence Marshall v. Jamaica*, communication No. 730/1996.

E. Communication No. 1047/2002, *Sinitsin v. Belarus** (Views adopted on 20 October 2006, Eighty-eighth session)

Submitted by:	Leonid Sinitsin (not represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	28 August 2001 (initial submission)
Subject matter:	Denial of possibility to run for Presidency of Belarus - inability to challenge the decisions of the Central Electoral Commission
Substantive issues:	Right to be elected without unreasonable restrictions - unavailability of an independent and impartial remedy
Procedural issue:	None
Articles of the Covenant:	25 (b), read in conjunction with article 2
Article of the Optional Protocol:	None

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

Meeting on 20 October 2006,

Having concluded its consideration of communication No. 1047/2002, submitted to the Human Rights Committee by Leonid Sinitsin under the Optional Protocol to the International Covenant on Civil and Political Rights,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The text of an individual opinion co-signed by Committee members Mr. Rafael Rivas Posada, Mr. Edwin Johnson and Mr. Hipólito Solari-Yrigoyen and a separate opinion signed by Committee member Ms. Ruth Wedgwood are appended to the present document.

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

Adopts the following:

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

1. The author of the communication is Mr. Leonid Georgievich Sinitsin, a Belarusian citizen born in 1954, residing in Minsk, Belarus. He claims to be a victim of violations by Belarus[1] of article 14, paragraph 1, and article 25 (b), read in conjunction with article 2 of the International Covenant on Civil and Political Rights. He is not represented.

The facts as submitted by the author

2.1 The author, then Vice-President of the Public Association "Social Technologies", was nominated as a candidate for the 2001 presidential elections in Belarus. An initiative group created to this end collected some 130,000 signatures in support of the author's nomination and submitted more than 110,000 signatures to the Electoral Commissions, whereas article 61 of the Belarus Electoral Code only requires the submission of 100,000 for the official registration of a candidate. All the documents required for the official registration of the author as a candidate for the presidential elections were submitted within the time limits specified by law.

2.2 On 25 July 2001, the Central Electoral Commission on Elections and Conduct of Republican Referendums (CEC) has refused to accept 14,000 signatures that were collected before the cut-off date of 20 July 2001 but were not submitted to the Electoral Commissions. The reason of the CEC for its refusal at that time was the alleged lack of a mandate to receive lists of signatures in support of a candidate. Regional Electoral Commissions also subsequently refused to accept these lists, allegedly contrary to article 81 of the Belarus Constitution. On 7 August 2001, the author challenged the 'disappearance' in the Mogilev and Brest regions of approximately 24,000 signatures in his support. Subsequently, the lists of signatures submitted by the author's initiative group were not counted by the Electoral Commissions towards the total number of signatures submitted in his support throughout Belarus. The author also challenged the decision of the Volkovys District Electoral Commission of 27 July 2001 not to count 878 signatures in his support as invalid. He claimed that contrary to article 61, part 14, paragraph 8 of the Electoral Code, this District Commission withdrew entire lists of signatures instead of declaring invalid the individual signatures of electors not residing in the same municipality. As a result, the total number of signatures withdrawn was ten times higher than the real number of invalid signatures. On an unspecified date, the decision of the Volkovys District Electoral Commission was appealed to the Grodnen Regional Electoral Commission. The author complained to the CEC about a number of electoral irregularities related to the refusal to accept the lists of signatures from one person and to certify their receipt by the District Electoral Commissions upon request of two other individuals, as well as about the intimidation of two of the initiative group's members at their work place.

2.3 On 8 August 2001, the CEC adopted a ruling stating that the total number of signatures in support of the author's nomination was only 80,540. The CEC thus declared that the author's nomination was invalid. The author claims that the CEC's decision on the invalidity of his nomination exceeded its powers. The CEC's powers are governed by article 33 of the Electoral Code and article 4 of the Law of 30 April 1998 "On the Central Electoral Commission

of the Republic of Belarus on Elections and Conduct of Republican Referendums". According to article 33, paragraph 6, of the Electoral Code, the CEC has the right to register presidential candidates; under article 68, paragraph 11, of the Code, the CEC should adopt a decision on the registration of a candidate or a reasoned decision on the refusal to register a candidate.[2] Moreover, since the author challenged before the CEC, that a large number of signatures in his support had "disappeared" and that the Prosecutor's Office had not completed its investigation of this complaint by the time the CEC decision was adopted, this decision was both unlawful and unfounded.

2.4 On 10 August 2001, the author appealed to the Supreme Court the CEC ruling of 8 August 2001 on the invalidity of his nomination. Although the Electoral Code does not envisage any right to appeal a ruling on this matter to a court, the author refers to article 341, part 1, of the Civil Procedure Code of Belarus and article 60, part 1, of the Belarus Constitution. The former allows judicial review of the decisions of the Electoral Commission related to discrepancies in lists of signatures and other matters provided by law; the latter guarantees to everyone a protection of his rights and liberties by a competent, independent and impartial court of law within the time limits specified in law. The author asserts that these limitations set by the Civil Procedure Code, which only allows an appeal of those decisions of the Electoral Commissions that are provided by law, are contrary to the constitutional guarantee of article 60, part 1. Article 112 of the Constitution stipulates that "the courts shall administer justice on the basis of the Constitution, the laws, and other enforceable enactments adopted in accordance therewith. If, during the hearing of a specific case, a court concludes that an enforceable enactment is contrary to the Constitution or other law, it shall make a ruling in accordance with the Constitution and the law, and raise, under the established procedure, the issue of whether the enforceable enactment in question should be deemed unconstitutional". The author filed his appeal before the Supreme Court since the Electoral Code itself gives jurisdiction to review CEC decisions to the Supreme Court.

2.5 On 14 August 2001, the Supreme Court refused to institute proceedings, on the grounds that the applicant did not have the right to file such a suit in court. It referred to article 245, paragraph 1, of the Civil Procedure Code stipulating that a judge shall refuse to institute proceedings when the applicant is not entitled to file a suit in court. The Court added that neither the Electoral Code nor legislation as such envisaged any procedure of judicial review of the CEC ruling on the invalidity of a candidate's nomination. The Supreme Court's decision is final.

2.6 On 20 August 2001, the author filed a complaint with the Chairman of the Supreme Court, requesting him to bring a supervisory protest to the ruling of the Supreme Court of 14 August 2001. He received no reply. On an unspecified date, a similar complaint was filed with the General Prosecutor of Belarus; no reply was received.

2.7 Pursuant to a National Assembly House of Representatives resolution on the presidential elections, the CEC decision and article 68 of the Electoral Code, the period for the registration of presidential candidates ran from 4 to 14 August 2001. On 14 August 2001, the author learned from a CEC media statement that he was not a registered candidate. Contrary to the requirement of article 68, part 11 of the Electoral Code, the CEC has not issued a reasoned decision on the refusal to register him as a candidate. On 16 August 2001, the author requested the CEC to provide him with a copy of its decision. On 17 August 2001, he received a reply, stating that there were no legal grounds for his registration as a presidential candidate. The author appealed the refusal to register him as a candidate to the Supreme Court, in accordance with the procedure

established by article 68, part 14, of the Electoral Code. On 20 August 2001, the Supreme Court returned the author's complaint without consideration, on the ground that it had already decided on the refusal to institute proceedings related to the CEC ruling of 8 August 2001.

The complaint

3.1 The author claims that the State party violated his right under article 25 (b) of the Covenant to be elected at genuine periodic elections, guaranteeing the free expression of the will of the electors without any of the distinctions mentioned in article 2 of the Covenant and without unreasonable restrictions by the CEC decision of 8 August 2001 on the invalidity of his nomination.

3.2 He maintains that, in breach or article 14, paragraph 1, read in conjunction with article 2 of the Covenant, the courts on two occasions and erroneously denied him the right to have his rights and obligations determined in a suit at law by a competent, independent and impartial tribunal established by law.

State party's observations on admissibility and merits

4. On 1 April 2002, the State party noted that on 10 August 2001, the author appealed the CEC ruling of 8 August 2001 on the invalidity of his nomination to the Supreme Court. On 14 August 2001, the Supreme Court refused to institute proceedings, on the grounds that the courts do not have jurisdiction to examine the subject matter. The State party refers to article 68 of the Electoral Code, which establishes that the CEC must decide on the registration of a presidential candidate after submission of a set of documents, including at least 100,000 signatures in support of that candidate's nomination. The CEC refusal to register a candidate can be appealed to the Supreme Court within three days. The State party asserts that according to the author's complaint, the CEC did not decide on the refusal to register him as a candidate. The CEC decision of 8 August 2001 merely stated that as only 80,540 signatures had been collected in his support, his nomination as a candidate was not valid. The State party further refers to article 341, part 1, of the Civil Procedure Code and article 6, part 2, of the Law "On the Central Electoral Commission of the Republic of Belarus on Elections and Conduct of Republican Referendums" which allows judicial review of CEC decisions provided by law by the Supreme Court. However, this law does not envisage any procedure for judicial review of the CEC ruling on the invalidity of a candidate's nomination. The State party concludes that there were no grounds for the Supreme Court to institute proceedings on the author's complaint.

Author's comments on the State party's observations

5. On 3 May 2003, the author reiterated his initial claims.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee has ascertained, as required under article 5, paragraph 2, of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement and notes that the State party did not contest that domestic remedies have been exhausted.

6.3 As to the author's claim under article 14, paragraph 1, the Committee has noted that it relates to issues similar to those falling under article 25 (b), read together with article 2 of the Covenant, namely, the right to an effective remedy involving an independent and impartial determination of the author's claim that his right to be elected without unreasonable restrictions was violated. Without prejudice to the question of whether the author's case constituted a "suit at law" within the meaning of article 14, paragraph 1, the Committee decides that the communication is admissible under article 25 (b) of the Covenant, read in conjunction with article 2.

Consideration of the merits

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

7.2 In reaching its decision, the Committee has taken into account, first, the fact that the State party admitted that no effective remedies were available for the author in his case. Secondly, that it did not respond to the author's allegations concerning either the irregularities in counting the signatures of support by the Electoral Commissions, the exceeding of the CEC mandate by adopting a ruling on the invalidity of the author's nomination or the unconstitutionality of article 341 of the Civil Procedure Code limiting the Constitutional guarantee of article 60. That being so, the allegations made must be recognized as carrying full weight, since they were adequately supported and not properly challenged by the State party.

7.3 The Committee takes note of the author's claim that despite numerous irregularities in as far as the handling of signatures in support of his candidacy by the Electoral Commissions on all levels is concerned, his initiative group submitted a sufficient number of signatures to the CEC for it to be able to make an informed decision on whether to register him as a candidate. The Committee also notes the author's claim, which is uncontested, that the adoption of the CEC ruling on the invalidity of his nomination exceeded the CEC's powers as set out in the Electoral Code and the Law "On the Central Electoral Commission of the Republic of Belarus on Elections and Conduct of Republican Referendums". In this regard, the Committee observes that the exercise of the right to vote and to be elected may not be suspended or excluded except on grounds, established by law, which are objective and reasonable.[3] The Committee recalls that article 2, paragraph 3, of the Covenant guarantees an effective remedy to any person claiming a violation of the rights and freedoms spelled out in the Covenant. In the present case, no effective remedies were available to the author to challenge the CEC ruling declaring his nomination invalid, nor could he challenge the subsequent refusal by the CEC to register him as a presidential candidate before an independent and impartial body. The Committee considers that the absence of an independent and impartial remedy to challenge (1) the CEC ruling on the invalidity of the author's nomination and, in the present case, (2) the CEC refusal to register his candidacy, resulted in a violation of his rights under article 25 (b) of the Covenant, read in conjunction with article 2.

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 information at its disposal discloses a violation by the State party of article 25 (b) of the Covenant, read in conjunction with article 2.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, namely, compensation for damages incurred in the 2001 Presidential campaign. It is also under an obligation to take steps to prevent similar violations occurring in the future.

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

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

APPENDIX

Partially concurring opinion by Committee members Mr. Rafael Rivas Posada, Mr. Edwin Johnson and Mr. Hipólito Solari Yrigoyen

We agree with the Committee's decision in paragraph 8 of the Views adopted on 20 October 2006 that the information provided in the above communication "discloses a violation by the State party of article 25 (b) of the Covenant, read in conjunction with article 2". We disagree on the following:

1. The author asserts in his complaint (paragraph 3.2 of the Views) that the alleged facts are in breach of article 14, paragraph 1, of the Covenant. The Committee needed to respond explicitly to the author's complaint, rather than merely stating, as it does in paragraph 6.3, that "without prejudice to the question of whether the author's case constituted a "suit at law" within the meaning of article 14, paragraph 1, the Committee decides that the communication is admissible under article 25 (b) of the Covenant, read in conjunction with article 2". The translation into Spanish of the English expression "suit at law", which is used both in the Covenant and in the original version of the Views in English, is not correct, since a "suit at law" is not equivalent to having one's "rights and obligations determined in a suit at law". The Committee decided that the complaint with respect to article 14, paragraph 1, was inadmissible, although implicitly rather than explicitly, by declaring admissibility with respect to articles 25 and 2 of the Covenant, without deciding whether the complaint raised issues relating to article 14.

2. In our opinion, the issue raised by the communication, that the author has a right to be elected without restrictions and that this right should be recognized by a competent, independent and impartial authority, falls under article 14, paragraph 1. The Committee has recognized in its jurisprudence that this article protects administrative, labour, and civil rights in general, not only in the field of private law. The rights enshrined in article 25 of the Covenant cannot be left outside the scope of the procedural safeguards prescribed by article 14, since this would leave unprotected certain rights explicitly mentioned in the Covenant which are highly important in democratic systems. Thus the Committee needed to declare the communication admissible with respect to the possible violation of article 14, paragraph 1, in the light of the information in the file.

3. In view of the admissibility of the communication with respect to article 14, paragraph 1, we are of the view that the latter was violated. The violation of article 25 found by the Committee resulted specifically from the violation of article 14, paragraph 1. The author could not secure the protection of his right under article 25 by a competent, independent and impartial authority and had no remedy by which to secure such protection. Without the violation of article 14, paragraph 1, the violation of article 25 in the case at hand cannot be explained.

4. In the light of the above, we believe that paragraph 8 of the Views should also have included a violation of article 14, paragraph 1, in the Committee's decision, either directly or

using the customary formula, viz. “the information at its disposal discloses a violation by the State party of article 25 (b) of the Covenant, read in conjunction with article 14, paragraph 1, and article 2”.

(*Signed*): Mr. Rafael Rivas Posada

(*Signed*): Mr. Edwin Johnson

(*Signed*): Mr. Hipólito Solari Yrigoyen

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

Concurring opinion by Committee member Ms. Ruth Wedgwood

The author of this complaint sought to place his name on the election ballot in 2001 as a nominee for the presidency of Belarus. The State party's "Central Electoral Commission on Elections and the Conduct of Republican Referendums" rejected the nomination. Thereafter, the Supreme Court of Belarus concluded that it did not have power to review the substance of the Commission's decision.

The Committee on Human Rights holds that Article 25 of the International Covenant on Civil and Political Rights was violated because the author was deprived of any effective ability to challenge alleged irregularities in the election process, including the rejection by regional and district bodies of petitions with signatures from Belarus citizens supporting his nomination. It appears that the law of Belarus itself, properly observed, would require the provision of an effective remedy. Under the Electoral Code, any decision by the Central Electoral Commission denying the registration of a candidate must be "motivated", i.e., reasoned. See article 68 (11) of the Belarus Electoral Code. There is no indication in the record of this case that the Belarus Central Electoral Commission provided any substantive review of the merits of the author's complaints.

That said, truly democratic States may vary in whether they provide a form of judicial review of the results of elections. Where there is an objective, impartial, and transparent form of administrative review, or a similar legislative procedure, in order to judge the validity or invalidity of alleged election violations, the Covenant has not been held to require judicial review of all electoral decisions.[4] It may be good practice, as an added guarantee of a democratic form of government. But election systems are varied and complicated, and their array of remedies is not presently before us.

(*Signed*): Ruth Wedgwood

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

Notes

[1] The Covenant and the Optional Protocol thereto entered into force for Belarus on 23 March 1976 and 30 December 1992 respectively.

[2] Article 68, paragraphs 4, 6, 7 of the Electoral Code provides for an exhaustive list of the grounds on which the registration could be refused.

[3] General comment No. 25 [57]: The right to participate in public affairs, voting rights and the right of equal access to public service (art. 25), CCPR/C/21/Rev.1/Add.7, para. 4.

[4] Compare U.S. Constitution, article 1, section 5, and *id.*, article 2, section 1, paragraph 2.

F. Communication No. 1052/2002, *J. T. v. Canada**
(Views adopted on 20 March 2007, Eighty-ninth session)

Submitted by:	N.T. (not represented)
Alleged victims:	The author and her daughter, J.T.
State party:	Canada
Date of communication:	3 February 1998 (initial submission)
Subject matter:	Denial of access of mother to her child
Substantive issues:	Arbitrary interference with family - protection of the family -protection of the child as a minor - fair trial - undue delay
Procedural issue:	Failure to substantiate claim
Articles of the Covenant:	14, paragraph 1, 17, 23 and 24
Article of the Optional Protocol:	2

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

Meeting on 20 March 2007,

Having concluded its consideration of communication No. 1052/2002, submitted to the Human Rights Committee by N.T. under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada and Sir Nigel Rodley.

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

1. The author of the communication is N. T., a Canadian citizen of Ukrainian origin, born on 28 July 1960. She also submits the communication on behalf of her daughter, J. T., born in Canada on 20 February 1993, who was removed from her care on 2 August 1997 and later adopted. Although the author did not initially make any specific claims under the Covenant, she later claimed that they were the victims of violations by Canada[1] of articles 1, 2, 3, 5 (2), 7, 9 (1, 3 and 5), 10 (1 and 2 (a)), 13, 14 (1, 2, 3 (d) and (e), and 4), 16, 17, 18 (4), 23, 24, 25 (c) and 26, of the International Covenant on Civil and Political Rights (the Covenant). She is not represented by counsel.

The facts as submitted by the author

2.1 The author was born in the Ukraine and obtained a qualification in the medical field there. She migrated to Canada in 1989 and became a Canadian citizen in 1994. After the birth of her daughter on 20 February 1993, she raised her child as a single parent, while pursuing University studies in order to obtain a professional Canadian qualification. The child's biological father did not have any contact with her.

2.2 During the night of 1 to 2 August 1997, the author called the police to report a sexual abuse of her four-year old daughter. The author also slapped her daughter, to prevent her from visiting the neighbours, resulting in a red mark on her face.[2] According to the author, this only happened once, in a special circumstance where she was concerned for her daughter's well-being. According to a police report, the author stopped a motorist to "give away" her daughter and said that she no longer wanted her daughter and that Canada could take care of her. However this has been consistently denied by the author, according to whom the child was standing on the sidewalk waiting for the author who was talking to the police, and according to whom she never abandoned her daughter. The police took her child to the Police Station and placed her in the care of the Children's Aid Society of Metropolitan Toronto which in turn entrusted her to a foster home. Despite the author's report that her daughter had been sexually assaulted, no investigation was allegedly made and the child was not examined by a doctor.

2.3 A few days later (5 August), the author was arrested and charged with assault (for what she believed to be an exercise of parental authority) of her daughter.[3] In an affidavit of 6 August, the author explained the circumstances of the incident and stated that she believed that she was capable of caring for her daughter, and that she would be pleased to have the Children's Aid Society attend her home to follow her parenting style. However, on 7 August, the Scarborough Provincial Court placed the child in temporary (three months) care of the Catholic Children's Aid Society of Toronto (CCAS), with supervised access. According to the author, this order did not provide the authority to place her child permanently in a foster home, nor to release her child for adoption. She claims that until the child protection trial and the judgement of 26 June 2000,[4] no custody order was issued in favour of the CCAS and it was not established that the child needed protection, as would have been required by national legislation, i.e. the Rules of Civil Practice, the Family Court Rules and the Family and Services Act, for the further apprehension of her daughter from 1997 to 2000. Although the girl initially disclosed that her mother had hit her, she repeatedly expressed the wish to return home and reacted negatively when separated from her mother at the end of visits. All visits were strictly supervised and the mother and daughter were allowed no privacy.

2.4 On 1 December 1997,[5] on her daughter's request, the author took her home. As a result, she was convicted of child abduction and sentenced to one month imprisonment. In prison, she was severely beaten by an inmate and thereafter placed in segregation without medical attention for 10 days. On 24 December 1997, she was released on bail, with the condition that before she could have any access to her daughter, she undergo an assessment as approved by the CCAS, and that any access to her daughter be under the immediate and direct supervision of the CCAS. Telephone contact between mother and daughter was terminated following an angry exchange between the author and the foster mother.

2.5 In March 1998, the author was assessed, on the CCAS' request, by Dr. K., an attending psychiatrist at the Clarke Institute of Psychiatry, for a total of 4 hours. The Committee has not been provided with a copy of the 14-page report that he produced. However, it transpires from the judgement of 26 June 2000[6] that the doctor, who based his assessment on two interviews and second hand information from other psychiatrists, found the author to suffer from a delusional disorder and erotomanic, persecutory, and somatic delusions. According to the judge, the doctor also observed that because her mental illness was proceeding untreated, her ability to care for her daughter was in question.

2.6 On 29 September 1998, Dr. K. replied to a letter from the author's counsel, and clarified a number of issues, among which was the fact that he was not able to detect the author's erotomanic delusions in his time spent with her, but rather that the notes from the University of Toronto Health Services Clinic suggested that her treatment there flowed from her erotomanic delusional material. He also indicated in his conclusions that if she did experience erotomanic delusions, they did not appear to have had an impact on her ability to care for her daughter.[7]

2.7 On 12 May 1998, the author was assessed by Dr. G. from the Toronto Hospital. In describing the author, he indicated that "there do not appear to be any manic or overt psychotic symptoms", that "there was no formal thought disorder" and that "her thought content revealed mostly ideas of persecution which appeared to be overvalued, but not of delusional proportions". He considered that "it is likely that this patient suffers from a paranoid personality disorder, although it is difficult to say at this point as a result of only one interview", but concluded that she did not need medication.

2.8 On 2 July 1998, a Dr. G., the author's family physician since May 1995, indicated in a letter that he did not feel that he knew the patient well and that she was difficult to describe, but that she did not appear to suffer from any major psychiatric illness and had not been on any medications.

2.9 In a letter of 6 July 1998, Dr. T., Consultant Paediatrician who had seen the child in consultation intermittently since August 1993, indicated that he had no reason or evidence to suggest that the author was an unfit mother.

2.10 As a result of Dr. K.'s report which outlined a medical condition, and despite other specialists' acknowledgment that she was in good health and did not need medication, the CCAS refused to reinstate access. In June 1998, the initial application of the CCAS for an order of 3 months wardship was amended to seek an order of crown wardship with no access, to allow the child to be adopted. In July, August and November 1998, the author's motions to reinstate access were denied by no-access orders.

2.11 In an adoptability assessment of 28 September 1998, an Adoption Social Worker of the CCAS considered that "since her admission into care, Julia's social skills have greatly improved". However, she found that "Julia appears to have a significant attachment to her mother" and "she has stated that she wants to live with her". "Julia, in a discussion with this worker indicated that she wanted to be with her mother, although she still has some ambivalence about her." She stated that she loved her mother although she had been beaten by her. "Despite this, she was not able to consider the possibility of living with another family at this time." The social worker concluded that it would be helpful to have the child psychologically assessed and specifically explore the attachment issues before making a decision about her adoptability.

2.12 On 12 December 1998, Dr. P., the child's psychologist, wrote a report on the possible effect that crown wardship without access might have on the child. The psychologist indicated that the child, who at that time had not seen her mother for one year, was at risk of developing attachment disorder. She further stated that:

> "Julia misses her mother, says she wants to see her, she is confused by her mother's absence. (…) Julia is a child in limbo. (…) The impression I got from both conversations with Julia's foster mother and from Julia's presentation is that she is clinging to the memory of her mother, that she is confused, and does not know what she should and can feel about her mother. She is at risk of depression. (…) Julia needs to come to some resolution in relation to her mother. (…) It could be helpful for Julia to have contact with her mother so that such a resolution can be achieved. (…) The recommendation is therefore that supervised visits with [the author] are reinstated. That Julia is given a chance to know her mother. (…) Should it be considered that the visits are detrimental to Julia, they should be stopped and the reasons for the termination explained to her."

2.13 In order to regain the care and control of her child or visiting rights, the author turned to various lawyers and eventually proceeded in person to pursue numerous motions and appeals to the courts during the years 1997 to 2000. In the result on 11 January 1999, on the CCAS' request, the Ontario Court of Justice, relying on Dr. K.'s report, found the author to be under a "mental disability" and ordered that she not be allowed to pursue any further court proceedings in person. In the circumstances the Public Guardian and Trustee Office (PGT) was assigned as the author's litigation guardian.[8] She claims that the PGT did not act on her behalf and tried to mislead her. The Court also ordered that the trial scheduled for February 1999 be postponed, as the PGT was not ready to proceed to trial.

2.14 In June 1999, as a result of an order issued on 17 May 1999, access to her child was reinstated by consent on certain terms and conditions, among which:

> "1. [The author] shall have supervised access to the child in the sole and absolute discretion of the CCAS.
>
> 2. Access shall be once every three weeks for a period of not more than 90 minutes.
>
> 4. [The author] shall remain in the visitation room at the CCAS office with the child at all times during the visits, fully supervised by CCAS employees. There will be a CCAS employee in the room at all times as well as a CCAS employee behind an observation mirror.

10. [The author] shall not question Julia regarding where she lives, her telephone number or where she attends school.

13. In the event [the author] fails to abide by any of these terms and conditions the access visits shall be terminated immediately and the CCAS shall have the right to determine if future visits shall take place."

2.15 Access was removed again by the CCAS in August 1999 although the visits had gone well and the author fully complied with all access conditions at each visit. On the author's motion to reinstate access, the access order was varied on 21 December 1999, in the best interests of the child. In December 1999, the child started living with new foster parents, who expressed the wish to adopt her.

2.16 On 8 December 1999, the author filed an application for judicial review of the entire child protection process in the Superior Court of Justice. The CCAS initiated a counter-application under Section 140 of the Courts of Justice Act, banning the author from continuing any proceedings she had commenced in any court, and preventing her from initiating any subsequent proceedings. On 8 March 2000, the Superior Court of Justice prohibited her from instituting further proceedings in any court, and ordered that all proceedings previously instituted in any court be discontinued. The Court's reasoning was that the author had initiated numerous motions, appeals and applications, sabotaging the timetable of the trial regarding the protection of the child, and thereby seriously compromising the child's welfare.

2.17 On 26 June 2000, in the main trial on the child protection case, the Ontario Court of Justice made an order for crown wardship without access for the purpose of adoption. The Court considered that "the evidence in this matter is overwhelming to permit the Court to find that the child is in need of protection and that there is overwhelming evidence to demonstrate that this child's best interests can only be served by an order for crown wardship without access." The Court further "firmly believed" that the author was a "seriously ill person", and that if the child were to be left in her care, she would suffer not only physical harm but irreparable emotional damage. The Court based this finding on Dr. K.'s 1998 medical report, Dr. G.'s indication that "it is likely that this patient suffers from a paranoid personality disorder" and another doctor's statement of 12 May 1998 that "While I have no direct confirmatory evidence of her suffering from a delusional disorder, I would feel that the material presented by Dr. K. and presumably to the Courts, would likely have stood up and would continue to do so". None of these specialists came to Court to testify.

2.18 The child was not heard during the trial. However, it transpires from the judgement that through her lawyer, "the position was taken on behalf of the child that she wished to remain with her present foster parents although she still indicated a wish to visit with her mother". During the trial, the child's psychologist stated that Julia was strongly attached to her mother, that she needed contact with her, and that she would suffer if deprivation of all access continued.

2.19 With regard to the author's condition and her conduct, the Court further noted that:

> "It is difficult to determine where [the author's] illness ends and her malicious behaviour begins as they are intertwined. The apprehension of this child took place in the early hours of the morning on August 2nd, 1997 and from then until this matter proceeded to trial in May and June of 2000, there were endless legal proceedings related to this apprehension which delayed the hearing of the initial problem and [the author], with the assistance of seven or eight lawyers, ran off in all directions attacking everyone with motions and appeals from decisions until finally this year an order was made in the Superior Court, directing that [the author] was a vexatious litigant and she was not permitted to institute any new legal proceedings without prior leave of the Court."

Finally, it considered that continued access would only perpetuate the state of limbo the child found herself in, and that there were no special circumstances demonstrated which would justify the continuation of access in these circumstances. On 10 October 2000, the author's attempted appeal of 26 July 2000 was dismissed, on procedural grounds.

2.20 In November 2000, the author asked the CCAS for the release of information related to Julia's placement for adoption. The CCAS replied that "the Society has no obligation to advise you as to whether your daughter has been placed for adoption".

2.21 It transpires from an affidavit of 22 June 2001 sworn by the child's foster mother, that the author attempted to be in contact with her daughter on several occasions. She called their home in February, August and October 2000 and went to her school twice, in May and June 2001. According to the foster mother, the girl had run away from the author and sought the assistance of a teacher. Julia told her foster mother that the author had approached her, but that "she knew not to speak to her", and that she "continued to be afraid of her mother". An "Acknowledgement of Adoption Placement" of 9 August 2001 signed by the foster parents indicates their intention to adopt the child.

2.22 The author made further motions and appeals which were all rejected on procedural grounds. Finally, on 13 September 2001, the Supreme Court of Canada dismissed an application for leave to appeal and a motion for stay of adoption filed by the author. Her applications to the Ontario Human Rights Commission, the Ministry of Community and Social Services, and to "many other authorities" were fruitless.

The complaint

3.1 While the author did not initially invoke violations of specific provisions of the Covenant, she subsequently, in comments on the State party's observations, invoked violations of articles 1; 2; 3; 5, paragraph 2; 7; 9, paragraphs 1, 3 and 5; 10, paragraphs 1 and 2 (a); 13; 14, paragraphs 1, 2, 3 (d) and (e) and 4; 16; 17; 18, paragraph 4; 23; 24; 25 (c); and 26 of the Covenant. The Committee, upon analysis of the complaint, considers that it raises the following issues under the Covenant.

3.2 The author claims, on her own behalf, violations of article 14, in relation to her convictions and imprisonment for the assault and abduction of her daughter, and of article 9 and article 10, in relation to her treatment while serving her sentence.

3.3 The author claims, on her daughter's and her own behalf, that her daughter was "abducted" and requests that she be returned to her custody or granted access. She claims that her family was "illegally destroyed" as her daughter was apprehended and kept by the CCAS without a legitimate custody order. Her access to her daughter was unlawfully and arbitrarily terminated by the CCAS without any explanations and in spite of a court order guaranteeing access. Her daughter stayed in the temporary care of the CCAS well beyond the maximum statutory one-year limit.[9] No efforts to return the child to the author, or seek a less restrictive solution, were made in the course of the proceedings. These claims raise issues under article 17, article 23 and article 24.

3.4 The author denounces on her daughter's and her own behalf the delays in considering their case, in particular a delay of almost three years between the commencement of the child protection proceedings in August 1997 and the trial in June 2000, thus raising issues under article 14, paragraph 1.

3.5 The author claims that the hearing of the child protection case was unfair. She claims that during the trial which resulted in the judgement of 26 June 2000, the court did not call the main witnesses nor acknowledge the numerous contradictions in the witnesses' statements. Further, the psychiatric assessment on which the Court based its finding was carried out two years before the trial and included hearsay information which was not evaluated in court. The judge based his decision on a single outdated report, prepared by the psychiatrist on the CCAS' request, and paid for by the CCAS. This psychiatrist did not testify during the proceedings. These claims also raise issues under article 14, paragraph 1, of the Covenant.

3.6 The author contends on her daughter's behalf that the court decisions in the case were not taken in the child's best interest, and that the unfair and prolonged nature of the proceedings caused her mental suffering, thus raising issues under article 7.

3.7 The author does not further substantiate her claims under articles 1, 2, 3, 5, 13, 16, 18, 25 and 26 of the Covenant.

State party's submission on the admissibility and merits of the communication

4.1 On 15 May 2002, the State party commented on the admissibility and merits of the communication. It notes that in her communication, the author describes her experiences with various legal and social institutions of the State party, and contends that the communication should be declared inadmissible for non-substantiation, as the author's allegations are formulated in an imprecise manner, without specifying which provisions of the Covenant allegedly were violated. The State party argues that in the light of this deficiency, it cannot provide a response to the author's complaint.

4.2 The State party refers to the Committee's decision in the case of *J.J.C. v. Canada*[10] where the Committee concluded that the author's complaint was not sufficiently substantiated due to the "sweeping nature" of the allegations made against the Canadian Court system, and found the communication inadmissible. It submits that the present communication suffers from the same inadequacies as those in that particular communication, and that it should likewise be found inadmissible.

4.3 The State party argues that the author's allegations reveal no specific violations of any Covenant provisions, and that the communication is without merits.

4.4 The State party reserved the right to make submissions with respect to the admissibility and merits of the communication if further information was received.

Author's comments

5.1 On 21 September 2003, the author commented on the State party's submissions, arguing that her sole intention is to gain the possibility to see her only child. All her efforts and court applications were aimed at reinstating contact with her daughter, who was separated from her against their will.

5.2 In reply to the State party's contention that her communication reveals no specific violations of Covenant provisions, the author lists the provisions she considers to have been violated by the State party (see paragraph 1 above). She reiterates her claim that her daughter was illegally removed from her custody, as the interim supervision order of 7 August 1997 expired after three months. When she decided to take her daughter home after the expiry of that order, she was immediately arrested and imprisoned for two months without trial. She contends that the subsequent terminations of access to her daughter were arbitrarily decided by the CCAS, despite a court order granting her access.[11]

5.3 The author reiterates that her daughter wanted to have contact with her, which was ignored by the judge, and refers to the adoptability assessment and the psychologist's recommendation that the author should have access to her child.

5.4 Finally the author claims that her daughter suffered severe anxiety and depression symptoms, as a result of her separation from her. Unnecessarily severe measures towards the family caused an irreversible psychological trauma to the child, and put her at risk of developmental disorders. For the author, this constituted cruel and unusual punishment of her child.

5.5 On the issue of standing of the author to represent her daughter, the author has confirmed that she wishes to bring the complaint also on behalf of her daughter. On 19 August 2006, she informed the Committee that her daughter has been adopted, and that she has no more contact with her. As a result of the incidents of 2001 in which she attempted to enter into contact with her, she was taken to court by her daughter's foster/adoptive parents and arrested. She also indicates that she has not been provided any information as to the date of adoption.

5.6 On 31 October 2006, the author indicated that her attempts to contact her daughter were prevented by the present caregivers, and that she has not been able to obtain an authorization from her daughter to act on her behalf in the proceedings before the Committee. Consequently she took the matter to court, in which the proceedings are still pending. On 22 February 2007, she confirmed that a court hearing initially scheduled for December 2006 had been postponed to 9 March 2007.

Absence of further comments from the State party

6. On 10 December 2003, the author's comments were transmitted to the State party, which did not provide any further comments.

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol. It notes that the State party has not contested the admissibility of the communication on grounds of non-exhaustion of domestic remedies, and that the author's application for leave to appeal to the Supreme Court was denied on 13 September 2001. It thus considers that the author has exhausted domestic remedies.

7.3 The Committee has noted the State party's contention that the communication should be declared inadmissible for non-substantiation because the author's allegations were formulated in an imprecise and sweeping manner, without referring to the Covenant. It observes, however, that in response to State party's comments, the author, who is unrepresented, made an effort to organize her claims and referred to different articles of the Covenant, although in a broad manner. The State party has not commented on these claims, although it has been given the opportunity to do so. The Committee concludes that the author's claims are not inadmissible on this ground.

7.4 With respect to the author's standing to represent her daughter in relation to her claims under article 7, article 14, article 17, article 23 and article 24, the Committee notes that the author's daughter is now fourteen years old and has been adopted. It further notes that the author has not provided an authorization from her daughter to act on her behalf. It recalls, however, that a non-custodial parent has sufficient standing to represent his or her children before the Committee.[12] The bond existing between a mother and her child and the allegations in the case should be considered sufficient to justify representation of the author's daughter by her mother. In addition, the Committee also notes that the author has repeatedly but unsuccessfully sought to obtain authorization from her daughter to act on her behalf (see paragraph 5.6 above). In the circumstances, the Committee is not precluded from examining the claims made on behalf of the child by her mother.

7.5 The Committee understands the author's claims under article 9, article 10 and article 14, paragraph 2, as relating to her convictions for assault of her daughter and for child abduction, and the imprisonment related thereto. It notes that she has not provided any evidence supporting these claims, nor any description of facts sufficiently substantiated for purposes of admissibility, and accordingly finds them inadmissible under article 2 of the Optional Protocol.

7.6 The Committee considers that the author's claim that her daughter was a victim of mental suffering in violation of article 7 is not sufficiently substantiated for purposes of admissibility, and finds this claim inadmissible under article 2 of the Optional Protocol.

7.7 The Committee considers that the remaining claims raise issues under the Covenant and are sufficiently substantiated, for purposes of admissibility, and declares the communication admissible with respect to the claims under article 14, paragraph 1; article 17; article 23; and article 24 of the Covenant.

Consideration of the merits

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

8.2 As to the alleged violation of article 17, the Committee recalls that the term "family" must be understood broadly, and that it refers not solely to the family home during marriage or cohabitation, but also to the relations in general between parents and a child.[13] Where there are biological ties, there is a strong presumption that a "family" exists and only in exceptional circumstances will such relationship not be protected by article 17. The Committee notes that the author and her daughter lived together until the child was four years old and she was placed in institutional custody and that the author was in contact with the child until August 1999. In these circumstances, the Committee cannot but find that at the time when the authorities intervened, the author and her daughter formed a family within the meaning of article 17 of the Covenant.

8.3 In respect of the author's claim that she unlawfully lost custody of and access to her child and that her family was destroyed, the Committee observes that the removal of a child from the care of his or her parent(s) constitutes interference in the parents' and the child's family. The issue thus arises whether or not such interference was arbitrary or unlawful and contrary to article 17. The Committee considers that in cases of child custody and access, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the effective right of a parent and a child to maintain personal relations and regular contact with each other, and on the other hand, in the light of the best interests of the child.[14]

8.4 The Committee notes that the authorities' initial removal of her daughter from the author's care, on 2 August 1997, confirmed by a judicial order of 7 August placing her under the care of the CCAS, was based on their belief, later confirmed by the author's conviction, that she had assaulted her child. The Committee notes that although the order was temporary (three months), it only granted the author access to her daughter under extremely harsh circumstances. It considers that the initial three-month placement of the author's daughter in the care of the CCAS was disproportionate.

8.5 In relation to the author's claims regarding the period commencing after the expiry of the three-month period covered by the interim order of 7 August 1997 up to the trial in May 2000, the Committee notes that the CCAS kept the child in its care. According to the order of 7 August 1997, the author was to have access to her daughter, although under very strict conditions. Following the author's "abduction" of her daughter on 1 December 1997 and her conviction in April 1998, the author was denied access. She did not regain access until June 1999, also under very harsh conditions, as a result of an order of 17 May 1999 reinstating

access. For instance, the author and her daughter were allowed to meet only in the CCAS' premises, every third week for 90 minutes. The visits were fully supervised by CCAS employees. The author was not allowed to telephone her daughter. The CCAS again terminated access on its own initiative, while the order for access of 17 May 1999 was still in force. In the conditions for access appended to that order, it was stated that the author should have supervised access to the child in the sole and absolute discretion of the CCAS. The access issue was not assessed by a judge until 21 December 1999 when the judge decided not to reinstate the author's access to her daughter. Since then, the author's access has not been reinstated.

8.6 The Committee observes that the child repeatedly expressed the wish to go home, that she cried at the end of visits and that her psychologist recommended that access be reinstated. It considers that the conditions of access, which also excluded telephone contact, were very severe vis-à-vis a four-year-old child and her mother. The fact that the author and the foster mother had an argument on the phone is not sufficient to justify the definitive termination of that contact between the author and her daughter. The Committee finds that the CCAS' exercise of its power unilaterally to terminate access in December 1997 and August 1999, without a judge having reassessed the situation or the author having been given the opportunity to present a defence constituted arbitrary interference with the author and her daughter's family, in violation of article 17 of the Covenant.

8.7 With respect to the alleged violation of article 23, the Committee recalls its jurisprudence that the national courts are generally competent to evaluate the circumstances of individual cases. However, the law should establish certain criteria so as to enable the courts to apply the full provisions of article 23 of the Covenant. "It seems essential, except in exceptional circumstances, that these criteria should include the maintenance of personal relations and direct and regular contact between the child and parents."[15] In the absence of such special circumstances, the Committee recalls that it cannot be deemed to be in the best interest of a child to eliminate altogether a parent's access to him or her.[16]

8.8 In the present case, the judge, during the child protection trial of 2000, considered that "there were no special circumstances demonstrated which would justify the continuation of access in these circumstances", instead of examining the issue whether there were exceptional circumstances justifying terminating access, thereby reversing the perspective under which such issues should be considered. Given the need to ensure family bonds, it is essential that any proceedings which have an impact on the family unit deal with the question of whether the family bonds should be broken, keeping in mind the best interests of the child and of the parents. The Committee does not consider that the slapping incident, the author's lack of cooperation with the CCAS and the contested fact of her mental disability constituted exceptional circumstances which would justify total severance of contact between the author and her child. It finds that the process by which the State party's legal system reached a conclusion to completely deny the author access to her daughter, without considering a less intrusive and less restrictive option, amounted to a failure to protect the family unit, in violation of article 23 of the Covenant. In addition, these facts result in a violation of article 24 with respect to the author's daughter, who was entitled to additional protection as a minor.

8.9 With respect to the claim of undue delay under article 14, paragraph 1, the Committee recalls its jurisprudence that the right to a fair trial guaranteed by this provision includes the expeditious rendering of justice, without undue delay,[17] and that the very nature of custody proceedings or proceedings concerning access of a divorced parent to his or her children requires that the issues complained of be adjudicated expeditiously.[18] The Committee considers that this jurisprudence also applies to child protection proceedings, which relate to the removal of parental authority and access of a parent to his or her child. In examining this issue, the Committee must take into consideration the age of the child in question and the consequences that delayed proceedings may have on the child's well-being and the outcome of the court case.

8.10 In the present case, the child was four years old at the time of apprehension in August 1997, and seven years old at the time of the child protection trial in June 2000. As a consequence of the delayed proceedings, the child's psychologist warned that she was at risk of depression and of developing attachment disorder[19] and that she found herself in a "state of limbo",[20] as she did not know where she belonged. Moreover, the judge partly based his finding on the fact that the child had formed very strong bonds with her foster parents, who wanted to adopt her, and that she wished to remain with them. The Committee notes that the child initially wanted to return to her mother's care, and that her wish only changed over time.

8.11 It further transpires from the file that the author changed lawyers various times and filed numerous court motions, which delayed the proceedings. She was also found to be a vexatious litigant who, by her numerous motions and appeals, was sabotaging the timetable of the trial. However, these were all motions aimed at reinstating access of the author to her child. The Committee considers that bringing a motion for access should not have as a necessary consequence the delaying of the main trial. In addition, the delay cannot be attributable only to the author. The Committee for example notes that it was on the CCAS' request that the PGT was appointed as the author's representative and that a consequence of this appointment was the postponement of the trial. The Committee finds that in view of the young age of the child, the delay of nearly three years between the placement of the child in CCAS' care and the trial on the child protection application, which cannot solely be imputed to the author, was undue and in violation of the author's and her daughter's rights to an expeditious trial, as guaranteed by article 14, paragraph 1.

8.12 As to the claims of unfair hearing under article 14, paragraph 1, the Committee observes that the judge based his finding on what he believed to be the "serious illness of the mother". This conclusion was based on the two-year old assessment of Dr. K. that the author suffered "from a delusional disorder" and "erotomanic, persecutory and somatic delusions", and other psychiatric reports. It transpires from the judgement that the judge selectively and incorrectly used these reports. In particular, he appears to have misinterpreted Dr. K.'s assessment (see paragraphs 2.5 and 2.6 above) that if she did experience erotomanic delusions, they did not appear to have had an impact on her ability to care for her daughter. Further, the judge omitted Dr. G.'s opinion that there was no formal thought disorder, and that her ideas of persecution were not of delusional proportions. The judge did not hear Dr. K., who had been summoned to court by the author but failed to appear, nor did he solicit the testimony any of the other doctors who had assessed the author.

8.13 It transpires from the file that the judge decided the question of removal on one single incident of assault and contested facts, which took place three years earlier. In addition, there is no indication that the judge considered hearing the child, or that the child was involved at any point in the proceedings. While her wishes were expressed by her lawyer at trial, indicating that "she wished to remain with her present foster parents although she still indicated a wish to visit with her mother", the judge found that "continued access would only keep this state of limbo which Dr. P. believes is very damaging for the child and there should be closure and the child should be permitted to get on with the new opportunity which she has for a decent life". The Committee notes however that the child's psychologist considered that the child was in a state of limbo because she was "confused by her mother's absence". Further, the judge pointed out that "it is significant to note that the child that we are dealing with now is not the same one that was apprehended in that these proceedings have taken nearly three years and we are now dealing with a seven year old child who has now expressed the desire not to return home". While the Committee has taken note that the judge did examine the child's wishes and ordered crown wardship without access in the best interests of the child, the Committee cannot share the Court's assessment that the termination of all contact between mother and child could serve the child's best interest in this case. In view of the above, the Committee considers that the author and her daughter did not have a fair hearing in the child protection trial, in violation of article 14, paragraph 1.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, finds that the facts before it disclose a violation of article 14, paragraph 1; article 17 read alone and in conjunction with article 2; article 23; and article 24 of the International Covenant on Civil and Political Rights.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and her daughter with an effective remedy, including regular access of the author to her daughter and appropriate compensation for the author. In addition, the State party should take steps to prevent further occurrences of such violations in the future.

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

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

Notes

[1] The Covenant and the Optional Protocol entered into force for Canada on 19 August 1976.

[2] According to the police, the girl had bruises on her face and arms.

[3] The author confessed the assault and was convicted of assault on 24 April 1998 and received a conditional sentence of 90 days imprisonment.

[4] The author refers to the trial which led to the 26 June 2000 judgement of Justice B.E. Payne of the Ontario Court of Justice, on the application of the Children's Aid Society of Toronto for an order for crown wardship without access of the child.

[5] According to the author, the temporary order of 7 August 1997, granting temporary care to the CCAS with supervised access, had expired at this time, and was neither varied nor extended by another order.

[6] See below.

[7] This information was also made available to the judge.

[8] In an affidavit of 17 May 2000, a lawyer from the PGT indicated that the author had "demonstrated that she was capable of instructing and keeping legal counsel" in support of a motion for the PGT to be removed as legal representative for the author.

[9] Child and Family Services Act, section 70 (1) (…) "the court shall not make an order for society wardship under this Part that results in a child being a society ward for a period exceeding:

(a) 12 months, if the child is less than 6 years of age on the day the court makes an order for society wardship".

[10] Communication No. 367/1989, *J.J.C. v. Canada*, inadmissibility decision of 5 November 1991.

[11] The author refers to the order of 7 August 1997 giving her access and the termination of access on 1 December 1997 further to the abduction, as well as the order of 17 May 1999 reinstating access and the CCAS' unilateral decision to terminate access in August 1999.

[12] See communication No. 417/1990, *Santacana v. Spain*, Views adopted on 15 July 1994, para. 6.1.

[13] See communication No. 201/1985, *Hendriks v. The Netherlands*, Views adopted on 27 July 1988, para. 10.3, and communication No. 417/1990, *Santacana v. Spain*, Views adopted on 15 July 1994, para. 10.2.

[14] See communication No. 946/2000, *L.P. v. Czech Republic*, Views adopted on 25 July 2002, para. 7.3.

[15] Communication No. 201/1985, *Hendriks v. The Netherlands*, Views adopted on 27 July 1988, para. 10.4.

[16] Communication No. 514/1992, *Fei v. Colombia*, Views adopted on 4 April 1995, para. 8.10.

[17] See communication No. 203/1986, *Muñoz Hermoza v. Peru*, Views adopted on 4 November 1988, para. 11.3; and communication No. 263/1987, *González del Río v. Peru*, Views adopted on 28 October 1992, para. 5.2.

[18] In a different context, see communication No. 514/1992, *Fei v. Colombia*, Views adopted on 4 April 1995, para. 8.4; and communication No. 417/1990, *Santacana v. Spain*, Views adopted on 15 July 1994, para. 6.2.

[19] P. psychological report of 12 December 1998.

[20] P. psychological report of 12 December 1998, 25 October 1999 and testimony at trial.

G. Communication No. 1057/2002, *Kornetov v. Uzbekistan** (Views adopted on 20 October 2006, Eighty-eighth session)

Submitted by:	Mrs. Larisa Tarasova (not represented by counsel)
Alleged victim:	Alexander Kornetov, author's son
State party:	Uzbekistan
Date of communication:	5 March 2002 (initial submission)
Subject matter:	Imposition of sentence to death after unfair trial - duty to investigate allegations of ill-treatment of a detainee
Substantive issues:	Torture - unfair trial - right to life
Procedural issues:	Evaluation of facts and evidence - substantiation of claim
Articles of the Covenant:	6; 7; 10; 14; 15; 16
Article of the Optional Protocol:	2

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

Meeting on 20 October 2006,

Having concluded its consideration of communication No. 1057/2002, submitted to the Human Rights Committee on behalf of Mr. Alexander Kornetov under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1.1 The author is Mrs. Larisa Tarasova, an Uzbek national of Russian origin, who submits the communication on behalf of her son, Alexander Kornetov, also Uzbek of Russian origin born in 1977, currently imprisoned in Uzbekistan and who, at the time of submission of the

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

communication awaited execution following a death sentence imposed on him by the Tashkent Regional Court on 7 August 2001. The author claims that her son is a victim of violation by Uzbekistan of his rights under article 6; 7; 10; 14; 15; and 16, of the Covenant.[1] She is not represented.

1.2 On 5 March 2002, the Human Rights Committee, acting through its Special Rapporteur on New Communications and Interim Measures, pursuant to rule 92 of the Committee's rules of procedures, requested the State party not to execute Mr. Kornetov while his case was under consideration by the Committee. Subsequently, the State party informed the Committee that on 19 February 2002, the Supreme Court of Uzbekistan had modified the author's conviction and commuted the death sentence to 20 years' imprisonment.

The facts as presented by the author

2.1 On 11 January 2001, the author's son was arrested by the police on suspicion of having unlawfully sold, on two occasions, an apartment that did not belong to him. Although officially he was investigated for fraud, he was put under "physical pressure" by investigators and forced to confess guilt in the murder of the owner of the apartment - one Mrs. P., whose body, according to the police, had been discovered in a river earlier, on 27 September 2000. A friend of the author's son (one Yemelin) was also arrested and forced to admit his involvement in the murder.

2.2 On 7 August 2001, the Tashkent Regional Court found the author's son guilty of fraud, robbery, and murder and sentenced him to death. His co-defendant was sentenced to 19 years' imprisonment. The author's son was found guilty of having killed Mrs. P., with the assistance of Yemelin, in order to sell her belongings and her apartment, as well as for robbing other apartments. On 26 December 2001, the Appeal Instance (Criminal College) of the Tashkent Regional Court upheld the judgement of 7 August 2001, confirming the death sentence. On 7 January 2002, Mr. Kornetov's lawyer appealed to the President of the Supreme Court under a supervisory procedure, asking for the reopening of the case and further investigations. On 19 February 2002, the Supreme Court of Uzbekistan commuted the death sentence to 20 years' imprisonment.

2.3 According to the author, her son's guilt was not established beyond reasonable doubt, and his sentence of 7 August 2001 was unfounded, severe, and based on indirect evidence, in the absence of the weapon of the crime. In substantiation of her allegations, she stated that:

(a) The conclusions of medical forensic experts in connection with the body discovered on 27 September 2000 did not permit an identification, beyond reasonable doubt, that the body in question (whose hands and head were missing) was that of Mrs. P. In addition, ADN tests on the discovered body and the body of Mrs. P.'s mother who had died a few years earlier did not confirm that the discovered body was indeed that of Mrs. P.;

(b) The police record of the discovery of the body did not mention a crucial element of evidence - a small hand written note by Mrs. P. - which was not discovered in the pockets of the jeans of the body at the time of discovery; this note was found later, during a forensic examination, and served as evidence for the identification of the body. According to the author, the police could have taken the note from Mrs. P.'s apartment and later hidden it in the body's clothes, so as to make it easier to accuse her son;

(c) The passport of Mrs P., as well as the documents related to ownership of the flat and the keys to her apartment were discovered in the author's son's flat, but they were left with him by Mrs. P., as a guarantee for the down payment he made to her as evidence of his intention to buy her flat. In this connection, the author affirms that she informed the investigators that Mrs. P. intended to travel to Russia to obtain the agreement of her brother (and co-owner of the flat) for the property transaction, and had two different passports; this was ignored by the investigators, and no inquiry was conducted.;

(d) Her son was arrested on 11 January 2001 as a fraud suspect, but in fact he was forced to confess guilt in the murder of P., and "wrote his confessions" on 16 and 17 January;

(e) Once she became aware of her son's arrest - on 15 January 2001 - she immediately went to the police station where he was kept, and saw him in an office, writing down a text being dictated by an investigator. At some point, the investigator beat him on the head. When the author intervened, the investigator ordered her to leave "if she wanted to see her son alive". On 17 January, she witnessed how three other police officials kicked her son in the investigator's office. In this context, she explains that she filed a complaint. According to a judgement of the Supreme Court No. 1 of 20 February 1996, evidence obtained by unlawful methods, such as physical influence or moral pressure, is inadmissible;

(f) The chief investigator of her son's case, one Ch., investigated other fraud charges against her son, that led to his earlier fraud conviction in 1997. The author declares that in 1997, Ch. had extorted a large sum of money from her for the release of her son (that finally did not occur). She had appealed to have another investigator placed in charge of her son's case, but allegedly her application was even not accepted in the Police station;

(g) The court called only witnesses against her son, and "simply ignored" witnesses on his behalf.

2.4 The author claims that contrary to article 138 of the Criminal Execution Code and article 6, paragraph 4, of the Covenant, while on death row, her son was informed by penitentiary authorities that he had to sign a declaration to the effect that he renounced his right to seek a pardon, which he did. The author asked for explanations and was informed, by letter of 22 January 2001, that when her son received a copy of the judgement of the Tashkent Regional Court of 26 December 2001, he was duly informed of his right to request a presidential pardon and of the right to be assisted by a lawyer when preparing this request. According to the authorities, her son refused to file a pardon request, without giving any reasons. A record in this connection was made and was sent to the Presidential administration.

The complaint

3. The author claims that her son's rights under articles 6; 7; 10; 14; 15; and 16 of the Covenant, have been violated.

State party's observations

4. The State party presented its comments on 22 May 2002. It recalls that the author's son's guilt was established and he was correctly sentenced to death on 7 August 2001, by the Tashkent Regional Court. On 26 December 2001, his conviction was confirmed by the appeal body of the Tashkent Regional Court. The State party also examines the facts of the criminal case. Finally, it indicates that on 19 February 2002, the Supreme Court commuted Mr. Kornetov's death sentence to 20 years' imprisonment.

Author's comments

5. The author presented additional comments on 2 September 2002, 7 April 2003, and 25 February 2005. She reiterates that her son is innocent and reaffirms that he was convicted on insufficient grounds. In particular, she reiterates that her son confessed guilt under duress at the beginning of the preliminary investigation, and that at the opening of the trial, he complained about his ill-treatment to the court and gave the names of the officials responsible for his beatings. According to the author, her son's affirmations in this context were not reflected in the trial records, and the court did not verify his affirmations.

Issues and proceedings before the Committee

Admissibility considerations

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

6.2 The Committee notes that the same matter is not being examined under any other international procedure, and that the State party has not contested that domestic remedies have been exhausted. The requirements of article 5, paragraph 2 (a) and (b), of the Optional Protocol, are therefore met.

6.3 The author claims a violation of her son's right under article 6, paragraph 4, since after he was sentenced to death, the penitentiary authorities explained to him that he had to sign a declaration to the effect that he renounced his right to seek a pardon, which he did. Notwithstanding the content of paragraph 2.4 above, the Committee notes, however, that the author did file, on 8 January 2002, a pardon application with the President's office. In the circumstances, and in the absence of any other information in this relation, the Committee considers that the author has failed sufficiently to substantiate her claim, for purposes of admissibility, and accordingly this part of the communication is inadmissible under article 2, of the Optional Protocol.

6.4 The author has claimed a violation of her son's right to a fair trial under article 14, paragraph 1, and challenges the way the courts evaluated the evidence that led to her son's conviction. The Committee notes that these allegations relate primarily to the evaluation of facts and evidence. It recalls that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that it was clearly arbitrary or amounted to a denial of justice.[2] In the absence of other pertinent information that would show that evaluation of evidence suffered from such deficiencies in the present case, the Committee considers that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 The author has affirmed that contrary to article 14, paragraph 3 (e), the court only called witnesses against her son, and ignored the witnesses called on his behalf. The Committee notes that this allegation is not refuted by the State party. However, in the absence of more precise information that would corroborate this claim, the Committee considers that the author has failed sufficiently to substantiate this claim, for purposes of admissibility, and it is accordingly inadmissible under article 2, of the Optional Protocol.

6.6 The author has alleged in general terms that her son's rights under articles 15 and 16 were violated. In the absence of more detailed information in substantiation of these claims, the Committee considers that this part of the communication is inadmissible as unsubstantiated, under article 2, of the Optional Protocol.

6.7 The Committee considers that the remaining allegations, under articles 6; 7; 10; and 14, paragraph 3 (g), of the Covenant, have been sufficiently substantiated, for purposes of admissibility, and declares them admissible.

Consideration of the merits

7.1 The author has claimed that her son was beaten by police investigators to force him to confess guilt. She affirms that she personally witnessed, on two separate occasions, in the police premises, how investigators beat her son. She also adds that at the beginning of his trial, her son notified the court that he had been beaten and that his confession was obtained under duress, that he provided the names of the responsible officers, and that these complaints were neither recorded in the trial record nor investigated. The Committee recalls that when a complaint against maltreatment contrary to article 7 is lodged, a State party is under a duty to promptly and impartially investigate it.[3] In the circumstances of the present case, and in the absence of any pertinent information submitted by the State party in this relation, due weight must be given to the author's allegations. Accordingly, the Committee decides that the facts as presented disclose a violation of article 7, read together with article 14, paragraph 3 (g), of the Covenant.

7.2 In light of the above conclusion, the Committee considers that the author's claim does not raise a separate issue under article 10 of the Covenant.

7.3 The Committee recalls its jurisprudence to the effect that that the imposition of a death sentence after a trial that did not meet the requirements for a fair trial amounts also to a violation of article 6 of the Covenant.[4] In the present case, however, the alleged victim's death sentence

imposed on 7 August 2001, confirmed on appeal on 26 December 2001, had already been commuted by the Supreme Court on 19 February 2002. The Committee considers that in the particular circumstances of the present case, the issue of the violation of the author's son's right to life has thus became moot.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the View that the facts before it disclose a violation of the author's son's rights under articles 7 and 14 paragraph 3 (g), of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Kornetov with an effective remedy. The remedy could include consideration of a reduction of his sentence and compensation. The State party is also under an obligation to prevent similar violations in the future.

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

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

Notes

[1] The Optional Protocol entered into force for the State party on 28 December 1995.

[2] See communication No. 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision adopted on 3 April 1995, para. 6.2.

[3] General comment on article 7, No. 20 [44], adopted on 3 April 1992, para. 14.

[4] See, inter alia, *Siragev v. Uzbekistan*, communication No. 907/2000, Views adopted on 1 November 2005, para. 6.4.

H. Communication No. 1108/2002, *Karimov v. Tajikistan** Communication No. 1121/2002, *Nursatov v. Tajikistan* (Views adopted on 26 March 2007, Eighty-ninth session)

Submitted by:	Mr. Makhmadim Karimov and Mr. Amon Nursatov (not represented by counsel)
Alleged victims:	Aidamir Karimov (Makhmadim Karimov's son), Saidabror Askarov, Abdumadzhid Davlatov and Nazar Davlatov (Nursatov's brother and cousins respectively)
State party:	Tajikistan
Date of communications:	16 August and 24 September 2002, respectively (initial submission)
Subject matter:	Imposition of death sentence after unfair trial and absence of legal representation in capital case
Substantive issues:	Torture - unfair trial - right to life - conditions of detention
Procedural issues:	Evaluation of facts and evidence - substantiation of claim
Articles of the Covenant:	6; 7; 9, 10; 14
Article of the Optional Protocol:	2

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

Meeting on 27 March 2007,

Having concluded its consideration of communications Nos. 1108/2002 and 1121/2002, submitted to the Human Rights Committee on behalf of Mr. Aidamir Karimov, Mr. Saidabror Askarov, Mr. Abdumadzhid Davlatov and Mr. Nazar Davlatov under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

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

1. The first author is Makhmadim Karimov, a Tajik national born in 1950, who submits the communication on behalf of his son, Aidamir Karimov, also Tajik national born in 1975. The second author is Mr. Amon Nursatov, a Tajik national born in 1958, who submits the communication on behalf of his brother Saidabror Askarov,[1] and his cousins Abdumadzhid Davlatov and Nazar Davlatov, both Tajiks born in 1975. At the time of submission of the communications, all four victims were awaiting execution, after being sentenced to death by the Military Chamber of the Supreme Court on 27 March 2002. The authors claim violations by Tajikistan of the alleged victims' rights under article 6, paragraphs 1 and 2; article 7; article 9, paragraphs 1 and 2; article 10; and article 14, paragraphs 1, and 3, (e) and (g), of the Covenant.[2] The second author invokes in addition violations of article 14, paragraph 3 (b) and (d) in relation to his brother Askarov; the communication appears to raise similar issues also in relation to Aidamir Karimov. They are unrepresented.

1.2 Pursuant to article 92 of its rules of procedures, when registering the communications, the Committee, acting through its Special Rapporteur of New Communications and Interim Measures, on 19 August (Karimov) and 25 September 2002 (Askarov/Davlatovs) respectively, requested the State party not to carry out the alleged victims' executions while their cases are under examination by the Committee. Later, the State party explained that all the death sentences of the alleged victims were commuted to 25 years' imprisonment.

The facts as submitted by the authors

2.1 On 11 April 2001, at around 8 a.m., the First-Deputy Minister of Internal Affairs of Tajikistan, Khabib Sanginov, was shot dead in his car near his house in Dushanbe. Two bodyguards and the car driver also died in the ambush. Seven individuals were arrested during 2001 as suspects in the murders, including the alleged victims.

The case of Aidamir Karimov

2.2 On an unspecified date in early June 2001, Aidamir Karimov was arrested in Moscow on charges of terrorism, pursuant an arrest warrant issued by the Tajik Prosecutor's Office that was transmitted to the Russian authorities. He was remitted to the Tajik authorities and arrived in Dushanbe allegedly on 14 June 2001, but his relatives were informed of this only five days after his arrival.

2.3 He was detained for two weeks on premises of Dushanbe's Internal Affairs' Department. The author claims that the building is not adapted for prolonged detentions, and the maximum allowed period for detention there is three hours. His son was transferred to a Temporary Detention Centre only two weeks later (exact date not specified) and kept there for two months, instead of the statutorily maximum authorized 10 days. Afterwards, he was transferred to the Investigation Detention Centre No. 1 in Dushanbe, but was systematically brought to the Internal Affairs' Department and subjected to long interrogations there that went on all day and often continued into the night. The food was insufficient and the parcels his family transmitted to the authorities did not reach him.

2.4 On 11 September 2001, the author's son was officially charged with premeditated murder under aggravating circumstances, accomplished with a particular violence, with use of explosives, acting in an organized group, theft of fire arms and explosives, illegal acquisition of fire arms and explosives, and deliberate deterioration of property.

2.5 During the preliminary investigation, the author's son was allegedly subjected to torture to force him to confess guilt. He was beaten, kicked in the kidneys, and beaten with batons. Allegedly, he received electroshocks with the use of a special electric device: electric cables were attached to different parts of his body (they were placed in his mouth and attached to his teeth, as well as to his genitals). According to the author, one of his son's torturers was I.R., deputy head of the Criminal Search Department of Dushanbe. His son was also threatened that if he did not confess guilt, his parents would also be arrested. These threats were taken seriously by his son, because he was aware that his two brothers and his father had already been arrested on 27 April and released on 28 May 2001. In these circumstances, he confessed and signed the confession (exact date not provided).

2.6 The author affirms that no relatives could see his son during the initial two months after arrest. His family met with him only once during the preliminary investigation, in the investigators' presence.

2.7 According to the author, the investigators had planned an investigation act - a verification of his son's confession at the crime scene - in advance. Two days before the actual verification, his son was brought to the crime scene where he was explained where to stand, what to say, and was shown to the individuals who later identified him during an identification parade. The reconstruction at the crime scene allegedly took place in the presence of 24 investigators, and his son was obliged to repeat was he had been previously instructed to say.

2.8 The author affirms that his son was given a lawyer by the investigators towards the beginning of the preliminary investigation, but the lawyer "acted passively" and was often absent. For this reason, two months after the beginning of the preliminary investigation, the author hired privately a lawyer to represent his son. His son allegedly immediately retracted his confessions and affirmed that they had been extracted under torture. The investigators allegedly refused to video tape his retraction and wrote a short note for the record.

2.9 The preliminary investigation ended on 15 November 2001. The case was examined by the Military College of the Supreme Court[3] from 8 January to 27 March 2002. On 27 March 2002, all alleged victims were sentenced to death. The author claims that his son's trial was not fair and that the court was partial. In substantiation, he affirms that:

(a) The court refused to order the removal of the handcuffs of the accused, thus preventing them from taking notes, although they were all sitting inside a metal cage in the court room. The alleged victims' presumption of innocence was violated because the chief of security, General Saidamorov, stated in court that it was impossible to remove handcuffs as the accused were "dangerous criminals" and could escape;

(b) At the end of the preliminary investigation, the author's son's indictment contained only three charges against him. At the beginning of the trial, the judge read out two new counts against him; this constitutes, according to the author, a violation of his son's right to be promptly informed of charges against him;

(c) The author's son retracted his confessions in court and claimed to be innocent. He affirmed that when the crime was committed, he was not in Dushanbe. This was confirmed by 15 witnesses, who testified that from 7 to 22 April he was in the Panch Region. These testimonies were allegedly ignored;

(d) Several witnesses against Karimov made contradictory depositions;

(e) The prosecution exercised pressure on the witnesses, limited the lawyers' possibility to ask questions, and interrupted the lawyers and witnesses allegedly in an aggressive manner;

(f) The court did not objectively examine the circumstances of the crime - the nature of the crime committed or the existence of a causal link between the acts and their consequences;

(g) Allegedly no witness could identify the co-accused in court as participants in the crime;

(h) According to the author, the conviction itself does not comply with the requirement of proportionality between crime and punishment, as those who were found to be the organizers of the crime received lighter sentences (15 to 25 years' of imprisonment) than those who were found to be the executors and who were sentenced to death.

2.10 On 29 April 2002, the Supreme Court confirmed on appeal the judgement of 27 March 2002. On 27 June 2002, the Supreme Court refused a request for a supervisory review.[4]

The case of Saidabror Askarov, and Abdumadzhid and Nazar Davlatovs

2.11 The second author, Mr. Nursatov, affirms that following the murder of Sanginov, several suspects were arrested, including his brother, Saidabror Askarov and the Davlatov brothers, as well as Karimov.

2.12 The author claims that after Askarov's arrest (exact date not provided), the latter was held in a building of the Ministry of Internal Affairs for a week. The author affirms that the Ministry's premises are inadequate for a long detention. On 4 May 2001, his brother was transferred to a Temporary Detention Centre where, instead of the statutorily authorized period, he was kept until 24 May 2001, and then he was transferred to the Investigation Detention Centre No. 1. During the initial month of detention, Askarov was interrogated at the Ministry of Internal Affairs' building all day long and often interrogatories continued into the night. An official record of his arrest was allegedly produced only on 4 May 2001 and he was placed in custody by a decision the same day. Abdulmadzhid and Nazar Davlatovs were sent to the Temporary Detention Centre on 5 May, and transferred to the Investigation Centre No. 1 on 24 May 2001.

2.13 The author claims that during the first three days of detention, Askarov and the Davlatov brothers were not given any food but received only limited quantities of water. The food provided to the detainees was insufficient and the parcels the family sent to the authorities did not reach the detainees.

2.14 According to the author, his brother Askarov was subjected to beatings and torture to force him to confess guilt. He allegedly received electric shocks with a special device, and electric cables were introduced into his mouth and anus or were attached to his teeth or genitals. One of his fingers was broken.[5] In addition, he was placed under psychological pressure, because his

brothers Amon (the author of the present communication) was also arrested together with their other brother, Khabib, on 27 April, and detained until 29 May 2001, and their fourth brother, Sulaymon, was also arrested on 27 April and released two months later. Askarov was constantly reminded of his brothers' arrests. Because of this treatment, Askarov and Davlatovs signed confessions.

2.15 Allegedly, Askarov was only allowed to meet with relatives for ten minutes six months after arrest (exact date not provided), in investigators' presence. Nazar Davlatov met his relatives only at the beginning of the trial, whereas Abdumadzhid Davlatov saw his mother only six months after his arrest.

2.16 The author affirms that his brother was not informed of his right to be represented by a lawyer from the moment of arrest, nor of the right to have a lawyer designated free of charge in case of lack of financial means. On 23 June 2001, the investigators appointed a lawyer (Aliev) for him. After one month, the family privately retained a lawyer, Fayzullaev, because all attempts to meet with the investigation-appointed lawyer failed. The new lawyer was allegedly forced to withdraw by the investigators, because he complained to the Prosecutor General about the illegality of Askarov's charges. After that, they privately hired a third lawyer.

2.17 In court, Askarov and the Davlatov brothers retracted their confessions. They claimed innocence and affirmed that they were in Panch region from 9 to 14 April 2001. This was confirmed by five witnesses. The court concluded that the court depositions, including the allegations of torture, were made in order to escape criminal liability.

2.18 The author presents similar claims to those made on behalf of Karimov (paragraph 2.9, letters (e) to (h) above).

2.19 The judgement against Askarov and the Davlatov brothers was confirmed, on 29 April 2002, by the Supreme Court's Criminal Chamber.

The complaint

Karimov's case

3.1 The author claims that in violation of articles 7 and 14, paragraph 3 (g), his son was beaten, tortured, and put under psychological pressure and thus forced to confess guilt.

3.2 His son's rights under article 9, paragraphs 1 and 2 were violated, because he was arrested unlawfully and was not charged for a long period of time after arrest.

3.3 He claims that in violation of article 10, the conditions of detention during the early stages of his son's arrest were inadequate. The food received was insufficient and the parcels sent by the family were not transmitted to him.

3.4 The author further claims that his son's rights under article 14, paragraph 1, were violated because the court was partial. His son's presumption of innocence was violated, contrary to article 14, paragraph 2, because of the statement of the high ranked policeman in court that the accused were "dangerous criminals". He adds that article 14, paragraph 3 (e), was violated as the testimonies of the witnesses on his son's behalf were rejected under the simple pretext that they were false.

3.5 Finally, it is claimed that Karimov's rights under article 6, paragraphs 1 and 2 were violated, as he was sentenced to death after an unfair trial which violated article 14, of the Covenant.

3.6 While the author does not invoke article 14, paragraph 3 (b) and (d) specifically, the communication appears to raise issues under these provisions in Karimov's respect.

Askarov and Davlatov brothers' case

3.7 Mr. Nursatov claims a violation of article 7, and article 14, paragraph 3 (g), as his brother Askarov and his cousins Abdumadzhid and Nazar Davlatov were tortured and forced to confess guilt.

3.8 Article 9, paragraphs 1 and 2, were violated in their cases, because they were detained for long periods of time without being informed of their charges on arrest.

3.9 The author claims that his brother's and cousins' rights under article 10 of the Covenant were also violated as at the early stages of detention, they were kept at premises that were inadequate for long detention, they were given no food and only limited quantities of water, and the parcels their family prepared for them never reached them.

3.10 The author claims that the court was partial, in violation of article 14, paragraph 1. He adds that article 14, paragraph 2, was violated, because of the statement made by a senior security officer in court that the accused were "dangerous criminals".

3.11 According to the author, his brother's and cousins' right to a defence was violated, contrary to article 14, paragraph 3 (b) and (d).

3.12 Askarov and the Davlatov brothers allegedly are victims of a violation of article 14, paragraph 3 (e), because the testimonies of the witnesses on their behalf were rejected as "false".

3.13 Finally, the author claims that Askarov's and the Davlatov brothers' rights under article 6, paragraphs 1 and 2, were violated, because they were sentenced to death after a trial that did not meet the requirements of article 14.

State party's observations

Karimov's case

4.1 On 20 February 2003, the State party informed the Committee that pursuant a Ruling of the Presidium of the Supreme Court of 3 December 2002, Karimov's death sentence was commuted to a 25 years' prison term.

4.2 On 3 April 2006, the State party presented its observations on the merits. According to it, the Supreme Court examined the criminal case and recalled that the author's son was found guilty of a multitude of crimes, including murder, committed together with his co-accused Revzonzod (Askarov), the Davlatovs, Mirzoev and Yormakhmadov, and was sentenced to death on 27 March 2000.

4.3 The murder victim was an opposition leader and a member of the National Reconciliation Commission created in 1997. After the work of the Commission resumed in June 1999, he was appointed as First Deputy Minister of Internal Affairs. In this function he took a number of steps for the demilitarization of armed opposition groups. He thus became a target of assassination attempts.

4.4 According to the Court, Karimov and the other co-accused were found guilty of murder, theft of fire arms and ammunitions, acting in an organized group, robbery, intentional deterioration of property, and illegal acquisition, storing, and carrying of fire arms and ammunition. Their guilt was established not only by their confessions made during the preliminary investigation, but also confirmed by the testimonies of many witnesses; as well as the records of several identification parades, face-to-face confrontations, records of the reconstruction of the crime scene; and the verification of depositions at the crime scene; seized fire arms, ammunition (bullets), conclusions of several medical-forensic and criminal experts, as well as other evidence collected. Karimov's acts were qualified correctly under the law, and his punishment was proportionate to the gravity and the consequences of the acts committed.

4.5 According to the court, the author's allegations that his son did not take part in the crime but was obliged to confess guilt during the preliminary investigation and the court convicted him on the basis of untrue and doubtful evidence, were not confirmed and were refuted by the material contained in the case file.

4.6 According to the State party, the author's allegations that his son was beaten and was kept unlawfully under arrest for a long period to force him confess guilt were rejected and were not corroborated by the circumstances and the material of the criminal case. The case file shows that Karimov left for the Russian Federation after the crime occurred. On 4 May 2001, the Tajik Prosecutor's Office charged him in absentia with terrorism, and an arrest warrant was issued against him. On this basis, he was arrested in Moscow on 14 June 2001. He was transferred to Dushanbe on 25 June 2001. The State party contends, without providing any documentary evidence, that Karimov was examined by a medical doctor upon arrival in Dushanbe, who concluded that his body did not reveal any bodily injuries as a result of ill-treatment. On 28 June 2001, in his lawyer's presence, Karimov described the crime events in detail at the crime scene, and on 30 June 2001, during a confrontation with his co-accused Mirzoev and again in their lawyers' presence, both co-accused reaffirmed that they had participated in the crime.

4.7 On 3 July 2001, Karimov was given a new lawyer and in his presence, during a reconstruction of the crime at the crime scene, he explained in detail how he had committed the crime.

4.8 The State party affirms, again without providing documentary evidence, that on 9 July 2001, Karimov was again examined by a medical expert, whose conclusions are contained in the case file, and which establish that Karimov's body did not show any marks of beatings and did not reveal any bodily injury.

The cases of Askarov and the Davlatov brothers

5. On 27 July 2004, the State party informed the Committee that after a Presidential Pardon, Askarov's and the Davlatovs' death sentences were commuted to long prison terms. Although several requests for submission of observations on the merits of the communication were addressed to the State party (on 10 March 2003, 20 September 2004, 17 November 2005, and 30 November 2006), no further information was received.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee notes that the same matter is not being examined under any other international procedure, as required by article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The authors claim that the alleged victims' rights under article 9, paragraphs 1 and 2, were violated, as they were arrested unlawfully and detained for a long period of time without being charged. In relation to Karimov, the State party affirms that following the opening of the criminal case in relation to the murder, and in light of the depositions of other co-defendants, he was charged with participation in the murder and a search warrant was issued against him. The State party has not commented on this issue in relation to Nurstov's brother and cousins. The Committee notes, however, that the material before it does not permit it to establish the exact date of their respective arrests, and it also remains unclear whether these allegations were ever brought up in the court. In these circumstances, the Committee considers that this part of the communication is unsubstantiated, for purposes of admissibility, and therefore inadmissible under article 2, and article 5, paragraph 2 (b), of the Optional Protocol.

6.4 Both authors claim that in violation of article 14, paragraph 1, of the Covenant, the trial did not meet the requirements of fairness and that the court was biased, (paragraph 2.9 and 2.18 above). The State party has not commented on these allegations. The Committee observes, however, that all of these allegations relate primarily to the evaluation of facts and evidence by the court. It recalls that it is generally for the courts of States parties to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice.[6] However it falls under the Committee's competence to assess if the trial was conducted in accordance with article 14 of the Covenant. Nevertheless, in the present case, the Committee considers that the authors have failed to sufficiently substantiate their claims under this provision, and therefore this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 The authors also claim that contrary to the requirements of article 14, paragraph 3 (e), the court heard the testimonies of witnesses on the alleged victims' behalf but simply ignored them. The State party has not made any observation in this relation. The Committee notes however, that the material available to it shows that the Court indeed evaluated the testimonies in question and concluded that they constituted a defence strategy. In addition, these allegations relate primarily to the evaluation of facts and evidence by the court. The Committee reiterates that it is

generally for the courts of the States parties to evaluate facts and evidence, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice. In the absence of other pertinent information that would demonstrate that the evaluation of evidence indeed suffered from such deficiencies in the present case, the Committee considers this part of the communication to be inadmissible under article 2 of the Optional Protocol.

6.6 The Committee considers that the remaining part of Mr. Karimov's and Mr. Nursatov's allegations, raising issues under articles 6; 7 read together with article 14, paragraph 3 (g); article 14, paragraph 2; and article 10, in relation to all four alleged victims, as well as under article 14, paragraph 3 (b) and (d), in relation to Messrs Karimov and Askarov, are sufficiently substantiated, for purposes of admissibility, and declares them admissible.

Consideration of the merits

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

7.2 The authors claimed that the alleged victims were beaten and tortured by the investigators, so as to make them confess guilt. These allegations were presented both in court and in the context of the present communication. The State party has replied, in relation to the case of Mr. Karimov, that these allegations were not corroborated by the materials in the case file, and that the alleged victim was examined on two occasions by medical doctors who did not find marks of torture on his body. The State party makes no comment in relation to the torture allegations made on behalf of Mr. Askarov and the Davlatov brothers. In the absence of any other pertinent information from the State party, due weight must be given to the authors' allegations. The Committee recalls that once a complaint about ill-treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially.[7] In the present case, the authors have presented a sufficiently detailed description of the torture suffered by Messrs Karimov, Askarov, and the Davlatov brothers, and have identified some of the investigators responsible. The Committee considers that in the circumstances of the case, the State party has failed to demonstrate that its authorities adequately addressed the torture allegations put forward by the authors. In the circumstances, the Committee concludes that the facts as presented disclose a violation of article 7, read together with article 14, paragraph 3 (g), of the Covenant.

7.3 Both authors claim that the conditions of detention at the premises of the Ministry of Internal Affairs were inadequate having regard to the lengthy period of detention. They point out that the alleged victims were unlawfully detained during periods largely exceeding the statutorily authorized time limits for detention in premises of the Ministry of Internal Affairs, and in the Temporary Detention Centre. During this period, no parcels sent to the victims by their families were transmitted to them, and the food distributed in the detention facilities was insufficient. In addition, Mr. Askarov and the Davlatov brothers were denied food for the first three days of arrest. The State party has not commented on these allegations. In these circumstances, due weight must be given to the authors' allegations. The Committee considers therefore that the facts as submitted reveal a violation by the State party of Mr. Mr. Karimov's, Askarov' s, and the Davlatov brothers' rights under article 10, of the Covenant.

7.4 Mr. Karimov and Mr. Nursatov claim that the alleged victims' presumption of innocence was violated, as in court they were placed in a metal cage and were handcuffed. A high ranked official publicly affirmed at the beginning of the trial that their handcuffs could not be removed because they were all dangerous criminals and could escape. The State party has not presented any observations to refute this part of the authors' claim. In the circumstances, due weight must be given to the authors' allegations. The Committee considers that the facts as presented reveal a violation of the alleged victims' rights under article 14, paragraph 2, of the Covenant.

7.5 Both authors invoke violations of article 14, paragraph 3 (b) and (d). The first author has claimed violations of Karimov's right to defence as although he was assigned a lawyer at the beginning of the preliminary investigation, this lawyer only occasionally attended the investigation hearings, to the point that a lawyer was hired privately to represent his son. Mr. Nursatov claims that his brother Askarov was not given a lawyer at the beginning of the investigation, although he risked the death sentence; when he was assigned an ex-officio lawyer, this lawyer was ineffective; and that the lawyer hired privately by his family was later forced to withdraw from the case. The State party has not refuted these allegations; in the circumstances the Committee concludes that they, since adequately substantiated, must be given due weight. The Committee recalls[8] its jurisprudence that particularly in cases involving capital punishment, it is axiomatic that the accused is effectively assisted by a lawyer at all stages of the proceedings. In the circumstances of the present case, the Committee concludes that Mr. Karimov's and Askarov's rights under article 14, paragraph 3 (b) and (d), were violated.

7.6 The Committee recalls that the imposition of a sentence of death upon conclusion of a trial that did not meet the requirements for a fair trial constitutes a violation of article 6 of the Covenant. In the present case, death sentences were imposed on all victims in violation of article 7 read together with article 14, paragraph 3 (g), as well as in violation of article 14, paragraph 2, of the Covenant. In addition, in relation to both Messrs Karimov and Askarov, the death sentence was imposed in violation of the fair trial guarantees set out in article 14, paragraph 3 (b) and (d), of the Covenant. Accordingly, the Committee concludes that the alleged victims' rights under article 6, paragraph 2, of the Covenant, have also been violated.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of Messrs Davlatovs' rights under articles 6, paragraph 2; article 7 and 14, paragraph 3 (g) read together; article 10; and article 14, paragraph 2; as well as Messrs Karimov's and Askarov's rights under article 6, paragraph 2; article 7 read together with article 14, paragraph 3 (g); article 10; and article 14, paragraphs 2 and 3 (b) and (d), of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Messrs Karimov, Askarov, and Abdumadzhid and Nazar Davlatovs with an effective remedy, including compensation. The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a

violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

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

Notes

[1] Both the author and the State party use two names in relation to Mr. Nursatov's brother: Saidabror Askarov and Said Rezvonzod.

[2] The Optional Protocol entered into force for the State party on 4 April 1999.

[3] The author explains that the case was adjudicated by the Military Chamber because one of the accused was a member of the military forces.

[4] The supervisory review procedures empower the President of the Supreme Court or the Prosecutor General (or their deputies) to introduce (or not) a motion to the Court with a request for the re-examination of a case (on issues of law and procedure only).

[5] The author claims that one of the persons that tortured his brother was Rasulov, deputy chief of Dushanbe's Criminal Search Department. Every day he visited the Temporary Detention Centre to check whether there "were good news for him". Receiving a negative reply, he beat Askarov.

[6] See, inter alia, communication No. 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision adopted on 3 April 1995, para. 6.2.

[7] General comment on article 7, No. 20 [44], adopted on 3 April 1992, para. 14.

[8] See for example *Aliev v. Ukraine*, communication No. 781/1997, Views adopted on 7 August 2003, para. 7.2.

I. Communication No. 1071/2002, *Agabekov v. Uzbekistan** (Views adopted on 16 March 2007, Eighty-ninth session)

Submitted by:	Mrs. Nadezhda Agabekova (not represented by counsel)
Alleged victim:	Valery Agabekov, author's son
State party:	Uzbekistan
Date of communication:	11 April 2002 (initial submission)
Subject matter:	Imposition of death sentence after unfair trial - duty to investigate allegations of ill-treatment
Substantive issues:	Torture - unfair trial - right to life
Procedural issues:	Evaluation of facts and evidence - substantiation of claim
Articles of the Covenant:	6; 7; 10; 14; 15; 16
Article of the Optional Protocol:	2

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

Meeting on 16 March 2006,

Having concluded its consideration of communication No. 1071/2002, submitted to the Human Rights Committee on behalf of Mr. Valery Agabekov under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1.1 The author is Mrs. Nadezhda Agabekova, an Uzbek national born in 1953. She submits the communication on behalf of her son, Valery Agabekov, also an Uzbek national, born in 1975, who at the time of submission of the communication was sentenced to death by the Tashkent

* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

Regional Court. The author claims that her son is a victim of violation by Uzbekistan, of his rights under articles 6; 7; 10; 14; 15; and 16, of the Covenant.[1] She is unrepresented.

1.2 On 11 April 2002, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party not carry out Mr. Agebekov's execution while his case is under consideration. On 30 May 2002, the State party replied that the alleged victim's death sentence was commuted to 20 years' imprisonment on 23 April 2002, and that following an Amnesty Act, his prison term was further reduced by one third.

The facts as presented by the author

2.1 On 29 January 2001, the author's son and his brother in law, Annenkov, were arrested as suspects in relation to the murder and robbery, on 27 January 2001, of their acquaintance M. and his companion S.

2.2 In an attempt to force them to confess their guilt, both suspects were allegedly beaten and tortured by the investigators during the initial stages of the investigation. The author provides 3 undated letters from her son, in which he claims to be innocent of the crime and affirms that he was only waiting in front of the door of the apartment of the murdered individuals, while it was Annenkov who entered in the apartment and killed them after an argument over money at around 7 a.m. on 27 January 2001. Only after the murder was he brought into the apartment by his brother-in-law. He provides details of the alleged ill-treatment and torture he was subjected to during the first week of the investigation: he claims he was beaten and investigators attempted to rape him while he was handcuffed to a radiator, and because he resisted they knocked his head onto the radiator. He alleges he was beaten with a plastic bag placed on his head to make him suffer additionally as he was prevented from breathing. He alleges that when he asked for a medical doctor, the investigators told him that they only could call for a grave-digger. He states that his brother in law was also beaten, and as a result suffered broken ribs and urinated blood.

2.3 The author affirms that she visited her son (on an unspecified date) in the Temporary Detention Isolation Centre in Akhangaran City, and found him to be in very poor condition: his head and hair were coated with blood, his face was bloated and distorted, he could not talk and was barely able to move his lips. He whispered that he felt pain everywhere, that he was unable to walk or stand, that he urinated blood, and that he could not talk because his jaw was either dislocated or broken. The author requested the penitentiary authorities to have her son examined by a medical doctor, but was answered that once in prison, he would have his face treated with "zelionka" (a green antiseptic). They allegedly told her that such treatment was usually reserved to prisoners on death row.

2.4 The preliminary investigation was concluded on 8 May 2001. Both Agabekov and Annekov were charged with murder, robbery, and with illegal acquisition and storing of large amounts of heroin.

2.5 On 18 September 2001, the Tashkent Regional Court found Agabekov and his co-accused guilty of committing a premeditated attack, acting in a group, and murdering the two individuals to take over their possessions, under aggravating circumstances, and of illegal acquisition and storage of heroin. The court sentenced them to death, with a confiscation of their property.

2.6 According to the author, at the beginning of the trial, her son complained about the torture and ill-treatment suffered and requested an investigation and a medical examination, but the presiding judge rejected his claims, arguing that "he was a murderer" and he was only trying to avoid criminal liability.

2.7 On 12 November 2001, the Appeal Chamber of the Tashkent Regional Court modified the sentence, excluding the confiscation of property part. The death sentences were however upheld.

2.8 The author states that when she visited her son on 11 April 2002, she learned that he was made to sign a renunciation of any entitlement to request a presidential pardon. When she asked for clarifications, she was told by the prison authorities that "when a person does not admit his/her guilt, he/she must renounce any request for a pardon".[2]

2.9 On 23 April 2002, the Supreme Court of Uzbekistan modified the sentences of both Agabekov and Annenkov and commuted the death sentences to 20 year prison term. The Amnesty Act of 22 August 2001 was also applied to them, and the remaining part of their sentence to be served was reduced by one third.

The complaint

3.1 The author claims that in violation of article 6 of the Covenant, the Tashkent Regional Court imposed her son's death sentence arbitrarily, notwithstanding that the law provided a prison term as a possible alternative[3] (15 to 20 years' imprisonment). After his conviction, he was allegedly made to sign a statement that he renounced the right to seek a Presidential pardon.

3.2 The author claims that her son was tortured and ill-treated by investigators, to force him to confess guilt. Her son requested the trial court to order an investigation and a (medical) examination of the result of the beatings, but the request was rejected. During the preliminary investigation, both her son and the author requested, without result, to have a medical doctor take care of him. This part of the communication appears to raise issues under articles 7 and 10, of the Covenant, even though the author does not invoke these provisions specifically.

3.3 According to the author, her son's trial did not meet the requirements of due process. She claims that (a) the presiding judge had determined her son's guilt before the end of the trial; (b) evidence were not examined in depth, nor objectively; (c) her son's conviction was based primarily on Annenkov's testimony, notwithstanding the murder knife was found in Annenkov's home; (d) the investigators did not reconstruct the crime, interrogated only Annenkov at the scene of the crime, and neither the investigation nor the court established who exactly murdered the victims; (e) the trial court fully accepted the prosecution charges, thus demonstrating that the trial was biased; (f) during the trial, the presiding judge constantly humiliated the two co-accused, interrupted Agabekov and commented on his answers, thus failing in his duty of impartiality.

3.4 The author argues that her son's sentence was determined without taking into account information about his personality and circumstances - i.e. that he has a young child and has a good reputation both at home and at work. The court did not take into account the fact that prior to the murder, M. had also committed unlawful acts.

3.5 Mr. Agabekov's presumption of innocence was allegedly violated, as he was obliged to prove his innocence, and the court established his guilt on the basis of indirect evidence. Article 463 of the Uzbek Criminal Code stipulates that convictions may only be grounded on evidence upon verification of all possible circumstances of the commission of the crime. The author states that the courts simply ignored doubts in relation to her son's guilt.

3.6 According to the author, the trial court wrongly held that the murder had been committed "with particular violence". The "particular violence" prerequisite relates only to cases where the victim is subjected to torture or humiliation. In her son's case, according to the author, the victims were not subjected to torture but died instantly.

3.7 Finally, and without further substantiating the claim, the author affirms that her son is also a victim of violations of his rights under articles 15 and 16 of the Covenant.

State party's observations

4.1 The State party presented its observations on 30 May 2002. It recalls that on 18 September 2001, Mr. Annenkov and his co-accused were found guilty and sentenced to death, with a confiscation of property, by the Tashkent Regional Court of having murdered and robbed Mr. M. and his companion S. Under the pretext of borrowing money from their victims, they came to M.'s apartment and there they administered several stabs with a knife to both victims, in a particularly violent manner. The victims died from the injuries and due to blood loss. After having taken 28 000 sums and electric interrupters valued at 4600 sums, they left. Later in the day, they bought six doses of heroin from one K., and after having injected themselves with four, kept the remaining two with them. These were later seized from Annenkov's apartment.

4.2 On 12 November 2001, the Tashkent Regional Court re-qualified the crimes in relation to the murders,[4] but maintained the death sentences. On 23 April 2002, the Supreme Court quashed the sentences of death and commuted them to 20 years' imprisonment.

Author's comments on the State party's observations

5.1 The author presented comments on 30 August 2002. She confirms that her son was removed from death row on 10 May 2002. She notes that the State party's reply does not contain information on investigations undertaken in relation to her son's torture and ill-treatment by the police officials of the Regional Department of the Ministry of Internal Affairs of Akhangaran City. She recalls that her son sustained severe injuries during the preliminary investigation, and when he complained about it in court and gave the names of those responsible (the Chief of the Criminal Search Department, R.Kh, his subordinates, and an investigator from the Prosecution's Office, F.), the court replied that these allegations amounted to a defence strategy.

5.2 The author states that her son never confessed guilt, neither during the investigation nor in court, and that he was only a witness at the crime scene, and that there was no direct evidence of his involvement in the murders. Under article 23 of the Uzbek Criminal Code, an accused does not have to prove his innocence. All doubts about guilt must be weighed in favour of the accused. However, according to her, in her son's case, the court failed to respect these principles.

5.3 By letters of 20 September 2004, 16 June 2005 and 18 November 2006, the author was requested to submit supplementary information. No reply was received. On 4 December 2006, the author informed the Committee that her son remains imprisoned in a penitentiary colony in Akhangaran City.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee notes that the same matter is not being examined under any other international procedure, as required by article 5, paragraph 2 (a), of the Optional Protocol, and that the State party has not presented any objection on the issue of non-exhaustion of domestic remedies.

6.3 The author invokes a violation of her son's right under article 6, of the Covenant, since he was sentenced to death without any possibility of an alternative sentence and, later he was made to sign a statement renouncing his right to seek a pardon. The State party has not commented on these allegations. The Committee notes that the author's son's death sentence was commuted to 20 years' imprisonment by the Supreme Court on 23 April 2002. Moreover, and notwithstanding the content of paragraph 2.8 above, the Committee notes, that the author, on 12 April 2002, did file a pardon application with the President's office, and another such application was filed by four of her neighbours on an unspecified date. In the circumstances, and in the absence of any other pertinent information by the parties in this regard, the Committee considers that the author has failed to sufficiently substantiate her claim, for purposes of admissibility. This part of the communication is therefore inadmissible under article 2, of the Optional Protocol.

6.4 The Committee notes the author's allegations under article 14 set out in paragraphs 3.3-3.7 above, that were not refuted by the State party. It observes, however, that these allegations relate primarily to the evaluation of facts and evidence by the courts. It recalls that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that it was clearly arbitrary or amounted to a denial of justice.[5] In the absence of other pertinent information that would show that evaluation of evidence indeed suffered from such deficiencies in the present case, as well as in the absence of a copy of any court record, or copies of the complaints filed in this connection or information on the authorities' reaction to such complaints, the Committee considers this part of the communication to be inadmissible under article 2 of the Optional Protocol.

6.5 The Committee considers that the author's allegation that her son is a victim of violations of articles 15 and 16 is inadmissible under article 2 of the Optional Protocol as it has not been sufficiently substantiated.

6.6 The Committee finds the remaining part of the author's allegations that appear to raise issues under articles 7 and 10 in the light of paragraphs 2.2-2.3, 2.6 and 3.2 above, to be sufficiently substantiated for purposes of admissibility.

Consideration of the merits

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

7.2 The author claims that her son was tortured and ill-treated by the investigators to make him confess guilt, that he was refused medial care in detention, and that when he complained about torture in court, the presiding judge refused to order an inquiry or request a medical examination. The Committee recalls that once a complaint against maltreatment contrary to article 7 is lodged, a State party is under a duty to investigate it promptly and impartially.[6] In the absence of any information by the State party, in particular in relation to any inquiry made by the authorities both in the context of the author's son's criminal case or in the context of the present communication, and in light of the detailed description provided by the author of how her son was ill-treated by investigators, the methods of torture used, and the names of those responsible, due weight must be given to the author's allegations. In the circumstances of the case, the Committee concludes that the facts as presented disclose a violation of article 7 of the Covenant.

7.3 In light of the above conclusion, the Committee does not consider it necessary to examine the author's claim under article 10.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the author's son's rights under article 7 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Agabekov with an effective remedy, including compensation. The State party is also under an obligation to prevent similar violations in the future.

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

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

Notes

[1] The Optional Protocol entered into force for the State party on 28 December 1995.

[2] The case file contains however copies of two requests for Presidential pardon of the author's son's death sentence, one signed by the author and dated 12 April 2002, and another one, undated, and signed by four of her neighbours, both addressed to the President's Office.

[3] The author refers in this relation to a Ruling of the Plenum of the Supreme Court of 20 December 1996, pursuant to which death penalty constitutes an exceptional measure of punishment, and in cases of murder with aggravating circumstances the law admits it, but does not require its compulsory imposition.

[4] In fact, as far as the robbery is concerned, initially, on 18 September 2001, the Tashkent Regional Court has sentenced the author's son to 14 years' of imprisonment with confiscation of his property, under article 164, part 3 (b) (robbery made by a particularly dangerous recidivist); the possible sanction was between 15 and 20 years' of imprisonment. On 12 November 2001, the appeal instance of the same Court modified the judgement, by sentencing him, in relation to the robbery, to 10 years' of imprisonment under article 164, part 2 (a, b) instead (robbery made by an organized criminal association (crime, for which the law provided 10 to 15 years' of imprisonment).

[5] See, inter alia, communication No. 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision adopted on 3 April 1995, para. 6.2.

[6] General comment on article 7, No. 20 [44], adopted on 3 April 1992, para. 14.

J. Communication No. 1124/2002, *Obodzinsky v. Canada**
(Views adopted on 19 March 2007, Eighty-ninth session)

Submitted by:	Walter Obodzinsky (deceased) and his daughter Anita Obodzinsky (not represented)
Alleged victim:	Walter Obodzinsky
State party:	Canada
Date of communication:	30 September 2002 (initial submission)
Subject matter:	Citizenship revocation proceedings against elderly man in poor health
Procedural issues:	Failure to substantiate complaint - admissibility *ratione materiae* - failure to exhaust domestic remedies
Substantive issues:	Right to life - cruel, inhuman or degrading treatment - liberty and security of person - fair trial - protection of privacy and reputation
Articles of the Covenant:	6, 7, 9, 14 and 17
Articles of the Optional Protocol:	2, 3 and 5, paragraph 2 (b)

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

Meeting on 19 March 2007,

Having concluded its consideration of communication No. 1124/2002 submitted to the Human Rights Committee by Walter Obodzinsky (deceased) and his daughter Anita Obodzinsky on behalf of Walter Obodzinsky, under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Ms. Ruth Wedgwood.

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

1.1 The author of the communication, dated 30 September 2002, is Walter Obodzinsky, a Canadian national. He died on 6 March 2004. His daughter, Anita Obodzinsky, has indicated her wish to maintain the communication. It is claimed that Walter Obodzinsky is a victim of violations by Canada of article 6; article 7; article 9; article 14; and article 17 of the International Covenant on Civil and Political Rights. He and his daughter are not represented. The Covenant and the Optional Protocol thereto came into force for Canada on 19 August 1976.

1.2 On 7 October 2002, the Special Rapporteur on New Communications and Interim Measures rejected the author's request for interim measures, by which he sought to stay the citizenship revocation proceedings.

Factual background

2.1 The author was born on 7 May 1919 in Turez, a Polish village that came under the control of the former USSR in 1939. It is now part of the territory of Belarus. According to the State party, the author voluntarily joined the police unit in the Mir district of Belarus, serving from summer 1941 until spring 1943. The State party argues that this unit participated in the commission of atrocities against the Jewish population and persons suspected of having links to the partisans, and that the author went on to become a squadron chief in a formation in Baranovichi that specialized in fighting the partisans. During the summer of 1944, following the retreat of German forces from Belarus, he was incorporated into a division of the Waffen SS and sent to France, where he deserted. He then joined the Polish Second Corps, which at the time was stationed in Italy and under British command.

2.2 The author arrived in Canada on 24 November 1946 by virtue of a Government order under which Canada agreed to accept 4,000 former members of the Polish Armed Forces. He was granted permanent residence in April 1950 and became a Canadian citizen on 21 September 1955.

2.3 In January 1993, the Canadian Government was informed by the British War Crimes Unit that several witness statements given in England linked the author to the Nazi forces and to the commission of criminal acts. The author was traced to Canada in 1995. Canada's Crimes Against Humanity and War Crimes Program then conducted an inquiry. During this inquiry, the author was questioned and disclosed his heart problems. The inquiry concluded that the author had obtained admission to Canada by fraudulent means.

2.4 Citizenship revocation proceedings began against the author on 27 July 1999, when the Minister of Citizenship and Immigration notified him of her intention to report to the Governor in Council under sections 10 and 18 of the Citizenship Act. When the author received this notice on 30 July 1999, he experienced coronary symptoms. On 19 August 1999, he suffered a heart attack and had to be admitted to hospital for two weeks. His coronary problems dated back to his first heart attack in 1984. Since his life was at risk, the author disclosed full details of his medical condition, in the hope that the Canadian Government would abandon the revocation proceedings. On 24 August 1999, the author requested the referral of the case to the Trial Division of the Federal Court, so that it could determine whether he had acquired citizenship by fraud or false representation, or by knowingly concealing material circumstances.

2.5 On 4 May 2000, the author applied to the Trial Division of the Federal Court for a definitive stay of the citizenship revocation proceedings on the grounds that, given his advanced age and precarious health, the very act of initiating and continuing such proceedings impaired his constitutional right to life, liberty and security of person. On 12 October 2000, the Federal Court dismissed the motion. It noted, however, that the author's precarious health made it difficult or impossible for him to take an active part in the ongoing proceedings without making his condition worse. The Court also stated that a stay of proceedings on grounds of the author's health would have been appropriate if this had been a criminal case. However, section 7 of the Canadian Charter, which guarantees the accused that the rules of fundamental justice will be observed, including the right to a full and complete defence, applies only to criminal proceedings.

2.6 The author appealed this decision on the additional ground that the proceedings constituted cruel and unusual treatment. On 17 May 2001, following the hearing before the Federal Court of Appeal, the author was again hospitalized, with heart failure. On 23 May 2001, the Federal Court of Appeal dismissed his appeal. On 9 July 2001, the same Court ordered a temporary stay of proceedings pending his application for leave to appeal to the Supreme Court and during any subsequent appeal. This was following the submission of several affidavits from medical practitioners who had examined the author. Most of the affidavits concluded that continuation of judicial proceedings would represent additional stress for the author but did not conclude that continuation of proceedings would be life-threatening. Two affidavits concluded that given the author's age and previous heart failures, he would not have the "cardiovascular capacity" to sustain prolonged judicial proceedings. On 14 February 2002, the Supreme Court refused the application for leave to appeal.

2.7 On 3 April 2002, the author filed a new motion asking the Trial Division of the Federal Court to determine, before trial, some preliminary questions of law: whether sections 10 and 18 of the Citizenship Act were consistent with Canadian constitutional law. On 13 June 2002, the Trial Division dismissed this motion. On 8 September 2002, the author refiled his motion. On 7 October 2002, the Trial Division again dismissed the motion and deferred its decision on the constitutionality of the statutory provisions relating to the procedure.

2.8 The hearings to determine whether the author had acquired citizenship by fraud or false representation or by knowingly concealing material circumstances began on 12 November 2002 before the Trial Division of the Federal Court. During final submissions in March 2003, the author again pleaded the issue of the constitutionality of the statutory provisions relating to the citizenship revocation procedure.

The complaint

3.1 The author claims to be a victim of violations by Canada of articles 6, 7, 9, 14 and 17 of the Covenant, on the basis that the continuation of proceedings poses a threat to his health and life. He contends that he has produced extensive medical evidence, uncontested by the State party, establishing that his capacities have been so affected or diminished that he is unable to defend himself without endangering his life and health, unable to collaborate with counsel in the preparation of his defence and unable to attend any hearing or inquiry. He recalls that the right to life, the right to security of person and the right not to be subjected to cruel or inhuman treatment are fundamental rights, and that no derogation may be made from articles 6, 7 and 9 of the

Covenant. He emphasizes that the proceedings could lead to his losing all status in Canada, to his deportation from that country and to his death. As to article 17, the author holds that his reputation could be seriously damaged and his privacy violated.

3.2 With regard to article 14, the author reiterates that he is unable to defend himself on account of his poor health. He points out that, while the power to revoke citizenship at the conclusion of the proceedings lies solely with the Governor in Council, there is no right in law to a hearing before him or her. There is no right of participation (except for the Minister). The Minister's report is not disclosed to allow for submissions in response. The author claims a violation of article 14, on the basis that naturalized citizens subject to citizenship revocation proceedings are not granted a hearing before the decision-maker. He believes that the procedure is intended to punish naturalized Canadians such as himself because they are suspected of having been collaborators during the Second World War.

3.3 The author contends that he has exhausted all available domestic remedies to obtain a stay of proceedings, since the Supreme Court refused to consider his appeal. He requests the State party to withdraw the proceedings against him.

Observations of the State party on admissibility and merits

4.1 In a note verbale dated 23 July 2003, the State party contests the admissibility of the communication. Firstly, it points out that the author has no absolute right to citizenship and that, since the Covenant does not establish such a right, the communication is inadmissible under articles 1 and 3 of the Optional Protocol. The State party also asserts that the citizenship revocation process does not constitute a criminal or analogous proceeding and is not otherwise punitive, since it is of a civil nature. The author's presence is not required during proceedings, and the author was in any case represented by counsel. Revocation of citizenship is distinct from removal from the country, which would require the initiation of separate proceedings under section 44 of the Immigration and Refugee Protection Act. Moreover, the Minister would still have discretion to permit the author to remain in Canada. This communication in fact concerns the question of whether the Canadian Government's initiation and continuation of civil proceedings to revoke the author's citizenship violates the Covenant.

4.2 Secondly, the State party argues that the author has not exhausted all available domestic remedies. While the author has exhausted domestic remedies in respect of his claims that the very existence of citizenship revocation proceedings under the Citizenship Act puts his life at risk, a decision on the constitutional challenge to the legislation giving rise to the proceedings remains pending. As to the author's claim that the very existence of citizenship revocation proceedings constitutes an arbitrary violation of his privacy and reputation under article 17 of the Covenant, the State party maintains that the author has made no attempt to seek redress domestically, no civil claim for defamation or injury to reputation having been filed against the State party.

4.3 Thirdly, the State party considers that there is no evidence of a prima facie violation and that the communication is incompatible *ratione materiae*. As regards article 6 of the Covenant, the State party argues that the subject of the author's communication, namely, the fatal consequences arising from the mere initiation of civil proceedings against an elderly person in poor health, does not fall within the scope of this article as interpreted by the Committee.[1] The author himself chose, following his receipt of the notice from the Minister, to exercise his

right to have the matter referred to the courts, and the relevant proceedings do not require either his presence or his active participation. The communication therefore fails to adduce any evidence that the mere introduction of citizenship revocation proceedings amounts to a prima facie violation of the author's right to life. On the same grounds, the State party submits that the communication is inadmissible *ratione materiae*.

4.4 Regarding article 7, the State party notes that the author does not substantiate his argument that the initiation of citizenship revocation proceedings constitutes cruel and inhuman treatment. The initiation of such proceedings does not constitute a "punishment" within the meaning of article 7. In the light of the Committee's jurisprudence on article 7,[2] the stress and uncertainty allegedly caused by the very existence of proceedings are not of the severity required for a violation of this article. The communication therefore fails to advance prima facie evidence of any cruel, inhuman or degrading treatment or punishment and, further, is incompatible *ratione materiae*.

4.5 Regarding article 9, the State party argues that the author does not substantiate his allegation that this article is violated by the introduction of citizenship revocation proceedings. Article 9 applies mainly, albeit not exclusively, to criminal proceedings, and its interpretation by the Committee is less broad than the author's complaint implies.[3] In any case, the author has been neither arrested nor detained. As to security of person, the State party contends that there has been no interference with the author's physical or psychological integrity within the meaning of article 9. The State party therefore considers that the present communication does not contain any evidence of any prima facie violation of article 9. In addition, the author misinterprets the substance and scope of article 9 and the communication should therefore be ruled inadmissible *ratione materiae*.

4.6 Regarding article 14, the State party argues that this article applies only to criminal proceedings or where civil or patrimonial rights are at issue, which is not the case here.[4] The State party recalls that in its jurisprudence the Committee has not determined whether immigration proceedings as such constitute "suits at law".[5] Nonetheless, article 14, paragraph 1, should not apply. If the Committee is of the view that article 14 does apply in this instance, the State party maintains that the citizenship revocation proceedings meet all the requirements of article 14, paragraph 1, since the author has been granted fair hearings before independent and impartial tribunals. The author does not claim that the Canadian courts that heard and rejected his arguments are not established by law or fail to comply with the guarantees of competence, independence and impartiality. Moreover, while the law does not expressly establish a right to be heard by the Governor in Council, in practice, a person subject to citizenship revocation proceedings is given an opportunity to submit written representations and give reasons why his or her citizenship should not be revoked. The State party therefore considers that the communication discloses no evidence of a prima facie violation of article 14, paragraph 1, and that the communication is inadmissible *ratione materiae*.

4.7 With respect to article 17, if the Committee rejects the argument that the author has failed to exhaust all domestic remedies, the State party maintains that the author's allegations fail to establish interference by the State such as to violate this article.[6] Should the Committee find that there is interference with the author's privacy, the State party contends that such interference is lawful under the Citizenship Act. The author also fails to substantiate how the initiation of citizenship revocation proceedings has damaged his reputation. In any event, article 17 does not

establish an absolute right to honour and a good reputation. The communication does not disclose any prima facie violation of article 17 and is therefore inadmissible *ratione materiae.*

4.8 The State party recalls that the Committee has pointed out on several occasions that it is not a "fourth instance" competent to re-evaluate findings of fact or evidence, or to review the interpretation and application of domestic legislation by national courts.[7] The author is, however, essentially asking the Committee to re-evaluate the interpretation of national law by the Canadian courts, since he requests the Committee to "correct the mistakes" of interpretation and application of law allegedly made by the Canadian courts. He has not, however, established that the interpretation and application of domestic law was manifestly unreasonable or in bad faith.

4.9 If the Committee considers that the communication is admissible, the State party contends that it lacks any merit for the reasons given above.

Author's comments on the State party's submissions

5.1 In his comments of 17 November 2003, the author points out that his complaint makes no reference to a right to citizenship. As to removal as a potential consequence, although the judicial determination at issue is technically a distinct stage from the actual revocation of citizenship, which may in turn be distinguished from loss of permanent residence and removal, it is not premature to consider the potential consequences of the determination under review. This determination is the only legal obstacle to all of the subsequent steps. The risk of action in breach of the Covenant arising from removal as a potential consequence is therefore sufficiently real and serious.

5.2 With regard to the exhaustion of domestic remedies, the author recalls that he appealed for a definitive stay of the citizenship revocation proceedings up to the Supreme Court. He also points out that, on 19 September 2003, the Trial Division of the Federal Court refused to consider the constitutionality of the provisions of the Citizenship Act.

5.3 In response to the State party's argument that the author has not provided evidence that the citizenship revocation proceedings would endanger his life, the author recalls that he provided several affidavits and uncontested expert reports establishing that the continuation of proceedings would "jeopardize his life", and that he was unable to participate in his defence. He maintains that the continuation of proceedings violates in particular articles 6 and 9 of the Covenant and, further, that the application of article 9 is not limited to cases of detention.[8] While he did request that his case should be referred to the Federal Court following his receipt of the citizenship revocation notice on 30 July 1999, he did so prior to his doctors' finding that such proceedings could endanger his health, which was made following his heart attack of 19 August 1999. Furthermore, and contrary to the State party's claims, the evidence shows that the presence and active participation of the author was necessary for a full and complete defence. The author claims that the judge at first instance disregarded the impact of the continuation of proceedings on his health.

5.4 As to article 7, the author explains that it is the effect of the proceedings in the particular context of this case that would lead to a violation of his rights and could cause his death. He claims that the proceedings are punitive in nature and in some respects are worse than a prison sentence, since they entail a level of stigma similar to that of a criminal case, without the fundamental guarantees and protections that apply in such cases. Further, he contends that the

threat of expulsion from the territory on the grounds of war crimes or crimes against humanity as a result of a civil judgement constitutes cruel and unfair treatment. The State party provides only a civil process for naturalized Canadians suspected of war crimes, but the same does not apply to citizens by birth.

5.5 As to article 9, the author argues that security of person encompasses protection against threats to the life and liberty of the person as well as to physical and moral integrity. In this sense, it also concerns the person's dignity and reputation. The author recalls that the order revoking citizenship alone could lead to the automatic loss of his right of residence in Canada.

5.6 As to article 14, the author argues that this article is applicable in his case because the dispute concerns his civil rights, specifically his status as a Canadian citizen. He claims that, as well as subjecting him to unequal treatment because of his particular circumstances, the revocation proceedings fail to provide an opportunity for a fair hearing before the decision maker. He recalls that the case concerns citizenship, not immigration. It is clear from the requirement for a prior judicial determination that this right cannot be withdrawn by the mere exercise of a prerogative. The court's consideration should not be limited to the issue of false representation. A broader review should be undertaken to safeguard the author's fundamental right to have any decision affecting his rights taken by an impartial tribunal. The author submits that the procedure under the Citizenship Act does not provide for a hearing before the decision maker who actually revokes citizenship, and that the proceeding violates the Covenant because the decision is not made by an impartial and independent court.

5.7 As to article 17, the author explains that he has invoked before the national courts a violation of section 7 of the Canadian Charter of Rights and Freedoms, which covers privacy and reputation. He maintains that the attack on his dignity and reputation is arbitrary to the extent that his circumstances prevent him from defending himself.

Supplementary submissions of the parties

6.1 On 28 October 2004, the State party informed the Committee that the author died on 6 March 2004. At the time of his death, his Canadian citizenship had not yet been revoked. The State party recalls that, on 19 September 2003, the Trial Division of the Federal Court decided that the author had acquired his Canadian citizenship by knowingly concealing material circumstances relating to his activities during the Second World War. In accordance with the domestic procedure for revocation of citizenship under the Citizenship Act, the procedure then moved from the judicial to the executive phase. In December 2003, on the basis of the determination of the Trial Division of the Federal Court, the Minister of Citizenship and Immigration approved a report recommending that the Governor in Council should revoke the author's Canadian citizenship. Before this report was forwarded to the Governor in Council for her decision, the author was given an opportunity to respond. In mid-February 2004, the author's wife transmitted his comments to the Minister of Justice. The Minister's response to these comments was sent to the author's wife in mid-March 2004, and she was informed that any response should be sent before the end of April 2004. This communication remained unanswered.

6.2 At the time, the State party was unaware that the author had died, and only became aware of this on 27 September 2004. The Governor in Council never took a decision on the report recommending the revocation of the author's Canadian citizenship. After the author's death, the

State party simply abandoned all proceedings concerning him. In the circumstances, the State party contends that the communication is rendered moot and invites the Committee to declare it inadmissible.

7. By a letter dated 13 September 2006, the author's daughter expressly requested to continue the procedure.

Issues and proceedings before the Committee

Consideration of admissibility

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

8.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 Concerning the requirement that domestic remedies should be exhausted, the Committee has taken note of the State party's arguments that the author has not exhausted domestic remedies in relation to his claim of a violation of article 17. The author asserted that he had invoked section 7 of the Canadian Charter of Rights and Freedoms before the national courts. Section 7 states that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". However, the Committee notes that, even if this provision did cover the notion of an arbitrary violation of privacy and reputation, this is not the sense in which it was raised by the author before the national courts (see paragraph 2.5). It follows that the part of the communication on article 17 must be declared inadmissible for failure to exhaust domestic remedies in conformity with article 5, paragraph 2 (b), of the Optional Protocol.

8.4 With regard to the claim of a violation of article 6, the Committee takes note of the medical reports submitted by the author. According to the author, this evidence shows that his capacities have been impaired to the point where he is unable to defend himself without endangering his life and health. However, the Committee notes that neither the application for a stay of the citizenship revocation proceedings, nor the revocation procedure itself, required the author's presence. Furthermore, the author was given an opportunity to submit written representations. The Committee considers that the author has failed to demonstrate how the initiation and continuation of the citizenship revocation proceedings constituted a direct threat to his life, as the medical affidavits he obtained reached different conclusions on the impact of the continuation of judicial proceedings on his health. The Committee therefore considers that the author has failed adequately to substantiate the alleged violation of article 6, for purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

8.5 As to the complaint of a violation of article 9, the Committee notes the author's argument that the application of this provision is not limited to cases of detention. The Committee, however, considers that the author has not demonstrated how the proceedings initiated against him by the State party constituted a violation of his right to security of person under article 9; the mere initiation of judicial proceedings against an individual does not directly affect the security

of the person concerned, and indirect impacts on the health of the person concerned cannot be subsumed under the notion of "security of person". It follows that the author has failed sufficiently to substantiate this allegation, for purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

8.6 As to the complaint of a violation of article 14, the Committee notes the author's argument that he was unable to defend himself because, under the law on citizenship, the right to a hearing was available only during the judicial process to determine whether he had acquired Canadian citizenship by false representation or fraud, or by knowingly concealing material circumstances. The author appears to have participated in or at least to have been represented in those hearings, and makes no claim under article 14 in their regard. There was no right to a hearing before the ultimate decision-making authority on the revocation of citizenship, the Governor in Council, who acts primarily on the basis of recommendations of the Minister for Citizenship and the determination of the Trial Division of the Federal Court. The Committee recalls that, for a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent, for example on the basis of existing law and/or judicial or administrative decision or practice.[9] In the present case, the Governor in Council never took any decision regarding the author and, following the author's death the State party simply abandoned the proceedings initiated against him. The Committee concludes that in these circumstances the author cannot claim to be a victim of a violation of article 14. This part of the communication is therefore inadmissible under article 1 of the Optional Protocol.

8.7 As to the complaint of a violation of article 7, the Committee considers that the author has sufficiently substantiated his allegations for the purposes of admissibility, and that this part of the communication is admissible.

Consideration of the merits

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

9.2 As regards the author's claim of violation of article 7, he argues that he had serious heart problems and that the initiation and the continuation of citizenship revocation proceedings placed him under considerable stress, amounting to cruel and inhuman treatment. The Committee acknowledges that there may be exceptional circumstances in which putting a person in poor health on trial may constitute treatment incompatible with article 7, for example, where relatively minor justice issues or procedural convenience are made to prevail over relatively serious health risks. No such circumstances exist in the present case, in which the citizenship revocation proceedings were provoked by serious allegations that the author participated in the gravest crimes. In addition, on the specific facts of the present case, the Committee notes that the citizenship revocation proceedings were conducted primarily in writing and that the author's presence was not required. Moreover, the author has not shown how the initiation and continuation of the citizenship revocation proceedings constituted treatment incompatible with article 7 since, as already mentioned, the conclusions of the medical affidavits he obtained differed on the impact of the proceedings on his health. Accordingly, the author has failed to establish that the State party was responsible for causing a violation of article 7.

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

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

Notes

[1] See for example *Van Oord v. the Netherlands*, communication No. 658/1995, decision on inadmissibility adopted on 23 July 1997, para. 8.2.

[2] See *C. v. Australia*, communication No. 900/1999, Views adopted on 28 October 2002, para. 4.6.

[3] See *Celepli v. Sweden*, communication No. 456/1991, Views adopted on 18 July 1994, para. 6.1.

[4] See *Y.L. v. Canada*, communication No. 112/1981, decision on inadmissibility adopted on 8 April 1986.

[5] See *V.M.R.B. v. Canada*, communication No. 236/1987, decision on inadmissibility adopted on 18 July 1988, para. 6.3.

[6] See *Van Oord v. the Netherlands*, communication No. 658/1995, decision on inadmissibility adopted on 23 July 1997.

[7] See *J.K. v. Canada*, communication No. 174/1984, decision on inadmissibility adopted on 26 October 1984, para. 7.2; and *V.B. v. Trinidad and Tobago*, communication No. 485/1991, decision on inadmissibility adopted on 26 July 1993, para. 5.2.

[8] See *Delgado Páez v. Colombia*, communication No. 195/1985, Views adopted on 12 July 1990, para. 5.5; and *Chongwe v. Zambia*, communication No. 821/1998, Views adopted on 25 October 2000, para. 5.3.

[9] See *E.W. et al. v. the Netherlands*, communication No. 429/1990, decision on inadmissibility adopted on 8 April 1993, para. 6.4; and *Aalbersberg et al. v. the Netherlands*, communication No. 1440/2005, decision on inadmissibility adopted on 12 July 2006, para. 6.3.

K. Communication No. 1140/2002, *Khudayberganov v. Uzbekistan** (Views adopted on 24 July 2007, Ninetieth session)

Submitted by:	Mrs. Matlyuba Khudayberganova (not represented by counsel)
Alleged victim:	Iskandar Khudayberganov (the author's son)
State party:	Uzbekistan
Date of communication:	28 November 2002 (initial submission)
Subject matter:	Imposition of death sentence after unfair trial with resort to torture during preliminary investigation
Substantive issues:	Torture - unfair trial - right to life
Procedural issues:	Evaluation of facts and evidence - substantiation of claim
Articles of the Covenant:	2; 3; 5; 6; 7; 10; 11; 14; 16
Article of the Optional Protocol:	2

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

Meeting on 24 July 2007,

Having concluded its consideration of communication No. 1140/2002, submitted to the Human Rights Committee on behalf of Mr. Iskandar Khudayberganov, under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1.1 The author is Mrs Matlyuba Khudayberganova, an Uzbek national. She submits the communication on behalf of her son, Iskandar Khudayberganov, also an Uzbek, born in 1974, awaiting execution in Tashkent following a death sentence imposed by the Tashkent City Court

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

on 28 November 2002. The author claims that her son is a victim of violations by Uzbekistan of his rights under article 2; article 3; article 5; article 6; article 7; article 10; article 11; article 14; and article 16 of the Covenant. She is unrepresented.

1.2 On 29 November 2002, pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party not to carry out Mr. Khudayberganov's death sentence while his case was under consideration. On 11 December 2003, the State party replied that the Supreme Court had deferred the execution, pending the Committee's final decision.

Factual background

2.1 On 16 February 1999, several explosions took place in Tashkent. Many people were killed and several others were injured. A number of individuals were suspected of having participated in the preparation of the bombings, including the author's son, and a criminal case was opened against him.

2.2 On 28 November 2002, Iskandar Khudayberganov was sentenced to death for the setting up of (and his participation in) an organized criminal association and participation in an organized armed group; incitement to national, racial or religious hatred; robbery; premeditated murder under aggravating circumstances carried out in a manner that put the life of others at risk; terrorism, and other crimes.

2.3 The author affirms that her son's punishment was particularly severe. His conviction did not correspond to his personality, and he had been positively assessed by his neighbours. An affidavit to this effect was presented in court. He is married and has two children. In 1996 and 1997, he worked as TV assistant cameraman.

2.4 Khudayberganov was initially arrested in Tajikistan, on 24 August 2001, allegedly as an "Uzbek spy". He was interrogated and tortured in the Tajik Ministry of Internal Affairs facilities. On 5 February 2002, he was transferred to Uzbekistan and arrested there. He was kept in the basement of the Ministry of Internal Affairs in Tashkent, where he was severely beaten and tortured by investigators and forced to confess guilt. The author submits a copy of an undated letter by her son, in which he describes the tortures suffered. Allegedly, he was beaten with batons, and he was prevented from sleeping, and not given any food "for weeks". He received kicks in the groin area as well on the head. He was hit with a tube, and started hearing noise in his head. All this was done in the absence of a lawyer.[1] He was beaten by several male individuals aged 30-35 years. He resisted until the moment when he was threatened that his relatives would be brought there and his mother, sister, and wife would lose "their dignity" in front of him. On 11 February 2002, he was placed in the Investigation Detention Centre of the National Security Service, NSS, and was officially charged under articles 242, 155, 158, 159, and 161 of the Uzbek Criminal Code (organization of a criminal association and establishment of an armed group, ensuring its leadership or participating in it; terrorism; attempt on the life of the President; Conspiring to seize power and to overthrow the Constitutional order; diversion/subversive activity).

2.5 The author was informed about her son's detention on 18 March 2002, when a lawyer informed her that she was representing her son. All complaints in relation to her son's ill-treatment, addressed to different institutions (the General Prosecutor's Office, to the

Presidential administration, and to the Constitutional Court), remained unanswered, and were simply transmitted to the instances she was complaining against. According to Supreme Court decision of 20 November 1996, evidence obtained by unlawful methods is inadmissible. Her son's confessions, however, served as a basis for his conviction. The conviction was also based on the testimonies of one Akhmedov who was mentally ill, and one Abdusamatov, whose testimony was wrong, a fact that the court was informed about.

2.6 At the beginning of the trial, Khudayberganov retracted his confessions. The court concluded that this was a defence strategy.

2.7 Allegedly no accusation against the author's son was confirmed in court, and only indirect evidence was used against him. The author's son's terrorism charges were similarly groundless. No information as to the moment of time, location, or nature of any terrorist acts committed by Khudayberganov was presented during the investigation or in court.

2.8 The author considers her son's charges for the organization of a criminal association unfounded. As to the charges that her son participated in two robberies, the author claims that in court, no victim identified him as having participated in the crimes. The accusation against her son of having participated in the murder of two police officers after the second robbery on 6 August 1999 is also unfounded, because at that moment he was abroad.

2.9 The investigators had seized several kilograms of ammonium nitrate and aluminium powder at one Karimov's home (where Khudayberganov had spent several months in hiding), and concluded that these substances served for the fabrication of explosives. The author claims that this conclusion is unfounded.

2.10 The author claims that her son's rights to be presumed innocent and to benefit from all remaining doubts were violated. Both the investigation and the court proceedings were allegedly conducted in an accusatory manner.

The complaint

3. The author claims violations of her son's rights under article 2; article 3; article 5; article 6; article 7; article 10; article 11; article 14; and article 16, of the Covenant.

State party's observations

4.1 On 23 December 2003, the State party affirmed that according to information of the Uzbek General Prosecutor's Office, Khudayberganov was arrested in Tajikistan on 31 January 2001 and was transferred to Uzbekistan on 5 February 2002, where he was detained. According to the evidence, he joined the extremist religious organization "Islamic Movement of Uzbekistan" (IMU) in 1998 and underwent military training in Chechnya. After his return in 1998, he established the Tashkent IMU branch together with other individuals, with the aim to establish an Islamic State. To finance their activities, the group committed several murders and armed robberies.

4.2 On 16 February 1999, a number of bombs exploded in Tashkent. On 4 March 1999, the author's son, together with other members of the group, robbed the house of a businessman in Tashkent, and took possession of a large sum of money and of a car. On 6 August 1999, they

attacked another entrepreneur, who died as a result of his injuries; two policemen were also killed following this episode. In August 1999, the alleged victim went to a military camp in Tajikistan.

4.3 In June 2000, he underwent special training in explosives in an IMU camp in Tajikistan. In July 2000, he arrived in Tashkent with the order to bomb the Railway Station or another important object. The bombing did not take place, because of the arrest, by the authorities, of his accomplices who were trying to bring detonators and cables from Tajikistan.

4.4 According to the prosecution's evidence, Khudayberganov's and his co-defendants' guilt was established partly by their confessions, as well as by the results of the verification of the accuracy of their claims at the crime scenes, the testimony of several witnesses, and information from the co-defendants' confrontation with the victims, and finally by forensic and ballistic evidence.

Further submissions by the author

5.1 The author provided further information in 2003. She notes that the State party provides no information about the conduct of any investigation with respect to her son's torture allegations, and observes that her son still displays a scar on his head as a result of a blow with a metal tube. When he was transferred to the NSS's detention centre, he was tortured, had psychotropic substances administered, and was threatened that his relatives would be raped in front of him. He complained in court about this and gave the names of those responsible, but the court rejected his allegations.

5.2 The author recalls that her son claimed to be innocent in court because he was abroad when the murders were committed, and no evidence confirmed his participation in the crimes. Her son proved his innocence in court. He did not follow any training in Chechnya in 1998 but studied in Tashkent. He denied being an IMU member. On 16 February 1999, during the bombings, he was at the home of his mother in law. After the bombings, the authorities made several arrests and on 21 February 1999, he escaped to Tajikistan. Several witnesses already detained for different crimes and who had incriminated the author's son, in court retracted their testimonies as false and given under coercion.

5.3 According to the author, the chemical substances found at Karimov's house were seized in the absence of any witnesses. It was not confirmed that her son owned any firearm, and no arms or cartridges were found during the searches. Her son's accusation and conviction on this count was purely conjectural.

5.4 The author claims that she was informed about her son's detention only 41 days after his arrest, although under Uzbek Criminal Code, the authorities must inform relatives of the arrested individual within 24 hours.

5.5 The author reiterates that the court was not impartial. When the torture claim was made in court, the judge replied that the accused had to repeat their confession from the preliminary investigation and should "not play drama". The judge simply ignored the declarations. The prosecutor was not present on several occasions, and during his absence, the prosecutor's functions allegedly were assumed by the judge.

5.6 Finally, the author claims that her son was beaten on death row, and that he was brought, on several occasions, to a special room, where he was attached to a chair and his head was shaved.

5.7 On 10 March 2005, the author presented further comments, reiterating her earlier comments.

State party's further observations

6.1 On 25 May 2004, the State party reiterated its earlier observations. It recalls that on 28 November 2002, he was sentenced to death by the Tashkent City Court. The court convicted him because, after having joined the IMU in February 1998, together with other individuals, he followed training in military camps in Chechnya and Tajikistan. After his return to Uzbekistan, he committed several crimes, including murders and robberies. On 28 January 2003, the Appeal Body of the Tashkent City Court confirmed the death sentence.

6.2 On 29 June 2005, the State party presented new observations. In relation to the torture allegations, in particular on the absence of an investigation, it asserts that neither officials of the Ministry of Internal Affairs nor those of the NSS used torture or any other unlawful investigation methods against the author's son. The author's torture allegations are said to be an attempt to mislead the Committee and to create a negative image of the State party's law enforcement authorities.

6.3 The State party affirms that Khudayberganov was represented by a lawyer from the moment of the first interrogation. The case file reveals that he produced his confessions freely. The trial materials and transcripts contain no record about his affirmations on torture, beatings, or use of violence against him. The torture allegations are groundless and this is also confirmed by the fact that they were never brought to the law enforcement authorities.

6.4 The State party contends that according to the case file, Khudayberganov confessed that he took part in the IMU's activities and visited terrorist training camps in Chechnya and Tajikistan. He returned in Tashkent in 1998 to recruit people for the camps. The State party reiterates the chronology of the events and affirms categorically that Khudayberganov's guilt was established beyond doubt in accordance with the applicable criminal law proceedings. The court proceedings fully observed the Criminal Procedure Code then into force, and the trial took place in the presence of two prosecutors, and of the author's son's two lawyers.

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2 The Committee notes that the same matter is not being examined under any other international procedure, as required by article 5, paragraph 2 (a), of the Optional Protocol, and takes note that it remains uncontested that domestic remedies have been exhausted.

7.3 The Committee notes, first, the author's claim that her son's rights under article 3, article 5, article 11, and article 16, have been violated. These allegations have not been substantiated by any other pertinent information, and are therefore inadmissible under article 2 of the Optional Protocol.

7.4 The Committee observes that the author's allegations that raise issues under article 14 tend to show that her son's trial did not meet the criteria of fairness, that the court was neither impartial nor objective, and that the presiding judge assumed the functions of the prosecutor during the latter's absence. The State party has refuted these allegations, in general terms by affirming that the trial was conducted in conformity with the law and procedures then into force, and in particular by contending that the trial was always held in the lawyers' and prosecutors' presence. In the absence of any other pertinent information, the Committee concludes that this part of the communication is inadmissible as insufficiently substantiated under article 2, of the Optional Protocol.

7.5 The Committee considers that the remaining part of the author's allegations under article 2; article 6; article 7; article 10; and article 14 are sufficiently substantiated, for purposes of admissibility, and declares them admissible.

Consideration of the merits

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

8.2 The author claims that her son was beaten and tortured by investigators, and thus forced to confess his guilt. He retracted his initial confessions in court, claiming that they had been obtained under duress and identifying the names of those responsible for his ill-treatment. The State party has rejected the claim as a defence strategy, and has asserted that no torture or unlawful methods of investigation were used against Khudayberganov, and that the entire investigation and all court proceedings complied with the law in force. The author has also claimed that her son was ill-treated on death row, which was not contested by the State party. The Committee recalls that once a complaint about ill-treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially.[2] It notes that the case file contains copies of complaints about the author's son's ill-treatment that were brought to the attention of the State party's authorities, including copies of letters from the alleged victim's sister, from lawyers, from NGOs, as well as a letter from Khudayberganov himself, which detailed the methods of torture used against him. The Committee considers that in the circumstances of the case, the State party has failed to demonstrate that its authorities adequately addressed the torture allegations advanced by the author, both in the context of domestic criminal proceedings and the present communication. Accordingly, due weight must be given to her allegations. In the circumstances, the Committee concludes that the facts as presented disclose a violation of the author's son's rights under article 7, read together with article 14, paragraph 3 (g), of the Covenant.

8.3 In light of the above conclusion in relation to article 7 of the Covenant, the Committee does not find it necessary to examine separately the author's claim under article 10, of the Covenant.

8.4 The Committee recalls that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have been violated constitutes a violation of article 6 of the Covenant. In the present case, the alleged victim's death sentence was imposed on the victim in violation of article 7, and article 14, paragraph 3 (g), of the Covenant. Accordingly, the Committee concludes that the alleged victim's rights under article 6, paragraph 2, of the Covenant, have also been violated.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of Mr. Khudayberganov's rights under article 6, paragraph 2; and article 7 and article 14, paragraph 3 (g), of the Covenant, the last two read together.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Khudayberganov with an effective remedy, including commutation of the death sentence and compensation. The State party is also under an obligation to prevent similar violations in the future.

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

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

Notes

[1] The case file contains also a copy of a letter addressed on 22 November 2002 to several institutions, including the Tashkent City Prosecutor's Office, in which the Chief of the "Initiative Group of the independent human rights defenders" affirms that both NGOs, diplomats and journalists were convinced that the accused were subjected to torture during the investigation, in the absence of a lawyer.

[2] General comment on article 7, No. 20 [44], adopted on 3 April 1992, para. 14.

L. Communication No. 1143/2002, *Dernawi v. Libyan Arab Jamahiriya** (Views adopted on 20 July 2007, Ninetieth session)

Submitted by:	Mr. Farag El Dernawi (represented by the World Organisation Against Torture)
Alleged victims:	The author, his wife, Salwa Faris, and their five children, and their six children, Abdelmenem, Abdelrahman, Abdallah, Abdoalmalek, Salma and Gahlia
State party:	Libyan Arab Jamahiriya
Date of communication:	15 August 2002 (initial submission)
Subject matter:	Confiscation of passport - inability of family to depart country and be reunified
Substantive issues:	Freedom of movement - interference with family life - protection of the family unit - protection of the rights of children
Procedural issues:	Exhaustion of domestic remedies - absence of cooperation by the State party
Articles of the Covenant:	12, 17, 23 and 24
Article of the Optional Protocol:	5, paragraph 2 (b)

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

Meeting on 20 July 2007,

Having concluded its consideration of communication No. 1143/2002, submitted to the Human Rights Committee on behalf of Farag El Dernawi, his wife, Salwa Faris, and their six children, Salwa Faris, and their six children, Abdelmenem, Abdelrahman, Abdallah, Abdoalmalek, Salma and Gahlia, under the Optional Protocol to the International Covenant on Civil and Political Rights,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

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

Adopts the following:

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

1. The author of the communication is Farag El Dernawi, a Libyan national born on 1 June 1952 and resident in Olten, Switzerland. He brings the communication on his own behalf and on behalf of his wife, Salwa Faris, born on 1 April 1966, and their six children, Abdelmenem, born 26 July 1983, Abdelrahman, born 21 August 1985, Abdallah, born 27 July 1987, Abdoalmalek, born 4 October 1990, Salma, born 22 January 1993, and Gahlia, born 18 August 1995. He claims violations by the Libyan Arab Jamahiriya of articles 12, 17, 23 and 24 of the Covenant. He is represented by the World Organisation Against Torture.

The facts as presented by the author

2.1 The author, a member of the Muslim Brotherhood, was persecuted in Libya on account of his political beliefs. In 1998, he was accompanying his brother and sick nephew to Egypt to seek medical treatment when he was warned that security personnel had been at his home, apparently seeking to arrest him. He decided not to return, separating him from his wife and six children in Libya.

2.2 In August 1998, the author arrived in Switzerland and applied for asylum. In March 2000, the Swiss federal authorities granted the author asylum and approved family reunification. On 26 September 2000, his wife and the three youngest children sought to leave Libya to join the author in Switzerland. She was stopped at the Libyan-Tunisian border and her passport, which also covered the three children, was confiscated. Upon return to her home city of Benghazi, she was ordered to appear before the security services, who informed her that she could not travel because the author's name was on an internal security wanted list in connection with a political case.

2.3 On numerous occasions, the author's wife has personally sought to retrieve her passport, including through friends and family with government influence, without success. Lawyers refuse to act for her on account of her husband's political activities. She, and her six children, have no income and face substantial economic hardship. In addition to the fear and strain, she has lately become ill, requiring medical treatment. Although the three eldest children have their own passports and could theoretically leave the country to join their father, they do not wish to leave their mother in difficulty.

The complaint

3.1 The author claims violations of articles 12, 17, 23 and 24 of the Covenant. He contends that the confiscation of passport and refusal of the State party to permit departure of his wife and the three youngest children amounts to a continuing violation of article 12 of the Covenant. The conditions of necessity and proportionality applicable to a legitimate restriction of the right to movement are clearly absent, as the State party's officials have not even claimed that the

author's wife and children represent a risk to national security. On the contrary, they have explicitly admitted that the family are being prevented from leaving solely because the author is accused of a political crime.

3.2 The author contends that the frustration by the State party of his wife and three youngest children joining him in Switzerland does not originate in any legitimate concern for the affected individuals, but is apparently motivated by a desire to punish the author. The interference with family life is accordingly arbitrary and in breach of articles 17 and 23 of the Covenant. In addition, the State party's action has effectively impeded all six of the children from fully enjoying their right to family life, as even the three eldest children, who have their own passports and could theoretically leave, cannot do so without leaving their mother and younger siblings behind.

3.3 The author also argues that by not permitting family reunification, the State party has placed the children in dire economic need as they have been deprived of their sole means of support. Although they have been able to survive with the assistance of family members, they have been forced to live in increasingly difficult conditions. By arbitrary and unlawful action to this effect that failed to give due consideration to the impact thereof on the well-being of the children under eighteen years of age, the State party violated article 24 of the Covenant.

3.4 As to the exhaustion of domestic remedies, the author argues that his wife has not been able to use any official instances, due to his situation, though her attempts as described to pursue such avenues as have been available to her have been without success. With reference to the material of a variety of international non-governmental organizations, the author contends that, in any event, there are no effective remedies in Libya for human rights violations that are politically motivated. In further support of this proposition, the author cites the Committee's concluding observations in 1998 seriously doubting the independence of the judiciary and freedom of action of lawyers,[1] and argues that the situation has not significantly changed. Instances of politically motivated arrest and trial, as well as harassment of victims' family members, are still routinely reported, and in cases of political persecution, the judiciary will not contradict decisions of the executive.

Absence of State party's cooperation

4. By notes verbale of 16 December 2002, 26 January 2006 and 23 April 2007, the State party was requested to submit to the Committee information on the question of admissibility and the merits of the communication. The Committee notes that this information has still not been received. It regrets the State party's failure to provide any information with regard to the author's claims, and recalls that it is implicit in the Optional Protocol that States parties make available to the Committee all information at their disposal.[2] In the absence of any observations from the State party, due weight must be given to the author's allegations, to the extent that these have been sufficiently substantiated.

Issues and proceedings before the Committee

Consideration of admissibility

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

5.2 As it is obliged to do pursuant to article 5, paragraph 2 (a), of the Optional Protocol, the Committee ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

5.3 With respect to the exhaustion of domestic remedies, the Committee notes that the State party has offered no argument to refute the author's contention that all his wife's approaches to the authorities have been futile, and that, in the circumstances of the case, effective remedies are unavailable. Accordingly, the Committee considers that it is not precluded by the provisions of article 5, paragraph 2 (b), of the Optional Protocol from consideration of the communication.

5.4 The Committee considers that the author's claims under articles 12, 17, 23 and 24 are sufficiently substantiated for purposes of admissibility, and therefore proceeds to consider them on the merits, in accordance with article 5, paragraph 2, of the Optional Protocol.

Consideration of the merits

6.1 The Human Rights Committee has considered this communication in the light of all the written information made available to it by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

6.2 In terms of the claim under article 12, the Committee recalls its jurisprudence that a passport provides a national with the means practicably to exercise the right to freedom of movement, including the right to leave one's own State, conferred by that article.[3] The confiscation of the passport of the author's wife, also covering her three youngest children, as well as the failure to restore the document to her, accordingly amount to an interference with the right to freedom of movement which must be justified in terms of the permissible limitations set out in article 12, paragraph 3, concerning national security, public order/ordre public, public health or morals or the rights and freedoms of others. The State party has not sought to advance any such justification, nor is any such basis apparent to the Committee on the basis of the material before it. The Committee accordingly concludes that there has been a violation of article 12, paragraph 2, in respect of the author's wife and three youngest children whom the wife's passport also covered.

6.3 As to the claims under articles 17, 23 and 24, the Committee notes that the State party's action amounted to a definitive, and sole, barrier to the family being reunited in Switzerland. It further notes that the author, as a person granted refugee status under the 1951 Convention on the Status of Refugees, cannot reasonably be expected to return to his country of origin. In the absence of justification by the State party, therefore, the Committee concludes that the interference with family life was arbitrary in terms of article 17 with respect to the author, his wife and six children, and that the State party failed to discharge its obligation under article 23 to respect the family unit in respect of each member of the family. On the same basis, and in

view of the advantage to a child's development in living with both parents absent persuasive countervailing reasons, the Committee concludes that the State party's action has failed to respect the special status of the children, and finds a violation of the rights of the children up to the age of eighteen years under article 24 of the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 12, paragraph 2, of the Covenant in respect of the author's wife and her three youngest children, a violation of articles 17 and 23 in respect the author, his wife and all children, and a violation of article 24 in respect of the children under the age of eighteen as of September 2000.

8. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to ensure that the author, his wife and their children have an effective remedy, including compensation and return of the passport of the author's wife without further delay in order that she and the covered children may depart the State party for purposes of family reunification. The State party is also under an obligation to take effective measures to ensure that similar violations do not recur in future.

9. The Committee recalls that by becoming a State party to the Optional Protocol, the Libyan Arab Jamahiriya has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to ensure an effective and enforceable remedy when a violation has been disclosed. The Committee therefore wishes to receive from the State party, within 90 days following the submission of these Views, information about the measures taken to give effect to them. The State party is also requested to publish the Committee's Views.

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

Notes

[1] CCPR/C/79/Add.101, at para. 14.

[2] See, inter alia, *Khomidova v. Tajikistan*, communication No. 1117/2002, Views adopted on 29 July 2004; *Khalilova v. Tajikistan*, communication No. 973/2001, Views adopted on 30 March 2005; and *Aliboeva v. Tajikistan*, communication No. 985/2001, Views adopted on 18 October 2005.

[3] *El Ghar v. Libyan Arab Jamahiriya*, communication No. 1107/2002, Views adopted on 29 March 2004.

M. Communication No. 1172/2003, *Madani v. Algeria**
(Views adopted on 28 March 2007, Eighty-ninth session)

Submitted by:	Salim Abbassi (represented by Mr. Rachid Mesli)
Alleged victim:	Abbassi Madani (his father)
State party:	Algeria
Date of communication:	31 March 2003 (initial submission)
Subject matter:	Arbitrary detention - house arrest - fair trial - freedom of expression
Procedural issue:	Power of attorney
Substantive issues:	Right to liberty and security of person - arbitrary arrest and detention - right to liberty of movement - right to a fair trial - right to a competent, independent and impartial tribunal - right to freedom of expression
Articles of the Covenant:	9, 12, 14 and 19
Articles of the Optional Protocol:	...

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

Meeting on 28 March 2007,

Having concluded its consideration of communication No. 1172/2003, submitted to the Human Rights Committee by Salim Abbassi on behalf of Mr. Abbassi Madani (his father) under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

Individual opinions signed by Committee members Mr. Abdelfattah Amor and Mr. Ahmed Tawfik Khalil are appended to the present document.

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

1. The author of the communication, dated 31 March 2003, is Salim Abbassi, born on 23 April 1967 in Algiers, who is submitting the communication on behalf of his father, Mr. Abbassi Madani, an Algerian citizen, born on 28 February 1931, in Sidi Okba (Biskra). The author states that his father is the victim of violations by Algeria of articles 9, 12, 14, 19, 20 and 21 of the International Covenant on Civil and Political Rights (the Covenant). He is represented by Mr. Rachid Mesli. The Covenant and the Optional Protocol entered into force for the State party on 12 December 1989.

The facts as submitted by the author

2.1 Abbassi Madani is one of the founding members and, at the time of the submission of the communication, president of the Front Islamique du Salut (Islamic Salvation Front) (FIS),[1] an Algerian political party approved by the State party as of 12 September 1989 following the introduction of political pluralism. With a view to forthcoming elections and in the wake of gains made by FIS during the local elections of 1990, the Algerian Government had to push through a new electoral law, which was unanimously condemned by all Algerian opposition parties. Protesting against this law, FIS organized a general strike along with peaceful sit-ins in public squares. After a few days of strikes and peaceful marches, the parties agreed to end the protest movement in exchange for a review of the electoral law in the near future. Despite this agreement, on 3 June 1991, the head of Government was requested to resign and public squares were stormed by the Algerian army.

2.2 On 30 June 1991, Abbassi Madani was arrested at his party's headquarters by the military police and on 2 July 1991 was brought before the investigating judge of the military court, accused of "jeopardizing State security and the smooth operation of the national economy". In particular, he was reproached for having organized a strike, which the prosecution described as subversive, since it had allegedly done serious harm to the national economy. The lawyers appointed to defend Abbassi Madani challenged the grounds for his prosecution before the military court, and the lawfulness of the investigation conducted by a military judge under the authority of the public prosecutor's office. According to the defence, the court had been established in order to remove leaders of the main opposition party from the political scene, and it was not competent to hear the case, it could only adjudicate on offences under criminal law and the Code of Military Justice committed by members of the armed forces in the performance of their duties. The competence of the military court to deal with political offences under legislation dating from 1963 had been revoked with the establishment of the National Security Court in 1971. Since the latter had been abolished following the introduction of political pluralism in 1989, the general rule of competence should therefore apply.

2.3 FIS won the first round of general elections on 26 December 1991, and the day after the official results were released, the military prosecutor was to inform defence lawyers of his intention to end the proceedings against Abbassi Madani. On 12 January 1992, however, the President of the Republic "resigned", a state of emergency was declared, the general elections were cancelled and so-called "administrative internment camps" were opened in southern Algeria. On 15 July 1992, the Blida military court sentenced Abbassi Madani in absentia to 12 years' rigorous imprisonment. The application for judicial review of this decision was rejected by the Supreme Court on 15 February 1993, thereby making the conviction final.

2.4 During his detention in Blida military prison, Abbassi Madani was, according to the author, subjected to ill-treatment on numerous occasions, in particular for having claimed political prisoner status and the same treatment as other prisoners. He was subjected to particularly severe treatment, despite his perilous state of health, spending a very long period of time in solitary confinement and being barred from receiving visits from his lawyers and family.

2.5 Following negotiations with the military authorities in June 1995, he was transferred to a residence normally used for dignitaries visiting Algeria. He was returned to the Blida military prison[2] for having refused to concede to the demands of army representatives, in particular that he should renounce his political rights. He was then detained in particularly harsh conditions[3] for the following two years until his release on 15 July 1997, on one condition "that he abide by the laws in force if he wished to leave the country". Upon his release, he did not resume his political activity as president of FIS, since the party had been banned in 1992.

2.6 Initially, the authorities tried to restrict Abbassi Madani's liberty of movement, considering any peaceful demonstration of support for him a threat to public order. Subsequently, the Minister of the Interior launched a "procedure" to place him under house arrest after he had been interviewed by a foreign journalist and had sent a letter to the Secretary-General of the United Nations[4] in which he expressed his willingness to help seek a peaceful solution to the Algerian crisis. On 1 September 1997, members of the military police informed him orally that he was under house arrest and forbidden to leave his apartment in Algiers. He was also informed that he was forbidden to make statements or express any opinion "failing which he would return to prison". He was denied all means of communicating with the outside world: his building was guarded around the clock by the military police, who prevented anyone, except members of his immediate family, from visiting him. He was not allowed to contact a lawyer or to lodge any appeal against the decision to place him under house arrest, which was never transmitted to him in writing.

2.7 On 16 January 2001, a communication was submitted to the Working Group on Arbitrary Detention on behalf of Mr. Madani. On 3 December 2001, the Working Group rendered its Opinion according to which his deprivation of liberty was arbitrary and contrary to articles 9 and 14 of the Covenant. The Working Group requested the State party "to take the necessary steps to remedy the situation and to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights".[5] No steps were taken by the State party.

The complaint

3.1 The author claims that the facts as presented by him reveal violations of articles 9, 12, 14 and 19 of the Covenant in respect of his father, Abbassi Madani.

3.2 As far as the allegations under articles 9 and 19 of the Covenant are concerned, Abbassi Madani's arrest was arbitrary and politically motivated. The charge against him that he had jeopardized State security was political, since no specific act that could in any way be categorized as a criminal offence could be established by the prosecution. He was reproached for having started a political strike that the military, and not the civil legal authorities, had described as subversive. This strike was put down with considerable bloodshed by the Algerian army, despite its peaceful nature and the guarantees provided by the head of Government. Even if a political protest movement could be categorized as a criminal offence, which is not the case

under Algerian law, the protest movement had ended following the agreement between the head of Government and the party headed by Abbassi Madani. His arrest by the military police and the charges brought against him by a military tribunal clearly served the sole purpose of removing the president of the main opposition party from the Algerian political scene, in violation of articles 9 and 19 of the Covenant.

3.3 As for the allegations relating to article 14, minimum standards of fairness were not observed. Abbassi Madani was sentenced by an incompetent, manifestly partial and unfair tribunal. The tribunal comes under the authority of the Ministry of Defence and not of the Ministry of Justice and is composed of officers who report directly to it (investigating judge, judges and president of the court hearing the case appointed by the Ministry of Defence). It is the Minister of Defence who initiates proceedings and has the power to interpret legislation relating to the competence of the military tribunal. The prosecution and sentence by such a court, and the deprivation of liberty constitute a violation of article 14.

3.4 With regard to article 9, there is no legal justification for the house arrest of Abbassi Madani. The Algerian Government justified this decision by citing "the existence of this measure in several pieces of Algerian legislation", in particular article 6, paragraph 4, of Presidential decree No. 99-44 of 9 February 1992 declaring the state of emergency, which was still in force at the time the communication was submitted. According to the Government, this decree was in conformity with article 4 of the Covenant. The Government, however, never complied with the provisions of article 4, paragraph 3, pursuant to which it should "immediately inform the other States parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated". Article 9 of the Criminal Code, which prescribes house arrest as an additional penalty,[6] is applied together with article 11, which obliges a person convicted to remain within a geographical area specified in a judgement.[7] House arrest may thus only be handed down as an additional penalty in the sentence imposing the main penalty. In the case of Abbassi Madani, there is no mention of any decision to place him under house arrest in the sentence handed down by the Blida military tribunal. At any rate, article 11 of the aforementioned Act lays down five years as the maximum duration for house arrest from the moment of the release of the convicted person. Since at the time the communication was submitted Abbassi Madani had been under house arrest for considerably more than five years, it constitutes a violation of the Act itself, which the Algerian Government is invoking to justify the imposition of that penalty.

3.5 The grounds for placing Abbassi Madani under house arrest are the same as those for his arrest and conviction by the military tribunal, namely the free exercise of his political rights enshrined in the Universal Declaration of Human Rights and the Covenant. This measure therefore constitutes a violation of articles 9, 12 and 19 of the Covenant.

State party's observations on admissibility and on the merits

4.1 On 27 June 2003, the State party pointed out that there is no indication in the communication that Abbassi Madani had given anyone the authority to act on his behalf, as provided for in the rules for submitting communications to the Committee. Mr. Salim Abbassi who claims to be acting on his father's behalf has not submitted any documentary evidence of his authority to so act. The power of attorney given by Salim Abbassi to Rachid Mesli was not authenticated and should not therefore be taken into consideration. Furthermore, Rachid Mesli

submitted the petition in his capacity as a lawyer, when he no longer practises as a lawyer in Algeria, having been disbarred by the disciplinary board of the Bar Association of the Tizi-Ouzou region on 3 October 2002. He is not a member of the Bar Association of the Canton of Geneva either, from where the communication was submitted. Accordingly, he is not entitled to act in this capacity. By using the title of lawyer, Rachid Mesli has acted under false pretences and wrongfully claimed a profession which he does not exercise. The State party also points out that an international arrest warrant (ref. No. 17/02) for Rachid Mesli has been issued by the investigating judge of the Sidi M'hamed court for his involvement in allegedly terrorist activities carried out by the Groupe Salafiste de Prédication et de Combat (Salafist Group for Preaching and Combat) (GSPC), which is on the list of terrorist organizations drawn up by the United Nations.

4.2 On 12 November 2003, the State party recalled that Abbassi Madani was arrested in June 1991 following a call to widespread violence, which was launched by Abbassi Madani and others by means of a directive bearing his signature. This came in the wake of a failed uprising, which he and others had planned and organized, with a view to establishing a theocratic State through violence. It was in the context of these exceptional circumstances, and to ensure the proper administration of justice, that he was brought before a military tribunal, which, contrary to the allegations by the source, is competent to try the offences of which he is accused. Neither article 14 of the Covenant, nor the Committee's general comment on this article nor other international standards refer to a trial held in courts other than ordinary ones as necessarily constituting a violation of the right to a fair trial. The Committee has made this point when considering communications relating to special courts and military courts.

4.3 The State party also points out that Abbassi Madani is no longer being held in detention, since he was released on 2 July 2003. He is no longer subject to any restriction on his liberty of movement and is not under house arrest as the source claims. He has been able to travel abroad freely.

4.4 Abbassi Madani was prosecuted and tried by a military tribunal, whose organization and competence are laid down in Ordinance No. 71-28 of 22 April 1971 establishing the Code of Military Justice. Contrary to the allegations made, the military tribunal is composed of three judges appointed by an order issued jointly by the Minister of Justice, Garde des Sceaux, and the Minister of Defence. It is presided over by a professional judge who sits in the ordinary-law courts, is subject by regulation to the Act on the status of the judiciary, and whose professional career and discipline are overseen by the Supreme Council of Justice, a constitutional body presided over by the head of State. The decisions of the military tribunal may be challenged by lodging an appeal before the Supreme Court on the grounds and conditions set forth in article 495 ff. of the Code of Criminal Procedure. As far as their competence is concerned, in addition to special military offences, the military tribunals may try offences against State security as defined in the Criminal Code, when the penalty incurred is for terms of imprisonment of more than five years. Military tribunals may thus try anyone who commits an offence of this type, irrespective of whether he or she is a member of the military. Accordingly, and on the basis of this legislation, Abbassi Madani was prosecuted and tried by the Blida military tribunal, whose competence is based on article 25 of the aforementioned Ordinance. The State party notes that the competence of the military tribunal was not challenged by Abbassi Madani before the trial judges. It was called into question the first time with the Supreme Court, which rejected the challenge.

4.5 Abbassi Madani benefited from all the guarantees recognized under law and international instruments. Upon his arrest, the investigating judge informed him of the charges against him. He was assisted during the investigation and the trial by 19 lawyers, and in the Supreme Court by 8 lawyers. He has exhausted the domestic remedies available under the law, having filed an application with the Supreme Court for judicial review, which was rejected.

4.6 The allegation that the trial was not public is inaccurate, and suggests that he was not allowed to attend his trial, or to defend himself against the charges brought against him. In fact, from the outset, he refused to appear before the military tribunal, although he had been duly summoned at the same time as his lawyers. Noting his absence, the president of the tribunal issued a summons for him to appear, which was served on him in accordance with article 294 of the Code of Criminal Procedure and article 142 of the Code of Military Justice. In the light of his refusal to appear, a report establishing the facts was drawn up before the president of the tribunal decided to dispense with the hearing, in accordance with the aforementioned provisions. Nevertheless, the defendant was kept abreast of all the procedural formalities relating to the hearings and relevant reports were drawn up. The trial of the accused in absentia is neither contrary to Algerian law nor to the provisions of the Covenant: although article 14 stipulates that everyone charged with a criminal offence shall have the right to be tried in his presence, it does not say that justice cannot be done when the accused has deliberately, and on his or her sole initiative, refused to appear in court. The Code of Criminal Procedure and the Code of Military Justice allow the court to dispense with the hearing when the accused persistently refuses to appear before it. This type of legal procedure is justified by the fact that justice must always be done, and that the negative attitude of the accused should not obstruct the course of justice indefinitely.

Comments by the author on the State party's observations

5.1 On 28 March 2004, counsel provided a power of attorney on behalf of Abbassi Madani, dated 8 March 2004, and informs the Committee that the order for house arrest was lifted on 2 July 2003, and that he is now in Doha, Qatar.

5.2 On the admissibility of the communication, counsel points out that rule 96 (b) of the Committee's rules of procedure allows a communication to be submitted by the individual personally or by that individual's representative. When the communication was submitted, Abbassi Madani was still under unlawful house arrest and unable to communicate with anyone except certain members of his immediate family. The house arrest order was lifted on 2 July 2003 and Abbassi Madani drew up a special power of attorney authorizing counsel to represent him before the Committee. Counsel responds to the personal attacks by the State party against him and requests the Committee to reject them.

5.3 On the merits, the house arrest order against Abbassi Madani was lifted on the expiration of his 12-year sentence to rigorous imprisonment, i.e. on 2 July 2003. Upon his release, he suffered further violations of his civil and political rights. The initial request to enjoin the State party to comply with its international obligations by lifting the house arrest order against the petitioner becomes moot. Abbassi Madani's detention in the conditions described in the initial communication constitutes a violation of the Covenant.

Additional comments by the State party

6. On 18 June 2004, the State party noted that, while acknowledging that he is no longer a lawyer, Abbassi Madani's representative nonetheless signs comments submitted to the Committee in that capacity. It also notes that the representative, instead of responding to the State party's observations on the merits, gives details of his own situation, forgetting that he is acting on behalf of a third party. The State party notes the representative's acknowledgement that Abbassi Madani is no longer subject to any restriction order and argues, accordingly, that his request to the Committee is now moot. The communication must therefore be considered unfounded and inadmissible.

Issues and proceedings before the Committee

Admissibility considerations

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

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

7.3 On the question of the validity of the power of attorney submitted by counsel, the Committee recalls: "Normally, the communication should be submitted by the individual personally or by that individual's representative; a communication submitted on behalf of an alleged victim may, however, be accepted when it appears that the individual in question is unable to submit the communication personally."[8] In the present case, the representative stated that Abbassi Madani had been placed under house arrest on the date of the submission of the initial communication, and that he was only able to communicate with members of his immediate family. The Committee therefore considers that the power of attorney submitted by counsel on behalf of Abbassi Madani's son was sufficient for the purposes of registering the communication.[9] Furthermore, the representative subsequently provided a power of attorney signed by Abbassi Madani, expressly and unequivocally authorizing him to represent him before the Committee in the case in question. The Committee therefore concludes that the communication was submitted to it in accordance with the rules.

7.4 As far as the complaints under articles 9, 12, 14 and 19 of the Covenant are concerned, in this case, the Committee considers that the facts as described by the author are sufficient to substantiate the complaints for the purpose of admissibility. It therefore concludes that the communication is admissible under the aforementioned provisions.

7.5 As for the decision to sentence Abbassi Madani in absentia to 12 years' rigorous imprisonment, the Committee, noting that the author only cites this matter when setting out the facts and does not take it up again when stating his complaint or respond to the detailed explanations furnished by the State party, considers that this aspect of the request does not constitute a claim that any of the rights enumerated in the Covenant have been violated, within the meaning of article 2 of the Optional Protocol.

7.6 The Committee notes the representative's request to restate his case, and his argument that his initial submission was made at a time when the author's father was under house arrest and before the order for house arrest had been lifted and that, although the request became moot as soon as the order for house arrest was lifted, this does not in any way affect the violation of the Covenant on the grounds of arbitrary detention. The Committee also takes note of the State party's request to deem the communication moot in the light of the representative's own admission that the author was no longer subject to any restriction order, and its call for the communication to be considered unfounded and inadmissible. The Committee considers that the lifting of the house arrest order does not necessarily mean that the consideration of the question of arbitrary detention automatically becomes moot, and therefore declares the complaint admissible.

Consideration of the merits

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

8.2 The Committee notes that Abbassi Madani was arrested in 1991 and tried by a military tribunal in 1992, for jeopardizing State security and the smooth operation of the national economy. He was released from Blida military prison on 15 July 1997. According to the author, on 1 September 1997, he was then placed under house arrest, without receiving written notification of the reasons for such arrest.

8.3 The Committee recalls that under article 9, paragraph 1, of the Covenant everyone has the right to liberty and security of person, and no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law. It further recalls that house arrest may give rise to violations of article 9,[10] which guarantees everyone the right to liberty and the right not to be subjected to arbitrary detention. The State party did not respond to the author's allegations, except to point out that Abbassi Madani is no longer being held in detention and is not under house arrest. Since the State party did not cite any particular provisions for the enforcement of prison sentences or legal ground for ordering house arrest, the Committee concludes that a deprivation of liberty took place between 1 September 1997 and 1 July 2003. The detention is thus arbitrary in nature and therefore constitutes a violation of article 9, paragraph 1.

8.4 According to article 9, paragraph 3, anyone detained must be brought promptly before a judge or other officer authorized by law to exercise judicial power and is entitled to trial within a reasonable time or to release. The Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.[11] In the present case, the author's father was released from house arrest on 2 July 2003, in other words after almost six years. The State party has not given any justification for the length of the detention. The Committee concludes that the facts before it disclose a violation of article 9, paragraph 3.

8.5 The Committee notes the author's allegations that for the duration of his house arrest the author's father was denied access to a defence lawyer, and that he had no opportunity to challenge the lawfulness of his detention. The State party did not respond to those allegations. The Committee recalls that in accordance with article 9, paragraph 4, judicial review of the lawfulness of detention must provide for the possibility of ordering the release of the detainee if

his or her detention is declared incompatible with the provisions of the Covenant, in particular those of article 9, paragraph 1. In the case in question, the author's father was under house arrest for almost six years without any specific grounds relating to the case file, and without the possibility of judicial review concerning the substantive issue of whether his detention was compatible with the Covenant. Accordingly, and in the absence of sufficient explanations by the State party, the Committee concludes that there is a violation of article 9, paragraph 4, of the Covenant.

8.6 In the light of the above findings, the Committee does not consider it necessary to deal with the complaint in respect of article 12 of the Covenant.

8.7 As far as the alleged violation of article 14 of the Covenant is concerned, the Committee recalls its general comment No. 13, in which it states that, while the Covenant does not prohibit the trial of civilians in military courts, nevertheless such trials should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. It is incumbent on a State party that does try civilians before military courts to justify the practice. The Committee considers that the State party must demonstrate, with regard to the specific class of individuals at issue, that the regular civilian courts are unable to undertake the trials, that other alternative forms of special or high-security civilian courts are inadequate to the task and that recourse to military courts is unavoidable. The State party must further demonstrate how military courts ensure the full protection of the rights of the accused pursuant to article 14. In the present case the State party has not shown why recourse to a military court was required. In commenting on the gravity of the charges against Abbassi Madani it has not indicated why the ordinary civilian courts or other alternative forms of civilian court were inadequate to the task of trying him. Nor does the mere invocation of domestic legal provisions for the trial by military court of certain categories of serious offences constitute an argument under the Covenant in support of recourse to such tribunals. The State party's failure to demonstrate the need to rely on a military court in this case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of article 14. The Committee concludes that the trial and sentence of Abbassi Madani by a military tribunal discloses a violation of article 14 of the Covenant.

8.8 Concerning the alleged violation of article 19, the Committee recalls that freedom of information and freedom of expression are the cornerstones of any free and democratic society. Such societies in essence allow their citizens to seek information regarding ways of replacing, if necessary, the political system or parties in power, and to criticize or judge their Governments openly and publicly without fear of reprisal or repression by them, subject to the restrictions laid down in article 19, paragraph 3, of the Covenant. With regard to the allegations that Abbassi Madani was arrested and charged for political reasons, the Committee notes that it does not have sufficient information to conclude that there was a violation of article 19 in respect of the arrest and charges brought against him in 1991. At the same time, although the State party has indicated that the author is enjoying all his rights and has been resident abroad since that time, and notwithstanding the author's allegations in this regard, the Committee notes that it does not have sufficient information to conclude that there was a violation of article 19 in respect of the alleged ban imposed on Abbassi Madani from making statements or expressing an opinion during his house arrest.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose violations by the State party of articles 9 and 14 of the Covenant.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide an effective remedy for Abbassi Madani. The State party is under an obligation to take the necessary steps to ensure that the author obtains an appropriate remedy, including compensation. In addition, the State party is required to take steps to prevent further occurrences of such violations in the future.

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

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

Notes

[1] FIS was disbanded in 1992, as the author confirms (see paragraph 2.5).

[2] Exact date not provided.

[3] Conditions not explained.

[4] Exact date not provided.

[5] Opinion No. 28/2001 of the Working Group on Arbitrary Detention.

[6] Article 9, Act No. 89-05 of 25 April 1989: "Additional penalties are: (1) house arrest; (2) banishment order; (3) forfeiture of certain rights; (4) partial confiscation of property; (5) dissolution of a legal person; (6) publication of the sentence."

[7] Article 11, Act No. 89-05 of 25 April 1989: "House arrest is the obligation on a convicted person to remain in a particular geographical area, specified in a judgement. Its duration may not exceed five years. House arrest shall take effect from the day the prisoner completes his or her main sentence or upon his or her release. The conviction shall be communicated to the Ministry of the Interior, which may issue temporary permits for travel within the country."

Ordinance No. 69-74 of 16 September 1969: "A person placed under house arrest who contravenes or avoids such a measure shall be liable to a term of imprisonment from three months to three years."

[8] Rule 96 (b), rules of procedure of the Human Rights Committee (CCPR/C/3/Rev.8).

[9] See for example communication No. 699/1996, *Maleki v. Italy*, Views adopted on 15 July 1999, submitted by Kambiz Maleki on behalf of his father, Ali Maleki.

[10] Communication No. 132/1982, *Monja Jaona v. Madagascar*, Views adopted on 1 April 1985, paras. 13-14; and communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 15 March 2005, para. 5.4.

[11] Communication No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002, para. 8.2; and communication No. 1014/2001, *Baban v. Australia*, Views adopted on 6 August 2003, para. 7.2.

APPENDIX

Dissenting opinion by Committee member Mr. Abdelfattah Amor

In this matter, the Committee, after affirming, in a style and language that it does not customarily employ, that:

> *"The State party's failure to demonstrate the need to rely on a military court in this case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of article 14."*

concludes that:

> *"the trial and sentence of Abbassi Madani by a military tribunal discloses a violation of article 14 of the Covenant"*.

I cannot associate myself with the approach followed and the conclusion underlying this paragraph 8.7 of the Committee's Views. I believe that they exceed the scope of article 14 and deviate from the general comment on this article.

Article 14 is essentially concerned with guarantees and procedures for the equitable, independent and impartial administration of justice. It is exclusively in that context that the body which administers justice is cited, and then only in the first paragraph of the article: "All persons shall be equal before the courts and tribunals. … everyone shall be entitled to a fair and public hearing by a competent, independent and impartial *tribunal* established by law."

Article 14 is not concerned with the nature of the tribunals. It contains nothing which prohibits, or expresses a preference for, any particular type of tribunal. The only tribunals which may not be covered by article 14 are those which have nothing to do with the safeguards and procedures which it provides. No category of tribunal is inherently ruled out.

In order to clarify the intent and the scope of article 14, in 1984, at its twenty-first session, the Committee adopted general comment No. 13. As of the present time, namely, the end of the eighty-ninth session, at which the present Views were adopted, this comment has never been amended or updated. Paragraph 4 of the general comment is concerned, in particular, with military courts. The general thrust of this paragraph may be summarized as follows:

- The Covenant does not prohibit the setting up of military tribunals;
- Only in exceptional circumstances may civilians be tried by military courts and such trials must be held in conditions which fully respect all the guarantees set out in article 14;
- Derogations from the normal procedures required under article 14 in times of public emergency, as contemplated by article 4 of the Covenant, may not go beyond the extent strictly required by the exigencies of the situation.

In other words, and taking due account of article 14, the Committee's attention should be focused on guarantees of an equitable, impartial and independent administration of justice. It is in this context, and this context alone, that the question of the legal body - the courts - can be taken up or apprehended.

The military tribunal which tried Abbassi Madani was set up under Algerian law. Its statutory jurisdiction covers military offences, as is the case in all countries which have military forces. In general, this jurisdiction also extends to non-military co-defendants or accomplices where military offences have been committed. In certain States it covers all matters in which members of the military are implicated.

In Algeria, in addition to their statutory jurisdiction, military courts have assigned jurisdiction, specifically established by law. Thus, Ordinance No. 71-28 of 22 April 1971 vests in military tribunals the authority to try offences against State security committed by civilians which incur penalties of more than six years' imprisonment. In other words, their powers go beyond the normal competence of military courts. This represents an exception to the general rules regarding the jurisdiction of military courts.

The Committee has always believed that, while the Convention may not actually prohibit the formation of military courts, these courts should only be used for the judgement of civilians in very exceptional circumstances and such trials should be conducted in conditions which fully respect all the guarantees stipulated in article 14. *Is it really necessary to go a step further and to impose yet more conditions, requiring the State party to demonstrate (where civilians are being tried in military courts) that "the ordinary civil courts are not in a position to take such steps and that alternative forms of special civil tribunals or high security courts have not been adapted to perform this task"?*

This new condition imposed by the Committee raises some difficult legal issues. It certainly does not fall within the scope of article 14 and is not covered by general comment No. 13. Submitting the State to conditions which have not been stipulated from the outset is not an acceptable way of applying the standards stipulated by or implicit in the Covenant. At the same time, this condition is questionable. It is questionable in that, save in the event of an arbitrary judgement or obvious error, *the Committee may not replace the State in order to adjudicate on the merits of alternatives to military courts*. By which reasoning is it possible for the Committee to adjudicate on the options before the State for special civil tribunals, high security tribunals or military tribunals? In accordance with which criteria can the Committee determine whether or not the special civil courts or high security courts have been suitably modified to try civilians prosecuted for breaching State security? *The only possible yardsticks for the Committee, regardless which courts are under consideration, are and shall remain the procedures and guarantees provided in article 14*. Only here is the Committee on firm ground, protected from shifting sands and unforeseen vicissitudes.

Nor can the Committee arrogate to itself the role of adjudicating on the exceptional nature of circumstances or determining whether or not there is a public emergency. The Committee is not the right authority to be passing judgement on situations over the extent or severity of which it has no control. In this context it can only exercise a minimal monitoring function, looking out for arbitrary judgements and obvious errors. When states of emergency are declared on the basis of article 4 of the Covenant, the Committee must make sure that the declaration has complied with the rules and that any derogations from the provisions of article 14 remain within the

bounds strictly required by the exigencies of the situation and respect the other conditions stipulated in that article. It is most regrettable that, in its analysis, the Committee has cast aside all these considerations. In proceeding as it has, *the Committee has ventured into uncharted waters*.

Another fundamental issue, in addition to that of the nature of the trial body, has to do with respect for the guarantees and procedures stipulated in article 14 and clarified in general comment No. 13. When, in exceptional circumstances, civilians are tried by military courts, it is essential that the proceedings should take place in conditions conducive to an equitable, impartial and independent administration of justice. *This is a key issue, which the Committee has skirted around, when it should have made it the focus of its attention and the goal of its endeavours*. In this context, a number of questions have remained unanswered.

Raising the issue of the composition of the military court, the author states that it is made up of military officers who report directly to the Ministry of Defence, that "investigating judge and judges making up the court hearing the case are officers appointed by the Ministry of Defence" and that the president of the court, although himself a civilian judge, is also appointed by the Ministry of National Defence. In its response, on which the author makes no comment, the Algerian Government states that "the military tribunal is composed of three judges appointed by an order issued jointly by the Minister of Justice, Garde des Sceaux, and the Minister of Defence. It is presided over by a professional judge who sits in the ordinary-law courts, is subject by regulation to the Act on the status of the judiciary, and whose professional career and discipline are overseen by the Supreme Council of Justice".

In another context, the author states that "it is the Minister of Defence who initiates proceedings, even, as in the current instance, against the wishes of the head of Government" and he explains that this minister also has the power to interpret legislation relating to the competence of the military tribunal. Without commenting on these allegations, the State party makes reference, in general terms, to the application of the Criminal Code, the Code of Criminal Procedure and the Code of Military Justice.

The Committee should have given due attention to these issues, just as it should have dwelt on a number of other points, such as the reasons for Mr. Madani's arrest, which are viewed in directly opposite ways by the author and by the State party - without any supporting facts or documents - and have submitted all elements of the case file to a more rigorous examination.

In another context, the author states that "minimum standards of fairness were not observed. Abbassi Madani was sentenced by an incompetent, manifestly partial and unfair tribunal". The State party asserts the opposite, without eliciting further comments from the author. It states that the military court was created by law, that its competence was not challenged before the trial judge and was only called into question the first time with the Supreme Court, which rejected the challenge. The State also indicates that the charges laid against Mr. Madani were notified to him at the time of his arrest, that he had the assistance of counsel during the investigation and the trial, that he availed himself of the remedies provided under law, that the trial, contrary to the allegations by the author, was public, that Mr. Madani's refusal to appear was dealt with in compliance with the procedures provided by law and that he was kept abreast of all the procedural formalities relating to the trial hearings and reports were drawn up of all such formalities.

All these arguments should similarly have been considered by the Committee and its decision to reject them on the grounds that the State has failed to demonstrate that it has developed acceptable alternatives to military courts was not the soundest decision in legal terms.

Attention is also drawn, in respect of the issue of the impartiality of justice, to the general rule that it is up to the appeal courts of States parties to the Covenant to consider the facts and the evidence in a particular case and that it is not, in principle, the business of the Committee to censure the conduct of hearings by a judge except where it might have been established that this was tantamount to a miscarriage of justice or that the judge had manifestly breached his obligation of the impartiality (see the Committee's decision in matter No. 541/1993: *Simms v. Jamaica*, April 1995, paragraph 6.2).

Paragraph 8.7 of the Committee's Views leaves certain essential questions unanswered. I feel duty-bound to point out that, on the one hand, the Committee has exceeded its remit in insisting that the State justify its choice of court from among a number of options available to it and, on the other, that it has not done what it was called upon to do and which was incumbent upon it with regard to determining whether or not the guarantees of full protection of the rights of the accused were duly upheld.

(*Signed*): Abdelfattah Amor

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

Individual opinion of Committee member Mr. Ahmed T. Khalil

As I have indicated in the plenary meeting of the Committee in New York on 28 March 2007, I cannot accept the views spelled out in paragraph 8.7 of the communication 1172/2003 *Abbassi Madani v. Algeria* which finds the State party in violation of article 14 of the Covenant. The reasons for taking this position on my part are based on the following considerations.

It is quite clear that the Covenant does not prohibit the establishment of military courts. Furthermore, paragraph 4 of general comment No. 13 on article 14, while clearly stating that the trial of civilians by such courts should be very exceptional, stresses, I believe more importantly, that the trying of civilians by such courts should take place under conditions which genuinely afford the full guarantees stipulated in article 14.

In that light the issue before the Committee in the case at hand is whether those guarantees were duly and fully respected. In other words the concern of the Committee, as I see it, is to ascertain whether the trial of Mr. Abbassi Madani meets the fundamental guarantees of equitable, impartial and independent administration of justice.

The author claims that the minimum standards of fairness were not observed and that Mr. Abbassi Madani was sentenced by an incompetent, manifestly partial and unfair trial.

For its part the State party informs that Mr. Abbassi Madani was prosecuted and tried by a military tribunal whose organization and competence are laid down in Ordinance No. 71-28 of April 1971 and that, contrary to the allegations by the author, a military tribunal is competent to try the offences of which Mr. Abbassi Madani was accused. The State party also points out that the competence of the military tribunal was not challenged by Mr. Abbassi Madani before the trial judges. It was called into question for the first time with the Supreme Court which rejected the challenge.

In addition the State party indicated inter alia that upon his arrest Mr. Abbassi Madani was informed by the investigating judge of the charges against him, that he was assisted during the investigation and trial and in the Supreme Court by a large number of lawyers and that Mr. Abbassi Madani has availed himself of the domestic remedies under the law, etc. It should be noted that the observations of the State party cited above did not elicit any new comments from the author.

It seems quite clear that all these questions on the part of the author as well as on that of the State party should have received the primary consideration of the Committee in its endeavour to formulate its views in respect of article 14 in the light of the guarantees spelled out therein.

Unfortunately, as it appears from paragraph 8.7 of the communication, instead of giving serious consideration to these fundamental issues the Committee has chosen to claim that in trying civilians before military courts States parties must demonstrate that the regular civilian courts are unable to undertake the trials, i.e. a condition which I believe does not constitute part of the guarantees stipulated in article 14. The Committee found that in the present case, the failure by the State party to meet this new condition is sufficient by itself to justify a finding of a violation of article 14.

Furthermore the Committee, in the wording of paragraph 8.7, came to the conclusion that the State party's failure to demonstrate the need to rely on a military court in the case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of article 14. It seems to me that this last contention by the Committee could be read to mean that we cannot totally exclude the possibility that had the Committee chosen, as it should have done, to examine the question of guarantees it may conceivably have found that in fact the military trial in question did meet the guarantees stipulated by article 14 of the Covenant.

For all those reasons, I find myself unable to subscribe to the views expressed by the Committee in paragraph 8.7 of the communication.

(*Signed*): Ahmed T. Khalil

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

N. Communication No. 1173/2003, *Benhadj v. Algeria**
(Views adopted on 20 July 2007, Ninetieth session)

Submitted by:	Mr. Abdelhamid Benhadj (represented by counsel Mr. Rachid Mesli)
Alleged victim:	Ali Benhadj (the author's brother)
State party:	Algeria
Date of communication:	31 March 2003 (initial communication)
Subject matter:	Arbitrary detention
Procedural issues:	Power of attorney
Substantive issues:	The right to liberty and security of person; arbitrary arrest and detention; the right to be treated with humanity and with respect for the inherent dignity of the human person; the right to a fair hearing; a competent, independent and impartial tribunal; the right to freedom of expression
Articles of the Covenant:	7, 9, 10, 12, 14 and 19
Articles of the Optional Protocol:	-

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

Meeting on 20 July 2007,

Having concluded its consideration of communication No. 1173/2003, submitted to the Human Rights Committee by Abdelhamid Benhadj on behalf of Ali Benhadj (his brother) under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

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

1. The author of the communication, dated 31 March 2003, is Abdelhamid Benhadj, who is submitting the communication on behalf of his brother, Ali Benhadj, born on 16 December in 1956 in Tunis. The author claims that his brother is a victim of violations by Algeria of articles 7, 9, 10, 12, 14 and 19 of the Covenant. He is represented by Mr. Rachid Mesli. The Covenant and the Optional Protocol to the Covenant entered into force for the State party on 12 December 1989.

The facts as submitted by the author

2.1 Ali Benhadj is one of the founding members and, at the time of submission of the communication, the Vice-President of the Islamic Salvation Front (FIS), an Algerian political party registered by the State party on 12 September 1989, following the introduction of political pluralism. In the context of upcoming elections and following the victory of the Islamic Salvation Front in the 1990 municipal elections, the Algerian Government adopted a new electoral law which was unanimously condemned by all Algerian opposition parties. In protest against this law, the Islamic Salvation Front organized a general strike, accompanied by peaceful sit-ins in public places. After several days of strikes and peaceful marches, the parties agreed to end the protests in exchange for a prompt revision of the electoral law. However, on 3 June 1991, the head of Government was asked to resign and public places were stormed by the Algerian army.

2.2 On 29 June 1991, Ali Benhadj was arrested by military security officers at the State television headquarters, where he had gone to present the position of his party. On 2 July 1991, he was brought before the military prosecutor of Blida and charged with "crimes against State security" and "jeopardizing the proper functioning of the national economy". In particular, he was accused of having organized a strike, which the prosecutor characterized as subversive, since it had allegedly done grave damage to the national economy. Ali Benhadj's counsel challenged the validity of the proceedings before the military tribunal, as well as the lawfulness of the investigation led by a military judge subordinate to the prosecuting authority. According to the defence,[1] the tribunal had been established to remove the leaders of the main opposition party from the political scene and did not have jurisdiction to judge the case, being authorized only to deal with offences against the Criminal Code and the Code of Military Justice committed by military personnel in the performance of their duties or by civilians acting as accomplices to an offence, the main perpetrator of which is a serviceman. The jurisdiction of military tribunals to try political offences, pursuant to a law of 1963, had been de facto abolished with the establishment, in 1971, of a special State security court to deal with this type of offence. That court had been dissolved after the introduction of political pluralism in 1989; the general rules on jurisdiction should, therefore, apply.

2.3 The Islamic Salvation Front won the first round of parliamentary elections on 26 December 1991, and the day after the official results were announced, the military prosecutor was supposed to inform the defence lawyers of his intention to discontinue proceedings against Ali Benhadj. However, on 12 January 1992, the President of the Republic "resigned", a state of emergency was declared, the parliamentary elections cancelled, and "administrative internment" camps were installed in the south of Algeria. On 15 July 1992, the

military court of Blida sentenced Ali Benhadj, in his absence, to 12 years' imprisonment. The appeal against this decision was rejected by the Supreme Court on 15 February 1993, whereupon the sentence became final.

2.4 At the time of submission of the communication, Mr. Benhadj was still in prison. All his co-defendants were released after serving part of their sentences. During his time in detention, he went through different forms of confinement and was treated differently according to whether he was considered by the military authorities to be a political interlocutor or not. Thus, from July 1991 to April 1993, he was detained in the military prison of Blida, where he was subjected to physical violence, mainly because he had asked to be treated in conformity with the law and the prison regulations, and also because he had rejected certain political overtures by the military authorities. He was subsequently transferred to the civilian prison of Tizi-Ouzou, where he was held in solitary confinement on death row for several months. He was transferred back to Blida military prison, where he was held until political negotiations broke down, and he was transferred, on 1 February 1995, to a military barracks in the far south of Algeria. There, he was held in incommunicado detention for four months and six days and placed in solitary confinement in a tiny cell without ventilation or sanitary facilities. Following this period of detention, he was transferred to a State residence normally reserved for dignitaries visiting Algeria; new negotiations had begun between a "national commission" chaired by General Liamine Zeroual and the leaders of the Islamic Salvation Front.

2.5 On the day on which these negotiations broke down - a failure, which General Zeroual attributed to Mr. Benhadj - the latter was again transferred to a secret place of detention, probably a military security barracks, in the far south of Algeria. He was kept in complete isolation in a tiny cell[2] with no opening onto the outside, except for a hatch in the ceiling, and there he lost all sense of time. He was locked up for two years. He was permitted to write to all public officials (the President, Head of the Government, the Minister of Justice, the military authorities) and was assured that his letters would reach the addressees. He went on numerous hunger strikes, which were brutally suppressed by his guards. Neither his family, nor *a fortiori* his lawyers, were able to visit him.

2.6 In the autumn of 1997, he was again transferred to Blida military prison, where he was held incommunicado and subjected to ill-treatment for almost two years. Thus, over a period of four years, his family did not know where he was being detained and whether he was still alive. Only in 1999, was his family informed of his place of detention and authorized to visit him. In January 2001, his family noted that his conditions of detention had again deteriorated, after the letters that Ali Benhadj had sent to the President of the Republic. On 16 January 2001, Mr. Mesli referred the case of Mr. Benhadj to the United Nations Working Group on Arbitrary Detention. On 3 December 2001, the Working Group found that the deprivation of his liberty was arbitrary and in contravention of articles 9 and 14 of the Covenant. The Working Group requested the State party to "take the necessary measures to remedy the situation and to bring it in conformity with the norms and principles set forth in the Universal Declaration of Human Rights and the Covenant".[3] No such measures were taken by the State party.

The complaint

3.1 The author maintains that the facts such as he has presented them show that articles 7, 9, 10, 12, 14 and 19 of the Covenant have been breached with regard to his brother Ali Benhadj.

3.2 As regards the allegations concerning articles 9, 12 and 19 of the Covenant, the indictment of Ali Benhadj for crimes against State security is political in nature: no specific acts which could be classified as offences were actually proven by the prosecution. Mr. Benhadj was accused of having initiated a political strike which the military authorities, and not the civil judicial authorities, described as subversive. That strike was brutally suppressed by the Algerian army, despite its peaceful nature and the guarantees given by the Head of Government. Even assuming that an act of political protest could be described as a criminal offence, which is not the case under domestic legislation, the protest came to an end once an agreement between the Head of Government and the party co-chaired by Ali Benhadj had been reached. The sole aim of his arrest by the military security services at the State television headquarters, where he had gone to explain his position, and of his indictment before a military court, was clearly to remove one of the main leaders of an opposition party from the Algerian political scene.

3.3 With regard to the allegations concerning article 14, the minimum standards of justice have not been observed. Ali Benhadj was convicted by an incompetent, partial and unfair court on purely political grounds. No public hearing was held. At the beginning of the trial, his counsel requested that the trial be held in public and that the hearings be open to all. The court turned down the request without providing a legal statement of reasons or explicitly ordering an in-camera hearing. Some of the defence lawyers were denied access to the courtroom by military personnel who blocked all the access routes.[4] From the beginning of the trial, Ali Benhadj was prevented from speaking by the military prosecutor who, in violation of the law, controlled the conduct of the proceedings and imposed his decisions on the president of the court. The trial of Ali Benhadj was conducted in his absence, following his forcible expulsion from the courtroom, by order of the military prosecutor, for having protested against the conditions in which he was being held.

3.4 Lastly, the military court, which had no jurisdiction, could be neither fair nor impartial. The court depended on the Ministry of Defence and not on the Ministry of Justice, and was composed of officers who depended hierarchically on that Ministry (the investigating judge, magistrates and the president of the court were appointed by the Minister of Defence). It is the Minister of Defence who initiates legal proceedings and has the power to interpret the law on the jurisdiction of military courts. The trials and sentence by the court, and the deprivation of liberty constitute a breach of article 14.

State party's submission on the admissibility and merits of the communication

4.1 On 12 November 2003, the State party recalled that Ali Benhadj had been arrested in June 1991 following a call for mass violence issued in part by Ali Benhadj via a directive that he had signed. That call followed a failed attempted uprising which he had helped to organize with a view to establishing a theocracy by violent means. In view of this exceptional situation, and in order to ensure the proper administration of justice, he was brought before a military court, which, contrary to the author's allegations, had jurisdiction under Algerian law to hear the charges against Ali Benhadj. Neither article 14 of the Covenant, nor the Committee's general comment on that article, nor other international norms maintain that a trial before a court other than an ordinary court necessarily constitutes a violation of the right to a fair trial. The Committee has repeated this point when considering communications concerning exceptional courts and military tribunals.

4.2 The State party submits that Ali Benhadj is no longer in detention, since he was released on 2 July 2003. His freedom of movement is no longer restricted in any way and he is not under house arrest as the author claims.

4.3 Ali Benhadj was prosecuted and tried by a military court, the organization and jurisdiction of which are specified in Decree No. 71-28 of 22 April 1971 pertaining to the Code of Military Justice. Contrary to the allegations, a military court is composed of three judges appointed by a joint order of the Minister of Justice and the Minister of National Defence. It is presided over by a professional judge of the ordinary courts, who is bound by the law on the status of the judiciary and whose career and conduct are overseen by the Supreme Council of the Judiciary, a constitutional body presided over by the Head of State. Decisions of a military court can be appealed before the Supreme Court on the grounds and under the conditions laid down in articles 495 et seq. of the Code of Criminal Procedure. As regards jurisdiction, in addition to special military offences, the military courts can deal with offences against State security, as defined by the Criminal Code, for which the penalty is over five years' imprisonment. In that case, the military courts can try anyone who commits such an offence, regardless of the person's military or other status. It is in accordance with, and on the basis of, this legislation that Ali Benhadj was prosecuted and tried by the military court of Blida, the jurisdiction of which is based on article 25 of the above-mentioned decree. The State party points out that the question of lack of jurisdiction of the military court was not raised before the trial judges. It was raised for the first time before the Supreme Court and was dismissed.

4.4 Ali Benhadj enjoyed all the guarantees afforded to him by the law and international instruments. As soon as he was arrested, the investigating judge informed him of the charges against him. He was assisted by 19 lawyers during the investigation and trial stages, and by eight lawyers before the Supreme Court. He utilized the available legal remedies, since he filed an appeal with the Supreme Court. The latter rejected the appeal.

4.5 The allegation that the hearing was not held in public is inaccurate and is designed to make it seem as if he was not allowed to attend the trial or to defend himself against the charges brought against him. In fact, from the very beginning of the trial, he refused to appear before the military court, even though he and his lawyers were summoned regularly. Noting his absence at the trial, the president of the court issued him with a subpoena, in accordance with article 294 of the Code of Criminal Procedure and article 142 of the Code of Military Justice. In view of his refusal to appear, a record of evidence was prepared and the president of the court then decided to proceed with the hearing in conformity with the above-mentioned provisions. Nevertheless, the accused was regularly informed of all procedural decisions concerning the hearing and minutes of the hearing were taken. Trying an accused in his absence is contrary neither to national law nor to the provisions of the Covenant: although article 14 provides that every person charged with an offence has the right to be present during his or her trial, it does not state that justice cannot be rendered when the defendant, on his or her own initiative, deliberately refuses to appear at the court hearings. The Code of Criminal Procedure and the Code of Military Justice authorize the courts to proceed with hearings when a defendant persistently refuses to appear. This legal way of proceeding is justified by the fact that justice must be done under all circumstances and the negative behaviour of the accused must not delay the proceedings indefinitely.

Comments by the author on the State party's observations

5.1 On 19 May 2004, Mr. Mesli produced a power of attorney, dated 13 March 2004, in the name of Mr. Ali Benhadj. With regard to the admissibility of the communication, he points out that no objections were raised by the State party.

5.2 Ali Benhadj was released on 2 July 2003. The day before his release, he was asked to renounce all activities of any kind. He refused to sign a document along those lines which was intended to make him renounce his civil and political rights. The day after his release, he was informed, through a joint official press release by the military authorities and the Ministry of the Interior, that he was prohibited from exercising his most basic rights,[5] on the pretext that such prohibitions were part and parcel of his main sentence. Ali Benhadj was questioned on several occasions, each time with the aim of prohibiting him from undertaking any activities. He continues to be threatened and harassed.

5.3 The State party limits itself to reiterating that the proceedings before the military court were lawful and that the court had jurisdiction to hear political offences. It also claims that the issue of lack of jurisdiction of the military court was not raised by the defendants before the court. Mr. Mesli points out that the issue of jurisdiction was the subject of a petition to declare the military court incompetent addressed to the indictments chamber presided over by the president of the military court. The petition was rejected and repeated *in limine litis* through the filing of written pleadings at the beginning of the trial. The petition was not examined by the president of the military court, who said that it would be considered in conjunction with the merits of the case. Following the physical abuse suffered by Ali Benhadj, in the presence of his lawyers, counsel for the defence withdrew in protest. With regard to the composition of the military court, although the court is indeed presided over by a professional ordinary judge, the latter is appointed by a joint decision of the Minister of Defence and the Minister of Justice. The court also comprises two military assistant judges who are neither qualified nor competent in judicial matters and who are appointed by, and subordinate to, the Minister of National Defence alone. These two assistants each have a vote when decisions are taken by a majority vote. During the reading of the judgement therefore, the military court of Blida was composed of the presiding judge and two members of the armed forces in active service, both subject to the orders of their superior, the Minister of National Defence. It was clear to counsel that in the aftermath of a military coup d'état, and in the context of the declaration of the state of emergency on 12 February 1992, the military court of Blida was neither independent nor impartial.

5.4 If the Committee does not consider that a trial before a military court necessarily entails a violation of the right to a fair trial, this is to be understood in the context of an independent system of justice based on effective separation of powers in a democratic society. With regard to trials of civilians before military courts, the Committee states, in its general comment No. 13 (para. 4), that "in some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights". The Committee also states that the right to be tried by an independent and impartial tribunal is an absolute right that

may suffer no exception.[6] On the public nature of the trial, counsel has submitted a statement issued by the 19 defence lawyers on 18 July 1992, at the end of the trial, which lists a number of violations.

5.5 Mr. Mesli points out that the State party does not comment on the ill-treatment of Ali Benhadj during his detention, on his detention incommunicado over a period of four years, or on his detention in the military barracks of the intelligence and security department during at least two years.[7] The treatment to which Ali Benhadj was subjected constitutes a violation of articles 7 and 10 of the Covenant.

Additional observations by the State party

6.1 On 27 September 2004, the State party submitted that the power of attorney which Ali Benhadj gave to Mr. Mesli is not authenticated and that it can therefore not be considered. The Committee has defined the conditions of admissibility of communications which must be submitted either by the victim himself or, when this is not possible, by a third person, who must prove that he is authorized to act on the victim's behalf. This condition is not met in the present case, since, in the absence of authentication of the power of attorney presented by Mr. Mesli, there is no evidence that Ali Benhadj gave Mr. Mesli the authority to act on his behalf. Therefore, the Committee should take note of the lack of authentication of the power of attorney and reject the communication.

6.2 On the merits, and with regard to the conduct of the trial, the State party considers that it has provided sufficient information for a decision to be taken. It requests the Committee to give due consideration to its previous submissions. With regard to the "new violations" that Ali Benhadj allegedly suffered, he was sentenced to imprisonment and was subject to a number of prohibitions, which are called additional penalties to the main penalty and are provided for under article 4, paragraph 3, and article 6 of the Criminal Code. These additional penalties do not have to be read out and are imposed ipso jure on the convicted person; thus, they do not violate the fundamental rights of Ali Benhadj. The allegations of ill-treatment of Ali Benhadj during his detention are not substantiated.

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2 The Committee notes that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

7.3 On the issue of the validity of the power of attorney presented by Mr. Mesli, the Committee recalls that "normally, the communication should be submitted by the individual personally or by that individual's representative; a communication submitted on behalf of an

alleged victim may, however, be accepted when it appears that the individual in question is unable to submit the communication personally".[8] In the present case, Mr. Mesli indicated that Ali Benhadj was in detention on the date of the initial submission. The Committee therefore considers that the power of attorney presented by Mr. Mesli on behalf of the brother of Ali Benhadj is sufficient for the submission of the communication.[9] In addition, Mr. Mesli has since provided a power of attorney signed by Ali Benhadj, who explicitly and clearly authorizes Mr. Mesli to represent him before the Committee. It therefore concludes that the communication has been properly submitted to the Committee.

7.4 With regard to the claim under article 12 of the Covenant, the Committee considers that the facts described by the author fail to demonstrate how they infringe the right to move freely within the State party's territory, and decides that the evidence is not sufficient to substantiate his claim for purposes of admissibility. With regard to the claims under articles 7, 9, 10, 12, 14 and 19 of the Covenant, the Committee considers that in the present case, the evidence provided by the author is sufficient to substantiate these claims for purposes of admissibility. Thus, the Committee concludes that the communication is admissible with regard to the above-mentioned articles.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information submitted by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes that Ali Benhadj was arrested in 1991 and sentenced by a military court on 15 July 1992 to 12 years of imprisonment, for jeopardizing State security and the proper functioning of the national economy. He was released on 2 July 2003. The Committee recalls the allegation that Ali Benhadj was detained in a secret location for four months and six days, beginning on 1 February 1995, and for four additional years up until March 1999. During that time, his family did not know where he was being detained and whether he was still alive. The Committee notes that the State party has not challenged the allegations of the author on the incommunicado detention of Ali Benhadj.

8.3 The Committee recalls[10] that the burden of proof does not lie solely with the author of a communication, especially as the author and the State party do not always have equal access to the evidence and often the State party alone has access to relevant information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to transmit to the Committee all information at its disposal. In cases where the author has communicated detailed allegations to the Committee and where further clarification depends entirely on information available to the State party alone, the Committee may consider the allegations substantiated, if the State party does not provide evidence and satisfactory explanations to refute them.

8.4 The Committee takes note of the author's allegation that, during several years of incommunicado detention, Ali Benhadj was denied access to counsel and was unable to challenge the lawfulness of his detention. The State party has not replied to these allegations.

The Committee recalls that, in accordance with article 9, paragraph 4, judicial review of the lawfulness of detention must include the possibility of ordering the release of a detainee, if his detention is declared incompatible with the provisions of the Covenant, in particular those of article 9, paragraph 1. In the present case, Ali Benhadj was detained in several prisons and held in secret places of detention, in three instances, for over four years, without the possibility of obtaining a judicial review of the compatibility of his detention with the Covenant. Consequently, and in the absence of sufficient explanations from the State party, the Committee concludes that there has been a violation of article 9, paragraph 4, of the Covenant.

8.5 With regard to the alleged violation of article 10 of the Covenant, the Committee notes that, according to the author, Ali Benhadj was subjected to physical abuse on several occasions during his detention and that he was held on death row for several months. Moreover, according to the author, during the first period of incommunicado detention he was kept in solitary confinement in a tiny cell without ventilation or any sanitary facilities, and subsequently, he was kept in a cell that was too small to allow him to stand or to lie down. The Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; they must be treated in accordance, inter alia, with the Standard Minimum Rules for the Treatment of Prisoners.[11] In the absence of concrete information from the State party on the conditions of detention of Ali Benhadj, the Committee concludes that the rights set forth in article 10, paragraph 1, of the Covenant, were violated. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary to give separate consideration to the claims arising under article 7. The Committee also considers that it is not necessary to give separate consideration to the other claims arising under article 9 of the Covenant.

8.6 With regard to the alleged violation of article 14 of the Covenant, the author has argued that the composition of the court violated the standards of justice; that Ali Benhadj's trial was not held in public; that the court proffered no legal justification for excluding the general public; that an in-camera trial was not ordered; and lastly, that some of his lawyers were not allowed to appear before the court.

8.7 With regard to the jurisdiction of the court to hear the case, the State party points out that military courts can deal with offences against State security when the penalty exceeds five years of imprisonment, in accordance with article 25 of Decree No. 71-28 of 22 April 1971. The Committee notes that Ali Benhadj was represented before the military court and that he lodged an appeal with the Supreme Court, which upheld the military court's decision. With regard to the fact that the trial was not public, the Committee notes that the State party did not respond to the author's allegations other than by stating that the allegation was "completely inaccurate". Finally, as regards the allegation that some of the lawyers were unable to attend the trial, the State party submitted that Ali Benhadj and his co-defendants were assisted by 19 lawyers during the investigation and trial, and by 8 lawyers before the Supreme Court.

8.8 With regard to the alleged violation of article 14 of the Covenant, the Committee recalls its general comment No. 13, in which it states that, while the Covenant does not prohibit the trial of civilians in military courts, nevertheless such trials should be very exceptional and take place

under conditions which genuinely afford the full guarantees stipulated in article 14. It is incumbent on a State party that does try civilians before military courts to justify the practice. The Committee considers that the State party must demonstrate, with regard to the specific class of individuals at issue, that the regular civilian courts are unable to undertake the trials, that other alternative forms of special or high-security civilian courts are inadequate to the task and that recourse to military courts ensures the full protection of the rights of the accused pursuant to article 14. The State party must further demonstrate how military courts ensure the full protection of the rights of the accused pursuant to article 14. In the present case the State party has not shown why recourse to a military court was required. In commenting on the gravity of the charges against Mr. Benhadj, it has not indicated why the ordinary civilian courts or other alternative forms of civilian court were inadequate to the task of trying him. Nor does the mere invocation of domestic legal provisions for the trial by military court of certain categories of serious offences constitute an argument under the Covenant in support of recourse to such tribunals. The State party's failure to demonstrate the need to rely on a military court in this case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of article 14. The Committee concludes that the trial and sentence of Mr. Benhadj by a military court discloses a violation of article 14 of the Covenant.

8.9 With regard to the fact that Ali Benhadj was sentenced, in his absence, to 12 years' imprisonment, in proceedings which he refused to attend, the Committee recalls that the guarantees under article 14 cannot be interpreted as necessarily excluding judgements pronounced in the absence of the defendant, whatever the reasons for the defendant's absence may be. Judgements pronounced in the defendant's absence may be acceptable in certain circumstances (for example, when a defendant, who has been given sufficient advanced notice of a hearing, refuses to attend) in the interest of justice.[12] In the present case, the Committee notes that, according to the State party, Ali Benhadj and his lawyers were regularly summoned, that the court issued Ali Benhadj with a subpoena, and that it was at this stage that the president of the court decided to proceed with the hearing. The Committee notes that the author has not responded to the State party's explanations, and concludes that the judgement rendered in the absence of Ali Benhadj does not point to a violation of article 14 of the Covenant.

8.10 With regard to the alleged violation of article 19, the Committee recalls that freedom of information and freedom of expression are the cornerstone of any free and democratic society. Such societies, in essence, authorize citizens to inform themselves about solutions for possible changes to the system or to the political parties in power, and to criticize or openly and publicly assess their Government without fear of intervention or repression on the Government's part, subject to certain restrictions set out in article 19, paragraph 3, of the Covenant. With regard to the allegations that Ali Benhadj's arrest and indictment were politically motivated, and that the restrictions imposed on him since his release are not provided for by law, the Committee notes that the evidence before it is not sufficient to conclude that article 19 has been violated.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it constitute violations by the State party of articles 9, 10 and 14 of the Covenant.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide Ali Benhadj with an effective remedy. The State party is under an obligation to take appropriate measures to ensure that the author obtains appropriate redress, including compensation for the distress suffered by his family and himself. The State party is also under an obligation to take measures to prevent similar violations from being repeated in the future.

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

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

Notes

[1] Counsel submitted the defence statement dated 18 July 1992, denouncing serious irregularities in the proceedings.

[2] It was too small to be able to stand up or lie down.

[3] Views No. 28/2001 of the Working Group on Arbitrary Detention.

[4] According to a defence statement, the defence lawyers were unable to communicate with Ali Benhadj before the hearing held on 18 July 1992, and "no legal document allows any civil or military authority to restrict access to a tribunal or a courtroom in which any person, be they an Algerian citizen or a foreigner, is on trial".

[5] For example, he is not allowed "to vote or to stand for election; to hold meetings; to found political, cultural, charitable or religious organizations; to join or participate in the activities of political parties, or any other civil, cultural, social, religious or other associations, whether as a member, a leader or a supporter". He is also prohibited from "participating in, speaking at, or expressing his views, in any capacity or by any means, in any public or private meeting and, more generally, from participating in any political, social, cultural, religious, national or local event, whatever the reason for it or the occasion".

[6] Counsel is quoting communication No. 263/1987, *González del Río v. Peru*, Views adopted on 28 October 1992.

[7] The length of incommunicado detention varies in the different submissions from counsel.

[8] Rule 96 (b), Rules of Procedure of the Human Rights Committee (CCPR/C/3/Rev.8).

[9] Communication No. 8/1977, *Weismann and Perdomo v. Uruguay*, Views adopted on 3 April 1980, para. 6.

[10] Communications Nos. 146/1983, *Baboeram Adhin et al. v. Suriname*, Views adopted on 4 April 1985, para. 14.2; No. 107/1981, *Elena Quinteros Almeida v. Uruguay*, Views adopted on 21 July 1983, para. 11; No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.4; No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

[11] General comment No. 21 [44] on article 10, paras. 3 and 5; communication No. 1134/2002, *Fongum Goji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2.

[12] Communications Nos. 16/1977, *Mbenge v. Zaire*, Views adopted on 25 March 1983, para. 14.1; No. 699/1996, *Maleki v. Italy*, Views adopted on 15 July 1999, paras. 9.2 and 9.3.

APPENDIX

Dissenting opinion by Committee member Mr. Abdelfattah Amor

The Committee, in paragraph 8.8 of the present Views, after stating that:

> "The State party's failure to demonstrate the need to rely on a military court in this case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of article 14",

concludes that:

> "the trial and sentence of Mr. Benhadj by a military court discloses a violation of article 14 of the Covenant".

The Committee thus returns, but in a more customary style, to its position on the same subject in the *Madani* case, which I consider to be legally flawed (communication No. 1172/2003 and my dissenting opinion and that of Mr. Ahmed Tawfik Khalil).

I would like to refer to my dissenting opinion in the *Madani* case and uphold its terms and content which apply perfectly to the present case, and to add the following remarks:

1. As in the *Madani* case, the Committee applied, before its adoption, new general comment No. 32 on article 14, which replaced general comment No. 13, when in fact the Committee's Views in the *Benhadj* case were adopted on 20 July 2007, prior to the adoption of the new general comment on 25 July 2007, which makes the Committee's position highly questionable. Apart from matters of principle regarding retroactivity, there is a more specific matter; namely, that the State party, having not been advised in advance of the "rule" to be applied, was not in a position to develop its argument in that connection.

2. In reality, the Committee did not simply engage in interpretation, as its implicit competence entitles it to do, but rather ventured into creation, by invoking a new "rule" that cannot be justified under the Covenant. This raises a fundamental question concerning the extent of the Committee's competence to determine its own jurisdiction, taking into account the obligations and commitments that the States parties to the Covenant have undertaken.

3. Even if one were to accept the Committee's logic, it is obvious that the Committee itself did not pursue that same logic. In the Committee's View, "The State party has not shown why recourse to a military court was required." Nevertheless, the State has shown that an "exceptional situation" arose following an "attempted uprising" and that Mr. Benhadj was tried by a military court in order to ensure the proper administration of justice and that the court is legally established in order to deal, in addition to special military offences, with offences against State security, for which the penalty is over five years' imprisonment, with respect for the guarantees afforded by the law and international instruments. The Committee could, or rather should, have examined the State party's arguments intended to demonstrate the justification of recourse to a military court, and rejected them if they were deemed to be inadequate. Its failure

to do so sawed off the very branch on which it intended to sit. Neither did it consider it necessary to determine whether the guarantees enshrined in article 14 had or had not been respected, which it should have done.

All in all, reservations about military courts and special courts, which I fully share with many Committee members, do not entitle the Committee to derogate from the legal rigour on which its reputation is built and which consolidates its credibility. Neither do they authorize it to exceed its remit or use the nature of the court hearing the case as an excuse not to ascertain whether all the guarantees and procedures spelled out in article 14 of the Covenant were respected or not. Legal flexibility can only be a source of enrichment and progress if law is not reduced to meta-law.

(*Signed*): Abdelfattah Amor

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

Individual opinion of Committee member Ahmed T. Khalil (dissenting)

I wish to put on record that I cannot accept the views expressed in paragraph 8.8 on communication No. 1173/2003, *Benhadj v. Algeria* in which the Committee finds a violation by the State party of article 14 of the Covenant.

The reasons for taking this position on my part are based on the same considerations spelled out in detail in my dissenting opinion on communication No. 1172/2003, *Abbassi Madani v. Algeria*.

(*Signed*): Ahmed T. Khalil

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

O. Communication No. 1181/2003, *Amador v. Spain**
(Views adopted on 31 October 2006, Eighty-eighth session)

Submitted by:	Francisco Amador Amador and Ramón Amador Amador (represented by counsel, Emilio Ginés Santidrián)
Alleged victim:	The authors
State party:	Spain
Date of communication:	20 September 2002 (initial submission)
Subject matter:	Scope of review in cassation of criminal sentences
Procedural issues:	-
Substantive issues:	Right to have a sentence and conviction reviewed by a higher court
Article of the Covenant:	14, paragraph 5
Article of the Optional Protocol:	-

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

Meeting on 31 October 2006,

Having concluded its consideration of communication No. 1181/2003, submitted to the Human Rights Committee on behalf of Mr. Francisco Amador Amador and Mr. Ramón Amador Amador 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 communication and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

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

1. The authors of the communication, which is dated 20 September 2002, are Francisco Amador Amador and Ramón Amador Amador, Spanish nationals who claim to be the victims of a violation by Spain of article 14, paragraph 5, of the International Covenant on Civil and Political Rights. The authors are represented by Mr. Emilio Ginés Santidrián. The Optional Protocol entered into force in Spain on 25 April 1985.

Factual background

2.1 In a judgement dated 12 December 2000, the Almería Provincial Court found the authors guilty of an offence against public health (drug trafficking), with the aggravating circumstance of recidivism, and sentenced them both to 10 years' imprisonment and a fine of 20 million pesetas (about €120,200), with an additional penalty of disqualification from public service or office for the duration of the sentence.

2.2 The authors submitted an appeal in cassation to the Supreme Court, alleging: (a) a violation of the right to be presumed innocent, on the grounds of the inadequacy of the evidence presented in the trial court; (b) a violation of the right to due process, on the grounds that the search of the house where the drugs were found had been overseen by an official of the investigating court and not the court registrar; and (c) a violation of the right to be presumed innocent, on the grounds of the refusal to admit expert evidence submitted by the defence.

2.3 The Supreme Court considered these grounds for cassation in a judgement dated 2 January 2002. It found that the use of a court official rather than the court registrar in the above-mentioned search procedure was not unlawful, since the possibility of replacing the registrar with a competent official was provided for by law. It also rejected the authors' claim that their right to be presumed innocent had been violated as a result of the inadequacy of the evidence presented. It pointed out that the trial court had based the authors' conviction on an incriminating statement made by another person implicated in the case, on the authors' presence in the house where the cocaine was being kept, and on the fact that they emerged from that house with other defendants when the police arrived. The Supreme Court concluded that the evidence for the prosecution had been lawfully obtained, presented in oral proceedings in accordance with due process, and objectively evaluated by the trial court; the latter had, moreover, explained the reasons underlying its conclusion, and had thus respected the defendants' right to be presumed innocent. However, the Court did partially accept the third allegation that the refusal to hear expert evidence on the exact quantity of trafficked cocaine had constituted a violation of the authors' right to be presumed innocent. The Court found that, given the lack of clarity on the exact quantity of trafficked drugs as a result of discrepancies in the pretrial proceedings, evidence submitted by the authors should have been examined in order to determine the quantity involved. The Supreme Court therefore allowed part of the appeal and reduced the sentence to seven years' imprisonment; it also withdrew the fine, but upheld the remaining elements of the contested sentence.

2.4 The authors submitted an application for *amparo* to the Constitutional Court, claiming a violation of the right to be presumed innocent, on the grounds that the house search had been invalid and that there was no evidence that the trafficked substance was a narcotic. The application was rejected on 1 July 2002 as manifestly devoid of substance with regard to the

Constitution. The Constitutional Court held that, as a warrant had been granted, the manner in which the search had been conducted was within the bounds of legality. Concerning the second ground for the application, the Court deemed that the seizure of the substance, the expert evidence and witnesses' testimony were sufficient to constitute incriminating evidence regarding the nature of the substance.

The complaint

3.1 The authors claim a violation of article 14, paragraph 5, of the Covenant, arguing that the Spanish judicial system provides no effective right of appeal in cases involving serious offences, since provincial court judgements are subject to an appeal in cassation before the Supreme Court on very limited legal grounds only. Such appeals allow no reappraisal of the evidence, as all factual determinations by the lower court are final. In any complaint to the Supreme Court regarding an error of fact in the weighing of the evidence, the Supreme Court refers back to the lower court's appraisal of that evidence, which demonstrates the inadequacy of the Spanish legal process. The Supreme Court does not have the status of an appeal court and is consequently barred from re-examining the evidence; as it has no direct access to the evidence, it cannot determine what conclusions should be drawn therefrom.

3.2 When an appeal is lodged with the Supreme Court against an error of fact in the appraisal of the evidence, the Supreme Court refers back to the trial court's appraisal of the evidence, whereas an appeal court would be required to invoke the safeguards contained in the Covenant; this reveals the inadequacy of the Spanish legal process and, thus, a violation of the authors' rights.

3.3 The authors refer to the Committee's established jurisprudence to the effect that article 14, paragraph 5, of the Covenant requires a full appraisal of the evidence and the conduct of the trial. They argue that the real thrust of article 14, paragraph 5, is the principle of a full second hearing for the convicted person, not as a means of rectifying errors made during the first hearing, but as a realization of the right of the accused to be sentenced on the basis of a double finding - first by the trial judge and then by a collegiate appeal court.

3.4 The authors cite a decision by the Criminal Division of the Supreme Court, dated 25 July 2002, which states that, on the basis of Human Rights Committee decisions, the Supreme Court has extended the concept of points of law affording grounds for an appeal in cassation beyond the traditional limits. At the same time, its case law has reduced the points of fact excluded by the remedy, so that it now excludes only those that would require resubmission of the evidence in order to permit its re-evaluation.

State party's observations on admissibility

4.1 In its observations of 4 August 2003, the State party maintains that the communication should be declared inadmissible on the grounds that domestic remedies have not been exhausted or, failing that, on the grounds that it is totally without merit. The authors confine their complaint to the proposition that an appeal in cassation does not meet the requirements of article 14, paragraph 5, of the Covenant. Yet the ruling handed down following just such an appeal found partly for the authors and corrected, in their favour, facts that had been declared proven in the

lower court's judgement. It appears from the Constitutional Court ruling that the authors at no time claimed a violation of the right to a review of the conviction and sentence handed down by the lower court, or of article 14, paragraph 5, of the Covenant.

4.2 Furthermore, it is clear from the Supreme Court's ruling that it conducted a thorough re-examination of the facts and evidence in the course of the appeal in cassation, and that the resulting reassessment of the facts deemed to have been proven was in the authors' favour. Under the circumstances, it is paradoxical to claim that a re-examination of the facts is limited under an appeal in cassation, when the ruling resulting from such an appeal shows that the facts were very thoroughly re-examined. The State party therefore concludes that the Committee should dismiss the communication as without merit.

Authors' comments

5.1 In their comments of 22 January 2004, the authors contend that the remedy of *amparo* in Spain is restricted in terms of the grounds on which an application may be based. These do not include the right to a second hearing, because such a right is not provided for in Spanish legislation on criminal cases falling under the jurisdiction of the provincial courts or the High Court. It is thus not possible to invoke article 14, paragraph 5, of the Covenant as the basis for either an appeal in cassation or an application for *amparo*. However, as in other cases that have come before the Committee, the Supreme Court judges who heard the appeal in cassation submitted by the authors have themselves noted that Spain's cassation procedure suffers from a number of shortcomings. The State party has on several occasions given the Committee assurances that it would carry out the necessary legislative reforms to introduce a second hearing in all criminal proceedings and reform the procedure for appeals in cassation to the Supreme Court in criminal cases. To date no such legislative reform has been carried out.

5.2 The authors argue that the principle of the presumption of innocence remained fully applicable following the trial in the lower court, which failed to consider evidence such as quantitative or qualitative analyses of the impounded substance. This was one of the reasons why the Supreme Court was obliged, in its wisdom, to quash part of the sentence. Since it could not hold the trial again, the authors had to be satisfied with a reduction of their sentence. The logical procedure would have been for the authors to be given a second trial in which the evidence of their innocence was examined.

Committee's decision on admissibility

6.1 On 4 July 2005, during its eighty-fourth session, the Committee considered the admissibility of the communication.

6.2 With respect to the State party's contention that domestic remedies had not been exhausted because the authors had not invoked a violation of their right to a review of the conviction and sentence during the *amparo* proceedings, the Committee observed, on the basis of the case before it and its previous decisions, that *amparo* was not an adequate mechanism for dealing with allegations regarding the right to a second hearing under the Spanish criminal justice system. It therefore concluded that domestic remedies had been exhausted.

6.3 The Committee concluded that the authors' complaint raised significant issues with respect to article 14, paragraph 5, of the Covenant and that those issues should be considered on the merits.

State party's observations on the merits

7.1 In its observations of 25 January 2006, the State party recalls that the Committee, in its decisions on earlier communications relating to article 14, paragraph 5, of the Covenant, considered the compatibility of each individual case with the Covenant without conducting a theoretical review of the Spanish legal system. It cites the Committee's decisions in communications Nos. 1356/2005 (*Parra Corral v. Spain*), 1059/2002 (*Carvallo Villar v. Spain*), 1389/2005 (*Bertelli Gálvez v. Spain*) and 1399/2005 (*Cuartero Casado v. Spain*), in which the Committee determined that the remedy of cassation in criminal cases met the requirements of the Covenant, and declared those communications inadmissible. It also cites a judgement of the Constitutional Court of 3 April 2002 (STC 70/02) in which the Court declares that there is a "functional similarity between the remedy of cassation and the right to the review of a conviction and sentence, as set out in article 14, paragraph 5, of the Covenant, provided that the concept of review by the court of cassation is interpreted broadly … It is incorrect to state that our system of cassation is restricted to an analysis of legal and formal issues and that it does not allow for a review of the evidence … Currently, under article 852 [of the Criminal Procedure Act], the remedy of cassation may be invoked for any violation of a constitutional precept. And, under article 24, paragraph 2 [of the Constitution] (trial with due process and presumption of innocence), the Supreme Court may review the legitimacy of the evidence on which the judgement is based and determine whether it is sufficient to outweigh the presumption of innocence and the reasonableness of the conclusions drawn. Therefore, [the applicant] does have a mechanism for a full review, in the sense that it is possible to reconsider not only the points of law but also the facts on which the finding of guilt is based, by reviewing the application of procedural rules and the evaluation of the evidence".

7.2 The State party notes that, in the case under consideration, the decision in cassation demonstrates that the sentence handed down by the trial court was very thoroughly reviewed, in that elements related to the presumption of innocence - namely, the evidence for the prosecution and an error in the appraisal of the evidence - were considered. Both these elements are suitable starting points for a review of the facts. In this case, moreover, the outcome of the review of the facts deemed to have been proven in the lower court was in the authors' favour, and it is therefore paradoxical, in the view of the State party, that they should be arguing that no review of the sentence and verdict was possible.

Authors' comments

8.1 On 3 March 2006, the authors submitted their observations on the merits. They point out that since the Committee issued its Views stating that the right to a second hearing was violated in the Spanish cassation procedure, more than 10 top legal authors have published studies supporting the Committee's position.

8.2 They add that a report on Spain by the Commissioner for Human Rights of the Council of Europe emphasized the Spanish Government's failure to comply with the Committee's Views on the right to a second hearing in the Spanish cassation procedure and invited the State party to comply with the Committee's demands in this area.

Issues and proceedings before the Committee

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

9.2 The Committee takes due note of the State party's contention that, in this case, the cassation proceedings included a full review of the facts and the evidence. Indeed, the Supreme Court thoroughly and objectively reviewed each of the grounds for the appeal, which were primarily based on an appraisal of the evidence examined by the trial court, and it was rightly on the basis of this reappraisal that the Court concluded that the refusal to hear expert testimony that would have established the precise quantity of trafficked cocaine was a violation of the authors' right to be presumed innocent. This was why the Court allowed part of the appeal in cassation and reduced the sentence imposed by the trial court. In the light of the circumstances of the case, the Committee concludes that there has been a genuine review of the conviction and sentence handed down by the trial court.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal any violation of article 14, paragraph 5, of the Covenant.

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

P. Communication No. 1255/2004, *Shams v. Australia**
Communication No. 1256/2004, *Atvan v. Australia*
Communication No. 1259/2004, *Shahrooei v. Australia*
Communication No. 1260/2004, *Saadat v. Australia*
Communication No. 1266/2004, *Ramezani v. Australia*
Communication No. 1268/2004, *Boostani v. Australia*
Communication No. 1270/2004, *Behrooz v. Australia*
Communication No. 1288/2004, *Sefed v. Australia*
(Views adopted on 20 July 2007, Ninetieth session)

Submitted by:	Saed Shams (1255/2004), Kooresh Atvan (1256/2004), Shahin Shahrooei (1259/2004), Payam Saadat (1260/2004), Behrouz Ramezani (1266/2004), Behzad Boostani (1268/2004), Meharn Behrooz (1270/2004), Amin Houvedar Sefed (1288/2004) (All represented by Refugee Advocacy Service of South Australia)
Alleged victims:	The authors
State party:	Australia
Date of communications:	9 February 2004 (1255/2004), 9 February 2004 (1256/2004), 15 February 2004 (1259/2004), 9 February 2004 (1260/2004), 12 March 2004 (1266/2004), 9 February 2004 (1268/2004), 9 February 2004 (1270/2004) and 25 May 2004 (1288/2004) (initial submissions)
Subject matter:	Arbitrary/mandatory detention and failure to review lawfulness of detention; Inhuman and degrading treatment in detention
Procedural issue:	Inadmissibility on the grounds of non-exhaustion and non-substantiation

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Ms. Ruth Wedgwood.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in adoption of the Committee's decision.

The text of an individual opinion signed by Committee member Ms. Ruth Wedgwood is appended to the present document.

Substantive issues: Arbitrary detention, mandatory asylum detention, no review of lawfulness of detention, inhuman and degrading treatment

Articles of the Covenant: 9, paragraphs 1 and 4, 7, 10, paragraph 1

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

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

Meeting on 20 July 2007,

Having concluded its consideration of communications Nos. 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004, submitted to the Human Rights Committee on behalf of Saed Shams, Kooresh Atvan, Shahin Shahrooei, Payam Saadat, Behrouz Ramezani, Behzad Boostani, Meharn Behrooz, Amin Houvedar Sefed under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1.1 The authors of the communication are Messrs. Saed Shams, Kooresh Atvan, Shahin Shahrooei, Payam Saadat, Behrouz Ramezani, Behzad Boostani, Meharn Behrooz, Amin Houvedar Sefed, all Iranian nationals currently residing in Australia. They claim to be victims of violations by Australia of articles 7; 9; paragraphs 1 and 4; and 10, paragraph 1, of the International Covenant on Civil and Political Rights.[1] All are represented by the Refugee Advocacy Service of South Australia Inc.

1.2 Between 5 and 18 March 2004, with respect to the authors' requests for interim measures under rule 86 of the rules of procedure, the Rapporteur for New Communications and Interim Measures requested the State party to inform it, as to whether the authors would be the subjects of removal prior to the last day of the following Committee session (2 April 2004). On 5 April 2004, having received no response to this request, the Rapporteur decided not to issue rule 86 requests in any of these cases, but left the requests pending subject to receiving further information from the State party and the authors. No further information was provided by any of the parties.

1.3 On 20 July 2007, during the ninetieth session of the Human Rights Committee, the Committee decided to join the consideration of these eight communications.

Factual background[2]

2.1 Between October 2000 and April 2001, the authors arrived in Australia from Iran by boat. As they were considered "unlawful non-citizens", all of them were detained under section 189 (1) of the Migration Act 1958[3], and all were remanded in detention until receipt of a

visa to remain in Australia. Upon arrival, each of the authors applied to the Department of Immigration and Multicultural and Indigenous Affairs for protection visas. They all subsequently appealed against the denial of protection visas to the Refugee Review Tribunal, which decided against them. They appealed the negative decisions of the Refugee Review Tribunal to the Federal Court which also found against them and from there they appealed to the Full Federal Court. Some of the authors also applied for special leave to appeal to the High Court, against the decision of the Full Court of the Federal Court. Following a period of between three and, in some cases, over four years of detention, all authors received either a permanent humanitarian visa or a temporary protection visa (TPVs). The authors provided the following information on their conditions of and treatment in detention.

2.2 On 3 November 2000, Mr. Saed Shams arrived in Australia. He was detained in several immigration detention centres prior to receiving a temporary protection visa on 7 June 2005. While he was detained at the Curtin Detention Center, he was involved in a demonstration by the prisoners over conditions at the center. He was arrested and charged with property damage. He spent 14 months in the Perth penitentiary before being cleared of the charge by a Magistrate. While detained at Baxter Immigration Detention Center, he was placed in isolation for one week after he complained about the condition of his shower and bathroom. His complaint led to a dispute with two guards during which he alleged that his head was forced into a mirror and he received cuts and abrasions. It is alleged that his mental health seriously deteriorated during his time in detention. He became severely depressed and regularly took medication. He saw a doctor on several occasions and told him/her that he frequently harmed himself and felt unable to control his impulses.[4] On various occasions he was denied access to visitors, regular exercise and recreation time, as well as privacy when detained in "isolation".

2.3 On 20 December 2000, Mr. Kooresh Atvan arrived in Australia. He was detained in several immigration detention centres prior to receiving a temporary protection visa on 18 August 2005. He alleges that he did not have immediate access to a lawyer and was detained "incommunicado". On 20 April 2001, Mr. Shahin Shahrooei arrived in Australia. He was detained in several immigration detention centres prior to receiving a permanent humanitarian visa on 1 September 2005. He alleges that he was detained "incommunicado". While in detention he suffered psychological harm and distress. He was psychologically evaluated on 2 November 2001, after stating that he suffered from serious depression and had attempted self harm. He alleges that his request for an alternative interpreter was denied. He argues that his testimony was not believed and that he was misinterpreted in his interviews, due to the interpreter's bias against him.

2.4 On 22 December 2000, Mr. Payam Saadat arrived in Australia. He was detained in several immigration detention centres prior to receiving a temporary protection visa on 27 April 2005. During a fire at Woomera Detention Centre in late 2002 and early 2003, much of the documentation pertaining to his case was allegedly destroyed. He alleges that he was detained "incommunicado", without access to a lawyer. On 23 December 2000, Mr. Behrouz Ramezani arrived in Australia. He was detained in several immigration detention centres prior to receiving a temporary protection visa on 14 April 2005. He claims that he was detained "incommunicado", and was refused immediate access to a lawyer.

2.5 In November 2000, Mr. Behzad Boostani arrived in Australia. He was detained in several immigration detention centres prior to receiving a temporary protection visa on 20 July 2005. He

alleges that he was denied access to visitors, medication, telephone calls, physical exercise and legal advice and was subjected to "solitary confinement" on various occasions, where he reportedly made several suicide attempts. At Curtin Detention Centre, he was treated by a psychologist for depression. He also alleges that he was detained "incommunicado", without access to a lawyer.

2.6 On January 2001, Mr. Meharn Behrooz arrived in Australia. He was detained in several immigration detention centres prior to receiving a temporary protection visa on 6 December 2004. He alleges that he was kept in "solitary confinement" and, on several occasions was denied a lawyer, access to visitors, telephone calls, hot showers, privacy, regular exercise and recreation. He also alleges that he was detained "incommunicado" and that he was sprayed with capsicum spray, handcuffed and beaten, as a result of which he suffered psychological harm and distress. On 12 October 2000, Mr. Houvedar Sefed arrived in Australia and remained in immigration detention until receipt of a permanent humanitarian visa on 9 September 2005.

The complaints

3.1 The following seven complainants, namely Messrs. Atvan, Behrooz, Boostani, Ramezani, Saadat, Shahrooei and Shams, claim that the mandatory nature of their detention amounts to torture or cruel, inhuman or degrading treatment or punishment, in violation of article 7.

3.2 The following six complainants allege that their "general treatment" during detention violated article 7: Messrs. Atvan; Behrooz; Boostani; Ramezani; Saadat; and Shams. Of these, the following complainants also claim violations of article 7 with respect to the following specific claims of mistreatment: (a) detention in isolation (Messrs. Behrooz, Boostani, and Shams); (b) denial of access to visitors (Messrs. Behrooz, Boostani, and Shams); (c) denial of usual and regular exercise and recreation time (Messrs. Behrooz, and Shams); (d) denial of privacy when detained in isolation: (Messrs. Behrooz, and Shams); (e) denial of access to legal advice (Mr. Boostani); and (f) denial of medication (Mr. Boostani).

3.3 The following four complainants make further allegations with regard to their general treatment in detention but do not invoke any specific articles of the Covenant: Messrs. Behrooz; Boostani; Shahrooei; and Shams. Mr. Behrooz claims a violation of his rights under the Covenant with respect to the fact that he was sprayed with capsicum spray, handcuffed, beaten and that he suffered physical assault while detained in immigration detention. Messrs. Behrooz, Boostani, Shahrooei and Shams all claim violations of their rights on account of the psychological harm and distress they suffered in detention, in some cases leading to depression and attempted suicide.

3.4 The following seven complainants allege that their treatment in general in immigration detention in Australia violated article 10, paragraph 1: Messrs. Atvan; Behrooz; Boostani; Ramezani; Saadat; Shahrooei; Shams.[5]

3.5 The following seven complainants allege that their "incommunicado" detention violated article 10, paragraph 1: Messrs. Atvan; Behrooz; Boostani; Ramezani; Saadat; Shahrooei; Shams. Some allege that the denial of immediate access to a lawyer or access to an alternative interpreter while held incommunicado also violated article 10, paragraph 1.

3.6 All complainants allege that their detention was arbitrary and in violation of article 9, paragraph 1. According to section 189 (1) of the Migration Act 1958, detainees cannot be released from detention under any circumstances. They invoke the Committee's Views in *A. v. Australia*[6] and *C. v. Australia.*[7]

3.7 All complainants allege that the lawfulness of their detention was not open to review, in violation of article 9, paragraph 4. They claim that there is no provision which would have allowed them to be released from detention either administratively or by a court and there was no justification for their prolonged detention. There was no assessment of whether there are any risk factors which would tend to favour their prolonged detention such as health or public safety factors; nor any assessment of whether they were at risk of absconding.

The State party's submission on admissibility and merits

4.1 On 4 January 2006, the State party responded to the admissibility and merits of all the communications jointly. On the facts and by way of update, the State party submitted that two of the authors (Mr. Houvedar Sefed and Mr. Shahrooei) had been granted permanent humanitarian visas by the Minister, exercising her powers under section 417. As to the remaining six authors, after being allowed to lodge new visa applications by the Minister under section 48B, all were granted temporary protection visas (TPVs). The State party submits that a TPV usually allows for three years of temporary residence in Australia for non-citizens who arrived unlawfully in the State party and who are found to be owed protection obligations under the criteria set out in the 1951 Convention on the Status of Refugees and its 1967 Protocol, as well as relevant legislation. TPV holders wishing to seek further protection in Australia can lodge a second application for protection at any time after their TPV was granted and before it expires.

4.2 On admissibility, the State party rejects the authors' claim that their detention was mandatory and in violation of article 7, as inadmissible for lack of substantiation, or alternatively, incompatibility with the Covenant. The complainants have not substantiated the claim that the mandatory nature of their detention itself, as distinct from their actual treatment in detention or the conditions of detention, caused them humiliation or physical or mental suffering of a level severe enough to constitute a breach of article 7, or that it extends beyond elements arising from the mere fact of detention itself. The State party argues that article 7 cannot be construed as including a right against mandatory asylum detention.

4.3 The State party submits that the claims relating to the general treatment of the authors in detention are inadmissible for non-exhaustion of domestic remedies and/or non-substantiation. It provides a detailed list and explanation of the domestic remedies available: a complaint to the immigration detention services provider; a complaint to the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA); a complaint to the Commonwealth Ombudsman; a complaint to the HREOC under the Human Rights and Equal Opportunity Commission Act 1986 (Cth); and civil and criminal remedies. According to the State party, most of the complainants failed to avail themselves of any or all of these remedies. Mr. Shams lodged a

complaint with the Australasian Correctional Management (ACM), who referred his complaint about the use of force by Detention Services Officers (DSO) to the Australian Federal Police (AFP). The police subsequently declined to investigate the case as there was insufficient evidence. He also lodged a complaint with the Ombudsman. Mr. Boostani lodged a complaint with DIMIA, but did not take other steps to exhaust domestic remedies in relation to his other claims.[8] In the State party's view, all the communications, except that of Mr. Shams, should be declared inadmissible for non-exhaustion of domestic remedies.

4.4 In addition, the State party submits that most of the authors' allegations are made by way of general statement with no further information provided in their support. For example, Mr. Behrooz, Mr. Boostani, and Mr. Shams, all allege that their treatment in detention breached article 7 by virtue of their being subject to all or some of the following: detention in isolation and denial of privacy, access to visitors, and regular exercise and recreation time. However, they do not provide further information, such as information relating to the dates and length of time spent in isolation, the circumstances surrounding the use of such detention, or the conditions of incommunicado detention to indicate that this practice in any way amounted to a breach of article 7. Mr. Behrooz does not provide any information in support of his general allegation to have been handcuffed and beaten. He has given no explanation of the circumstances surrounding these allegations. Messrs. Behrooz, Boostani, Shahrooei and Shams, all fail to provide any information in support of their general claims to have suffered psychological harm and distress in immigration detention. The State party applies the same arguments to the claims under article 10, paragraph 1, relating to their treatment in detention and alleged incommunicado detention.

4.5 On the merits, and in relation to the general treatment in detention, the State party sets out the Immigration Detention Standards developed by DIMIA in consultation with the Commonwealth Ombudsman's Office and HREOC, which describes the treatment of detainees in immigration detention in Australia. Section 5 (1) of the Migration Act permits immigration officers to take such action and use such force as is reasonably necessary to take a person into or keep a person in immigration detention. The State party denies that detainees in immigration detention facilities are held in isolation or solitary confinement. Observation rooms known as Management Support Units (MSU) are used to monitor detainees who may pose an immediate threat to themselves, to others, to the facility itself or to the security of the facility. Detainees are monitored at set intervals, as appropriate to the circumstances of a particular case, including through the use of closed circuit television cameras. Transfers to a MSU are regularly assessed and reviewed by professionals. Whilst accommodated in a MSU, a detainee's access to telephones, visitors, television and personal belongings may be temporarily suspended depending on a number of factors, including potential self-harm, mental health and well-being and the good order and security of the facility. Such detainees have access to a shower cubicle with hot and cold running water, a toilet, and a washing basin. The rooms contain a bed with a mattress, pillow, pillow case, sheets and a mattress protector. Detainees also have access to the MSU recreation room and an outside courtyard area for exercise or to smoke. Dependent on the detainee's individual management plan, he or she can interact with other detainees housed in the MSU in the outside courtyard area.

4.6 The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) works closely with experienced health professionals, including mental health professionals, to ensure that the health care needs of all detainees are appropriately met. The health care needs of each

detainee are identified by qualified medical personnel as soon as possible after a person is placed in detention. Medical treatment is available 24 hours a day, seven days a week with ready access to doctors and registered nurses. Detainees have access to psychological/ psychiatric services, trauma counselling and dental services. Where necessary, they are referred to external advice and/or treatment. Where a person is held in immigration detention, DIMIA has an obligation under Section 256 of the Migration Act, to facilitate that person's obtaining legal advice or taking legal proceedings in relation to his or her immigration detention. When held in immigration detention detainees may communicate with their legal representatives, the Ombudsman and HREOC at all times, including in a MSU. Upon receiving a request by a detainee for access to legal advice, DIMIA makes every effort to facilitate the visit. Access may be in person or by telephone. DIMIA provides reasonable access to interview rooms and video-conferencing facilities, subject to availability.

4.7 As to the claims of Mr. Atvan, Mr. Ramezani, and Mr. Saadat that the manner in which they were treated in detention violates article 7, the State party submits that no further elaboration is provided by the authors and that an extensive search of Departmental records has provided no evidence of harsh treatment upon arrival or in detention. Mr. Shahrooei does not provide any evidence indicating that he suffered any psychological difficulties as alleged or that these difficulties were caused by being subjected to mistreatment contrary to article 7. The evidence indicates that Messrs. Behrooz, Boostani and Shams were relocated to a MSU on a number of occasions. They were only detained there on a temporary basis, to ensure their own safety and to ensure the security of the detention facility and the safety of detainees and detention centre personnel. The measure was certainly not intended to inflict any physical or mental suffering on them. There is no evidence to suggest that this measure, or the alleged deprivations (lack of privacy, access to visitors, and regular exercise and recreation time) suffered by Messrs. Behrooz and Shams as a result, amounted to 'torture' or to 'cruel, inhuman or degrading treatment or punishment'. Nor does the evidence does not support Mr. Behrooz's allegation that he was sprayed with capsicum spray and beaten. There is no evidence either of Mr. Boostani's claim that he was denied access to legal advice, or of Mr. Shams' claim that he suffered psychological harm and distress of sufficient gravity to justify the conclusion that article 7 had been breached.

4.8 The State party contests the allegation that some of the authors were detained "incommunicado", which it understands as the "complete isolation from the outside world such that not even the closest relatives know where the person is located".[9] Upon arriving in Australia, unlawful non-citizens are placed in separation detention to ensure the integrity of its visa assessment process. Subject to DIMIA's approval, detainees in separation detention may communicate by letter or fax to an overseas address to confirm their safe arrival in Australia. These detainees do not, except with DIMIA's approval: have contact with detainees who are not held in separation detention; receive personal visits; have access to telephones or faxes for communicating with members of the community; or have access to incoming mail. However, visits and communication between detainees in separation detention and DIMIA, the Immigration Detention Advisory Group (IDAG), Commonwealth Ombudsman, the United Nations High Commission for Refugees, the Australian Red Cross, consular personnel or HREOC is possible, in accordance with the standards applied to other detainees. They have access to the full range of detention facilities and services, including food, health, welfare and recreation.

4.9 Detainees remain in separation detention for no longer than 28 days, save for exceptional circumstances. Once an initial assessment has been made and it has been determined whether a detainee attracts the State party's obligations under the Refugees Convention, the detainee is removed to general detention with other detainees whose claims have been assessed. The Immigration Detention Standards ensure that detainees in general detention have access to telephones, faxes and mail, to enable them to maintain a reasonable level of contact with relatives, friends, and with diplomatic and consular representatives of the country to which they belong and with their legal representatives. They can receive personal visits from such persons. Visits by the Commonwealth Ombudsman, HREOC, the Australian Red Cross and other organizations or groups as determined by DIMIA are also facilitated either at the request of the detainee or of the organization. On the issue of interpretation, the State party submits that there is no evidence, either in the material provided in Mr. Shahrooei's communication or divulged by searches of the government's own records, that he complained about regarding his interpreter at the time or that he was denied access to an alternative interpreter, as he alleges.

4.10 As to the claims of a violation of article 9, paragraph 1, for unlawful detention, the State party understands that the term "law" as it is used in this article refers to law in the domestic legal system and that the detention of the complainants occurred in accordance with procedures established by the Migration Act and was therefore lawful. The complainants entered Australia without a valid visa, and their detention resulted directly from their status as unlawful non-citizens, under Section 189 of the Migration Act. Unlawful non-citizens who arrive in Australia are placed in detention, but can apply for one of many visas. If they are granted a visa, they are released from detention, as happened with all complainants. The State party denies that their detention was arbitrary. It refers to the Committee's jurisprudence, which has stated that the detention of unauthorized arrivals, including asylum seekers, is not arbitrary per se, and that the main test is whether it is reasonable, necessary, proportionate, appropriate and justifiable in all of the circumstances.[10] Further, there is no indication in the Committee's jurisprudence that detention for a particular length of time could be considered per se arbitrary. The determining factor is not the length of the detention but whether the grounds for the detention can be justified.

4.11 The State party reiterates that mandatory immigration detention is an exceptional measure reserved for people who arrive in Australia without authorization. The detention of such persons is necessary to ensure that non-citizens entering Australia are entitled to do so, while also upholding the integrity of Australia's migration system, that they are available for processing of any protection claims and that they are available for removal if found not to have a basis to lawfully remain in Australia. The State party has no system of identity cards or national means of identification or system of registration which is required for access to the labour market, education, social security, financial services and other services, which makes it difficult for the Government to detect, monitor and apprehend illegal immigrants within the community. Various versions of Australia's immigration detention provisions have been considered by the High Court over the years, including *Chu Kheng Lim v. Minister for Immigration and Ethnic Affairs*, where the Court considered the constitutional validity of the then Section 88 and Part 2, Division 4b of the Migration Act. It held that mandatory detention provisions would be constitutionally valid if they limited detention to, "... what was reasonably capable to being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered".[11]

4.12 The State party explains that there are mechanisms in the legislation which provide for the release of people from detention in certain circumstances: through a Bridging Visa (Section 73 of the Migration Act) or humanitarian consideration under Section 417. The factors surrounding the detention of each of the complainants indicates that their detention was justifiable and appropriate and was not arbitrary or otherwise in violation of article 9, paragraph 1: they arrived in Australia without valid visas and immigration officers were therefore required to detain them pursuant to Section 189 (1) of the Migration Act; they were detained while their asylum claims were assessed as they remained unlawful non-citizens; several of the detainees did try to escape the detention facilities and therefore posed a risk to themselves and potentially to the community; and as soon as they were granted visas, they were released. Since the complainants were detained, the Migration Act and Regulations have been amended to give the Minister the non-delegable and non-compellable power to do any of the following: grant a visa to any immigration detainee, whether the detainee has applied for it or not; detain an unlawful non-citizen in a form of community detention, referred to as a "residence determination"; or invite a detainee who cannot be removed in the foreseeable future to apply for a new class of Bridging Visa, known as a "Removal Pending Bridging Visa" (RPBV). These powers are exercised personally by the Minister on a case-by-case basis, taking into account the situation of each individual detainee.

4.13 As to the author's reliance on *A v. Australia*,[12] the State party notes that the Australian Government did not accept the Committee's view that the detention of the author in that case was arbitrary. As to the claim that there was a violation of article 9, paragraph 4, as there was no possibility of review of the lawfulness of their detention, the State party submits that this does not mean that a court must be able to order the release of a detainee even if detention is lawful. A court must be able to consider the detention and must have the real and effective power to order the detainee's release if the detention is unlawful, which it understands to refer to domestic law. Those in immigration may take proceedings before the High Court under section 75 of the Commonwealth of Australia Constitution Act 1901, to obtain a writ of mandamus or other appropriate remedy. This jurisdiction may also be invoked in the Federal Court. The remedy of habeas corpus remains available to persons in detention. The fact that Section 189 (1) of the Migration Act provides for mandatory detention of people such as the complainants does not prevent the court from ordering their release if they are found not to be lawfully detained. The State party distinguishes the present cases from the facts in *A. v. Australia* in that the present authors had access to judicial review and the author's application in *A. v. Australia* was assessed under the Migration Amendment Act, whereas the law has now changed under the Migration Act.

The authors' comments on the State party's submission

5.1 By letter received on 11 July 2006, the authors confirm that they have been allowed to remain in the State party and for this reason they withdraw their claims relating to their removal to Iran, but they maintain their other claims. They reiterate that the detention of asylum-seekers is mandatory, that there is no discretion to consider the reasonableness of detention in individual cases, that asylum-seekers are excluded from every avenue of judicial review, including the final resort of a writ of habeus corpus. They point to domestic jurisprudence to support this claim.[13] They submit that the prolonged and indefinite nature of detention without any proper review procedure breaches the Covenant. In each case, detention was in excess of between three and in most cases over four years, without any foreseeable prospect of release. The anxiety caused to

the complainants by the nature of their detention resulted in humiliation and physical and mental suffering. Now that the authors have been found to be refugees, the anguish created as a result of detention is evident.

5.2 As to the State party's interpretation of the concept of "lawful detention" in article 9, paragraph 1 (see paragraph 4.10), the authors submit that if it only referred to domestic law, there would be no need for the Committee ever to determine "lawfulness" and the most unjust laws of States could go unchallenged. In the authors' view, the length of time in detention was not proportionate and appropriate, and the methods used by the State party to determine refugee status were obviously flawed causing the authors great anguish.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.2 The Committee notes that, in light of the granting of temporary protection visas or humanitarian visas since the registration of these communications, all authors have withdrawn their claims relating to the fear of torture in the event of their return to Iran. All of the other claims are maintained. As to the claim that the mandatory nature of the authors' detention itself violates article 7, the Committee finds that the authors have failed to substantiate that their detention per se, as distinct from their treatment in detention, amounted to torture or to cruel, inhuman or degrading treatment or punishment within the meaning of article 7. Thus, this claim is inadmissible under article 2 of the Optional Protocol.

6.3 The Committee notes the authors' claims, under articles 7 and 10, paragraph 1 of the Covenant, of inhuman and degrading treatment in detention, including alleged denial of medication, assault and incommunicado detention, which in some cases allegedly led to psychological difficulties. In the Committee's view, incommunicado detention is the denial of a detainee's access to the outside world. It does not accept the State party's view that it additionally requires that the outside world must also be kept in ignorance of a detainee's whereabouts (para. 4.8). The Committee notes the State party's argument that, apart from Mr. Shams, none of the authors in question have exhausted domestic remedies. It notes that the authors have failed to contest this argument and thus finds that, except in the case of Mr. Shams, their claims relating to their general treatment in detention are inadmissible for non-exhaustion of domestic remedies, under article 5, paragraph 2 (b), of the Optional Protocol. As to Mr. Shams, the Committee notes that the author has failed to contest the very detailed arguments and information provided by the State party on the substance of his claims and has made no further attempts to corroborate his initial claims. For these reasons, the Committee finds that the claims relating to Mr. Sham's treatment in detention are inadmissible for non-substantiation, under article 2 of the Optional Protocol.

6.4 The Committee notes that the State party has not contested the admissibility of the claim relating to the alleged arbitrary nature of the authors' detention, under article 9, paragraph 1, and thus finds this claim admissible.

6.5 The Committee notes that although the State party has not specifically contested the admissibility of the claim relating to the right to review the lawfulness of the authors' detention (art. 9, para. 4), it refers to the possibility of seeking judicial review of detention by way of a writ of habeas corpus in the High Court, without stating whether any of the authors filed such an application. In any event, the Committee notes that the legislation under which the authors were detained provides for mandatory detention until either a permit is granted or a person is removed from the State party's territory. The Committee observes that the only power of review vested in the courts is to make the formal determination that the individual is in fact an "unlawful non-citizen" to which the section applies, which is uncontested in all cases, rather than to assess whether there are substantive grounds which justify detention in the circumstances of each case. Thus, by direct operation of statute, substantive judicial review which could provide a remedy is extinguished. Moreover, the Committee notes that the High Court has confirmed the constitutionality of mandatory detention regimes on the basis of the policy factors advanced by the State party.[14] The Committee reiterates its jurisprudence[15] and accordingly decides that the State party has failed to demonstrate that there were available domestic remedies that the authors could have exhausted with respect to their claims about their detention, and these claims are therefore admissible.

Consideration of the merits

7.1 The Human Rights Committee has examined the present communication in the light of all the information placed before it by the parties, as it is required to do under article 5, paragraph 1, of the Optional Protocol to the Covenant.

7.2 As to the claim that the authors were arbitrarily detained, in terms of article 9, paragraph 1, the Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.[16] In the present case, the authors' detention as unlawful non-citizens continued, in mandatory terms, until they were granted visas. The Committee notes that humanitarian or temporary protection visas were granted in each case after at least three but in most cases after over four years in detention. While the State party has advanced general reasons to justify the authors' detention, apart from the statement that some of them, without stating who, attempted to escape, the Committee observes that the State party has not advanced grounds particular to the authors' cases which would justify their continued detention for such prolonged periods. In particular, the State party has not demonstrated that, in the light of each authors' particular circumstances, there were no less invasive means of achieving the same ends. While welcoming the amendments to the Migration Act and Regulations relating to the detention procedure, outlined by the State party above, the Committee notes that these amendments were made since the authors' detention and were not available to the authors when they were detained. For these reasons, the Committee concludes that the authors' detention for a period of between three and over four years without any chance of substantive judicial review was arbitrary within the meaning of article 9, paragraph 1.

7.3 As to the authors' claims of a violation of article 9, paragraph 4, the Committee observes that the court review available to the authors was confined purely to a formal assessment of whether they were unlawful "non-citizen[s]" without an entry permit. It observes that there was no discretion for a court to review their detention on any substantive grounds for its continued justification. The Committee recalls its jurisprudence[17] that any court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may establish differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effect, real and not purely formal. By stipulating that the court must have the power to order release, "if the detention is not lawful", article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or with any relevant provisions of the Covenant. In the authors' cases, the Committee considers that the inability of the judiciary to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, concludes that the facts as found by the Committee reveal a breach by Australia of article 9, paragraphs 1 and 4, and article 2, paragraph 3, of the Covenant.

9. Under article 2, paragraph 3, of the Covenant, the authors are entitled to an effective remedy. In the Committee's opinion, this should include adequate compensation for the length of the detention to which each of the authors was subjected.

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

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

Notes

[1] The authors had previously also claimed violations of articles 7, 18, paragraph 1, 19, paragraph 1, 26 and 27, with respect to their return to Iran but in light of the receipt of temporary protection/humanitarian visas, these claims were withdrawn (see below - authors' comments).

[2] To reduce the size of the draft and since the claims relating to the authors' return to Iran were subsequently withdrawn by them, the domestic procedural and judicial steps taken by them prior to receiving their visas as well as claims relating to their fear of return to Iran have not been included.

[3] This section provides that, "If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person."

[4] No corroborating reports medical or otherwise were provided.

[5] The authors provide no further explanation of this claim.

[6] Communication No. 560/1993, Views adopted on 3 April 1997.

[7] Communication No. 900/1999, Views adopted on 28 October 2002.

[8] The outcome, if any, of this complaint is not provided.

[9] Nowak, ICCPR Commentary, 2nd ed. p. 187.

[10] *A v. Australia*, supra.

[11] (1992) 176 CLR 1 at 33 per Brennan, Deane, and Dawson JJ. Also in *Al-Kateb v. Godwin, Keenan & Minister for Immigration and Multicultural and Indigenous Affairs*, [2004] HCA 37; (2004) 208 ALR 124 at 34 per McHigh J; at 226 per Hayne J, the High Court held that sections 189, 196 and 198 of the Migration Act validly authorize the immigration detention of an unlawful non-citizen who is liable for removal while efforts to remove the person continue.

[12] Supra.

[13] Australian High Court decision in "Al-Kateb", and the Federal Court of Australia decision in Falee v. Minister for Immigration, Multicultural & Indigenous Affairs [2004] FCA 1681. In this latter case, Tamberlin J made the following comments on the High Court decision in Al-Kateb, "the Court decided that ss 189, 196 and 198 of the Migration Act 1958 (Cth) required Mr. Al-Kateb to be kept in immigration detention until removed from Australia. The Court considered that the wording of these provisions was unambiguous, and that they could not be read subject to any purpose or limitation such as that they should not affect fundamental human rights".

[14] *Lim v. Australia*, supra.

[15] *C. v. Australia*, supra.

[16] *A v. Australia, C v. Australia*, supra.

[17] *A v. Australia, C v. Australia*, supra.

APPENDIX

Individual opinion of Committee member Ms. Ruth Wedgwood

States are entitled to enforce their immigration laws in an effective and proportionate manner. Each of the authors in these cases entered Australia without lawful visas. Each was denied a protection visa by the Australian Department of Immigration on its initial review. Each took appeals through three or four levels of administrative and judicial review, and ultimately, each was granted either a permanent humanitarian visa or a temporary protection visa. The legislature of the State party (at the time of these cases) required the detention of unsuccessful visa applicants during the appellate process, on the claim that it was otherwise difficult to obtain the voluntary appearance of unsuccessful applicants in immigration proceedings that might result in their deportation.

On this record, I cannot join the views of the Committee concerning the application of article 9, namely, the Committee's conclusion that the detention of the authors was per se "arbitrary" and "unlawful" within the meaning of article 9 (1) and 9 (4) of the Covenant. Each had access to the courts to challenge the underlying basis for his detention, in particular, the finding that he was an unlawful entrant. The State party has argued that its legislature concluded there were particular difficulties in enforcing immigration laws against unsuccessful applicants in a national community that chose to avoid such measures as national identity cards or official registration for access to social services and employment. Since the time of these cases, Australia has changed its law to permit the Minister for Immigration to grant a form of "community detention" that is less onerous.

Nonetheless, the State party must be aware that it is not a happy circumstance to see that persons who were ultimately awarded the state's protection against a forced return to Iran had to wait three to four years in a detention facility before that protection was awarded.

(*Signed*): Ruth Wedgwood

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

Q. Communication No. 1274/2004, *Korneenko v. Belarus**
(Views adopted on 31 October 2006, Eighty-eighth session)

Submitted by:	Viktor Korneenko et al. (not represented by counsel)
Alleged victims:	The author
State party:	Belarus
Date of communication:	6 November 2003 (initial submission)
Subject matter:	Dissolution of human rights association by a court order of the State party's authorities
Substantive issues:	Equality before the law; prohibited discrimination; right to freedom of association; permissible restrictions; right to have one's rights and obligations in suit at law determined by a competent, independent and impartial tribunal
Procedural issues:	Inadmissibility *ratione personae*; non-exhaustion of domestic remedies
Articles of the Covenant:	14, paragraph 1; 22, paragraphs 1 and 2; 26
Articles of the Optional Protocol:	1; 2

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

Meeting on 31 October 2006,

Having concluded its consideration of communication No. 1274/2004, submitted to the Human Rights Committee by Viktor Korneenko in his own name and on behalf of 105 other individuals under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

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

1. The author of the communication is Viktor Korneenko, a Belarusian citizen born in 1957, residing in Gomel, Belarus. The communication is presented in his own name and on behalf of 105 other individuals of Belarusian and other nationalities, all residing in Belarus. The author claims to have received the prior consent of the 105 other co-authors to act on their behalf, and lists in relation to each co-author the full name, nationality, occupation, date and place of birth, and current address. He does not submit, however, letters authorizing him to act on their behalf. The author alleges that he and the co-authors are victims of violations by Belarus[1] of article 14, paragraph 1; article 22, paragraphs 1 and 2; and article 26 of the International Covenant on Civil and Political Rights. He is not represented.

Factual background

2.1 The author is the Chairperson of the Gomel regional association "Civil Initiatives", registered by the Department of Justice of Gomel Regional Executive Committee (the Department of Justice) on 30 December 1996 and re-registered on 29 September 1999. On 13 May 2002, the Department of Justice gave a written warning to the "Civil Initiatives" Governing Board about a violation of domestic law. "Civil Initiatives" was accused of improper use of equipment, received through foreign grants, for the production of propaganda materials and the conduct of propaganda activities, contrary to paragraph 4, part 3, of Presidential Decree No. 8 "On Certain Measures for Improvement of Procedure for Receipt and Use of Foreign Grants" of 12 March 2001 (Presidential Decree No. 8). The latter prohibits the use of such grants for the preparation of gatherings, meetings, street processions, demonstrations, pickets, strikes, the production and dissemination of propaganda materials, as well as the organization of seminars and other forms of propaganda activities. According to the author, the evidence on which this warning was based[2] was obtained illegally by the Department of State Security Committee of Gomel Oblast (DSSC). On an unspecified date, the author appealed this reprimand to the Gomel Regional Court. On 2 August 2002, the Court refused to initiate proceedings, on the ground that the applicant did not have a right to file such a suit in a court of general jurisdiction. On an unspecified date, this ruling was appealed to the Supreme Court and, on 26 August 2002, the Supreme Court quashed the ruling and returned the case to the Gomel Regional Court, directing it to initiate proceedings. Proceedings were initiated on 3 September 2002, and the case was referred for hearing. On 16 September 2002, the Gomel Regional Court suspended proceedings, on the ground that the Supreme Court was at that time simultaneously considering an appeal submitted by the author in relation to an administrative case. On an unspecified date, the author appealed this ruling to the Supreme Court, which again quashed it on 10 October 2002, returning the case to the Gomel Court. On 4 November 2002, the Gomel Court considered the author's case on its merits and upheld the Department of Justice's warning of 13 May 2002. The latter decision was upheld by the Supreme Court on 23 December 2002. The author's appeal of 4 November 2002 to the Chairman of the Supreme Court for a supervisory review was rejected on 12 February 2003. As a result, the warning of the Department of Justice stayed on "Civil Initiatives" record.

2.2 From 1 to 30 April 2003, the Department of Justice undertook an inspection of "Civil Initiatives" statutory activities and, on 30 April 2003, filed a suit in the Gomel Regional Court, requesting the dissolution of "Civil Initiatives". Article 29, paragraph 2, of the Law "On Public Associations" stipulates that an association can be dissolved by court order if it again undertakes,

within a year, activities for which it had already received a written warning. Article 57, paragraph 2, subparagraph 2, of the Civil Procedure Code also envisages a procedure for the dissolution of a legal entity. This time, "Civil Initiatives" was accused of (1) improper use of equipment, received through foreign grants, for the production of propaganda materials and the conduct of propaganda activities; (2) production of an information bulletin in quantities exceeding the association's internal demand; (3) opening a number of district branches without obligatory state registration, contrary to paragraph 4.1 of the association's statutes; (4) forgery of documents and incompatibility of the letterhead with legal requirements; and (5) creation of a number of independent organizational structures as "resource centres" for civil society support. The author asserts that after the suit for the dissolution of "Civil Initiatives" was filed in court, the court proceedings on the matter were adjourned upon the request of the Minister of Justice, due to the visit to Gomel on 26 May 2003 of the Head of the OSCE Parliamentary Assembly's Working Group.

2.3 At the hearing on 17 June 2003, the author explained that the Department of Justice's inspection in April 2003 was undertaken without any "Civil Initiatives" representatives present, and only on the basis of written materials presented by the association. He further challenged the allegation that the association's use of equipment, received through foreign grants, was contrary to Presidential Decree No. 8, and advanced arguments in support of his claim. He questioned the authenticity of the copies of the information bulletin before the Court and requested an expert examination. The author referred to paragraph 4.2 of the association's statutes, according to which the state registration of district branches is not required where they are not intended to have a distinct legal capacity. He denied that the association's letterhead failed to comply with legal requirements, and stated that the resource centres mentioned in the Department of Justice's suit were, in fact, the association's activities, rather than independent organizational structures. On the same day, the Gomel Regional Court ordered the dissolution of "Civil Initiatives" on grounds 1, 4 and 5 argued by the Department of Justice (paragraph 2.2 above).

2.4 This decision was upheld by the Supreme Court on 14 August 2003, and, subsequently, it became executory. The author's appeal to the Prosecutor's Office for a supervisory review of the dissolution decision was rejected on 3 October 2003, despite the fact that the prosecutor who participated in the Supreme Court hearing of 14 August 2003 stated that the "guilt" of "Civil Initiatives" had not been proven. The author's appeal of 6 November 2003 to the Chairman of the Supreme Court for a supervisory review of that decision was rejected on 21 November 2003.

2.5 The author filed a counter-claim on 16 May 2003, requesting the Court to initiate proceedings to protect the "Civil Initiatives'" business image in the light of "patently false information", appearing in the Department of Justice's suit to the Gomel Regional Court. On 21 May 2003, the Court refused to initiate proceedings, on the ground that the applicant did not have a right to file such a suit in a court of general jurisdiction. This decision was upheld by the Supreme Court on 30 June 2003. Domestic law outlaws the operation of unregistered associations in Belarus.

The complaint

3.1 The author submits that the decision of the Gomel Regional Court to dissolve "Civil Initiatives" amounts to a violation of his and the co-authors' right under article 22, paragraph 1, of the Covenant. He contends that contrary to article 22, paragraph 2, the restrictions placed on

the exercise of this right by the State party do not meet the criteria of necessity to protect the interests of national security or public safety, order, health, or morals, or the rights and freedoms of others.

3.2 The author claims that he and the co-authors were denied the right to equality before the courts and to the determination of their rights and obligations in a suit at law (article 14, paragraph 1, of the Covenant).

3.3 The author alleges that the State party's authorities violated his and the co-authors' right to equal protection of the law against discrimination (article 26 of the Covenant), on the grounds of their political opinion.

State party's observations on admissibility and merits

4. On 29 September 2004, the State party recalls the chronology of the case as set out in paragraphs 2.1-2.4 above. It specifies that the inspection of "Civil Initiatives" activities for the period of November 2001 to March 2003, conducted by the Ministry of Justice, revealed that the association continued to use equipment, received through foreign grants, for the production of propaganda materials and the conduct of other forms of propaganda activities. It asserted that the "Civil Initiatives" appeal published in its information bulletin of 16 February 2003 and addressed to other public associations, the mass media, the OSCE Office in Belarus and embassies, is perceived to call for the dissemination of propaganda against the government in power and spells out the association's role in this field. The State party submits that there were additional grounds for the dissolution of "Civil Initiatives", namely other violations of domestic law, such as deficiencies in the association's documentation. The Prosecutor's Office conducted a supervisory review of the decisions of the Gomel Regional Court of 17 June 2003[3] and of the Supreme Court's decision of 14 August 2003, respectively. It did not find grounds that would have justified further action.

Author's comments on the State party's observations

5.1 On 17 January 2005, the author denies that the Department of Justice itself discovered any evidence of improper use of equipment by "Civil Initiatives" on which it based the first written warning of 13 May 2002. He submits a copy of the written submission of 25 April 2002, which prompted the above warning, sent by the inspector of the Ministry of Customs and Duties of the Zheleznodorozhniy District of Gomel (MTD) to the Department of Justice. From this, it appears that MTD's inspection of "Civil Initiatives" activities was prompted by the DSSC's letter of 3 August 2001. The MTD was informed of the improper use of equipment by "Civil Initiatives" in a letter from the DSSC dated 17 August 2001. Thus, neither the Department of Justice nor the MTD revealed any evidence of improper use of the equipment. Their conclusions about the matter were derived exclusively from the information received from the DSSC.

5.2 The author challenges the State party's assertion that "Civil Initiatives" used its equipment, received through foreign grants, to produce propaganda materials and to conduct other forms of propaganda activities and that its appeal of 16 February 2003 called for the dissemination of propaganda against the government in power and underlines the association's role in this field. He submits a copy of a Department of Justice note on the results of the inspection dated 30 April 2003, which mentions for the first time that the appeal published in the

information bulletin of 16 February 2003 runs counter to the prohibition of paragraph 4 of Presidential Decree No. 8 (paragraph 4.1 above). Neither the Department of Justice nor the courts could prove that the bulletin in question was produced with the use of equipment received through foreign grants. He further argues that the State party did not specify which exact part of the appeal was perceived by it as "a call for the dissemination of propaganda against the government", nor how this appeal would be a legitimate restriction on his right to a freedom of association, in the light of article 22 of the Covenant.

5.3 The author denies the State party's claim that there were deficiencies in the association's documentation, contrary to article 50 of the Civil Procedure Code. He reiterates that the State party failed to advance any arguments as to why the "Civil Initiatives" resource centres mentioned in the Department of Justice's suit were considered to be independent organizational structures. He refers to the copy of the information bulletin of 16 February 2003, as an example of the association's compliance with the requirements of article 50 of the Civil Procedure Code.

5.4 As to the argument that the dissolution decision adopted against the association was subject to a supervisory review by the Prosecutor's Office, the author contends that the Prosecutor's Office was biased. He refers to the letter of the Prosecutor's Office dated 29 November 2002 received in reply to the author's complaint on the inadmissibility in court of evidence that was obtained illegally by the DSSC.[4] It transpires from this letter that it was impossible for the DSSC officers to seal up the equipment seized from "Civil Initiatives" because of its size. He points out that domestic law does not make any exception to the obligation to seal up a seized object based on its size. The author concludes that the State party failed to advance explanations as to which of the "Civil Initiatives'" unlawful activities prompted its dissolution by court order.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee has ascertained, as required under article 5, paragraph 2, of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement and notes that the State party did not contest that domestic remedies have been exhausted.

6.3 On the question of standing, the Committee notes that the author has submitted the communication in his own name and on behalf of 105 other named individuals. At the same time, he has not presented to the Committee any proof whatsoever of their consent, by either requesting each of the other 105 individuals to sign up to the initial complaint or by having them issue a letter of authorization. The Committee considers that the author has no standing before the Committee required by article 1 of the Optional Protocol with regard to these 105 individuals but considers that the communication is nevertheless admissible so far as the author himself is concerned.

6.4 As to the alleged violation of articles 14, paragraph 1, and 26 of the Covenant, in that the author was denied the right to equality before the courts, to the determination of his rights by a competent, independent and impartial tribunal, and to equal protection of the law against discrimination, the Committee considers that these claims are insufficiently substantiated, for purposes of admissibility, and are thus inadmissible under article 2 of the Optional Protocol.

6.5 The Committee considers the author's remaining claim under article 22 to be sufficiently substantiated and accordingly declares it admissible.

Consideration of the merits

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

7.2 The key issue before the Committee is whether the dissolution of "Civil Initiatives" amounts to a restriction of the author's right to freedom of association, and whether such restriction was justified. The Committee notes that according to the author's information, which is uncontested, "Civil Initiatives" was registered by the Department of Justice on 30 December 1996, re-registered on 29 September 1999 and dissolved by order of the Gomel Regional Court on 17 June 2003. It notes that domestic law outlaws the operation of unregistered associations on the territory of Belarus. In this regard, the Committee observes that the right to freedom of association relates not only to the right to form an association, but also guarantees the right of such an association freely to carry out its statutory activities. The protection afforded by article 22 extends to all activities of an association, and dissolution of an association must satisfy the requirements of paragraph 2 of that provision. In the light of the serious consequences which arise for the author and his association in the present case, the Committee considers that the dissolution of "Civil Initiatives" amounts to a restriction of the author's right to freedom of association.

7.3 The Committee observes that, in accordance with article 22, paragraph 2, in order for the interference with the right to freedom of association to be justified, any restriction on this right must cumulatively meet the following conditions: (a) it must be provided by law; (b) may only be imposed for one of the purposes set out in paragraph 2; and (c) must be "necessary in a democratic society" for achieving one of these purposes. The reference to the notion of "democratic society" in the context of article 22 indicates, in the Committee's opinion, that the existence and operation of associations, including those which peacefully promote ideas not necessarily favourably received by the government or the majority of the population, is a cornerstone of a democratic society.

7.4 In the present case, the court order dissolving "Civil Initiatives" is based on two types of perceived violations of the State party's domestic law: (1) improper use of equipment, received through foreign grants, for the production of propaganda materials and the conduct of propaganda activities; and (2) deficiencies in the association's documentation. These two groups of legal requirements constitute de facto restrictions and must be assessed in the light of the consequences which arise for the author and "Civil Initiatives".

7.5 On the first point, the Committee notes that the author and the State party disagree on whether "Civil Initiatives" indeed used its equipment for the stated purposes. It considers that even if "Civil Initiatives" used such equipment, the State party has not advanced any argument as to why it would be necessary, for purposes of article 22, paragraph 2, to prohibit its use 'for the preparation of gatherings, meetings, street processions, demonstrations, pickets, strikes, production and the dissemination of propaganda materials, as well as the organization of seminars and other forms of propaganda activities'.

7.6 On the second point, the Committee notes that the parties disagree over the interpretation of domestic law and the State party's failure to advance arguments as to which of the three deficiencies in the association's documentation triggers the application of the restrictions spelled out in article 22, paragraph 2, of the Covenant. Even if "Civil Initiatives" documentation did not fully comply with the requirements of domestic law, the reaction of the State party's authorities in dissolving the association was disproportionate.

7.7 Taking into account the severe consequences of the dissolution of "Civil Initiatives" for the exercise of the author's right to freedom of association, as well as the unlawfulness of the operation of unregistered associations in Belarus, the Committee concludes that the dissolution of "Civil Initiatives" does not meet the requirements of article 22, paragraph 2 and is disproportionate. The author's rights under article 22, paragraph 1, have thus been violated.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses a violation by the State party of article 22, paragraph 1, of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an appropriate remedy, including reestablishment of "Civil Initiatives" and compensation. It is also under an obligation to take steps to prevent similar violations occurring in the future.

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

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

Notes

[1] The Covenant and the Optional Protocol thereto entered into force for Belarus on 23 March 1976 and 30 December 1992 respectively.

[2] The Department of Justice's warning is based on the written submission of 25 April 2002 by the Inspector of the Ministry of Customs and Duties of the Zheleznodorozhny District of Gomel, on the results of her audit of tax payments by "Civil Initiatives".

[3] The State party refers to the decision of the Gomel Regional Court of 17 September 2003, although it transpires from the information available on file that no decision on the present case was taken on this date.

[4] Reference is made to article 27 of the Belarus Constitution.

R. Communication No. 1291/2004, *Dranichnikov v. Australia**
(Views adopted on 20 October 2006 Eighty-eighth session)

Submitted by: Mrs. Olga Dranichnikov (not represented by counsel)

Alleged victim: The author

State party: Australia

Date of communication: 1 June 2004 (initial submission)

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

Meeting on 20 October 2006,

Having concluded its consideration of communication No. 1291/2004, submitted to the Human Rights Committee by Mrs. Olga Dranichnikov under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1. The author of the communication, dated 1 June 2004, is Olga Dranichnikov, a Russian national born on 8 January 1963. She claims to be a victim of a violation by Australia of articles 2, 6, 7, 9, 14, 23 and 26 of the International Covenant on Civil and Political Rights. She is not represented by counsel. The Optional Protocol entered into force for Australia on 25 December 1991.

Factual background

2.1 The author, with her husband and their daughter, arrived in Australia in January 1997 on a tourist visa. On 2 April 1997, her husband lodged an application for a protection visa on behalf

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in adoption of the Committee's decision.

of the family with the department of immigration and multicultural affairs (DIMA). The application was based on threats received by the author and her husband in Vladivostok, Russia, as a consequence of their active involvement in the defence of human rights in Russia.

2.2 On 20 May 1997, DIMA rejected the application, after a request for further information from the author's husband was returned because it had been sent to the author's old address. No interview with the author was conducted.

2.3 On 19 June 1997, the author's husband applied to the Refugee Review Tribunal for review of DIMA's decision. On 11 August 1998, the Tribunal rejected the application.

2.4 On 9 September 1998, the author's husband lodged a second application for review. On 19 September 1998, the author requested the Tribunal to consider her application separately from her husband's. On 21 January 1999, they were informed that the second application for review was invalid. On 15 February 1999, the author's husband appealed to the Federal Court against the rejection of his application by the Refugee Review Tribunal. His appeal was dismissed on 7 February 2000. His further appeal to the Full Federal Court was dismissed on 14 December 2000. On 24 December 2000, he appealed to the High Court which allowed his appeal and remitted the application to the Refugee Review Tribunal on 8 May 2003.

2.5 On 29 January 1999, the author and her husband went to the DIMA office where they were informed that their stay in Australia had been unlawful since the Tribunal's rejection of their application and made to sign a letter of petition to the Minister in order to be given a bridging visa. The bridging visa did not allow either of the spouses to work.

2.6 On 11 August 2000, the author wished to lodge an application for a protection visa in her own right, but DIMA refused to register the application as it considered it invalid since her previous refugee claim had been finally determined. On 5 September 2000, the author applied to the Federal Court of Australia for review of DIMA's decision. On 29 January 2001 the Federal Court rejected the appeal. Upon request for leave to appeal, the Full Federal Court, on 22 June 2001, found in the author's favour that she should be allowed to make her own application for a protection visa. On 13 August 2001, the Minister applied for leave to appeal the judgement to the High Court but discontinued the application on 30 November 2001, following amendments to the Migration Act in order to prevent repeat applications in cases such as that of the author.

2.7 Parallel to the above procedure, the author, on 27 September 2000, had filed a complaint with the Human Rights and Equal Opportunity Commission. In March 2001 the President of the HREOC rejected the author's complaint and the author appealed to the Federal Magistrates Court. On 18 February 2002, her appeal was dismissed and on 8 March 2002 the author filed a further appeal with the Federal Court. The Federal Court dismissed the appeal on 5 December 2002. The author then applied for special leave to appeal which was refused by the High Court on 25 June 2003.

2.8 On 14 November 2002, DIMA informed the author that no further action would be taken on her protection visa application, since she had not paid the fee of 30 dollars. It transpires from the letter that, following the Federal Court's decision in the author's case, the author had been informed four times since February 2002 that her application would be deemed valid as

of 22 June 2001 if she would forward the 30 dollar fee. Any new application that the author would wish to make would be treated in accordance with the revised Migration Act.

2.9 On 6 December 2002 the author filed an application in the High Court seeking an order Nisi which was refused by the Court on 25 June 2003.

The complaint

3.1 The author claims that she is a victim of violations by Australia of articles 2, 23 and 26 of the Covenant, (a) for not allowing her to file a refugee claim in her own right; (b) for failure to conduct an interview with her as a woman included in her husband's family unit; (c) for implementing allegedly discriminatory amendments to the Migration Act. The author claims that she has been discriminated on the basis of sex and marital status.

3.2 The author further claims that she has been denied a fair hearing in violation of article 14 (1) of the Covenant. She claims that the Refugee Review Tribunal is not independent, since it is Government-funded and its members are appointed by the Governor-General on recommendation of the Minister of Immigration. She claims that the Minister of Immigration heavily influences the Tribunal's decisions and she refers in this context to newspaper articles which reported that after a controversial decision made by the Tribunal, the Minister had indicated that he was unlikely to renew fixed term appointments of Tribunal members who took decisions outside international refugee law. In the case of her husband's application for a protection visa, the author claims that the Tribunal is breaching the rules of natural justice by delaying determination of his refugee claim, following the High Court's decision of 8 May 2003 to remit the matter for consideration to the Tribunal.

3.3 Finally, the author claims that she would be a victim of violation by Australia of articles 6, 7 and 9 of the Covenant if she were to be deported to Russia.

3.4 The author claims damages of $ 420,000 for the suffering occurred, plus the full costs of reunification with the author's mother and parents-in-law.

The State party's observations on admissibility and merits

4.1 By submission of 16 August 2005, the State party comments both on the admissibility and the merits of the communication. It submits that the author, her husband and their daughter have been granted a permanent protection visa on 10 February 2005 following reconsideration by the Refugee Review Tribunal of the husband's application on behalf of the family on 19 August 2004.

4.2 As to the facts, the State party explains that when the author's husband filed the application for a protection visa on behalf of the family in April 1997, the author did not fill out the relevant section of the application to be assessed as an applicant in her own right and was accordingly assessed as a member of the family unit.

4.3 The State party challenges the admissibility of the author's allegations under articles 6, 7 and 9 of the Covenant on the basis that the author has failed to substantiate her

claims, that she had not exhausted available domestic remedies at the time of submitting her communication to the Committee and that subsequently her concerns have been remedied by having been granted a protection visa.

4.4 The State party further challenges the admissibility of the author's claim under article 23 of the Covenant as incompatible with the provisions of the Covenant.

4.5 As to the merits of the author's claim under articles 2 and 26 of the Covenant, the State party denies that any violation took place and submits that the author's original application was correctly processed according to the form which she submitted. In the form, the author filled out the part for members of the family not having their own, separate, claim instead of the part for members of the family with claims in their own right. As a consequence the author was assessed as part of the family unit on the basis of her husband's claim. In the light of these facts, the State party argues that there is no basis for suggesting any discriminatory conduct in relation to the original application.

4.6 The State party further denies that it was under any obligation to conduct a separate interview with the author in the context of her husband's asylum claim and that, even if it was, the failure would not constitute discrimination. In this context, the State party explains that DIMA's Gender Guidelines 1996 assist decision-makers in how best approach claims of gender-based prosecution and advice on the desirability of a separate interview with a woman who is included in the application as a member of the family in case gender-related claims are raised or suspected or if she requests a separate interview. The State party submits that the family's claim did not raise the issues of gender-based persecution and that the author did not request a separate interview. Accordingly, there was no obligation to conduct an interview with the author and the failure to do so does not constitute discrimination.

4.7 As to the author's application of 11 August 2000, DIMA rejected the validity of the application due to its understanding of section 48A (1) of the Migration Act, which precluded non-citizens from making more than one application for a protection visa.[1] On 22 June 2001, the Full Federal Court reversed DIMA's interpretation of the Migration Act and held that section 48A (1) did not prevent a member of the family who had not submitted claims in their own right from making a further application for a protection visa. As a result of the judgement, it was open to the author to submit an application for a protection visa in her own right. She was indeed invited to do so and informed that if she paid the $30 fee her earlier application would be deemed valid as of the date of the Federal Court's judgement, 22 June 2001. However, the author never paid the nominal application fee and thus no valid application was made.

4.8 Finally, the State party contests that the September 2001 amendments to the Migration Act discriminate against persons on the basis of gender or marital status. The State party explains that the amendment precludes the submission of a further application where the applicant has unsuccessfully claimed protection status on the grounds that he or she is the spouse or the dependant of a person who is owed protection obligations under the Refugees Convention. According to the State party, the purpose of the amendment was to prevent misuse of the protection visa process by family groups wishing to prolong their stay in Australia, each family member taking turns to advance claims for protection while the others apply as family members. The State party emphasizes however that the amendment does not prevent a spouse or dependant from advancing their own protection claim, independently from the main applicant, in the first

instance. The State party thus concludes that the amendment does not discriminate against persons on the basis of gender or marital status or any other ground.

4.9 As to the merits of the author's allegation under article 14 (1) of the Covenant, the State party submits that the author's claim is unfounded and that appropriate legislative and administrative measures exist to ensure independence and impartiality of the Refugee Review Tribunal and its members. The Tribunal is governed by legislative provisions in the Migration Act, its members are appointed by the Governor-General and the members' tenure is limited to five years. A member who has a conflict of interest in relation to a case must not take part in proceedings. Tribunal members are statutory officers and independent from the Minister for Immigration.

4.10 As to the delay in the hearing of the husband's case, the State party acknowledges that the delay was longer than the aims of the Tribunal in the Client Service Charter and that for this reason the Tribunal, on 25 March 2004, wrote a letter of apology. The State party denies any deliberate intention on the part of the Tribunal to delay proceedings. The State party moreover argues that the delay cannot be considered undue delay within the meaning of international law. The State party explains that the first determination of the Tribunal in the family's application was made within 14 months and the second determination, after remittance by the High Court, 15 months. The State party submits that the length of time was caused by the complexity of the case, in which the Tribunal was required to issue a 199 page decision record in support of its reasons.

Author's comments

5.1 In her comments, dated 26 October 2005, on the State party's submission, the author claims that the application for leave to appeal filed by the Minister for Immigration against the Federal Court judgement in her case, deprived her of the possibility to file her own protection visa application before the amendment to the Migration Act.

5.2 As to her claim under articles 2 and 26 of the Covenant, the author states that she is seeking effective remedies to give effect to the rights recognized in the Covenant, as follows: To repeal the amendment to section 48A of the Migration Act as discriminatory, to remove the determination process for refugee status from the Minister for Immigration, to ensure that the Refugee Review Tribunal is a competent, independent and impartial body, established by law, and to compensate her losses and damages.

5.3 The author reiterates that she is a victim of discrimination on the basis of gender and marital status because she was deprived of the right to seek asylum in her own right since 1997, when she was included in her husband's application. In this context, she claims that she had no access to legal representation and guidance in the completion of her refugee claim, that she was not provided with a qualified interpreter, that she was not given enough time to provide additional information and that she was not given a separate interview. The author submits that the structure of the visa protection application form as well as DIMA's interviewing policy implicitly uphold the assumption that asylum seekers are politically active males and that women should be regarded as dependants, with the effect of perpetuating discrimination and gender imbalances. She claims that despite appearing to be gender neutral, the amendments to section 48 of the Migration Act in fact discriminate against women asylum-seekers. In the

author's case, if her husband's application had not been successful, she would have been deported to Russia without having been given a chance to file her own refugee claim.

5.4 As to the State party's argument that she was invited to validate her protection visa claim following the Federal Court's judgement of 22 June 2001, it appears from the documents submitted with the author's submission that she declined to pay the fee because she preferred to await the final determination of her husband's case. She however claimed the right to do seek asylum in her own right in case her husband's application would fail.

5.5 With regard to her claim under article 14 of the Covenant, the author claims that the State party's assertions of independence of the Refugee Review Tribunal lack foundation because she was informed that the Tribunal falls under the responsibility of the Minister for Immigration. She further claims that the principal member of the Tribunal intentionally delayed the reconsideration of her husband's refugee claim. She further claims that the case officer to hear her husband's matter expressed sarcasm and arrogance towards the family and refused to disqualify himself. Consequently, the author and her husband sought an order from the High Court for contempt of court against both the principal member and the case officer of the Tribunal. The author reiterates her claim that in practice the appointments of the members and officers in the Tribunal, their remuneration and the duration of their terms are greatly dependant on the Minister for Immigration.

5.6 With regard to her claims under articles 6, 7 and 9 of the Covenant, the author reiterates that if her husband's application had not been successful, she would have been deported to Russia. She further states that she was subjected to inhuman and degrading treatment, since between January 1999 and February 2000 she was deprived of the right to work as a dependant of her husband when his permission to work was withdrawn. Because of the ensuing poverty and stress, she was admitted to hospital in 2000. She further states that the State party's discriminatory policy encourages the split of families, since only then can family members submit a refugee claim in their own right.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 In respect of the author's claims under articles 6, 7 and 9 of the Covenant if she were to be returned to the Russian Federation, the Committee notes that these claims have become moot since the author has been granted a protection visa in Australia. This part of the communication is thus inadmissible under article 1 of the Optional Protocol.

6.4 With regard to the author's claim that the State party's policy encourages the breaking up of families, in violation of article 23 of the Covenant, the Committee notes that the facts presented by the author do not show how she is a victim in this respect. The Committee considers therefore that this part of the communication amounts to an *actio popularis* and that it is inadmissible under article 1 of the Optional Protocol.

6.5 The Committee notes that the author claims that she is a victim of discrimination in violation of article 26 of the Covenant because she was not allowed to make a claim for a protection visa in her own right. The Committee considers that this claim is inadmissible for non-exhaustion of domestic remedies under article 5-2 (b) of the Optional Protocol since, after a High Court judgement in her favour and after having been invited by the Immigration Department, the author failed to avail herself of the remedy that was offered to her.

6.6 Concerning the author's claim of a violation of article 26 in relation to the amendments to the Migration Act, annulling the effect of the High Court's judgement in her case, the Committee notes that the amended law was not applied to the author and that she can thus not claim to be a victim of a violation of the Covenant in this respect.[2] The Committee considers that this part of the communication amounts to an *actio popularis* and that it is inadmissible under article 1 of the Optional Protocol.

6.7 In respect of the author's claim under article 14 (1) of the Covenant, the Committee notes that the State party has not raised any objections to its admissibility. The Committee considers however that the author's claims of lack of independence of the Refugee Review Tribunal because of its alleged dependence on the Minister for Immigration and because of the perceived arrogance of a Tribunal member are not substantiated for purposes of admissibility and are thus inadmissible under article 2 (a) of the Optional Protocol.

6.8 The Committee notes that the State party has conceded that the Refugee Review Tribunal is a tribunal within the meaning of article 14, paragraph 1, of the Covenant.[3] The Committee is not aware of any obstacles to the admissibility of the author's claim that the delay in hearing her husband's case was intentional and shows the lack of independence and objectivity of the Refugee Review Tribunal. Accordingly it declares the communication admissible with regard to this claim under article 14 (1) of the Covenant and proceeds immediately to the consideration of its merits.

Consideration of the merits

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

7.2 The author has claimed that she is a victim of a violation of article 14 (1) of the Covenant since the Refugee Review Tribunal is not independent and objective as it deliberately delayed the review of her husband's case. The State party has rejected this allegation and has explained the safeguards taken to guarantee the Tribunal's independence. While the Committee is concerned about the delay in the determination of the author's husband's refugee claim, the Committee notes that this delay was caused by the totality of the proceedings - including the Federal Court (22 months) and the High Court (27 months) - and not just by the Refugee Review

Tribunal (14 months for the first review, 15 months for the second). The Committee concludes that the information before it does not show that the author has been a victim of lack of independence of the Tribunal in this respect.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of article 14, paragraph 1, of the Covenant.

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

Notes

[1] The relevant text of the section reads: "… a non-citizen who, while in the migration zone, has made … an application for a protection visa … may not make a further application for a protection visa while in the migration zone".

[2] See communications Nos. 318/1988, *E.P. et al. v. Colombia*, para. 8.2, No. 35/1978 *Shirin Aumeeruddy-Cziffra et al. v. Mauritius*, para. 9.2.

[3] See also communication No. 1015/2001, *Perterer v. Austria*, para. 9.2 (Views adopted on 20 July 2004).

S. Communication No. 1295/2004, *Mohamed el Awani, Ibrahim v. Libyan Arab Jamahiriya**
(Views adopted on 11 July 2007, Ninetieth session)

Submitted by:	Mr. Farag Mohammed El Alwani (represented by counsel, Mr. Boris Wijkström)
Alleged victim:	The author and his brother (Mr. Ibrahim Mohammed El Alwani)
State party:	The Libyan Arab Jamahiriya
Date of communication:	26 May 2004 (initial submission)
Subject matter:	Disappearance, detention incommunicado, death in prison
Procedural issues:	None
Substantive issues:	Right to life, prohibition of torture and cruel, inhuman or degrading treatment or punishment; right to liberty and security of person; arbitrary arrest and detention; respect for the inherent dignity of the human person; right to recognition before the law
Articles of the Covenant:	6, 7, 9, paragraphs 1 to 5, 16, 2 (3)
Articles of the Optional Protocol:	5, 2 (b)

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

Meeting on 11 July 2006,

Having concluded its consideration of communication No. 1295/2004, submitted to the Human Rights Committee by Mr. Farag Mohammed El Alwani under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

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

1. The author of the communication is Mr. Farag Mohammed El Alwani, a Libyan citizen, currently residing in Switzerland, who is acting on his own behalf and on behalf of his deceased brother, Mr. Ibrahim Mohammed El Alwani, a Libyan citizen. The author claims that his brother is a victim of violations by the Libyan Arab Jamahiriya of his rights under article 6; article 7; article 9, paragraphs 1, 2, 3 and 4; and article 10, paragraph 1, read in conjunction with article 2, paragraph 3, of the International Covenant on Civil and Political Rights and that he himself is a victim of violations by the Libyan Arab Jamahiriya of his rights under article 7 of the Covenant. He is represented by counsel. The Covenant and the Optional Protocol entered into force for the State party on 23 March 1976 and 16 August 1989, respectively.

The facts as submitted by the author

2.1 The author witnessed his brother's arrest on 27 July 1995, at approximately 3 a.m., by between five and seven plain-cloth members of the Al Bida branch of the internal security forces. They did not present an arrest warrant nor state the reasons for his arrest. When the author protested against his brother's arrest, he was also arrested and detained for three days.

2.2 The author's brother was taken to the Benghazi Internal Security Compound, from where he was reportedly transferred to Tripoli, presumably to the Ain-Zara prison and later to Abu Salim prison, as was standard procedure in cases concerning political opponents. The author's family did not receive any information on his brother's whereabouts, the charges against him, or any legal proceedings initiated against him. On several occasions, they were denied access by the prison authorities, who neither confirmed nor denied the arrest of the author's brother and merely told his family to go away.

2.3 In June 1996, the author's family heard rumours of a mutiny at Abu Salim prison, where according to a former detainee, the author's brother was detained on charges of membership in a banned Islamic group. Reportedly, the mutiny was violently repressed, resulting in the killing of hundreds of prisoners.

2.4 In July 2002, the police informed the author's family that his brother had died, without giving reasons. In 2003, the author's family received a death certificate confirming that the author's brother had died in a Tripoli prison, without indicating the cause of his death. The body of the deceased was never returned to his family, nor was the location of his burial site disclosed to them.

The complaint

3.1 On admissibility, the author submits that the same matter is not being examined by another procedure of international investigation or settlement. As regards exhaustion of domestic remedies, he argues that there are no effective remedies in Libya for cases of alleged human rights violations concerning political opponents. He refers to the Committee's Concluding Observations on the Libyan Arab Jamahiriya of 6 November 1998[1] and to an Amnesty International report,[2] which expressed concern about the lack of independence of the judiciary in the State party. Lastly, the author submits that his family feared reprisals by the police and did not dare to avail itself of official remedies, while the unofficial remedies used were unsuccessful.

3.2 The author claims that the authorities' failure to take appropriate measures to protect his brother's life while he was in custody, and to investigate his death, amounts to a violation of article 6.[3]

3.3 He claims that the presumed length of his brother's incommunicado detention, lasting from his arrest on 25 July 1995 until the riot at Abu Salim prison in June 1996, was in violation of article 7 and article 10, paragraph 1.[4]

3.4 The author argues that his brother's arrest without a warrant, the failure by the police to inform him of the charges against him and to bring him promptly before a judge, as well as the absence of any means to challenge the legality of his detention, violated article 9, paragraphs 1, 2, 3 and 4.

3.5 By reference to the Committee's jurisprudence,[5] the author submits that the authorities' refusal to inform him of his brother's whereabouts, their failure to notify him of his death for several years, to disclose the cause of his death and to return his body for burial amounts to a violation of article 7, read in conjunction with article 2, paragraph 3, in his own respect.

3.6 The author argues that the lack of an effective remedy to challenge the legality of his brother's detention, the State party's failure to compensate his family and to return his brother's body and to inform his family of the location where he is buried also violated article 2, paragraph 3.

State party's failure to cooperate

4. By notes verbales of 26 May 2004, 16 February and 18 November 2005 and 28 July 2006, the State party was requested to submit information on the admissibility and merits of the communication. The Committee notes that this information has not been received. The Committee regrets the State party's failure to provide any information with regard to the admissibility or substance of the author's claims. It recalls that under the Optional Protocol, the State party concerned is required to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that it may have taken. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.[6]

Issues and proceedings before the Committee

Consideration of admissibility

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

5.2 As to exhaustion of domestic remedies, the Committee reiterates its concern that in spite of three reminders addressed to the State party no information or observations on the admissibility or merits of the communication have been received from the State party. In the circumstances,

the Committee finds that it is not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol. The Committee finds no other reason to consider this communication inadmissible and thus proceeds to its consideration on the merits.

Consideration of the merits

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

6.2 The Committee recalls the definition of enforced disappearance in article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court: "Enforced disappearance of persons means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time." Any act leading to such disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to liberty and security of the person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10). It also violates or constitutes a grave threat to the right to life (art. 6).[7] In the present case, the author invokes articles 7, 9, and 10, paragraph 1.

6.3 The Committee notes that the State party has provided no response to the author's allegations. It reaffirms that the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone has the relevant information. It is implicit in article 4, paragraph 2 of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information exclusively in the hands of the State party, the Committee may consider the author's allegations adequately substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party. In the present case, counsel has informed the Committee that a former detainee of the prison at which the author's brother was reported to have been detained corroborated the latter's detention and stated that the author's brother was detained for charges of membership in a banned Islamic group.

6.4 With respect to the claim under article 9, in light of the State party's failure to provide any information on the admissibility and merits of this communication, due weight must be given to the information provided by the author. The Committee bases its assessment on the following undisputed facts: that the author's brother was arbitrarily arrested and detained on 27 July 1995; that he was not informed of the charges against him; was not brought promptly before a judge; and was denied an opportunity to challenge the legality of his detention. The Committee recalls that incommunicado detention as such may violate article 9 and notes the author's claim that his brother was held in incommunicado detention from July 1995 until June 1996. For these reasons,

and in the absence of adequate explanations on this point from the State party, the Committee is of the opinion that the author's brother was subjected to arbitrary arrest and detention, contrary to article 9 of the Covenant.

6.5 As to the alleged violation of article 7 of the Covenant, the Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20, on article 7, which recommends that States parties should make provision against detention incommunicado. In the circumstances, the Committee concludes that the disappearance of the author's brother, preventing him from any contact with his family or the outside world, constitutes a violation of article 7 of the Covenant.[8] Further, the circumstances surrounding the disappearance of the author's brother and the testimony that the brother was tortured strongly suggest that the brother was so treated. The Committee has received nothing from the State party to dispel or counter such an inference. The Committee concludes that the treatment of the authors' brother amounts to a violation of article 7.[9]

6.6 The Committee also notes the anguish and distress caused to the author by his brother's disappearance and subsequent death. Consequently, it finds that the facts before it reveal a violation of article 7 of the Covenant with regard to the author himself.[10]

6.7 With respect to the alleged violation of article 6, paragraph 1, the Committee recalls its general comment 6 on article 6, which states, inter alia, that "The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6 (1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities."

6.8 The Committee observes that sometime in 2003, the author was provided with his brother's death certificate, without any explanation of the exact date, cause or whereabouts of his death or any information on investigations undertaken by the State party. In addition, the State party has not denied that the disappearance and subsequent death of the author's brother was caused by individuals belonging to the Government's security forces. In the circumstances, the Committee finds that the right to life enshrined in article 6 has been violated by the State party.

6.9 The authors have invoked article 2, paragraph 3, of the Covenant, which requires States parties to ensure that individuals have accessible, effective and enforceable remedies to uphold the rights enshrined in the Covenant. The Committee attaches importance to States parties' establishment of appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. It refers to its general comment No. 31,[11] which states that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. In the present case, the information before it indicates that neither the author nor his brother had access to such effective remedies, and the Committee concludes that the facts before it disclose a violation of article 2, paragraph 3, of the Covenant, read in conjunction with article 6, article 7, and article 9 with respect to the author's brother; and a violation of article 2, paragraph 3, read in conjunction with article 7 of the Covenant with respect to the author himself.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of article 6; article 7; and article 9 of the Covenant, and article 2, paragraph 3, read in conjunction with article 6, article 7, and article 9 in respect of the author's brother, and of article 7 and article 2, paragraph 3, of the Covenant read in conjunction with article 7 in respect of the author himself.

8. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including a thorough and effective investigation into the disappearance and death of the author's brother, the appropriate information emerging from its investigation, and adequate compensation to the author for the violations suffered by him. The State party is also under a duty to prosecute, try and punish those held responsible for such violations. The State party is, further, required to take measures to prevent similar violations in the future.

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

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

Notes

[1] The author quotes from the observations of the Human Rights Committee on the Libyan Arab Jamahiriya, 6 November 1998, UN Doc. CCPR/C/79/Add.101, at para. 14.

[2] Reference is made to Amnesty International, Libya: Time to make human rights a reality, 27 April 2004, AI Index: MDE 19/002/2004, at pp. 13-17 and 27-29.

[3] The author refers to communication No. 84/1981, *Dermit Barbato v. Uruguay*, Views adopted on 21 October 1982, para. 10 (a); communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 11; communication No. 449/1991, *Mojica v. Dominican Republic*, Views adopted on 15 July 1994, para. 7; communication No. 161/1991, *Rubio Herrera v. Colombia*, Views adopted on 2 November 1987, para. 11.

[4] Reference is made to communication No. 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya*, Views adopted on 23 March 1994, para. 5.4

[5] The author refers to communications Nos. 886/1999, *Schedko v. Belarus*, Views adopted on 3 May 2003, para. 10.2 and 887/1999, *Staselovich v. Belarus*, Views adopted on 3 April 2003, para. 9.2.

[6] See Committee's jurisprudence: communications No. 1208/2003, *Kurbonov v. Tajikistan*, Views adopted on 16 March 2006, and communication No. 760/1997, *J.G.A. Diergaardt et al. v. Namibia,* Views adopted on 25 July 2000, para. 10.2.

[7] Cf communications No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 31 July 2003, para. 9.3.

[8] Communications Nos. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 8.5; 458/1991, *Mukong v. Cameroon*, Views adopted on 24 July 1994, para. 9.4.

[9] Communications Nos. 449/1991, *Mójica v. Dominican Republic*, Views adopted on 10 August 1994, para. 5.7; 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 9.6.

[10] Communications Nos. 107/1981, *Elena Quinteros Almeida v. Uruguay*, Views adopted on 21 July 1983, para. 14; 950/2000, *Sarma v. Sri Lanka*, Views adopted on 31 July 2003, para. 9.5.

[11] Paragraph 15.

T. Communication No. 1296/2004, *Belyatsky v. Belarus** (Views adopted on 24 July 2007, Ninetieth session)

Submitted by:	Aleksander Belyatsky et al. (not represented by counsel)
Alleged victims:	The authors
State party:	Belarus
Date of communication:	8 April 2004 (initial submission)
Subject matter:	Dissolution of human rights association by a court order of the State party's authorities
Substantive issues:	Equality before the law; prohibited discrimination; right to freedom of association; permissible restrictions; right to have one's rights and obligations in suit at law determined by a competent, independent and impartial tribunal
Procedural issue:	Lack of substantiation of claims
Articles of the Covenant:	14, paragraph 1; 22, paragraphs 1 and 2; 26
Article of the Optional Protocol:	2

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

Meeting on 24 July 2007,

Having concluded its consideration of communication No. 1296/2004, submitted to the Human Rights Committee by Aleksander Belyatsky in his own name and on behalf of 10 other individuals 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 communication, and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

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

1. The author of the communication is Aleksander Belyatsky, a Belarusian citizen born in 1962, residing in Minsk, Belarus. The communication is presented in his own name and on behalf of 10 other Belarusian citizens, all members of the non-governmental public association "Human Rights Centre 'Viasna'" (hereinafter, "Viasna"), residing in Belarus. He submits the signed authorization of all 10 co-authors. He author alleges that all are victims of violations by Belarus[1] of article 14, paragraph 1; article 22, paragraphs 1 and 2; and article 26 of the International Covenant on Civil and Political Rights. He is not represented.

Factual background

2.1 The author is Chairperson of "Viasna"'s Council, a non-governmental association registered by the Ministry of Justice on 15 June 1999. By October 2003, it had more than 150 members in Belarus, 4 regional and 2 city registered branches. Its activities included monitoring the human rights situation in Belarus, and preparing alternative human rights reports on Belarus, which have been used and referred to by United Nations treaty bodies. "Viasna" monitored the Presidential elections of 2001, arranging for some 2000 people to observe the voting process, as well as the 2003 municipal council elections. It also organized protests and pickets in relation to various human rights issues. "Viasna" was frequently subjected to the persecution by the authorities, including administrative detention of its members and thorough scheduled and spontaneous inspections of its premises and activities by the Ministry of Justice and tax authorities.

2.2 In 2003, the Ministry of Justice undertook an inspection of the statutory activities of "Viasna"'s branches and, on 2 September 2003, filed a suit in the Supreme Court of Belarus, requesting the dissolution of "Viasna", because of several alleged offences committed by it. The suit was based on article 29, of the Law "On Public Associations" and article 57, paragraph 2, subparagraph 2, of the Civil Procedure Code.[2] "Viasna" was accused of the following: having submitted documents with forged founding member signatures in support of its application for registration in 1999; the Mogilev branch of "Viasna" having only 8, rather than the required 10 founding members at the time of registration; non-payment of membership fees envisaged by "Viasna"'s statutes and non-establishment of a Minsk branch; acting in the capacity of a public defender of the rights and freedoms of citizens who are not members of "Viasna" in the Supreme Court, contrary to article 72 of the Civil Procedure Code,[3] Article 22 of the Law "On Public Association"[4] and its own statutes; and offences against electoral laws allegedly carried out during its monitoring of the 2001 Presidential elections.[5]

2.3 On 10 September 2003, the Supreme Court opened a civil case against "Viasna" on the basis of the Ministry of Justice's suit. On 28 October 2003, in a public hearing, a Supreme Court judge upheld the charges of breaching electoral laws but dismissed the other charges and ordered the dissolution of "Viasna". With regard to the breaches of electoral law, the Supreme Court established that 'Viasna' did not comply with the established procedure of sending its observers to the meetings of the electoral commission and to the polling stations. The relevant paragraphs of the Supreme Court decision of 28 October 2003 read:

"Namely, the association was sending empty forms of excerpts from the minutes of Rada's meetings of 18 June, 1 and 22 July, 5 August 2001, to the Mogilev and Brest regions. Subsequently, these forms were arbitrarily filled-in with the names of citizens with regard to whom no decisions on sending them as observers had been taken; and who were not the members of this association.

In Postav district, one of the association's members offered pay to the citizens, who were neither "Viasna"'s nor the other public associations' members, to be observers at the polling stations, and have been filling-in in their presence the excerpts from the minutes of Rada's meetings.

Similar breaches of the law in sending the public association's observers occurred at the polling stations Nos. 30 and 46 of the Novogrudok district."

The court found that the breach of the electoral laws was "gross" enough to trigger the application of article 57, paragraph 2, of the Civil Procedure Code.[6] The court's conclusion was corroborated by the written warning issued to "Viasna"'s governing body by the Ministry of Justice on 28 August 2001 and on the ruling of the Central Electoral Commission on Elections and Conduct of Republican Referendums (hereinafter, CEC) of 8 September 2001. The latter ruling was based on the inspections conducted by the Ministry of Justice and the Belarus Prosecutor's Office.

2.4 The Supreme Court's decision became executory immediately after its adoption. Under Belarus law, the Supreme Court's decision is final and cannot be appealed on cassation. The Supreme Court decision can be appealed only through a supervisory review procedure and can be repealed by the Chairperson of the Supreme Court or the General Prosecutor of Belarus. The appeal of "Viasna"'s representatives to the Chairperson of the Supreme Court for a supervisory review of the Supreme Court's decision of 28 October 2003 was rejected on 24 December 2003. There are no other available domestic remedies to challenge the decision to dissolve "Viasna"; domestic law outlaws the operation of unregistered associations in Belarus.

The complaint

3.1 The author submits that the decision to dissolve "Viasna" amounts to a violation of his and the co-authors' right under article 22, paragraph 1, of the Covenant. He contends that contrary to article 22, paragraph 2, the restrictions placed on the exercise of this right by the State party do not meet the criteria of necessity to protect the interests of national security or public safety, order, health, or morals, nor the rights and freedoms of others.

3.2 The author claims that he and the other co-authors were denied the right to equality before the courts and to the determination of their rights and obligations in a suit at law (article 14, paragraph 1, of the Covenant).

3.3 The author alleges that the State party's authorities violated his and his co-authors' right to equal protection of the law against discrimination (art. 26), on the ground of their political opinion.

3.4 The author further challenges the applicability of article 57, paragraph 2, of the Civil Procedure Code (paragraph 2.3 above) to the dissolution of "Viasna". Under article 117, paragraph 3, of the Civil Procedure Code, the legal regime applicable to public associations in their capacity as participants in civil relations, is subject to a *lex specialis*. Therefore, the scope of the "repeated commission of gross breaches of the law" for which an association can be dissolved by court order under article 57 of the Civil Procedure Code, should be defined on the basis of this *lex specialis*. Under the Law "On Public Associations", an association can be dissolved by court order if it undertakes again, within a year, activities for which it had already received a written warning. Under this Law and other relevant *lex specialis*, the list of the "repeated commission of gross breaches of the law" is defined as follows: (1) activities aimed at overthrowing or forceful change of the constitutional order; violation of the state's integrity or security; propaganda of war, violence; incitation of national, religious and racial hatred, as well as activities that can negatively affect the citizens' health and morals; (2) a single violation of the law on public actions in cases explicitly defined by the Belarus law; (3) violation of the requirements of paragraph 4, parts 1-3, of Presidential Decree "On the Receipt and Use of Free Aid" of 28 November 2003. For the author, "Viasna"'s activities do not fall under any of the above categories. Moreover, by relying on the written warning of 28 August 2001 and on the CEC ruling of 8 September 2001 in its decision of 28 October 2003 to dissolve "Viasna", the Supreme Court effectively penalized it twice for identical actions: the first time by the Ministry of Justice's warning and the second time by the Supreme Court's decision on the dissolution The author concludes that the decision to dissolve "Viasna" was illegal and politically motivated.

State party's observations on admissibility and merits

4.1 On 5 January 2005, the State party recalls the chronology of the case. It specifies that the decision to dissolve "Viasna" is based on article 57, paragraph 2, of the Civil Procedure Code. It further challenges the author's claim that "Viasna" was penalized twice for identical actions and submits that the Ministry of Justice's written warning of 28 August 2001 was issued in response to "Viasna"'s violation of record keeping and not because of the violation of electoral laws. For the State party, the forgery of member signatures and the violation of "Viasna"'s statutes were discovered during the association's re-registration.

4.2 The State party further adds that the author's claim under article 14, paragraph 1, of the Covenant is unsupported by the case file of "Viasna"'s civil case. The case was examined in public hearing, at the request of "Viasna"'s representative it was conducted in the Belarusian language and the hearing was audio and video recorded. The hearing complied with the 'equality of arms' principle guaranteed by article 19 of the Civil Procedure Code, which is illustrated by the fact that the Supreme Court did not uphold all charges identified in the Ministry of Justice's suit. For the State party, the decision to dissolve "Viasna" was adopted on the basis of a thorough and full analysis of the evidence presented by both parties, and the decision complied with the legal procedure of Belarus then in place.

Author's comments on the State party's observations

5.1 On 19 January 2005, the author submits that the Supreme Court and the State party's reference to article 57, paragraph 2, of the Civil Procedure Code is contrary to the provisions of article 117, paragraph 3, of the same Code (see paragraph 3.4 above). In the absence of what is referred to by the "repeated commission of gross breaches of the law" in article 57 of the Civil

Procedure Code, the court has wide discretion to determine this matter in the circumstances of each case. In "Viasna"'s case, the Supreme Court decided that the violation of the electoral laws allegedly carried out during its monitoring of the 2001 Presidential elections, was sufficiently "gross" to warrant "Viasna"'s dissolution two years later. The author reiterates that this decision was politically motivated and is directly linked to "Viasna"'s public and human rights related activities.[7]

5.2 The author rejects the State party's argument that the Ministry of Justice's written warning of 28 August 2001 was issued purely in response to "Viasna"'s violation of record keeping and not because of the violation of electoral laws. He refers to the CEC ruling of 8 September 2001, which explicitly stated that the officers of the Ministry of Justice and of the Prosecutor's Office of Belarus inspected "Viasna"'s compliance with the law on sending the observers. The Ministry of Justice's written warning of 28 August 2001 was subsequently used as a basis for the CEC ruling of 8 September 2001. In turn, the Supreme Court's decision of 28 October 2003 to dissolve "Viasna" was based on the same facts as the Ministry of Justice's written warning of 28 August 2001.

5.3 The author refutes the State party's claim that the forgery of member signatures was discovered during the association's re-registration. As a public association registered on 15 June 1999, "Viasna" did not have to undergo a re-registration procedure. In its decision of 28 October 2003, the Supreme Court explicitly stated that it did not receive any evidence in support of the Ministry of Justice's claims that there had been any forged member signatures in "Viasna"'s 1999 application for registration. The author adds that the Supreme Court did not uphold any of the other charges presented in the Ministry of Justice's suit, except for those related to the violation of article 57, paragraph 2, of the Civil Procedure Code.

5.4 On 5 October 2006, the author adds that since "Viasna"'s dissolution, the State party has introduced new legal provisions detrimental to the exercise of the rights to freedom of expression, peaceful assembly and association and representing a very serious risk for the existence of an independent civil society in Belarus. Among them are amendments to the Criminal Code of Belarus signed by the President on 13 December 2005 and in force since 20 December 2005, which introduced criminal sanctions for activities carried out by a suspended or dissolved association or foundation. The new article 193-1 of the Criminal Code stipulates that anyone who organizes activities in the framework of a suspended, dissolved or unregistered association may face a fine, arrest for up to six months or be subjected to a sentence "restricting his freedom" of up to two years. In 2006, four members of the non-governmental association "Partnership" were sentenced to different terms of imprisonment under article 193-1. He requests the Committee to examine his claim under article 22, paragraph 1, of the Covenant in the light of this new legislation which criminalises the operation of unregistered associations in Belarus.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee has ascertained, as required under article 5, paragraph 2, of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement and notes that the State party did not contest that domestic remedies in the present communication have been exhausted.

6.3 In relation to the alleged violation of article 14, paragraph 1, and article 26 of the Covenant, in that the author was denied the right to equality before the courts, to the determination of his rights by a competent, independent and impartial tribunal, and to equal protection of the law against discrimination, the Committee considers that these claims have been insufficiently substantiated, for purposes of admissibility. They are thus inadmissible under article 2 of the Optional Protocol.

6.4 The Committee considers the author's remaining claim under article 22 to be sufficiently substantiated and accordingly declares it admissible.

Consideration of the merits

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

7.2 The issue before the Committee is whether the dissolution of "Viasna" amounts to a violation of the author and his co-authors' right to freedom of association. The Committee notes that according to the author's uncontested information, "Viasna" was registered by the Ministry of Justice on 15 June 1999 and dissolved by order of the Supreme Court of Belarus on 28 October 2003. It recalls that domestic law outlaws the operation of unregistered associations in Belarus and criminalizes the activity of individual members of such associations. In this regard, the Committee observes that the right to freedom of association relates not only to the right to form an association but also guarantees the right of such an association freely to carry out its statutory activities. The protection afforded by article 22 extends to all activities of an association, and dissolution of an association must satisfy the requirements of paragraph 2 of that provision.[8] Given the serious consequences which arise for the author, the co-authors and their association in the present case, the Committee concludes that the dissolution of "Viasna" amounts to an interference with the author's and his co-authors' freedom of association.

7.3 The Committee observes that, in accordance with article 22, paragraph 2, in order for the interference with freedom of association to be justified, any restriction on this right must cumulatively meet the following conditions: (a) it must be provided by law; (b) may only be imposed for one of the purposes set out in paragraph 2; and (c) must be "necessary in a democratic society" for achieving one of these purposes. The reference to the notion of "democratic society" indicates, in the Committee's opinion, that the existence and operation of associations, including those which peacefully promote ideas not necessarily favourably received by the government or the majority of the population, is a cornerstone of a democratic society.[9] The mere existence of reasonable and objective justifications for limiting the right to freedom of association is not sufficient. The State party must further demonstrate that the prohibition of an association is necessary to avert a real and not only hypothetical danger to national security or democratic order, and that less intrusive measures would be insufficient to achieve the same purpose.[10]

7.4 In the present case, the court order which dissolved "Viasna" is based on perceived violations of the State party's electoral laws carried out during the association's monitoring of the 2001 Presidential elections. This de facto restriction on the freedom of association must be assessed in the light of the consequences which arise for the author, the co-authors and the association.

7.5 The Committee notes that the author and the State party disagree over the interpretation of article 57, paragraph 2, of the Civil Procedure Code, and its compatibility with the *lex specialis* governing the legal regime applicable to public associations in Belarus. It considers that even if "Viasna"'s perceived violations of electoral laws were to fall in the category of the "repeated commission of gross breaches of the law", the State party has not advanced a plausible argument as to whether the grounds on which "Viasna" was dissolved were compatible with any of the criteria listed in article 22, paragraph 2, of the Covenant. As stated by the Supreme Court, the violations of electoral laws consisted of "Viasna"'s non-compliance with the established procedure of sending its observers to the meetings of the electoral commission and to the polling stations; and offering to pay third persons, not being members of "Viasna", for their services as observers (see paragraph 2.3 above). Taking into account the severe consequences of the dissolution of "Viasna" for the exercise of the author's and his co-authors' right to freedom of association, as well as the unlawfulness of the operation of unregistered associations in Belarus, the Committee concludes that the dissolution of the association is disproportionate and does not meet the requirements of article 22, paragraph 2. The authors' rights under article 22, paragraph 1, have thus been violated.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses a violation by the State party of article 22, paragraph 1, of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author and the co-authors are entitled to an appropriate remedy, including the re-registration "Viasna" and compensation. It is also under an obligation to take steps to prevent similar violations occurring in the future.

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

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

Notes

[1] The Covenant and the Optional Protocol thereto entered into force for Belarus on 23 March 1976 and 30 December 1992 respectively.

[2] Article 29 of the Law "On Public Associations" stipulates that an association can be dissolved by court order when: (1) it undertakes activities enumerated in article 3 [activities aimed at overthrowing or forceful change of the constitutional order; violation of the state's integrity or security; propaganda of war, violence; incitation of national, religious and racial hatred, as well as activities that can negatively affect the citizens' health and morals]: (2) it again undertakes, within a year, activities for which it had already received a written warning; and (3) the founding members committed offences of the present and other laws while at during the registration of the public association. Public association can be dissolved by court order for a single violation of the law on public actions in cases explicitly defined by the Belarus law. Article 57, paragraph 2, of the Civil Procedure Code envisages a procedure for dissolution of legal entity by court order when this entity is engaged in unlicensed activities or the activities prohibited by law or when it has repeatedly committed gross breaches of the law.

[3] Article 72 of the Civil Procedure Code reads:

> "A legally capable person that has duly legalized authority to conduct a case in court, except for those persons listed in article 73 of the same Code, can be a representative in court.
>
> The following [persons] can be representatives in court:
>
> (1) Attorneys at law;
>
> (2) Staff members of legal entities - in cases involving these entities;
>
> (3) Authorized representatives of public associations (organizations) who are entitled by law to represent and defend in court the rights and legitimate interests of the members of these public associations (organizations) and of other persons;
>
> (4) Authorized representatives of organizations who are entitled by law to represent and defend in court the rights and legitimate interests of the members of other persons;
>
> (5) Legal representatives;
>
> (6) Close relatives, spouses;
>
> (7) Representatives appointed by court;
>
> (8) One of the procedural co-participants mandated by the latter."

[4] Article 22, paragraph 2, of the Law "On Public Associations" reads: "Public associations shall have a right to represent and defend the rights and legitimate interests of its members (participants) in the government, commercial and public bodies and agencies."

[5] Reference is made to the ruling of the Central Electoral Commission on Elections and Conduct of Republican Referendums of 8 September 2001.

[6] Supra No. 2.

[7] The author refers to the report of the FIDH/OMCT International Judicial Observation Mission "Belarus: The 'liquidation' of the independent civil society", April 2004, pp. 12-16, in support of his claims.

[8] *Korneenko et al v. Belarus*, communication No. 1274/2004, Views adopted on 31 October 2006, para. 7.2.

[9] Ibid., para. 7.3.

[10] *Jeong-Eun Lee v. Republic of Korea*, communication No. 1119/2002, Views adopted on 20 July 2005, para. 7.2.

U. Communication No. 1320/2004, *Pimentel et al. v. Philippines** (Views adopted on 19 March 2007 Eighty-ninth session)

Submitted by:	Mariano Pimentel et al. (represented by counsel, Mr. Robert Swift)
Alleged victim:	The author
State party:	The Philippines
Date of communication:	11 October 2004 (initial submission)
Subject matter:	Enforcement of a foreign judgement in the State party
Procedural issue:	None
Substantive issues:	Concept of "suit at law", reasonable delay
Articles of the Covenant:	2, paragraph 3 (a), 14, paragraph 1
Article of the Optional Protocol:	5, paragraph 2 (b)

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

Having concluded its consideration of communication No. 1320/2004, submitted to the Human Rights Committee on behalf of Mariano Pimentel et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Meeting on 19 March 2007,

Adopts the following:

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

1. The authors of the communication are Mariano Pimentel, Ruben Resus and Hilda Narcisco, all Philippine nationals. The first author resides in Honolulu, Hawaii, and the others in the Philippines. They claim to be victims of violations by the Republic of the

* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Ms. Ruth Wedgwood.

Philippines of their rights under article 2, paragraph 3 (a), of the International Covenant on Civil and Political Rights. The communication also appears to raise issues under article 14, paragraph 1, of the Covenant. The Covenant and the Optional Protocol entered into force for the State party on 23 January 1987 and 22 November 1989, respectively. The authors are represented by counsel; Mr. Robert Swift of Philadelphia, Pennsylvania.

Factual background

2.1 The authors claim to be members of a class of 9,539 Philippine nationals who obtained a final judgement in the United States for compensation against the estate of the late Ferdinand E. Marcos ("the Marcos estate") for having been subjected to torture during the regime of President Marcos.[1] Ferdinand E. Marcos was residing in Hawaii at the time.

2.2 In September 1972, the first author was arrested by order of President Marcos two weeks after the declaration of martial law in the Philippines. Over the next six years, he was detained for a total of four years in several detention centres, without ever being charged. Upon return from his final period in detention, he was kidnapped by soldiers, who beat him with rifles, broke his teeth, his arm and leg, and dislocated his ribs. He was buried up to his neck in a remote sugar cane field and abandoned, but was subsequently rescued.

2.3 In 1974, the second author's son, A.S., was arrested by order of President Marcos and taken into military custody. He was tortured during interrogation and kept in detention, without ever being charged. He disappeared in 1977. In March 1983, the third author was also arrested by order of President Marcos. She was tortured and gang-raped during her interrogation. She was never charged with nor convicted of any offence.

2.4 In April 1986, the authors, together with other class members, brought an action against the Marcos estate. On 3 February 1995, a jury at the United States District Court in Hawaii awarded a total of US$ 1,964,005,859.90 to the 9,539 victims (or their heirs) of torture, summary execution and disappearance. The jurors found a consistent pattern and practice of human rights violations in the Philippines during the regime of President Marcos from 1972-1986. Where individuals were randomly selected, part of the amount of the judgement is divided per claimant. Individuals, who were not randomly selected but are part of the class, including the authors, will receive part of the award which was made to three subclasses.[2] However, the amounts were not divided per claimant and it is only after collection (in whole or in part) of the judgement amount that the United States District Court of Hawaii will allocate amounts to each claimant. On 17 December 1996, the United States Court of Appeal for the Ninth Circuit affirmed the judgement.[3]

2.5 On 20 May 1997, five class members, including the third author, filed a complaint against the Marcos estate, in the Regional Trial Court of Makati City, Philippines, with a view to obtaining enforcement of the United States judgement. The defendants counter filed a motion to dismiss, claiming that the PHP 400 (US$ 7.20) paid by each plaintiff was insufficient as the filing fee. On 9 September 1998, the Regional Trial Court dismissed the complaint, holding that the complainants had failed to pay the filing fee of PHP 472 million (US$ 8.4 million), calculated on the total amount in dispute (US$ 2.2 billion). On 10 November 1998, the authors filed a motion for reconsideration before the same Court, which was denied on 28 July 1999.

2.6. On 4 August 1999, the five class members filed a motion with the Philippine Supreme Court, on their own behalf and on behalf of the class, seeking a determination that the filing fee was PHP 400 rather than PHP 472 million. By the time of submission of the communication to the Committee (11 October 2004), the Supreme Court had not acted on this motion, despite a motion for early resolution filed by the petitioners on 8 December 2003. (see paragraph 4 below for an update).

2.7 According to the authors, since the five class members filed their motion with the Philippine Supreme Court, the same Court entered judgement for the State party against the Marcos Estate in a forfeiture action and directed enforcement of that judgement for over US$ 650 million, even though that appeal was filed over two years after the authors' own petition.

The complaint

3. The authors claim that their proceedings in the Philippines on the enforcement of the United States judgement have been unreasonably prolonged and that the exorbitant filing fee amounts to a de facto denial of their right to an effective remedy to obtain compensation for their injuries, under article 2 of the Covenant. They argue that they are not required to exhaust domestic remedies, as the proceedings before the Philippine courts have been unreasonably prolonged. The communication also appears to raise issues under article 14, paragraph 1, of the Covenant.

The State party's submission on admissibility and merits

4. On 12 May 2005, the State party submitted that the communication is inadmissible for failure to exhaust domestic remedies. It submits that, on 14 April 2005, the Supreme Court handed down its decision in *Mijares et al. v. Hon. Ranada et al*., affirming the authors' claim that they should pay a filing fee of PHP 410 rather than PHP 472 million with respect to their complaint to enforce the judgement of the United States District Court in Hawaii. The State party denies that the authors were not afforded an effective remedy.

The authors' comments on the State party's submission

5.1 On 12 January 2006, the authors submit that there has been no satisfactory resolution of their claims. They confirm that, on 14 April 2005, the Supreme Court decided in their favour with respect to the filing fee. However, despite the Supreme Court's view that there be a speedy resolution to their claim by the trial court, this court has not yet decided on the enforceability of the decision of the United States District Court of Hawaii.

5.2 In addition, the authors argue that an appeal in a parallel case, which is one year older than the appeal in the current case has been pending for over seven years in the Philippine Supreme Court.[4]

Additional comments by the parties

6. On 1 June 2006, the State party submitted that, following the Supreme Court decision on the filing fee, the case was reinstated before the trial court. It adds that the authors of the current case are unrelated to the case referred to in paragraph 5.2.

7.1 On 15 June and 4 July 2006, in response to a request for clarification from the Secretariat regarding the authors' status as "victim[s]" for the purposes of article 1 of the Optional Protocol, the authors stated that a class action in the United States may be brought by any member of the class on behalf of a defined group, in this case, 9,539 victims of torture, summary execution and disappearance. All class members have standing in a class action once it is certified by a court and all have the right to share in a final judgement. A court is free to designate particular class members as "class representatives" for purposes of prosecuting the litigation, but the "class representative" has no more standing on his claim than any other individual class members. Thus, the use of different "class representatives" for the same class in lawsuits filed in the United States and the Philippines has no bearing on the authors' standing. The Philippine rule on class actions is derived from and based on the United States rule.

7.2 According to the authors, in a class action filed in the United States, it is not common to file a list of all class members. In this case, where the public record could be inspected by the Philippine Ministry, which might act in reprisal against the living torture victims, caution was exercised. The authors provide evidence to prove that they are members of the United States class action: an excerpt from Ms. Narcisco's testimony at the trial on liability in the United States; an excerpt from Mr. Pimentel's deposition in 2002 in the United States, and a United States judgement in which he was certified as a class representative in a subsequent case; and a claim form as required by the court with respect to M. Resus. The authors also confirm that there has been no action taken for the enforcement of the judgement.

Issues and proceedings before the Committee

Consideration of admissibility

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

8.2 The Committee notes that the claim relating to the enforcement of the United States District Court of Hawaii's judgement is currently pending before the State party's Regional Trial Court. Since the last hearing on the filing issue relating to this case, on 15 April 2005, in which the Supreme Court found in favour of the authors, the issue of the enforcement of the judgement has been reinstated before the Regional Trial Court. For this reason, and bearing in mind that the complaint relates to a civil claim for compensation, albeit for torture, the Committee cannot conclude that the proceedings have been so unreasonably prolonged that the delay would exempt the authors from exhausting them. Accordingly, the Committee finds that this claim is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

8.3 The Committee observes that since the authors brought their action before the Regional Trial Court in 1997, the same Court and the Supreme Court considered the issue of the required filing fee arising from the authors claim on three subsequent occasions (9 September 1998, 28 July 1999 and 15 April 2005) and over a period of eight years before reaching a conclusion in favour of the authors. The Committee considers that the length of time taken to resolve this issue raises an admissible issue under article 14, paragraph 1, as well as article 2, paragraph 3, and should be considered on the merits.

Consideration of the merits

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

9.2 As to the length of the proceedings relating to the issue of the filing fee, the Committee recalls that the right to equality before the courts, as guaranteed by article 14, paragraph 1, entails a number of requirements, including the condition that the procedure before the national tribunals must be conducted expeditiously enough so as not to compromise the principle of fairness.[5] It notes that the Regional Trial Court and Supreme Court spent eight years and three hearings considering this subsidiary issue and that the State party has provided no reasons to explain why it took so long to consider a matter of minor complexity. For this reason, the Committee considers that the length of time taken to resolve this issue was unreasonable, resulting in a violation of the authors' rights under article 14, paragraph 1, read in conjunction with article 2, paragraph 3, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 14, paragraph 1, read in conjunction with article 2, paragraph 3, as it relates to the proceedings on the amount of the filing fee.

11. The Committee is of the view that the authors are entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy. The State party is under an obligation to ensure an adequate remedy to the authors including, compensation and a prompt resolution of their case on the enforcement of the United States judgement in the State party. The State party is under an obligation to ensure that similar violations do not occur in the future.

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

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

Notes

[1] United States District Court in Hawaii, Estate of Ferdinand E. Marcos Human Rights Litigation, MDL No. 840. [The authors' names are not mentioned in the judgement. There is a list of around 137 randomly selected "class claims" and the compensatory damages awarded to them (ranging from US$ 10,000 to US$ 185,000) is specified. Judgement for compensatory damages was also awarded to victims in three of the remaining plaintiff subclasses "of all current citizens of the Republic of the Philippines, their heirs and beneficiaries, who between September 1972 and February 1986 were tortured/summarily executed/ disappeared and are presumed dead, while in the custody of the Philippine military or paramilitary groups, in the aggregate of US$ 251,819,811.00, US$ 409,191,760.00 and US$ 94,910,640.00, to be divided pro rata. Judgement for US$ 1,197,227,417.90 exemplary damages was also awarded to be divided pro rata among all members of the plaintiff class.]

[2] The subclasses relate to those victims that had been (1) tortured, (2) summarily executed and (3) disappeared and are presumed dead.

[3] United States Court of Appeals for the Ninth Circuit, *Hilao v. Estate of Marcos*, 103 F.3d 767.

[4] This case relates to *Imelda M. Manotoc v. Court of Appeals*, which involves an interlocutory appeal from the lower court finding there was sufficient service on Imee Marcos-Manotoc, the daughter of Ferdinand E. Marcos, in an action to enforce a United States judgement against her for the torture and murder of a man.

[5] *Perterer v. Austria*, communication No. 1015/2001, Views adopted on 20 July 2004, para. 10.7.

V. Communication No. 1321/2004, *Yoon v. Republic of Korea** Communication No. 1322/ 2004, *Cho v. Republic of Korea* (Views adopted on 3 November 2006, Eighty-eighth session)

Submitted by:	Mr. Yeo-Bum Yoon and Mr. Myung-Jin Choi (represented by counsel, Mr. Suk-Tae Lee)
Alleged victims:	The authors
State party:	Republic of Korea
Date of communications:	18 October 2004 (initial submissions)
Subject matter:	Conscientious objection on the basis of genuinely-held religious beliefs to enlistment in compulsory military service
Procedural issues:	Joinder of communications
Substantive issues:	Freedom to manifest religion or belief-permissible limitations on manifestation
Articles of the Optional Protocol:	None
Articles of the Covenant:	18, paragraphs 1 and 3

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

Meeting on 3 November 2006,

Having concluded its consideration of communications Nos. 1321/2004 and 1322/2004, submitted to the Human Rights Committee on behalf of Yeo-Bum Yoon and Myung-Jin Choi 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 communication and the States party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The texts of two individual opinions signed by Committee members Mr. Hipólito Solari-Yrigoyen and Ms. Ruth Wedgwood are appended to the present document.

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

1.1 The authors of the communications, both initially dated 18 October 2004, are Mr. Myung-Jin Choi and Mr. Yeo-Bum Yoon, nationals of the Republic of Korea, born on 27 May 1981 and 3 May 1980, respectively. The authors claim to be victims of a breach by the Republic of Korea of article 18, paragraph 1, of the Covenant. The authors are represented by counsel, Mr. Suk-Tae Lee.

1.2 Pursuant to Rule 94, paragraph 2, of the Committee's Rules of Procedure, the two communications are joined for decision in view of the substantial factual and legal similarity of the communications.

The facts as presented by the authors

Mr. Yoon's case

2.1 Mr. Yoon is a Jehovah's Witness. On 11 February 2001, the State party's Military Power Administration sent Mr. Yoon a notice of draft for military service. On account of his religious belief and conscience, Mr. Yoon refused to be drafted within the prescribed period of time, whereupon he was arrested and charged under article 88 (section 1) of the Military Service Act.[1] In February 2002, Mr. Yoon was bailed.

2.2 On 13 February 2004, the Eastern Seoul District Court convicted Mr. Yoon as charged and sentenced him to one and a half years of imprisonment. On 28 April 2004, the First Criminal Division of the Eastern Seoul District Court upheld the conviction and sentence, reasoning inter alia:

> "… it cannot be said that an internal duty of acting according to one's conscience motivated by an individual belief is greater in value than the duty of national defence, which is essential to protect the nation's political independence and its territories, the people's life, body, freedom and property. Furthermore, since whether there is an expectancy for compliance or not must be determined based on specific actors but on the average person in society, so-called 'conscientious decisions', where one objects to the duty of military service set by the law on grounds of religious doctrine, cannot justify acts of objection to military service in violation of established law."

2.3 On 22 July 2004, a majority of the Supreme Court in turn upheld both the conviction and sentence, reasoning, inter alia:

> "if [Mr. Yoon's] freedom of conscience is restricted when necessary for national security, the maintenance of law and order or for public welfare, it would be a constitutionally permitted restriction … Article 18 of the [Covenant] appears to provide essentially the same laws and protection as Article 19 (freedom of conscience) and Article 20 (freedom of religion) of the Korean Constitution. Thus, a right to receive an exemption from the concerned clause of the Military Service Act does not arise from Article 18 of the [Covenant]."

2.4 The dissenting opinion, basing itself on resolutions of the (then) United Nations Commission on Human Rights calling for institution of alternative measures to military service as well as on broader State practice, would have held that genuinely-held conscientious objection amounted to "justifiable reasons", within the meaning of article 88 (1) of the Military Services Act, allowing for exemption from military service.

Mr. Choi's case

2.5 Mr. Choi is also a Jehovah's Witness. On 15 November 2001, the State party's Military Power Administration sent Mr. Choi a notice of draft. On account of his religious belief and conscience, Mr. Choi refused to be drafted within the prescribed period of time, whereupon he was arrested and charged under article 88 (section 1) of the Military Service Act.[2]

2.6 On 13 February 2002, the Eastern Seoul District Court convicted Mr. Choi as charged and sentenced him to one and a half years of imprisonment. On 28 February 2002, Mr. Yoon was bailed. On 28 April 2004 and on 15 July 2004, the First Criminal Division of the Eastern Seoul District Court and the Supreme Court, respectively, upheld the conviction and sentence, on the basis of the same reasoning described above with respect to Mr. Yoon.

Subsequent events

2.7 On 26 August 2004, in a case unrelated to Messrs. Yoon or Choi, the Constitutional Court rejected, by a majority, a constitutional challenge to article 88 of the Military Service Act on the grounds of incompatibility with the protection of freedom of conscience protected under the Korean Constitution. The Court reasoned, inter alia:

> "the freedom of conscience as expressed in Article 19 of the Constitution does not grant an individual the right to refuse military service. Freedom of conscience is merely a right to make a request to the State to consider and protect, if possible, an individual's conscience, and therefore is not a right that allows for the refusal of one's military service duties for reasons of conscience nor does it allow one to demand an alternative service arrangement to replace the performance of a legal duty. Therefore the right to request alternative service arrangement cannot be deduced from the freedom of conscience. The Constitution makes no normative expression that grants freedom of expression a position of absolute superiority in relation to military service duty. Conscientious objection to the performance of military service can be recognized as a valid right if and only if the Constitution itself expressly provides for such a right."

2.8 While accordingly upholding the constitutionality of the contested provisions, the majority directed the legislature to study means by which the conflict between freedom of conscience and the public interest of national security could be eased. The dissent, basing itself on the Committee's general comment No. 22, the absence of a reservation by the State party to article 18 of the Covenant, resolutions of the (then) United Nations Commission on Human Rights and State practice, would have found the relevant provisions of the Military Services Act unconstitutional, in the absence of legislative effort to properly accommodate conscientious objection.

2.9 Following the decision, the authors state that some 300 conscientious objectors whose trials had been stayed were being rapidly processed. Accordingly, it was anticipated that by the end of 2004, over 1,100 conscientious objectors would be imprisoned.

The complaint

3. The authors complain that the absence in the State party of an alternative to compulsory military service, under pain of criminal prosecution and imprisonment, breaches their rights under article 18, paragraph 1, of the Covenant.

The State party's submissions on admissibility and merits

4.1 By submission of 2 April 2005, the State party submits that neither communication has any merit. It notes that article 18 provides for specified limitations, where necessary, on the right to manifest conscience. Although article 19 of the State party's Constitution protects freedom of conscience, article 37 (2) provides that: "The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare … Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated." Accordingly, the Constitutional Court ruled that "the freedom of conscience prescribed in article 19 of the Constitution does not grant one the right to object to fulfilling one's military service duty" based on limitations of principle that all basic rights must be exercised within the boundary of enabling pursuit of civic engagement and keeping the nation's "law order" intact. Hence, the freedom to manifest one's conscience may be restricted by law when it is harmful to public safety and order in pursuing civic engagement or when it threatens a nation's "law order".

4.2 The State party argues that in view of its specific circumstances, conscientious objection to military service needs to be restricted as it may incur harm to national security. Unlike the freedom to form or determine inner conscience, the freedom to object to fulfilling military service duty for reasons of religion may be restricted, as recognized in article 18 of the Covenant, for public causes in that it manifests or realizes one's conscience through passive non-performance.

4.3 Under the specific security circumstances facing a hostile Democratic People's Republic of Korea (DPRK), the State party, as the world's sole divided nation, adopted the Universal Conscription System, which recognizes all citizens' obligation to military service. Thus, the equality principle of military service duty and responsibility carries more meaning in the State party than in any other country. Considering the strong social demand and anticipation for the equality of the performance of military service duty, allowing exceptions to military service duty may prevent social unification, greatly harming national security by eroding the basis of the national military service system - the Universal Conscription System - especially considering the social tendency of attempting to evade military service duty by using any and every means.

4.4 The State party argues that a nation's military service system is directly linked to issues of national security, and is a matter of legislative discretion vested in the lawmakers for the creation of the national army with the maximum capabilities for national defence, after considering a nation's geopolitical stance, internal and external security conditions, economic and social state and national sentiment, along with several other factors.

4.5 The State party contends that given its security conditions, the demand for equality in military service and various concomitant restricting elements in adopting an alternative service system, it is difficult to argue that it has reached the stage of improved security conditions that would allow for limitations to military service, as well as the formation of national consensus.

4.6 The State party concludes that the prohibition of conscientious objection to military service is justified by its specific security and social conditions, which makes it difficult to conclude that the decision violates the essential meaning of the freedom of conscience set out in paragraph 3 of article 18 of the Covenant. Considering the State party's security conditions, the demand for equality in military service duty, and the absence of any national consensus, along with various other factors, the introduction of any system of alternative service is unlikely.

The authors' comments on the State party's submission

5.1 By letter of 8 August 2005, the authors responded to the State party's submissions. They note that the State party does not identify which of the permissible restrictions in section 3 of article 18 is invoked, though accept that the general import of argument is on "public safety or order". Here, however, the State party has not identified why conscientious objectors can be considered to harm public safety or order. Strictly speaking, as conscientious objection has never been allowed, the State party cannot determine whether or not any such danger in fact exists.

5.2 The authors note a vague fear on the State party's part that allowing conscientious objection would threaten universal conscription. But such a fear cannot justify the severe punishments meted out under the Military Service Act to thousands of objectors and the discrimination faced by objectors after their release from prison. In any event, the authors question the real value of conscience, if it must be kept internal to oneself and not expressed outwardly. The authors note the long history, dating from the Roman Republic, of conscientious objection and the pacifist rejection of violence of objectors. Referring to the Committee's general comment No. 22, the authors argue that conscientious objectors, far from threatening public safety or order or others' rights, in fact strengthens the same, being a noble value based on deep and moral reflection.

5.3 On the aspect of the threat posed by the DPRK, the authors note that the State party's population is almost twice as large, its economy thirty times as large and its annual military spending over the last decade nearly ten times as large as that of its northern neighbour. That country is under constant satellite surveillance, and is suffering a humanitarian crisis. By contrast, the State party fields almost 700,000 soldiers, and 350,000 young people perform military service each year. The number of 1,053 imprisoned objectors, as of 11 July 2005, is a very small number incapable of adversely affecting such military power. Against this background, it is unreasonable to argue that the threat posed by the DPRK is sufficient justification for the punishment of conscientious objectors.

5.4 On the issue of equitability, the authors argue that the institution of alternative service arrangements would preserve this, if necessary by extending the term of the latter kind of service. The authors note the positive experience gained from the recent institution of alternative service in Taiwan, facing at least equivalent external threat to its existence as the State party, and in Germany. Such an institution would contribute to social integration and development and

respect for human rights in society. The social tendency to avoid military service, for its part, is unrelated to the objection issue and stems from the poor conditions faced by soldiers. Were these improved, the tendency to avoid service would lessen.

5.5 The authors reject the argument that the introduction of alternative service is at the discretion of the legislative branch, noting that such discretion cannot excuse a breach of the Covenant and in any event little if any work in this direction has been done. Moreover, the State party has not observed its duty as a member of the United Nations Commission on Human Rights, and, whether deliberately or not, has failed to report to the Committee in its periodic reports on the situation of conscientious objectors.

Supplementary submissions of the State party

6.1 By submission of 6 September 2006, the State party responded to the authors' submissions with supplementary observations on the merits of the communications. The State party notes that under article 5 of its Constitution, the National Armed Forces are charged with the sacred mission of national security and defence of the land, while article 39 acknowledges that the obligation of military service is an important, indeed one of the key, means of guaranteeing national security, itself a benefit and protection of law. The State party notes that national security is an indispensable precondition for national existence, maintaining territorial integrity and protecting the lives and safety of citizens, while constituting a basic requirement for citizen's exercise of freedom.

6.2 The State party notes the freedom to object to compulsory military service is subject to express permission of limitations set out in article 18, paragraph 3, of the Covenant. Allowing exceptions to compulsory service, one of the basic obligations imposed on all citizens at the expense of a number of basic rights to protect life and public property, may damage the basis of the national military service which serves as the main force of national defence, escalate social conflict, threaten public safety and national security and, in turn, infringe on the basic rights and freedoms of citizens. Hence, a restriction on the basis of harm to public safety and order or threat to a nation's legal order when undertaken in a communal setting is permissible.

6.3 The State party argues that while it is true that the situation on the Korean peninsula has changed since the appearance of a new concept of national defence and modern warfare, as well as a military power gap due to the disparities in economic power between North and South, military manpower remains the main form of defence. The prospect of manpower shortages caused by falling birth rates must also be taken into account. Punishing conscientious objectors, despite their small overall number, discourages evasion of military service. The current system may easily crumble if alternative service systems were adopted. In light of past experiences of irregularities and social tendencies to evade military service, it is difficult to assume alternatives would prevent attempts to evade military service. Further, accepting conscientious objection while military manpower remains the main force of national defence may lead to the misuse of conscientious objection as a legal device to evade military service, greatly harming national security by demolishing the conscription basis of the system.

6.4 On the authors' arguments on equality, the State party argues that exempting conscientious objectors or imposing less stringent obligations on them risks violating the principle of equality enshrined in article 11 of the Constitution, breach the general duty of national defence imposed by article 39 of the Constitution and amount to an impermissible awarding of decorations or

distinctions to a particular group. Considering the strong social demand and anticipation of equality in performance of military service, allowing exceptions may hinder social unification and greatly harm national capabilities by raising inequalities. If an alternative system is adopted, all must be given a choice between military service and alternative service as a matter of equity, inevitably threatening public safety and order and the protection of basic rights and freedoms. The State party accepts that human rights problems are a major reason for evasion of service and substantially improved barracks conditions. That notwithstanding, the two year length of service - significantly longer than that in other countries - continues to be a reason for evasion unlikely to fade even with improved conditions and the adoption of alternative service.

6.5 On the authors' arguments as to international practice, the State party notes that Germany, Switzerland and Taiwan accept conscientious objection and provide alternative forms of service. It had contacted system administrators in each country and gathered information on the respective practices through research and seminars, keeping itself updated on an ongoing basis on progress made and reviewing the possibility of its own adoption. The State party notes however that the introduction of alternative arrangements in these countries was adopted under their own particular circumstances. In Europe, for example, alternative service was introduced in a general shift from compulsory to volunteer military service post-Cold War, given a drastic reduction in the direct and grave security threat. Taiwan also approved conscientious objection in 2000 when over-conscription became a problem with the implementation in 1997 of a manpower reduction policy. The State party also points out that in January 2006, its National Human Rights Commission devised a national action plan for conscientious objection, and the Government intends to act on the issue.

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2 In the absence of objection by the State party to the admissibility to the communication, as well as any reasons suggesting that the Committee should *proprio motu*, declare the communication inadmissible in whole or in part, the Committee declares the claim under article 18 of the Covenant admissible.

Consideration of the merits

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

8.2 The Committee notes the authors' claim that article 18 of the Covenant guaranteeing the right to freedom of conscience and the right to manifest one's religion or belief requires recognition of their religious belief, genuinely held, that submission to compulsory military service is morally and ethically impermissible for them as individuals. It also notes that article 8, paragraph 3, of the Covenant excludes from the scope of "forced or compulsory labour", which is proscribed, "any service of a military character and, in countries where conscientious objection

is recognized, any national service required by law of conscientious objectors". It follows that the article 8 of the Covenant itself neither recognizes nor excludes a right of conscientious objection. Thus, the present claim is to be assessed solely in the light of article 18 of the Covenant, the understanding of which evolves as that of any other guarantee of the Covenant over time in view of its text and purpose.

8.3 The Committee recalls its previous jurisprudence on the assessment of a claim of conscientious objection to military service as a protected form of manifestation of religious belief under article 18, paragraph 1.[3] It observes that while the right to manifest one's religion or belief does not as such imply the right to refuse all obligations imposed by law, it provides certain protection, consistent with article 18, paragraph 3, against being forced to act against genuinely-held religious belief. The Committee also recalls its general view expressed in general comment 22[4] that to compel a person to use lethal force, although such use would seriously conflict with the requirements of his conscience or religious beliefs, falls within the ambit of article 18. The Committee notes, in the instant case, that the authors' refusal to be drafted for compulsory service was a direct expression of their religious beliefs, which it is uncontested were genuinely held. The authors' conviction and sentence, accordingly, amounts to a restriction on their ability to manifest their religion or belief. Such restriction must be justified by the permissible limits described in paragraph 3 of article 18, that is, that any restriction must be prescribed by law and be necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. However, such restriction must not impair the very essence of the right in question.

8.4 The Committee notes that under the laws of the State party there is no procedure for recognition of conscientious objections against military service. The State party argues that this restriction is necessary for public safety, in order to maintain its national defensive capacities and to preserve social cohesion. The Committee takes note of the State party's argument on the particular context of its national security, as well as of its intention to act on the national action plan for conscientious objection devised by the National Human Rights Commission (see paragraph 6.5, *supra*). The Committee also notes, in relation to relevant State practice, that an increasing number of those States parties to the Covenant which have retained compulsory military service have introduced alternatives to compulsory military service, and considers that the State party has failed to show what special disadvantage would be involved for it if the rights of the authors' under article 18 would be fully respected. As to the issue of social cohesion and equitability, the Committee considers that respect on the part of the State for conscientious beliefs and manifestations thereof is itself an important factor in ensuring cohesive and stable pluralism in society. It likewise observes that it is in principle possible, and in practice common, to conceive alternatives to compulsory military service that do not erode the basis of the principle of universal conscription but render equivalent social good and make equivalent demands on the individual, eliminating unfair disparities between those engaged in compulsory military service and those in alternative service. The Committee, therefore, considers that the State party has not demonstrated that in the present case the restriction in question is necessary, within the meaning of article 18, paragraph 3, of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, concludes that the facts as found by the Committee reveal, in respect of each author violations by the Republic of Korea of article 18, paragraph 1, of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including compensation. The State party is under an obligation to avoid similar violations of the Covenant in the future.

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

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

APPENDIX

Dissenting opinion by Committee member Mr. Hipólito Solari-Yrigoyen

While I agree with the majority's conclusion in paragraph 9 that the facts before the Committee reveal a violation of article 18, paragraph 1, I disagree with the reasoning of the majority, as will be apparent from the following observations:

Consideration of the merits

8.2 The Committee notes the authors' claim that the State party breached article 18, paragraph 1, of the Covenant by prosecuting and sentencing the authors for their refusal to perform compulsory military service on account of their religious beliefs as Jehovah's Witnesses.

The Committee also notes the comment by the State party that article 19 of its Constitution does not grant one the right to object to fulfilling one's military service duty. The State party also argues that conscientious objection may be "restricted" as it may harm national security. The State party concludes that the prohibition of conscientious objection to military service is justified and that, given the wording of article 18, paragraph 3, it does not violate the Covenant. The Constitutional Court (see paragraph 2.7, *supra*) would limit the right to freedom of conscience to a mere right to request the State to consider and protect the objector's right "if possible".

The fundamental human right to conscientious objection entitles any individual to an exemption from compulsory military service if this cannot be reconciled with that individual's religion or beliefs. The right must not be impaired by coercion. Given that the State party does not recognize this right, the present communication should be considered under paragraph 1 of article 18, not paragraph 3.

8.3 The right to conscientious objection to military service derives from the right to freedom of thought, conscience and religion. As stated in article 4, paragraph 2, of the Covenant, this right cannot be derogated from even in exceptional circumstances which threaten the life of the nation and justify the declaration of a public emergency. When a right to conscientious objection is recognized, a State may, if it wishes, compel the objector to undertake a civilian alternative to military service, outside the military sphere and not under military command. The alternative service must not be of a punitive nature. It must be a real service to the community and compatible with respect for human rights.

In general comment No. 22, the Committee recognized this right "inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief". The same general comment states that the right to freedom of thought, conscience and religion "is far-reaching and profound", and that "the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief".

Because of their religious beliefs, the authors invoked this right, established in article 18, paragraph 1, to avoid compulsory military service. The prosecution, conviction and prison term imposed on the authors directly violated this right.

The mention of freedom to manifest one's religion or belief in article 18, paragraph 3, is a reference to the freedom to manifest that religion or belief in public, not to recognition of the right itself, which is protected by paragraph 1. Even if it were wrongly supposed that the present communication does not concern recognition of the objector's right, but merely its public manifestation, the statement that public manifestations may be subject only "to such limitations as are prescribed by law" in no way implies that the existence of the right itself is a matter for the discretion of States parties.

The State party's intention to act on the national plan for conscientious objection devised by the National Human Rights Commission (see paragraph 6.5, *supra*), which the Committee notes in paragraph 8.4, must be considered alongside the statement in paragraph 4.6 that the introduction of any system of alternative service is unlikely. Moreover, intentions must be acted upon, and the mere intention to "act on the issue" does not establish whether, at some point in the future, the right to conscientious objection will be recognized or denied.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, concludes that the Republic of Korea has, in respect of each author, violated the authors' rights under article 18, paragraph 1, of the Covenant.

(*Signed*): Hipólito Solari-Yrigoyen

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

Dissenting opinion by committee member Ms. Ruth Wedgwood

I concur with the Committee that a State party wishing to apply the principles of the International Covenant on Civil and Political Rights with a generous spirit should respect the claims of individuals who object to national military service on grounds of religious belief or other consistent and conscientious beliefs. The sanctity of religious belief, including teachings about a duty of non-violence, is something that a democratic and liberal state should wish to protect.

However, regrettably, I am unable to conclude that the right to refrain from mandatory military service is strictly required by the terms of the Covenant, as a matter of law. Article 18 paragraph 1, of the Covenant states that "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."

Article 18 thus importantly protects the right to worship in public or private, to gather with others for worship, to organize religious schools, and to display outward symbols of religious belief. The proviso of article 18 paragraph 3 - that the "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others" - cannot be used by a state party as a backdoor method of burdening religious practice. The Human Rights Committee has appropriately rejected any attempt to limit the protections of article 18 to "traditional" religions or to use forms of administrative regulation to impede or deny practical implementation of the right to worship.

But article 18 does not suggest that a person motivated by religious belief has a protected right to withdraw from the otherwise legitimate requirements of a shared society. For example, citizens cannot refrain from paying taxes, even where they have conscientious objections to state activities. In its present interpretation of article 18, seemingly differentiating military service from other state obligations, the Committee cites no evidence from the Covenant's negotiating history to suggest that this was contemplated. The practice of States parties may also be relevant, whether at the time the Covenant was concluded or even now. But we do not have any record information before us, most particularly, in regard to the number of parties to the Covenant that still rely upon military conscription without providing de jure for a right to conscientious objection.

To be sure, in the "concluding observations" framed upon the examination of country reports, the Human Rights Committee has frequently encouraged states to recognize a right of conscientious objection to military practice. But these concluding observations permissibly may contain suggestions of "best practices" and do not, of themselves, change the terms of the Covenant. It is also true that in 1993, the Committee stated in "general comment 22", at paragraph 11, that a right to conscientious objection "can be derived" from article 18. But in the interval of more than a decade since, the Committee has never suggested in its jurisprudence under the Optional Protocol that such a "derivation" is in fact required by the Covenant.[5] The language of article 8, paragraph 3 (c) (ii), of the Covenant also presents an obstacle to the Committee's conclusion.

This does not change the fact that the practice of the state party in this case has apparently tended to be harsh. The "stacking" of criminal sentences for conscientious objection, through repeated re-issuance of notices for military service, can lead to draconian results. The prohibition of employment by public organizations after a refusal to serve also is a severe result.

In a recent decision of the Constitutional Court of Korea, the national defence minister suggested that "present conditions for life as a serviceman within the military [are] poor" and therefore that "the number of objectors to military service will increase rapidly" if "alternative service is allowed in a country like ours."[6] This may suggest the wisdom of seeking to ameliorate the living conditions of service personnel. In any event, many other countries have felt able to discern which applications for conscientious objection are based upon a bona fide moral or religious belief, without impairing the operation of a national service system. Thus, a State party's democratic legislature would surely wish to examine whether the religious conscience of a minority of its citizens can be accommodated without a prohibitive burden on its ability to organize a national defence.

(*Signed*): Ruth Wedgwood

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

Notes

[1] Article 88 of the Military Service Act provides as follows:

"Evasion of Enlistment

(1) Persons who have received a notice of enlistment or a notice of call (including a notice of enlistment through recruitment) in the active service, and who fails to enlist in the army or to comply with the call, even after the expiration of the following report period from the date of enlistment or call, without any justifiable reason, shall be punished by imprisonment for not more than three years: 1. Five days in cases of enlistment in active service [...]"

[2] Ibid.

[3] In *Muhonen v. Finland* (case No. 89/1981), for example, the Committee declined to decide whether article 18 guaranteed a right of conscientious objection. In *L.T.K. v. Finland* (case No. 185/1984), the Committee declined to address the issue fully on the merits, deciding as a preliminary matter of admissibility on the basis of the argument before it that the question fell outside the scope of article 18. *Brinkhof v. The Netherlands* (case No. 402/1990) addressed differentiation between total objectors and Jehovah's Witnesses, while *Westerman v. The Netherlands* (case No. 682/1996) involved a procedure for recognition of conscientious objection under domestic law itself, rather than the existence of underlying rights as such. Although the statement was not necessary for its final decision, in *J.P. v. Canada* (case No. 446/1991) the

Committee noted, without further explanation, that article 18 "certainly protects the right to hold, express and disseminate opinions and convictions, including conscientious objection to military activities and expenditures".

[4] General comment No. 22 (1993), para. 11.

[5] In the case of *J.P. v. Canada*, communication No. 446/1991, 7 November 1991, the Committee rejected the claim of a petitioner that she had a right to withhold taxes to protest Canada's military expenditures. The Committee stated that "Although article 18 of the Covenant certainly protects the right to hold, express and disseminate opinions and convictions, including conscientious objection to military activities and expenditures, the refusal to pay taxes on grounds of conscientious objection clearly falls outside the scope of protection of this article." In other words, an individual's conscientious objection to taxes for military activities did not require the state to refrain from collecting those taxes.

[6] See 2002 HeonGal, Alleging Unconstitutionality of Article 88, Section 1, Clause 1 of Military Service Act, Constitutional Court of Korea, in the case of Kyung-Soo Lee.

W. Communication No. 1324/2004, *Shafiq v. Australia**
(Views adopted on 31 October 2006, Eighty-eighth session)

Submitted by:	Danyal Shafiq (represented by counsel, the Refugee Advocacy Service of South Australia Inc)
Alleged victim:	The author
State party:	Australia
Date of communication:	5 November 2004 (initial communication)
Subject matter:	Detention of unlawful non-citizen, deportation, risk of torture upon return to the country of origin
Procedural issues:	Non-exhaustion of domestic remedies
Substantive issues:	Arbitrary detention, review of the lawfulness of detention
Articles of the Covenant:	7; article 9, paragraphs 1 and 4; and article 10, paragraph 1
Articles of the Optional Protocol:	5, 2 (b)

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

Meeting on 31 October 2006,

Having concluded its consideration of communication No. 1324/2004, submitted to the Human Rights Committee on behalf of Danyal Shafiq under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in adoption of the Committee's decision.

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

1.1 The author of the communication is Danyal Shafiq, a Bangladeshi national born in 1972, currently detained at the Glenside Campus of the Royal Adelaide Hospital, awaiting deportation from Australia to Bangladesh. He claims to be a victim of violations by Australia[1] of article 7; article 9; and article 10, paragraph 1, of the International Covenant on Civil and Political Rights. He is represented by counsel, the Refugee Advocacy Service of South Australia Inc.

1.2 On 8 November 2004, the Special Rapporteur on New Communications and Interim Measures requested the State party not to deport the author before it had informed the Committee of its plans concerning the apprehended deportation of the author, specifically, whether the author was subject to removal in the near future and, if so, whether the State party planned to deport him to Bangladesh and what measures would be taken to ensure that the author would not be under a risk of irreparable harm, if deported to Bangladesh.

Facts as submitted by the author

2.1 In January 1987, at the age of 15, the author, who was raised at an orphanage in Bangladesh, looked for work and was unwittingly recruited into an illegal political organization, the Sharbahara Party. He was asked to deliver documents to Party activists across Bangladesh. He was unaware of the violent and subversive activities of the Party and believed he was delivering information about the welfare activities of the Party. He later became aware that he was delivering information regarding people to be killed and extortion operations by Sharbahara activists. In 1992 he started working on the Indian border, which he later realised involved smuggling of arms and drugs. When he raised concerns with his recruiter, he was told that the only way he could leave the party was as a dead person. He was also told and believed that if he went to the police he would be killed, either by the police torturing him for information or by Sharbahara activists.

2.2 In 1995, the party split into two. In 1996, the author, who did not wish to be involved in the Party's activities anymore, decided to leave Bangladesh. He arrived in Australia by boat in September 1999 and has been in detention as an "unlawful non citizen" since then. He is effectively a stateless person, as he has no birth or citizenship records from Bangladesh, which might prove his nationality. The Bangladesh mission to Australia denied that he is a citizen of Bangladesh, having no record of his birth or citizenship.

2.3 On 28 February 2000, the author filed an application for a protection visa (refugee status), which was denied on 21 June 2000. His application for merits review to the Administrative Appeals Tribunal (AAT) was rejected on 1 June 2001, because there were "serious reasons for considering that the applicant had committed a serious non-political crime outside Australia prior to his admission to Australia, within the meaning and for the purposes of paragraph (b) of article 1 F of the Refugees Convention".[2] It concluded that the provisions of that Convention did not apply to him and that he was not a person to whom Australia had protection obligations under the Convention. The author appealed for legal review before the Federal Court, which denied his appeal on 19 June 2002. On 31 March 2004, the author applied for consideration on compassionate grounds. Under section 417 of the Migration Act 1958, the Minister for Immigration, Multiculturalism and Indigenous Affairs can exercise his or her discretion and grant a protection visa on humanitarian grounds. On 14 May 2004, she refused to exercise this discretion.

The complaint

3.1 The author alleges a violation to article 9, paragraphs 1 and 4, because he has been held in arbitrary and indefinite mandatory detention since his arrival in Australia in September 1999. He refers to the case of *A v. Australia*[3], and claims that his detention is arbitrary in that it bears no relation to the circumstances of the case. The author's detention is indefinite and continues while he is present in Australia or until a favourable decision is made regarding his refugee status. He has no recourse to a court for legal determination of his refugee status. Australian courts can merely remit any administrative decisions on asylum claims back to the decision maker on grounds of legal error. While the lawfulness of his detention may be decided by a court, the grounds for his detention (refugee status) cannot be reviewed by a court. Further, as a stateless person, he is detained indefinitely until and unless a favourable decision is made granting him asylum or a humanitarian visa.

3.2 If deported to Bangladesh, he would be at risk of being imprisoned, tortured and subject to cruel and inhuman treatment by the police or by members of Sharbahara, in violation of article 7 of the Covenant. Bangladeshi authorities would be interested in the reasons for his forcible return. According to Amnesty International reports, members of Sharbahara, more than others, who surrender to police or are caught or arrested face long prison terms, risk being killed, and are at risk of torture. The author fears possible elimination by Sharbahara agents within the police. The author submits various reports[4], from 1999 to 2004, to corroborate his claim that torture is widespread in Bangladesh. In addition to his fear of the police, the author fears reprisals from members of Sharbahara. The death threat he received from Sharbahara members would materialise.

3.3 The author claims a violation of article 10 of the Covenant if returned to Bangladesh. He refers to the Standard Minimum Rules for the Treatment of Prisoners, and fears that he would be imprisoned in inhuman conditions because of the poor state of Bangladeshi prisons.

3.4 The author acknowledged that at the time of submission of his communication, he had not exhausted domestic remedies. After the Federal Court's denial to review the decision to refuse his request for asylum, he could have applied for an extension of time and leave to appeal from the Federal Court decision before the Full Federal Court. Leave to appeal and extension of time are not assured, as it depends on there being strong reasons why the extension should be granted, good reasons for the failure to appeal within time, and a good chance of success of the appeal. The author claims that this avenue is discretionary and that his deportation to Bangladesh is not necessarily constrained by the pursuit of this remedy.

The State party's observations

4.1 On 21 October 2005, the State party commented on admissibility and merits of the communication. It refers to the Committee's jurisprudence that mere doubt as to the effectiveness of domestic remedies or the prospect of the financial costs involved does not absolve a complainant from pursuing such remedies.[5] It further recalls that ignorance of the existence of a remedy or of the conditions for its invocation does not constitute an excuse for failure to exhaust domestic remedies.

4.2 With regards to the claim under article 7, the State party submits that this part of the communication is inadmissible for failure to exhaust domestic remedies. The State party

indicates that these remedies may not be available to him now because of statutory limitations. It refers to the Committee's jurisprudence in *N.S. v. Canada*,[6] where it held that a failure to exhaust a remedy in time means that available domestic remedies have not been exhausted.

4.3 The Federal Court reviewed the decision of the Administrative Appeals Tribunal (AAT) to affirm the primary delegate's decision that the author was subject to the exclusion clause of the Refugees Convention and found no legal error. The author then appealed the Federal Court's decision to the Full Federal Court. However, he withdrew from that litigation before the matter was heard by that Court. He could have maintained his appeal to the Full Bench of the Federal Court. If the Full Federal Court had found in his favour, it would have remitted his case to the AAT for reconsideration. If the author had continued with his appeal and the Full Federal Court had not found in his favour, then he could have sought special leave to appeal from that decision to the High Court. He has not pursued the available Full Federal Court and High Court remedies. Nor has he offered prima facie evidence that these remedies are ineffective or that an application for review would inevitably be dismissed, for example, because of clear legal precedent. The State party submits that available remedies could remedy the alleged potential breach of article 7.

4.4 Alternatively, the State party submits that the communication provides insufficient evidence of the author's allegations regarding a potential breach of article 7. For the purposes of article 2 of the Optional Protocol, a "claim" is not just an allegation, but an allegation supported by certain substantiating evidence.[7] The communication fails to establish that the author would be subjected to torture or to cruel, inhuman or degrading treatment or punishment upon returning to Bangladesh. The reports cited by him provide general information on the situation in Bangladesh and do not establish that the author would personally be at risk. For the State party, there is a particular onus on the author in refoulement cases to substantiate and convincingly demonstrate a prima facie case. Evidence assumes greater importance in refoulement cases, which by their very nature are concerned with events outside the State party's immediate knowledge and control. The State party submits that the communication fails to substantiate, for purposes of admissibility, the allegation that Australia would breach article 7 if the author is removed to Bangladesh.

4.5 The State party submits that the allegations concerning article 7 are without merit. It refers to the Committee's jurisprudence that, if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that this person's rights under the Covenant will be violated in another jurisdiction, the State party itself may violate the Covenant,[8] and that the Committee has equated a "necessary and foreseeable" consequence with "a real risk".[9] There is no evidence to support the conclusion that it is a necessary and foreseeable consequence of removal that the author would face a real risk of violation of his rights under article 7.

4.6 The State party recalls that the AAT did not accept the author's evidence that he was told by Sharbahara party members that he would be killed if he questioned their illegal activities or if he did not continue to participate in those activities,[10] and considered that he could have left the party had he wanted to. The delegate of the Minister reached a similar conclusion when determining the author's asylum claim in 2000. He expressed the view that as the author had been absent from Bangladesh for four years, the potential for risk against him was minimized.[11] Given the time lapse of almost nine years, it cannot be accepted that it is highly likely that the author would be killed by Sharbahara party members upon returning to Bangladesh.[12]

4.7 On the author's similar allegations of risk of ill-treatment by the police, the State party submits that the reports cited in support of the allegation of potential mistreatment at the hands of the Bangladesh police force do not sufficiently substantiate this claim. The reports suggest, inter alia, that the police force in Bangladesh employs torture during arrests and interrogations and continues to practice torture in custody and extrajudicial executions. The reports suggest that Sharbahara members may be at risk of imprisonment and mistreatment by police, particularly if they surrender to police. However, these reports provide only general information on the police force and treatment of prisoners by police in Bangladesh and do not bear sufficient relevance to the author's personal circumstances to establish that he would be at any real risk of harm if removed to Bangladesh. The likelihood that the author will be identified by police as a Sharbahara party member must therefore be greatly reduced.

4.8 On the claim under article 9, paragraph 1, of arbitrary indefinite mandatory detention since the author's arrival in Australia, the State party submits that he has failed to substantiate his claims, for purposes of admissibility, because his allegation amounts to a general statement. The author does not provide any further information, such as information relating to the dates and length of time spent in detention, the means by which he has attempted to challenge his detention or how the detention is in any way arbitrary and amounted to a breach of article 9, paragraph 1. The author further claims that there is no "consideration of release". This claim is plainly wrong. Unlawful non-citizens who arrive in Australia are placed in detention, but can apply for one of many visas. If they are granted a visa, they are released from detention. There may also be other grounds for release from detention. Since the author was detained, the Migration Act and Regulations have been amended to give the Minister the non-delegable and non-compellable power to:

- Grant a visa to any immigration detainee, whether the detainee has applied for it or not;

- Detain an unlawful non-citizen in a form of community detention, referred to as a "residence determination";

- Invite a detainee who cannot be removed in the foreseeable future to apply for a new class of Bridging Visa, known as a "Removal Pending Bridging Visa" (RPBV).

These powers are exercised personally by the Minister on a case-by-case basis, taking into account the situation of each individual detainee. Additionally, the author can cooperate at any time to assist in his travel back to Bangladesh. There are therefore a number of ways by which he could be released from detention, and his detention cannot be described as "arbitrary".

4.9 Subsidiarily, the State party challenges the merits of the allegation on the ground that at no stage was the detention of the author unlawful or arbitrary. On the contrary, detention was reasonable and necessary in the circumstances and could not be said to be inappropriate, unjust or unpredictable. The author's detention was in accordance with procedures established by the Migration Act and was lawful. The author entered Australia in the context of an unauthorized boat arrival. His detention resulted from his status as an unlawful non-citizen under section 189 of the Migration Act and continued while he chose to challenge the decision that he was not a person to whom Australia owed protection obligations.

4.10 The State party contends that the author's detention was not arbitrary and that the key elements in determining whether detention is arbitrary are whether the circumstances under

which a person is detained are "reasonable" and "necessary" in all of the circumstances.[13] Further, detention will not be arbitrary if it is demonstrated to be proportional to the end that is sought. In *A. v. Australia*,[14] the Committee stated that the detention of asylum seekers is not arbitrary per se. The main test in relation to whether detention for immigration control is arbitrary is whether it is reasonable, necessary, proportionate, appropriate and justifiable in all of the circumstances. The State party argues that the determining factor is not the length of the detention but whether the grounds for the detention are justifiable. In every respect, the author's detention was necessary and reasonable to achieve the purposes of Australia's immigration policy and the Migration Act.

4.11 It has been the experience of the State party that unless unauthorized persons are detained, there is a strong likelihood that they will escape and abscond into the community.[15] It is reasonably suspected that if people are released into the community pending the finalization of their applications rather than being detained, there would be a strong incentive for them not to adhere to the conditions of their release and to disappear into the community and remain in Australia unlawfully.

4.12 According to the State party, the factors surrounding the detention of the author indicate that detention was justifiable and appropriate and was not arbitrary. He arrived in Australia without a valid visa. Immigration officers were required to detain him pursuant to section 189 (1) of the Migration Act, as he was an unlawful non-citizen. He was detained while his asylum claim was assessed as he remained an unlawful non-citizen. He remained in detention while choosing to pursue avenues for further review and litigation of the decision not to grant him a protection visa. The author is free to leave Australia at any time, thus obtaining his release.

4.13 The State party concludes that the detention of the author is proportionate to the ends sought, namely, to allow his application for a Protection Visa and his appeals to be properly considered. His detention is also necessary as part of the broader policy of ensuring the integrity of Australia's right to control entry into Australia.

4.14 On the author's claim under article 9, paragraph 4, the State party submits that, while the ground for his detention, namely, his failure to obtain refugee status, cannot be reviewed and determined by any Australian Court, the lawfulness of his detention may be open to review, with the result that the communication is inadmissible *ratione materiae* for failure to reveal any evidence of a violation of any of the rights under the Covenant and also fails to substantiate the claim. The State party further contends that, while Article 9, paragraph 4, guarantees to persons deprived of their liberty the right to have the lawfulness of their detention determined by a court, the author is not denying that he could challenge the lawfulness of his detention, but rather challenged the method of review of the unfavourable decision regarding his protection visa claim. This claim is therefore incompatible with the scope of article 9, paragraph 4.

4.15 The author was detained pursuant to the Migration Act as an unlawful non-citizen. The refusal of a visa to the author could be reviewed both administratively and judicially. Review tribunals in Australia are set up as inquisitorial, non-adversarial bodies to investigate the merits of a person's claim. They are quicker, more efficient, cheaper and more informal than court processes. A review tribunal considers the application for a protection visa afresh, taking into consideration all materials available to the primary decision- maker and any new or additional material. A tribunal can take a different view of the facts and can make different findings on the credibility of an applicant.

4.16 Once an applicant has exhausted administrative review, judicial review is available to consider the legality of the visa refusal or visa cancellation decision. Judicial review does not look at the merits of the decision, but rather, whether it was made in accordance with the law. The Court can consider a range of issues, including whether there was a fair hearing, whether the decision-maker correctly interpreted and applied the relevant law, and whether the decision-maker was unbiased. If the Court finds a legal error of this kind, it remits the matter to the decision-maker for reconsideration.

4.17 The State party notes that the author had extensive review of the decision not to grant him a protection visa before the AAT, the Federal Court and before the Minister. As noted above, he could have pursued his appeal options before the Full Federal Court and the High Court. On the merits of this claim, the State party contends that there is no evidence of how the court system does not provide the author with a remedy.

4.18 On the claim under article 10, the State party contends that this should be found inadmissible as incompatible *ratione materiae* with the provisions of the Covenant. Although it accepts that it is under a limited obligation not to expose the author to a violation of his fundamental rights under the Covenant by returning him to Bangladesh, it argues that the non-refoulement obligation is confined to only the most fundamental rights relating to the physical and mental integrity of the person reflected in articles 6 and 7 of the Covenant. From its survey of the Committee's jurisprudence, the State party understands that the Committee has only considered this obligation to apply to the threat of execution under article 6[16] and torture and cruel, inhuman or degrading treatment under article 7 upon return. The Committee does not appear to have found a non-refoulement obligation derived from articles other than articles 6 and 7. The State party therefore submits that the author's allegations under article 10 should be dismissed on the ground that they are incompatible with the provisions of the Covenant.

Authors' comments

5.1 On 1 February 2006, the author commented on the State party's observations. He explains that the reason why he withdrew his appeal to the Full Federal Court was that he was legally advised that such an appeal would be futile, and that it would delay the Minister's consideration of his request for a humanitarian visa under section 501 J of the Migration Act. He was made aware by his legal adviser of the Minister for Immigration's widely known practice of refusing to consider the exercise of her discretionary power to grant humanitarian visas whilst court proceedings remain pending. He submits that his actions to cease wasting court resources and to fast track a decision under the only power that could see his release from immigration detention was sound. He claims that these circumstances amount to special circumstances which absolve him from exhausting domestic remedies at his disposal. He further claims that he would have had to seek leave to reopen his appeal, the time-limit having expired, and that counsel was unable to identify a single error of law which may have given rise to a successful appeal.

5.2 With regard to the State party's argument that the claims under article 7 are unsubstantiated, the author submits a report prepared by Amnesty International specifically related to former Sharbahara party members, which outlines the present and real risk or torture, in the Bangladeshi prison system, of former members of Sharbahara. The report finally states that "Amnesty International is concerned about the safety of former Sharbahara Party members

being returned to Bangladesh. They might risk facing human rights violations from various actors, ranging from former associates, security forces, armed Islamic groups to other communal elements".

.5.3 Counsel provides copies of submissions made to the Minister in July, October and November 2005, making a further request for humanitarian intervention, under section 501 J of the Migration Act, and invoking Amnesty International's new report. She claims that the author's mental and physical health is very poor and that**,** if he is returned to Bangladesh, he would die from lack of access to insulin, as he is a diabetic and requires insulin twice a day.

5.4 The author claims that he is likely to be imprisoned if returned to Bangladesh, as a failed asylum seeker. He would be easily identified by Bangladeshi officials, which is buttressed by the fact that the State party communicated with Bangladesh in efforts to deport him in November 2004 and because of his status as a former Sharbahara member.

5.5 Alternatively, if he were able to avoid imprisonment in Bangladesh, in addition to the danger he would face if he were discovered by a member of Sharbahara, his access to life saving medication as a diabetic would be hampered by his need to maintain a low profile to avoid former Sharbahara associates and by lack of access to affordable drugs.

5.6 With respect to the State party's comments on article 9, paragraph 1, counsel notes that the author has been detained for six years and four months since the start of his detention in September 1999. The author has become mentally ill because of his ongoing immigration detention, which resulted in his committal to a mental institution in Adelaide.[17] In January 2006, the Guardianship Board of South Australia gave the Public Advocate of South Australia control over the author's living arrangements for three years, on the basis that his health or safety would be at risk due to his mental incapacity if power to make decisions regarding his own autonomy were not removed from him. Psychiatric experts have concluded that prolonged immigration detention has caused psychiatric illness to the author and recommended that he be allowed to live in the community to improve his mental health.

5.7 The author reiterates that he is unable to apply for a visa to be released from immigration detention. The recently introduced Removal Pending Bridging Visa (RPBV) is only available on an invitation to apply from the Minister of Immigration. The author's mental health has been adversely affected in June 2005, when he was one of very few long term detainees not invited to apply for a RPBV.

5.8 On the issue of arbitrariness, the author refers to the case of *A. v. Australia*[18] where the Committee noted that "arbitrariness" must not be equated with "against the law" but must be interpreted more broadly to include such elements as inappropriateness and injustice. In that case, the Committee found that the author's detention for a period of over four years was arbitrary.

5.9 The author claims that the State party has not provided adequate justification for his lengthy detention, including its allegation of a high risk of absconding. He has been at Glenside Campus in Adelaide since July 2005, which is not fenced, and from where patients could easily leave. Despite the ease with which he could have absconded, he has not done so. There is no risk that he will abscond, because he wants a right to stay in Australia. He claims that his treatment is

particularly cruel given that most other long term detainees have been released, and that the State party has stated nothing exceptional about his case to justify such lengthy detention.

5.10 In relation to article 9, paragraph 4, the author refers to the case of *Bakhtiyari v. Australia*,[19] and contends that judicial review of his detention would be restricted to a formal assessment of whether he was a "non-citizen" without an entry permit. There is no judicial mechanism to review the justification of his detention in substantive terms.

Issues and proceedings before the Committee

Consideration of Admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the communication is admissible under the Optional Protocol.

6.2 With respect to the author's claim under article 9, paragraph 1, the Committee notes the State party's contention that the author has failed to substantiate his claim. The Committee considers that the author, who has provided considerable details about the length of his mandatory immigration detention and its effect on his mental health, has sufficiently substantiated this claim, for purposes of admissibility.

6.3 The State party contends that the claim under article 9, paragraph 4, is incompatible *ratione materiae* with the provisions of the Covenant. The Committee notes that the author's detention is based on the statutory ground that he is an unlawful non-citizen. It further notes that the author was placed in mandatory immigration detention pursuant to Section 189 of the Migration Act, and that his detention was an automatic consequence of his status as an unlawful non-citizen. The only effective challenge to his detention would be a challenge to his status as a non-citizen, i.e. to the ground on which he was detained, as opposed to a challenge of the lawfulness of his detention. The Committee concludes that the author's claim falls within the scope of article 9, paragraph 4, and declares it admissible.

6.4 The Committee has noted the State party's challenge to the admissibility of the author's claim under article 7 for non-exhaustion of domestic remedies, because he withdrew his appeal to the Full Bench of the Federal Court, and the author's contention that this remedy was not an effective one. The Committee notes that a review by the Full Bench of the Federal Court in the author's case would only have related to the granting of a protection visa with regard to the 1951 Refugee Convention. However neither the AAT nor the Federal Court examined the author's case in the light of the State party's obligations under the Covenant and the author's risk of torture if returned to Bangladesh. On appeal, the Full Bench of the Federal Court would have considered the issue from the same perspective of the 1951 Convention. The Committee does not consider that this would have constituted an effective remedy for the author in relation to his claims under article 7.

6.5 However, the Committee also notes that the author has filed a request for a visa on humanitarian grounds under section 501 J of the Migration Act. According to information before the Committee, the "Guidelines on Ministerial Powers under sections (…) 501 J of the Migration

Act" spell out the circumstances in which the Minister may exercise his or her public interest powers to substitute for a decision of a review tribunal, including the AAT, a decision which is more favourable to the visa applicant. Factors to be taken into account include:

> "circumstances that may bring Australia's obligations as a signatory to the International Covenant on Civil and Political Rights into consideration. For example:
>
> – A non-refoulement obligation arises if the person would, as a necessary and foreseeable consequence of their removal or deportation from Australia, face a real risk of violation of his or her rights under Article 6 (right to life), or Article 7 (freedom from torture and cruel, inhuman or degrading treatment or punishment) of the ICCPR, or face the death penalty (…)
>
> – Issues relating to Article 23.1 of the ICCPR are raised (...)."

As of today, the author's request for a humanitarian visa under article 501J of the Migration Act remains pending. While the Committee notes that the Minister's power is a discretionary one, in the particular circumstances of the author's case, which falls under the exclusion clause of article 1 F of the 1951 Refugee Convention, it cannot be excluded that the exercise of this prerogative could in principle provide the author with an effective remedy. The Committee accordingly concludes that this claim is, at this stage, inadmissible. In addition, the Committee considers that the author's claim under article 10 on the conditions of detention in Bangladesh is related to that under article 7 and also finds it inadmissible at this stage.

6.6 The Committee accordingly decides that the communication is admissible insofar as it appears to raise issues under article 9, paragraphs 1 and 4.

Consideration of merits

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

7.2 In respect of the author's claim under article 9, paragraph 1, that he was held in arbitrary and indefinite detention, the Committee recalls its jurisprudence that the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice. In this regard, the Committee recalls that the important guarantee contained in article 9 is applicable to all deprivations of liberty, whether in criminal cases or other cases such as, for example, mental illness, drug addiction, educational purposes, immigration control, etc.[20] Thus remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case and proportionate to the ends sought, for example, to prevent absconding or interference with evidence.[21] It recalls that every decision to keep a person in detention should be open to periodical review, in order to reassess the necessity of detention and detention should not continue beyond the period for which a State party can provide appropriate justification.[22]

7.3 In the present case, the State party has provided as justification for the author's detention its general experience that asylum seekers abscond if not retained in custody. The Committee notes that the author was placed in an institution as a result of his mental illness, which has been found to be the consequence of his prolonged detention which, by then, had lasted for some six years. From the time of his placement in an open institution in July 2005 until the present time, he has not attempted to abscond. The State party has not provided any other justification, in relation to the author's particular case, which would justify his continued detention for a period of over seven years as at present. The additional fact that the author has become mentally ill during this period should have been a sufficient ground for a prompt and substantive review of his detention. The Committee thus concludes that the author's mandatory immigration detention, for a period of over seven years, was arbitrary within the meaning of article 9, paragraph 1.

7.4 With respect to the author's claim under article 9, paragraph 4, the Committee notes the State party's contention that the law and policy have changed since the consideration of *A. v. Australia*, and that the Minister now has a non-delegable and non-compellable power with respect to new grounds for release. While the Committee welcomes this amendment, it regrets that the author was not part of the detainees who were "invited" to apply for a RPBV. It notes furthermore that the amendment does not provide for judicial review of the grounds and circumstances of detention. The Committee has taken note that the State party did not accept its views in *A. v. Australia.* It considers, however, that the principles applied in that case remain applicable to the present case. Indeed, the Australian courts' control and power to order the release of an individual remain limited to a formal determination whether this individual is an unlawful non-citizen within the narrow confines of the Migration Act. If the criteria for such determination are met, the courts have no power to review any substantive grounds for the continued detention of an individual and to order his or her release. The Committee recalls that court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere formal compliance of the detention with domestic law governing the detention.[23] The Committee concludes that the author's right under article 9, paragraph 4, to have his detention reviewed by a court, was violated.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 9, paragraphs 1 and 4, of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including release and appropriate compensation.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights

recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

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

Notes

[1] The Covenant and the Optional Protocol entered into force for Australia respectively on 13 November 1980 and 25 December 1991.

[2] Article 1 F (b) of the Convention relating to the Status of Refugees (Refugees Convention) stipulates that: "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (…) (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."

[3] Communication No. 560/1993, Views adopted on 3 April 1997, paras. 9.2 and 9.4.

[4] These include reports from Amnesty International, Human Rights Watch and the US Department of State.

[5] Communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997.

[6] Communication No. 26/1978, *N.S. v. Canada,* Decision on admissibility adopted on 28 July 1978.

[7] Report of the Human Rights Committee to the forty-ninth session of the United Nations General Assembly of 1994, UN Doc. A/49/40 Vol. 1, p. 67.

[8] Communication No. 469/1991, *Ng v. Canada*, Views adopted on 5 November 1993, para. 6.2.

[9] Communication No. 469/1991, *Ng v. Canada*, para. 14.1; and communication No. 692/1996, *ARJ v Australia*, Views adopted on 28 July 1996, para. 6.13

[10] Decision and Reasons for Decision of the Administrative Appeals Tribunal, 1 June 2001, W2000/231, para. 46.

[11] Protection Visa Decision Record, 21 June 2000, p. 3

[12] The State party refers to the Committee against Torture's view in *H.A.D. v. Switzerland*, where it noted that the period of time between the alleged infliction of ill treatment by the complainant's State of origin and consideration of the communication by the Committee (15 years) indicated that the complainant did not face a current risk of torture if returned. (*H.A.D. v. Switzerland*, communication No. 126/1999, para. 8.6.)

[13] See communication No. 305/1988, *Alphen v. The Netherlands*, Views adopted on 23 July 1990, para. 5.8.

[14] Communication No. 560/1993, *A v. Australia*, Views adopted on 3 April 1997, paras. 9.2 and 9.3.

[15] In the past, the Australian Government has held some unauthorized arrivals in unfenced migrant hostels. A number of these unauthorized arrivals breached their reporting requirements and absconded. It proved difficult to gain the co-operation of the local communities to locate such persons.

[16] Communication No. 470/1991, *Kindler v. Canada*; and communication No. 539/1993, *Cox v. Canada*.

[17] Glenside Campus of the Royal Adelaide Hospital.

[18] Communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, para. 9.2.

[19] Communication No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 6 November 2003.

[20] See paragraph 1 of general comment No. 8 on article 9.

[21] Communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, para. 9.2.

[22] Communication No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 6 November 2003, para. 9.2.

[23] Communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, para. 9.5.

X. Communication No. 1325/2004, *Conde v. Spain**
(Views adopted on 31 October 2006 Eighty-eighth session)

Submitted by:	Mario Conde Conde (represented by José Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	7 January 2003 (initial submission)
Subject matter:	Imposition of heavier penalties by the higher court; scope of review in cassation proceedings in the Spanish Supreme Court
Procedural issues:	Failure to substantiate claims
Substantive issues:	Right to have sentence and conviction reviewed by a higher court
Articles of the Covenant:	14, paragraph 5
Articles of the Optional Protocol:	2

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

Meeting on 31 October 2006,

Having concluded its consideration of communication No. 1325/2004, submitted on behalf of Mario Conde Conde under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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* The following Committee members participated in the consideration of the communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

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

1. The author of the communication, dated 7 January 2003, is Mario Conde Conde, a Spanish national born in 1948 and currently detained in Alcalá-Meco prison in Madrid. He claims to be a victim of a violation by Spain of article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel, José Luis Mazón Costa.

Factual background

2.1 The author was President of the Banco Español de Crédito (Banesto) at the time the events took place. In early 1989, exercising the powers conferred on him by virtue of his office, but without the authorization of the Banesto administration, he disposed unilaterally of 300 million pesetas (€1,803,339) for purposes other than the proper business of the company. This incident was followed by a number of other corporate transactions and accounting fraud operations by companies with links to Banesto.

2.2 On 14 November 1994, the prosecutor's office attached to the National High Court brought criminal proceedings against 10 individuals, including the author, who was charged on eight counts relating to nine transactions: four counts of misappropriation, three of fraud and one of forgery of a commercial document. In addition to the proceedings brought by the Government Advocate, 14 *acusaciones particulares* (private prosecutions) and *acusaciones populares* (citizens' actions) were brought. In the course of the hearings, which lasted two years, statements were taken from 470 witnesses and expert witnesses. The case file consisted of 53 volumes of pretrial proceedings and 121 volumes of evidence.

2.3 On 31 March 2000, the National High Court:

(1) Found the author guilty of misappropriation in relation to the "Cementeras" operation and sentenced him to four years and two months' imprisonment and payment of joint and several compensation to Banesto in the amount of 1,556 million pesetas (€9,353,322);

(2) Found the author guilty of a continuing offence of fraud in relation to the Centro Comercial Concha Espina y Oil Dor operations and sentenced him to six years' imprisonment and payment of joint and several compensation to Banesto in the amount of 1,880,016,900 pesetas (€11,301,900);

(3) Found the author not guilty of misappropriation in relation to the Carburos Metálicos operation;

(4) Found the author not guilty of misappropriation for the withdrawal of cash funds from Banesto (referred to as the "300 million in cash" operation). The court took the view that an offence of misappropriation had been committed, but classed it as a single offence and thus time-barred, five years having passed as required by the relevant law, and the author consequently incurred no criminal liability;

(5) Found the author not guilty on one count of misappropriation and one of fraud in relation to the Isolux operation;

(6) Found the author not guilty on one count of misappropriation and one of fraud in relation to the Promociones Hoteleras operation; and

(7) Found the author not guilty of forgery of a commercial document in relation to the accounting fraud operation.

2.4 The author submitted an appeal in cassation on 39 grounds, most of which alleged errors in the assessment of the evidence at trial and violations of the principle of presumption of innocence, maintaining that he had been convicted on the basis of insufficient incriminating evidence. Separate appeals in cassation were also lodged, one by the Government Advocate, three in the form of *acusaciones populares* and six as *acusaciones particulares*.

2.5 On 29 July 2002, the Supreme Court rejected the author's appeal and partially upheld the Government Advocate's appeal, the *acusaciones populares* and two of the *acusaciones particulares*. The Court upheld the National High Court's sentence, except in relation to points (4) and (7) above:

With regard to point (4), the Supreme Court characterized the charge of misappropriation (the "300 million in cash" operation) as a continuing offence and therefore not time-barred. Consequently, the Court sentenced the author to six years and one day's imprisonment and payment of 300 million pesetas (€1,803,339) in compensation.

With regard to point (7), the Supreme Court found an offence of forgery of a commercial document in connection with the accounting fraud operation, and sentenced the author to four years' imprisonment and a fine of 1 million pesetas (€6,011).

The Supreme Court partially set aside the High Court sentence against the author and increased the penalty imposed in first instance, characterizing the charge of misappropriation (the "300 million in cash" operation) as a continuing offence and therefore not time-barred, and finding an offence of forgery of a commercial document in connection with the accounting fraud operation.

The complaint

3.1 The author alleges a violation of article 14, paragraph 5, of the Covenant, arguing that he was unable to secure a full review of the sentence handed down by the National High Court since the review in the higher court dealt only with points of law. He argues that the sentence was based on an evaluation of a great deal of evidence that the Supreme Court had been unable to reconsider.

3.2 The author alleges a second violation of article 14, paragraph 5, on the grounds that he was denied any kind of review in relation to his conviction and the increased sentence imposed by the Supreme Court. The author claims that Spain, unlike other States parties, did not enter reservations to article 14, paragraph 5, to ensure that this provision would not apply to first-time convictions handed down by an appeal court. He adds that the settled practice of the Constitutional Court is that there is no right of appeal for *amparo* in respect of a sentence handed down by the court of cassation, so it was futile to submit an application for *amparo* in this case.

State party's observations on admissibility and the merits

4.1 In its note verbale of 3 January 2005, the State party maintains that the communication is inadmissible under article 5, paragraph 2 (b), of the Covenant because domestic remedies have not been exhausted. It argues that the author's appeal in cassation made no mention of the right to review of the sentence and did not invoke article 14, paragraph 5, of the Covenant or any similar provisions of domestic or international law. Furthermore, the author failed to submit an application for *amparo* to the Constitutional Court claiming a violation of his right to a review of the sentence.

4.2 The State party submits that, in contrast with past practice, as a result of the development of the Constitutional Court's case law and doctrine, there has been a considerable broadening of the scope of the remedy of cassation, which now permits a thorough review of the facts and the evidence. The State party cites as an example of that transformation the judgement in cassation in the author's own case, which ruled on many points of fact raised by the appellants in connection with the presumption of innocence and errors of fact in the evaluation of the evidence. The State party quotes from the judgement handed down by the Supreme Court, which reads: "... the various parties have had the opportunity to formulate more than 170 grounds for cassation, frequently invoking errors of fact in the assessment of evidence and the subsequent review of proven facts. The presumption of innocence is also invoked as grounds for challenging the rationality and logic applied in assessing the evidence. This implies that we are speaking of a remedy that goes beyond the strictly defined, formal limits of cassation in the conventional sense and satisfies the requirement of a second hearing."

4.3 As to the conviction and heavier sentence imposed on appeal, the State party points out that the Constitutional Court has established that "there is no denial of the right of appeal even where [the sentence] is handed down by exactly the same court as tried the case on appeal". Moreover, article 14, paragraph 5, cannot be interpreted as denying the prosecuting parties the right of appeal. In the State party's view, the fact that a number of States parties have made reservations to article 14, paragraph 5, of the Covenant, thereby excluding its application to cases in which a heavier sentence is handed down, does not imply that the provision itself precludes the imposition of a heavier sentence.

4.4 The State party argues that the author claimed only a violation of article 14, paragraph 5, yet the points raised, had they been borne out, would have constituted violations of numerous articles of the Covenant, which raises the question of what the real purpose of the communication is.

4.5 In a note verbale dated 10 January 2006, the State party repeats that the author's appeal in cassation included no claim of a violation of the right of appeal, and that he failed to apply for *amparo*, which would have allowed him to make such a claim.

4.6 The State party also repeats that the Constitutional Court has developed its interpretation of the remedy of cassation in Spain, broadening it so that it now allows a thorough review of the facts and the evidence.

4.7 It further repeats that the author claimed only a violation of article 14, paragraph 5, even though the claims made in the communication would constitute a violation of a considerable number of articles of the Covenant.

Author's comments

5.1 On the question of exhaustion of domestic remedies, the author refers to the Committee's Views in *Pérez Escolar v. Spain* (communication No. 1156/2003), which relates to the same judicial proceedings and which the Committee found admissible since the remedy of *amparo* was ineffective.

5.2 The author repeats that the limitations of Spain's remedy of cassation precluded any review of the credibility of witnesses or reconsideration of the allegedly conflicting documentary evidence on which the conviction rested.

5.3 The author argues that he had been found not guilty by the lower court in the "accounting fraud" and "300 million in cash" operations but had been convicted by the higher court and sentenced by it to four years' imprisonment and to six years' imprisonment plus a fine of 300 million pesetas, respectively. He repeats that there was no possibility of review of the heavier sentence by a higher court. He recalls that, in its Views on *Gomariz v. Spain* (communication No. 1095/2002), the Committee found that the lack of a remedy in respect of a first-time sentence handed down on appeal with no possibility of review was a violation of article 14, paragraph 5, of the Covenant.

Issues and proceedings before the Committee

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

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

6.3 The Committee has noted the State party's argument that domestic remedies were not exhausted, since the alleged violations that were referred to the Committee were never brought before the domestic courts. However, the Committee recalls its established jurisprudence that it is only necessary to exhaust those remedies that have a reasonable prospect of success.[1] An application for *amparo* had no prospect of success in relation to the alleged violation of article 14, paragraph 5, of the Covenant, and the Committee therefore considers that domestic remedies have been exhausted.

6.4 The author claims a violation of article 14, paragraph 5, of the Covenant, on the grounds that the evidence that proved decisive for his conviction was not reviewed by a higher court owing to the limited scope of Spain's remedy of cassation. However, the Committee finds from the judgement that the Supreme Court looked carefully and in detail at the trial court's evaluation of the evidence relating to the charges against him and that it did indeed diverge to some extent from the High Court's assessment in respect of two of the charges. The Committee finds that this complaint of a violation of article 14, paragraph 5, has not been sufficiently substantiated for the purposes of admissibility and declares it inadmissible under article 2 of the Optional Protocol.

6.5 The Committee finds that the author's complaint in respect of his conviction and the imposition of a heavier sentence on appeal with no possibility of review by a higher court raises issues under article 14, paragraph 5, of the Covenant, and declares it admissible.

Consideration of the merits

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

7.2 The Committee takes note of the author's contention that his conviction by the appeal court on two counts of which he had been cleared by the trial court, and the subsequent imposition of a heavier penalty, could not be reviewed by a higher court. It recalls that the absence of any right of review in a higher court of a sentence handed down by an appeal court, where the person was found not guilty by a lower court, is a violation of article 14, paragraph 5, of the Covenant.[2] The Committee notes that, in the present case, the Supreme Court found the author guilty of an offence of forgery of a commercial document, a charge of which he had been acquitted in the lower court, and that it characterized the offence of misappropriation as a continuing offence and thus not time-barred. On that basis the Supreme Court partially set aside the lower court's sentence and increased the penalty, with no opportunity for review of either the conviction or the sentence in a higher court in accordance with the law. The Committee finds that the facts before it constitute a violation of article 14, paragraph 5.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy which allows a review of his conviction and sentence by a higher tribunal. The State party has an obligation to take the necessary measures to ensure that similar violations do not occur in future.

10. By becoming a party to the Optional Protocol, Spain recognized the competence of the Committee to determine whether there has been a violation of the Covenant. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to furnish them with an effective and applicable remedy should it be proved that a violation has occurred. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

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

Notes

[1] See, for example, communications Nos. 1095/2002, *Gomariz v. Spain*, Views of 22 July 2005, para. 6.4, and 1101/2002, *Alba Cabriada v. Spain*, Views of 1 November 2004, para. 6.5.

[2] In this context, see communications Nos. 1095/2002, *Gomariz v. Spain*, Views of 22 July 2005, para. 7.1, and 1421/2005, *Larrañaga v. Philippines*, Views of 7 July 2006, para. 7.8.

Y. Communication No. 1327/2004, *Grioua v. Algeria** (Views adopted on 10 July 2007, Ninetieth session)

Submitted by:	Messaouda Grioua, née Atamna (represented by counsel, Nassera Dutour)
Alleged victims:	Mohamed Grioua (the author's son) and Messaouda Grioua, née Atamna
State party:	Algeria
Date of communication:	7 October 2004 (initial submission)
Subject matter:	Disappearance, detention incommunicado
Procedural issues:	None
Substantive issues:	Prohibition of torture and cruel, inhuman and degrading treatment and punishment; right to liberty and security of person; arbitrary arrest and detention; respect for the inherent dignity of the human person; right to recognition before the law
Articles of the Covenant:	2, paragraph 3; 7; 9; 16
Articles of the Optional Protocol:	5, paragraph 2 (b)

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

Meeting on 10 July 2007,

Having concluded its consideration of communication No. 1327/2004, submitted on behalf of Mohamed Grioua (the author's son) and Messaouda Grioua, née Atamna (the author) under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

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

1.1 The author of the communication, dated 7 October 2004, is Ms. Messaouda Grioua, née Atamna, an Algerian national, who is acting on her own behalf and on behalf of her son, Mohamed Grioua, also an Algerian national, born on 17 October 1966. The author claims that her son is a victim of violations by Algeria of article 2, paragraph 3, and articles 7, 9 and 16 of the International Covenant on Civil and Political Rights and that she herself is a victim of violations by Algeria of articles 2, paragraph 3, and 7 of the Covenant. She is represented by counsel, Nassera Dutour, spokesperson for the Collectif des Familles de Disparu(e)s en Algérie. The Covenant and its Optional Protocol entered into force for the State party on 12 December 1989.

1.2 On 11 July and 23 August 2005, counsel requested interim measures relating to the State party's draft *Charte pour la Paix et la Réconciliation Nationale*, which was submitted to a referendum on 29 September 2005. In counsel's view, the draft law was likely to cause irreparable harm to the victims of disappearances, putting at risk those persons who were still missing, and to deprive victims of an effective remedy and render the views of the Human Rights Committee ineffective. Counsel therefore requested that the Committee invite the State party to suspend its referendum until the Committee had issued views in three cases (including the *Grioua* case). The request for interim measures was transmitted to the State party on 27 July 2005 for comment. There was no reply.

1.3 On 23 September 2005, the Special Rapporteur on new communications and interim measures requested the State party not to invoke, against individuals who had submitted or might submit communications to the Committee, the provisions of the law affirming "that no one, in Algeria or abroad, has the right to use or make use of the wounds caused by the national tragedy in order to undermine the institutions of the People's Democratic Republic of Algeria, weaken the State, impugn the integrity of all the agents who served it with dignity, or tarnish the image of Algeria abroad", and rejecting "all allegations holding the State responsible for deliberate disappearances. They [the Algerian people] consider that reprehensible acts on the part of agents of the State, which have been punished by law whenever they have been proved, cannot be used as a pretext to discredit the security forces as a whole, who were doing their duty for their country with the support of the general public".

The facts as presented by the author

2.1 The author states that, between 5.30 a.m. and 2 p.m. on 16 May 1996, uniformed men and official vehicles of the "joint forces" (police, gendarmerie and Army) surrounded El Merdja, a large district of Baraki, in the eastern suburbs of Algiers, and conducted an extensive search operation which led to the arrest of some 10 people. At 8 a.m., several members of the National People's Army in paratrooper uniforms came to the Grioua family's door. They entered and searched the house from top to bottom without a warrant. Finding nothing, the soldiers arrested the author's son in the presence of the family and informed his parents, of whom the author is one, that their son was being detained to help with inquiries; they produced no legal summons or arrest warrant.

2.2 The author states that she ran after the soldiers who had taken her son away and followed them to the house of her neighbours, the Chihoubs. There she saw the soldiers arrest Djamel Chihoub, whom they also took away, together with her son. She then saw the

soldiers go to the home of the Boufertella family and arrest their son, Fouad Boufertella. Finally, the soldiers (and their three prisoners) entered the Kimouche family's house and again arrested the son, Mourad Kimouche. The author provides several statements by individuals who have officially declared that they witnessed the events of 16 May 1996 and saw the author's son being arrested at his home by soldiers and taken away in army vehicles. The author maintains that these statements confirm the circumstances surrounding her son's arrest.

2.3 The soldiers handcuffed the prisoners in pairs and at 11 a.m. took them in a service vehicle to the Ibn Taymia school at the entrance to the Baraki district, which had been requisitioned as command headquarters. All those arrested that day were taken to the Ibn Taymia school, where the joint forces proceeded to carry out identity checks. Some were released immediately, while others were taken to the Baraki gendarmerie, the Baraki military barracks or the Les Eucalyptus police station, in a district not far from Baraki.

2.4 The author says she began searching at 10 a.m. the same day, going first to the Baraki gendarmerie. The gendarmes told her that the people she had seen arrested and had herself identified had not been taken there. They advised her to try the Baraki police station, but there she was told by the officers that they had not arrested anyone and she should go to the Baraki barracks, where her son would be. At the Baraki military barracks the soldiers advised her to try the police station instead, but when she returned to the police station the police officers again told her son was definitely at the barracks and the soldiers had been lying. The author continued to search until nightfall.

2.5 The next day, 17 May 1996, the author resumed her search and the gendarmes, police and military again sent her from pillar to post. From that day on, the author has not ceased in her efforts to locate her son. She has been to the barracks several times and each time has met with the same vague responses from the soldiers. She has constantly come up against the silence of the authorities, who refuse to give her any information on her son's detention.

2.6 On the day of the raid, Fouad Boufertella was released at around 7 p.m. with injuries to one eye and a foot. He told the author that he had been released from the Baraki barracks, saying that the author's son and the others arrested at the same time (Mourad Kimouche and Djamel Chihoub) had been held with him. He said that he and they had each been tortured, one by one, for 10 minutes. He said he had seen Djamel Chihoub being given electric shocks and had heard the torturers saying they would wait until that night to torture the author's son.

2.7 The author states that she lodged several complaints with various courts, the first barely a month after her son's disappearance.[1] Most were never acted upon.[2] The case was dismissed by the El Harrach Court on jurisdictional grounds on 29 October 1996 and the Algiers Court prosecutor replied on 21 January 1997, saying "I regret to inform you that inquiries into your son's whereabouts have proved fruitless, but if we locate him we will inform you forthwith." The examining magistrate at the El Harrach Court dismissed proceedings in the Grioua cases (Nos. 586/97 and 245/97)[3] on 23 November 1997. Case No. 836/98 was transferred to the Algiers Court on 4 April 1998; lastly, in case No. 854/99, the examining magistrate at the El Harrach Court dismissed the proceedings on 28 June 1999, a decision against which the author lodged an appeal with the Algiers Appeal Court on 18 July 1999. The Indictments Division of the Algiers Court, with which the appeal was lodged, rejected the author's petition

on procedural grounds[4] in a decision dated 17 August 1999. On 4 September 1999, again in relation to case No. 854/99, the author submitted an appeal in cassation within the legal time limits, but this was not forwarded to the Cassation Department of the Algiers Court until 20 July 2002, and to the Supreme Court of Algiers on 4 August 2002. The Supreme Court has still not handed down a judgement.

2.8 On the question of domestic remedies, the author recalls the Committee's case law, which holds that only effective and available remedies need to be exhausted; she submits that, in the case under consideration, since it was her son's fundamental rights that were violated, only remedies of a judicial nature need to be exhausted.[5] She draws attention to the excessive delay (nearly three years) between the submission of her appeal in cassation and its referral to the Algiers Supreme Court. During that time, on 21 May 2000, the author sent a telegram to the Supreme Court asking how the case was progressing. Her appeal is still before the Supreme Court, its tardy referral having greatly delayed its consideration and put back the date of any decision indefinitely. In view of the delay incurred in the judicial proceedings, counsel argues that these have been "unreasonably prolonged" within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, and that the requirement to exhaust domestic remedies no longer applies for the purposes of the Committee's consideration of the case of the author's son. Furthermore, every procedure initiated by the author in the past eight years has proved futile. The Algerian courts, notwithstanding the copious evidence in the file on the disappearance of the author's son and the existence of corroborating testimony from several witnesses, have not exercised due diligence in ascertaining the fate of the author's son or in identifying, arresting and bringing to trial those responsible for his abduction. Under the circumstances, the available domestic remedies of a judicial nature should be deemed exhausted.

2.9 On the question of administrative remedies, a review of the procedures undertaken shows that the State party has no desire to assist families in their inquiries, and highlights the many inconsistencies often to be found in the various State authorities' handling of disappearance cases. The author has sent complaints by registered mail with recorded delivery to the State authorities at the highest level:[6] the President, the Prime Minister, the Minister of Justice, the Minister of the Interior, the Minister of Defence, the Ombudsman, the President of the National Observatory for Human Rights and subsequently the President of the National Advisory Commission for the Promotion and Protection of Human Rights, which replaced the Observatory in 2001. The Observatory replied to the author on three occasions. On 17 September 1997, it wrote: "Following steps taken by the Observatory and according to information received from Police Headquarters, the individual in question faces proceedings under detention warrant No. 996/96 issued by the examining magistrate." On 27 January 1999, the Observatory informed her it had "duly contacted the relevant security services. We undertake to forward to you any new information from the inquiry that we may receive". Lastly, on 5 June 1999, the Observatory confirmed that "following steps taken by the Observatory and on the basis of information received from the security services, we can confirm that the individual in question is wanted by these services and is the subject of arrest warrant No. 996/96 issued by the El Harrach Court, which has territorial jurisdiction". Yet the only military and judicial authorities in a position to provide the Observatory with such information have never acknowledged that the author's son faced judicial proceedings. The file on the disappearance was lodged with the Office for Families of the Disappeared on 11 November 1998.

2.10 The author states that the case was submitted to the United Nations Working Group on Enforced or Involuntary Disappearances on 19 October 1998, but counsel refers to the Committee's case law, which holds that "extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Economic and Social Council, and whose mandates are to examine and publicly report on human rights situations in specific countries or territories or on major phenomena of human rights violations worldwide, do not, as the State party should be aware, constitute a procedure of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol".[7] Lastly, counsel emphasizes that the case of the author's son is not unique in Algeria. More than 7,000 families are searching for relatives who have disappeared, chiefly from police, gendarmerie and Algerian Army premises. No serious inquiry has been conducted to establish who was guilty of these disappearances. To this day, most of the perpetrators known to and identified by witnesses or family members enjoy complete impunity, and all administrative and judicial remedies have proved futile.

The complaint

3.1 The author claims that the facts as presented reveal violations of article 2, paragraph 3, and article 7, in respect of herself and her son, and of article 2, paragraph 3, and articles 9 and 16 of the Covenant in respect of her son.

3.2 As to the claims under article 7 in respect of the author's son, the circumstances of his disappearance and the total secrecy surrounding his highly probable detention are factors recognized by the Commission on Human Rights as constituting in themselves a form of inhuman or degrading treatment. The Committee has also accepted that being subjected to forced disappearance may be regarded as inhuman or degrading treatment of the victim.[8] The author pursues her search every day, despite her age (65) and the difficulty she has in moving around. She suffers deeply from the constant uncertainty over her son's fate. This uncertainty and the authorities' refusal to divulge any information is a cause of profound and continuing anguish. The Committee has recognized that the disappearance of a close relative constitutes a violation of article 7 of the Covenant in respect of the family.[9]

3.3 As to article 9, the author's son was arrested on 16 May 1996 and his family has not seen him since. No legal grounds were given for his arrest and his detention was not entered in the police custody registers. Officially, there is no trace of his whereabouts or his fate. The fact that his detention has not been acknowledged and was carried out in complete disregard of the guarantees set forth in article 9, that the investigations have displayed none of the efficiency or effectiveness required in such circumstances, and that the authorities persist in concealing what has happened to him, means that he has been arbitrarily deprived of his liberty and the protection afforded by the guarantees specified in article 9. According to the Committee's case law, the unacknowledged detention of any individual constitutes a violation of article 9 of the Covenant.[10] Under the circumstances, the violation of article 9 is sufficiently serious for the authorities to be required to account for it.

3.4 Article 16 establishes the right of everyone to be recognized as the subject of rights and obligations. Forced disappearance is essentially a denial of that right insofar as a refusal by the perpetrators to disclose the fate or whereabouts of the person concerned or to acknowledge the deprivation of liberty places that person outside the protection of the law.[11] Furthermore, in its

concluding observations on the State party's second periodic report, the Committee recognized that forced disappearances might involve the right guaranteed under article 16 of the Covenant.[12]

3.5 With regard to article 2, paragraph 3, of the Covenant, the detention of the author's son has not been acknowledged and he is thus deprived of his legitimate right to an effective remedy against his arbitrary detention. For her part, the author has sought every remedy at her disposal, but has constantly run up against the authorities' refusal to acknowledge her son's arrest and detention. The State party had an obligation to guarantee her son's rights, and its denial that the security services were involved in his forced disappearance cannot be considered an acceptable and sufficient response to resolve the case of the author's son's forced disappearance. In addition, according to the Committee's general comment No. 31, the positive obligations on States parties, under paragraph 3, to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations, as a result of States parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent or punish such acts by private persons.

3.6 The author asks the Committee to find that the State party has violated article 2, paragraph 3, and articles 7, 9 and 16 of the Covenant and to request the State party to order independent investigations as a matter of urgency with a view to locating her son, to bring the perpetrators of the forced disappearance before the competent civil authorities for prosecution, and to provide adequate reparation.

State party's observations on the admissibility and merits of the communication

4.1 On 28 August 2005, the State party reported that inquiries by the clerk of the Supreme Court had not succeeded in locating the Grioua file. The State party therefore requested further details, including the number of the receipt issued upon deposition of the file with the Supreme Court. Considering the large number of cases before the Court, more specific information would help shed light on the case in question.

4.2 By note verbale dated 9 January 2006, the State party reported that the Grioua case had been brought to the police's attention by a complaint from Mohamed Grioua's brother Saad, alleging abduction on 16 May 1996 "by persons unknown". Charges of abduction, a punishable offence under article 291 of the Criminal Code, were filed by the prosecutor at El Harrach (Algiers) with the examining magistrate of the third division. Several months of inquiries having failed to identify the perpetrator of the alleged abduction, the examining magistrate decided on 23 November 1997 to dismiss the proceedings. An appeal was lodged with the Indictments Division of the Algiers Court, which in a ruling dated 17 August 1999 rejected it on procedural grounds as failing to comply with the provisions of the Code of Criminal Procedure governing appeals against decisions of examining magistrates. Upon appeal in cassation, the Supreme Court handed down a judgement rejecting the application.

Author's comments on the State party's observations

5. On 24 February 2006, counsel argued that the State party was merely recapitulating the judicial procedure, not responding on the merits to either deny or accept responsibility for the forced disappearance of the author's son. According to the Committee's case law, the State party must furnish evidence if it seeks to refute claims made by the author of a communication: it is no use the State party merely denying them, whether explicitly or implicitly.[13] In terms of procedure, counsel pointed out that all relevant effective remedies had been exhausted and drew attention to the time that had elapsed between the submission of the author's appeal and its referral to the Supreme Court.

Issues and proceedings before the Committee

Admissibility considerations

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

6.2 The Committee notes that the same matter is not being examined under any other procedure of international investigation or settlement, as required under article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With regard to exhaustion of domestic remedies, the Committee notes that the State party makes no comment on the admissibility of the communication. It notes that the author states that since 1996 she has lodged numerous complaints, the outcome of which was a dismissal of proceedings, upheld on appeal despite, the author says, the copious evidence in the file on her son's disappearance and the existence of corroborating testimony from several witnesses. The Committee also considers that the application of domestic remedies in response to the other complaints introduced repeatedly and persistently by the author since 1996 has been unduly prolonged. It therefore considers that the author has met the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 As to the claims under articles 7 and 9 of the Covenant, the Committee notes that the author has made detailed allegations about her son's disappearance and the ill-treatment he allegedly suffered. The State party has not replied to these allegations. In this case, the Committee takes the view that the facts described by the author are sufficient to substantiate the complaints under articles 7 and 9 for the purposes of admissibility. As to the claim under article 2, paragraph 3, the Committee considers that this allegation has also been sufficiently substantiated for the purposes of admissibility.

6.5 As regards the claims under article 16, the Committee considers that the question of whether and under what circumstances a forced disappearance may amount to denying recognition of the victim of such acts as a person before the law is intimately linked to the facts of this case. Therefore, it concludes that such claims are most appropriately dealt with at the merits stage of the communication.

6.6 The Committee concludes that the communication is admissible under article 2, paragraph 3, and articles 7, 9 and 16 of the Covenant, and proceeds to their consideration on the merits.

Consideration of the merits

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

7.2 The Committee recalls the definition of enforced disappearance in article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court: "Enforced disappearance of persons means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time." Any act leading to such disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to liberty and security of the person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10). It also violates or constitutes a grave threat to the right to life (art. 6).[14] In the present case, the author invokes articles 7, 9 and 16.

7.3 With regard to the author's claim of disappearance, the Committee notes that the author and the State party have submitted different versions of the events in question. The author contends that her son was arrested on 16 May 1996 by agents of the State and has been missing since that date, while according to the National Observatory for Human Rights her son is wanted under arrest warrant No. 996/96 issued by the El Harrach Court. The Committee notes the State party's indication that the examining magistrate considered the charge of abduction and, following investigations that failed to establish the identity of the perpetrator of the alleged abduction, decided to dismiss proceedings.

7.4 The Committee reaffirms[15] that the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone has the relevant information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information exclusively in the hands of the State party, the Committee considers the author's allegations sufficiently substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party. In the present case, the Committee has been provided with statements from witnesses who were present when

the author's son was arrested by agents of the State party. Counsel has informed the Committee that one of those detained at the same time as the author's son, held with him and later released, has testified concerning their detention and the treatment to which they were subjected.

7.5 As to the alleged violation of article 9, the information before the Committee reveals that the author's son was removed from his home by agents of the State. The State party has not addressed the author's claims that her son's arrest and detention were arbitrary or illegal, or that he has not been seen since 16 May 1996. Under these circumstances, due weight must be given to the information provided by the author. The Committee recalls that detention incommunicado as such may violate article 9,[16] and notes the author's claim that her son was arrested and has been held incommunicado since 16 May 1996, without any possibility of access to a lawyer, or of challenging the lawfulness of his detention. In the absence of adequate explanations on this point from the State party, the Committee concludes that article 9 has been violated.

7.6 As to the alleged violation of article 7 of the Covenant, the Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20, on article 7, which recommends that States parties should make provision against detention incommunicado. In the circumstances, the Committee concludes that the disappearance of the author's son, preventing him from contacting his family and the outside world, constitutes a violation of article 7 of the Covenant.[17] Further, the circumstances surrounding the disappearance of the author's son and the testimony that he was tortured strongly suggest that he was so treated. The Committee has received nothing from the State party to dispel or counter such an inference. The Committee concludes that the treatment of the author's son amounts to a violation of article 7.[18]

7.7 The Committee also notes the anguish and distress caused to the author by her son's disappearance and her continued uncertainty as to his fate. It is therefore of the opinion that the facts before it reveal a violation of article 7 of the Covenant with regard to the author herself.[19]

7.8 As to the alleged violation of article 16 of the Covenant, the question arises as to whether and under what circumstances a forced disappearance may amount to denying the victim recognition as a person before the law. The Committee points out that intentionally removing a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person before the law if the victim was in the hands of the State authorities when last seen and, at the same time, if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3) have been systematically impeded. In such situations, disappeared persons are in practice deprived of their capacity to exercise entitlements under law, including all their other rights under the Covenant, and of access to any possible remedy as a direct consequence of the actions of the State, which must be interpreted as a refusal to recognize such victims as persons before the law. The Committee notes that, under article 1, paragraph 2, of the Declaration on the Protection of All Persons from Enforced Disappearance,[20] enforced disappearance constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the

law. It also recalls that article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court, recognizes that the "intention of removing [persons] from the protection of the law for a prolonged period of time" is an essential element in the definition of enforced disappearance. Lastly, article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance mentions that enforced disappearance places the person concerned outside the protection of the law.

7.9 In the present case, the author indicates that her son was arrested together with other individuals by members of the National People's Army on 16 May 1996. After an identity check, he was allegedly taken to the Baraki military barracks. There has been no news of him since that date. The Committee notes that the State party has neither contested these facts nor conducted an investigation into the fate of the author's son, nor provided the author with any effective remedy. It is of the view that if a person is arrested by the authorities and there is subsequently no news of that person's fate, the failure by the authorities to conduct an investigation effectively places the disappeared person outside the protection of the law. Consequently, the Committee concludes that the facts before it in the present communication reveal a violation of article 16 of the Covenant.

7.10 The author has invoked article 2, paragraph 3, of the Covenant, which requires States parties to ensure that individuals have accessible, effective and enforceable remedies to uphold these rights. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. It refers to its general comment No. 31,[21] which states that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. In the present case, the information before it indicates that neither the author nor her son have had access to an effective remedy, and the Committee concludes that the facts before it reveal a violation of article 2, paragraph 3, of the Covenant, in conjunction with articles 7, 9 and 16, in respect of the author's son, and a violation of article 2, paragraph 3, of the Covenant, in conjunction with article 7 of the Covenant, in respect of the author herself.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of articles 7, 9 and 16 of the Covenant, and of article 2, paragraph 3, in conjunction with articles 7, 9 and 16, in respect of the author's son, and of article 7 and article 2, paragraph 3, in conjunction with article 7, in respect of the author herself.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including a thorough and effective investigation into the disappearance and fate of her son, his immediate release if he is still alive, and the appropriate information emerging from its investigation, and to ensure that the author and her family receive adequate reparation, including in the form of compensation. While the Covenant does not give individuals the right to demand the criminal prosecution of another person,[22] the Committee nevertheless considers the State party duty-bound not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and violations of the right to life, but also to prosecute, try and punish the culprits. Thus, the State party is therefore also under an obligation to prosecute, try and punish

those held responsible for such violations. The State party is further required to take measures to prevent similar violations in the future. The Committee also recalls the request made by the Special Rapporteur on new communications and interim measures dated 23 September 2005 (see paragraph 1.3 above) and reiterates that the State party should not invoke the *Charte pour la Paix et la Réconciliation Nationale* against individuals who invoke the provisions of the Covenant or have submitted or may submit communications to the Committee.

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

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

Notes

[1] Complaint No. 849/96 dated 24 June 1996, lodged with the State prosecutor at the El Harrach Court; complaint No. 2202/96 dated 10 August 1996, lodged with the prosecutor at the Algiers Court; complaint referred on 28 August 1996 to the court prosecutor at Bir Mourad Rais, on 21 October 1996 to the court prosecutor at El Harrach and on 2 July 1997 to the Baraki gendarmerie; a new complaint dated 30 December 1996 lodged with the State prosecutor at the El Harrach Court; complaint dated 1 April 1998 lodged with the prosecutor at the Algiers Court; complaint dated 2 August 1999 lodged with the prosecutor at the Blida military court; complaint dated 2 January 2001 lodged with the State prosecutor at the El Harrach Court.

[2] Counsel provides copies of several summonses instructing members of the Grioua family to go to the Baraki gendarmerie (5 February 1997, 21 February 1997, 10 May 1998, 9 July 1998), the Algiers *wilaya* offices (22 June 1997), the Baraki police station (7 November 1997), the El Harrach Court (12 November 1997, 24 May 1999) and the Algiers prosecutor's office (date illegible).

[3] Notification recorded 31 November 1997.

[4] Under articles 170-174 ff. of the Code of Criminal Procedure.

[5] Counsel cites communications Nos. 147/1983, *Lucia Arzuada Gilboa v. Uruguay*, Views adopted on 1 November 1985; 563/1993, *Bautista de Arellana v. Colombia*, Views adopted on 27 October 1995; 612/1995, *José Vicenté et al. v. Colombia*, Views adopted on 29 July 1997; and 778/1997, *Coronel et al. v. Colombia*, Views adopted on 24 October 2002.

[6] Counsel provides copies of letters, in Arabic, with proof of delivery.

[7] Communication No. 540/1993, *Celis Lauréano v. Peru*, Views adopted on 25 March 1996, para. 7 (1).

[8] Counsel cites communications Nos. 449/1991, *Mójica v. Dominican Republic*, Views adopted on 10 August 1994; 540/1993, *Celis Lauréano v. Peru*, Views adopted on 25 March 1996; 542/1993, *Tshishimbi v. Zaire*, Views adopted on 25 March 1996.

[9] Counsel cites communication No. 107/1981, *Elena Quinteros Almeida v. Uruguay*, Views adopted on 21 July 1983, and the Committee's concluding observations on Algeria in 1998 (CCPR/C/79/Add.95, 18 August 1998, para. 10).

[10] Counsel cites communications Nos. 612/1995, *José Vicenté et al. v. Colombia*, Views adopted on 29 July 1997; 542/1993, *Tshishimbi v. Zaire*, Views adopted on 25 March 1996; 540/1993, *Celis Lauréano v. Peru*, Views adopted on 25 March 1996; 563/1993, *Bautista de Arellana v. Colombia*, Views adopted on 27 October 1995; 181/1984, *Sanjuan Arévalo v. Colombia*, Views adopted on 3 November 1989; 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985; and 56/1979, *Celiberti de Casariego v. Uruguay*, Views adopted on 29 July 1981.

[11] Counsel cites the third preambular paragraph of the Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992 (A/RES/47/133).

[12] CCPR/C/79/Add.95, para. 10.

[13] Counsel cites communication No. 107/1981, *Elena Quinteros Almeida v. Uruguay*, Views adopted on 21 July 1983.

[14] See communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 31 July 2003, para. 9.3.

[15] Communications Nos. 146/1983, *Baboeram Adhin et al. v. Suriname*, Views adopted on 4 April 1985, para. 14.2; 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 7.2; 202/1986, *Graciela Ato del Avellanal v. Peru*, Views adopted on 31 October 1988, para. 9.2; 30/1978, *Bleier v. Uruguay*, Views adopted on 29 March 1982, para. 13.3; 107/1981, *Elena Quinteros Almeida v. Uruguay*, Views adopted on 21 July 1983, para. 11; and 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.4.

[16] Communication No. 1128/2002, *Rafael Marques de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.3. See also general comment No. 8, para. 2.

[17] Communications Nos. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 8.5; 458/1991, *Mukong v. Cameroon*, Views adopted on 24 July 1994, para. 9.4; and 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya*, Views adopted on 23 March 1994, para. 5.

[18] Communications Nos. 449/1991, *Mójica v. Dominican Republic*, Views adopted on 10 August 1994, para. 5.7; and 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 9.6.

[19] Communications Nos. 107/1981, *Elena Quinteros Almeida v. Uruguay*, Views adopted on 21 July 1983, para. 14; and 950/2000, *Sarma v. Sri Lanka*, Views adopted on 31 July 2003, para. 9.5.

[20] See General Assembly resolution 47/133 of 18 December 1992.

[21] Paragraph 15.

[22] Communications Nos. 213/1986, *H.C.M.A. v. The Netherlands*, Views adopted on 30 March 1989, para. 11.6; and 612/1995, *José Vicenté et al. v. Colombia*, Views adopted on 29 July 1997, para. 8.8.

Z. Communication No. 1328/2004, *Kimouche v. Algeria**
(Views adopted on 10 July 2007 Ninetieth session)

Submitted by:	Messaouda Kimouche, née Cheraitia, and Mokhtar Kimouche (represented by counsel, Nassera Dutour)
Alleged victims:	Mourad Kimouche (the authors' son), Messaouda Kimouche, née Cheraitia, and Mokhtar Kimouche
State party:	Algeria
Date of communication:	7 October 2004 (initial submission)
Subject matter:	Disappearance, detention incommunicado
Procedural issues:	None
Substantive issues:	Prohibition of torture and cruel, inhuman or degrading treatment or punishment; right to liberty and security of person; arbitrary arrest and detention; respect for the inherent dignity of the human person; right to recognition before the law
Articles of the Covenant:	2, paragraph 3; 7; 9; 16
Article of the Optional Protocol:	5, paragraph 2 (b)

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

Meeting on 10 July 2007,

Having concluded its consideration of communication No. 1328/2004, submitted on behalf of Mourad Kimouche (the authors' son), Messaouda Kimouche, née Cheraitia, and Mokhtar Kimouche (the authors) 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 communication and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

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

1.1 The authors of the communication, dated 7 October 2004, are Messaouda Kimouche, née Cheraitia, and Mokhtar Kimouche, Algerian nationals, who are acting on their own behalf and on behalf of their son Mourad Kimouche, also an Algerian national, born on 21 December 1973. The authors claim that their son is a victim of violations by Algeria of article 2, paragraph 3, and articles 7, 9 and 16 of the International Covenant on Civil and Political Rights and that they themselves are victims of violations by Algeria of articles 2, paragraph 3, and 7 of the Covenant. They are represented by counsel, Nassera Dutour, spokesperson for the Collectif des Familles de Disparu(e)s en Algérie. The Covenant and its Optional Protocol entered into force for the State party on 12 December 1989.

1.2 On 11 July and 23 August 2005, counsel requested interim measures relating to the State party's draft *Charte pour la Paix et la Réconciliation Nationale*, which was submitted to a referendum on 29 September 2005. In counsel's view, the draft law was likely to cause irreparable harm to the victims of disappearances, putting at risk those persons who were still missing, and to deprive victims of an effective remedy and render the views of the Human Rights Committee ineffective. Counsel therefore requested that the Committee invite the State party to suspend its referendum until the Committee had issued views in three cases, including the present case. The request for interim measures was transmitted to the State party on 27 July 2005 for comment. There was no reply.

1.3 On 23 September 2005, the Special Rapporteur on new communications and interim measures requested the State party not to invoke, against individuals who had submitted or might submit communications to the Committee, the provisions of the law affirming "that no one, in Algeria or abroad, has the right to use or make use of the wounds caused by the national tragedy in order to undermine the institutions of the People's Democratic Republic of Algeria, weaken the State, impugn the integrity of all the agents who served it with dignity, or tarnish the image of Algeria abroad", and rejecting "all allegations holding the State responsible for deliberate disappearances. They [the Algerian people] consider that reprehensible acts on the part of agents of the State, which have been punished by law whenever they have been proved, cannot be used as a pretext to discredit the security forces as a whole, who were doing their duty for their country with the support of the general public".

The facts as presented by the authors

2.1 The authors state that, between 5.30 a.m. and 2 p.m. on 16 May 1996, uniformed men and official vehicles of the "joint forces" (police, gendarmerie and Army) surrounded El Merdja, a large district of Baraki, in the eastern suburbs of Algiers, and conducted an extensive search operation which led to the arrest of some 10 people. At about 8 a.m., several members of the National People's Army in paratrooper uniforms came to the door of the Kimouche family's house. They did not conduct a search but arrested Mourad Kimouche, saying that he was being detained to help with inquiries, and took him away with three other young men they had already arrested: Mohamed Grioua, Djamel Chihoub and Fouad Boufertella.

2.2 The soldiers handcuffed the prisoners in pairs and at 11 a.m. took them in a service vehicle to the Ibn Taymia school at the entrance to the Baraki district, which had been requisitioned as command headquarters. All those arrested that day were taken to the Ibn Taymia school, where

the joint forces proceeded to carry out identity checks. Some were released immediately, while others were taken to the Baraki gendarmerie, the Baraki military barracks or the Les Eucalyptus police station, in a district not far from Baraki.

2.3 The authors began searching at 11 a.m. the same day. Among the officers directing the operation, Ms. Kimouche had recognized Captain Betka from the Baraki military barracks. Accordingly, the authors went to the Baraki barracks and were shown to the office where the identity papers for those arrested that morning were being kept. The soldiers told them their son was not at the barracks. When they went to the barracks a second time, at 2 p.m., a soldier told them, after they had given him a full description of what their son was wearing, that he had in fact been one of those brought in that morning and that he had been transferred with a number of others to the Châteauneuf prison.

2.4 On the same day, Fouad Boufertella was released at around 7 p.m. with injuries to one eye and a foot. He testified that he had been released from the Baraki barracks and stated that the authors' son and the others arrested at the same time (Mohamed Grioua and Djamel Chihoub) had been held with him. He said that he and they had each been tortured in turn for 10 minutes. He said he had seen Djamel Chihoub being given electric shocks and had heard the torturers saying they would wait until that night to torture Mohamed Grioua.

2.5 Some two weeks after her son was abducted, Ms. Kimouche learnt from police officers that he was in Châteauneuf prison, a fact not denied by Captain Betka when questioned by the authors. Ms. Kimouche attempted to see her son at Châteauneuf, without success. According to information received, Mourad appears to have been held in Châteauneuf prison for about 22 days. Two and a half months after the abduction, Ms. Kimouche's uncle, Amar Mezanar, said he saw the authors' son being brought before the magistrate at the El Harrach Court; an examining magistrate denied this the next day when questioned by Mr. Kimouche. The examining magistrate asked Mr. Kimouche to write to him giving details of his son's disappearance. The letter was subsequently sent to the Algiers Appeal Court, where the examining magistrate reported that, according to the central police station, Mourad Kimouche was not wanted and was not accused of terrorism.

2.6 Three months later, the authors learnt from a relative that Mourad Kimouche had been transferred to El Harrach prison, where the relative had seen him. Six months after that, Mr. Merabet, one of the authors' neighbours, recognized Mourad Kimouche and Djamel Chihoub in the Ben Aknoun (military) prison while he was looking for his own son, who had disappeared six months after Mourad Kimouche. According to further information obtained from a confidential source, Mourad was again transferred from the Ben Aknoun prison to the Beni Messous (military) detention centre. Some years later, an army colonel whose identity has not been revealed identified Mourad Kimouche from his identity photograph and told the authors he had been a prisoner at Reggane for two or three years.

2.7 Since 16 May 1996, the authors have not ceased in their efforts to find their son. They have launched a number of complaints, starting with one dated 18 June 1996 to the prosecutor at the El Harrach Court, and have been summoned to appear before the authorities on several occasions. Mr. Kimouche wrote to the prosecutor at the Bir Mourad Rais Court on 23 June 1996, and on 24 August 1997 lodged another complaint with the Blida military court, which was referred to the competent El Harrach Court. The examining magistrate at the El Harrach Court who was assigned the file decided on 30 May 1999 to dismiss proceedings in cases Nos. 166/99

and 60/99, a ruling that was appealed on 30 June 1999 by the prosecutor of El Harrach before the Public Prosecutor of the Algiers Appeal Court, on the grounds that the examining magistrate's investigation had been insufficiently thorough. The Algiers Appeal Court handed down a ruling on 13 July 1999 upholding the decision by the examining magistrate at El Harrach to dismiss proceedings in cases Nos. 687/99 and 732/99, despite submissions by the prosecutor's office in Algiers supporting the appeal. Mr. Kimouche then lodged an appeal in cassation on 8 August 1999 (application No. 1305, case No. 687/99). Despite a report from the Public Prosecutor of the Algiers Appeal Court supporting the application, the Criminal Division of the Algiers Supreme Court, in a judgement dated 25 July 2000 (decision No. 247023), upheld the trial court's position and confirmed the decision to dismiss proceedings. A further decision to dismiss proceedings in cases Nos. 103/100 and 43/00 was issued on 3 August 2004 by the examining magistrate at the El Harrach Court.

2.8 On the availability of domestic remedies, the authors recall the Committee's case law, which holds that only effective and available remedies need to be exhausted; they submit that, in the case under consideration, since it was their son's fundamental rights that were violated, only remedies of a judicial nature need to be exhausted. In this case, the authors have availed themselves of multiple judicial remedies, right up to the Supreme Court, all of which have ended in decisions to dismiss proceedings although the circumstances of Mourad Kimouche's disappearance are attested to by several witnesses who have never been given a hearing. Moreover, the complaints were brought against named individuals such as Captain Betka but were turned by the courts into complaints against a person or persons unknown. Counsel recalls that the Committee considers that "[a] State party has a duty to investigate thoroughly alleged violations of human rights, particularly enforced disappearances and violations of the right to life, and to criminally prosecute, try and punish those deemed responsible for such violations. This duty applies *a fortiori* in cases in which the perpetrators of such violations have been identified".[1]

2.9 On the question of administrative remedies, a review of the procedures undertaken shows that the State party has no desire to assist families in their inquiries, and highlights the many inconsistencies to be found in the various State authorities' handling of disappearance cases. Several letters have been sent (on 10 August 1996, 23 October 1996 and 4 June 2000) to the National Observatory for Human Rights, which has replied to them all but provided no information about the place of detention or the fate of Mourad Kimouche, stating merely that he was not wanted by the security services or a suspect in any current case and there was no warrant for his arrest.

2.10 The authors state that the case has been submitted to the United Nations Working Group on Enforced or Involuntary Disappearances. Counsel emphasizes that the case of the authors' son is not unique in Algeria. More than 7,000 families are searching for relatives who have disappeared, chiefly from police, gendarmerie and Algerian Army premises. No serious inquiry has been conducted to establish who was guilty of these disappearances. To this day, most of the perpetrators known to and identified by witnesses or family members enjoy complete impunity, and all administrative and judicial remedies have proved futile.

The complaint

3.1 The authors claim that the facts as presented reveal violations of article 2, paragraph 3, and article 7 in respect of the authors and their son, and of article 2, paragraph 3, and articles 9 and 16 of the Covenant in respect of their son.

3.2 As to the claims under article 7, in respect of Mourad Kimouche, being subjected to forced disappearance may be regarded as inhuman or degrading treatment of the victim. In respect of the authors, the disappearance of their son is a frustrating and painful ordeal inasmuch as they have no information whatsoever concerning his fate and the authorities have made no attempt to relieve their suffering by conducting effective inquiries. The Committee has recognized that the disappearance of a close relative constitutes a violation of article 7 of the Covenant in respect of the family.

3.3 As to article 9, the authors' son was arrested on 16 May 1996 and was transferred to the Baraki barracks and then to the prison, but his detention has not been acknowledged by any authority. There is no official indication of his whereabouts or his fate, which means he has been arbitrarily detained in complete disregard of the guarantees set forth in article 9. According to the Committee's case law, the unacknowledged detention of any individual constitutes a violation of article 9 of the Covenant. Under the circumstances, the violation of article 9 is sufficiently serious for the authorities to be required to account for it.

3.4 Article 16 establishes the right of everyone to be recognized as the subject of rights and obligations. Forced disappearance is essentially a denial of that right insofar as a refusal by the perpetrators to disclose the fate or whereabouts of the person concerned or to acknowledge the deprivation of his or her liberty places that person outside the protection of the law. Furthermore, in its concluding observations on the State party's second periodic report, the Committee recognized that forced disappearances might involve the right guaranteed under article 16 of the Covenant.[2] Mourad Kimouche has been in unacknowledged detention since 16 May 1996, in violation of his right to recognition as a person before the law and as the holder of protected rights.

3.5 With regard to article 2, paragraph 3, of the Covenant, Mourad Kimouche has suffered forced disappearance and has consequently been deprived of his legitimate right to an effective remedy against his arbitrary detention. The authors have sought every remedy at their disposal in order to find their son. The Committee has considered that "[a] State party has a duty to investigate thoroughly alleged violations of human rights, particularly enforced disappearances and violations of the right to life, and to criminally prosecute, try and punish those deemed responsible for such violations. This duty applies *a fortiori* in cases in which the perpetrators of such violations have been identified". No such measures have been taken by the authorities, in violation of article 2, paragraph 3, of the Covenant.

3.6 The authors ask the Committee to find that the State party has violated article 2, paragraph 3, and articles 7, 9 and 16 of the Covenant and to request the State party to order independent investigations as a matter of urgency with a view to locating their son, to bring the perpetrators of the forced disappearance before the competent civil authorities for prosecution, and to provide adequate reparation.

State party's observations

4.1 On 28 August 2005, the State party reported that inquiries by the clerk of the Supreme Court had not succeeded in locating the Kimouche file. The State party therefore requested further details, including the number of the receipt issued upon deposition of the file with the Supreme Court. Considering the large number of cases before the Court, more specific information would help shed light on the case in question.

4.2 On 9 January 2006, the State party reported that the case relating to Mourad Kimouche's disappearance had opened with a complaint lodged in April 1999 by Mr. Kimouche concerning the abduction of his son in, he said, May 1996. On receipt of the complaint, a statement was taken from Mr. Kimouche at the gendarmerie station and forwarded to the prosecutor at El Harrach. The prosecutor filed charges of abduction, a punishable offence under article 291 of the Criminal Code, against a person or persons unknown on 12 April 1999. The case was dealt with by an examining magistrate of the El Harrach Court. After several months of inquiries which proved fruitless, the examining magistrate ordered a temporary stay of proceedings, meaning that the investigation may be reopened at any time if new information comes to light. This decision was appealed in the Indictments Division of the Algiers Court, which upheld the examining magistrate's decision. The Indictments Division ruling was appealed in cassation before the Supreme Court, which rejected the application. The case is not definitively closed inasmuch as the examining magistrate's decision was to order a temporary stay of proceedings, with the legal consequences already noted.

Authors' comments on the State party's observations

5. On 24 February 2006, counsel argued that the State party was merely recapitulating the judicial procedure, not responding on the merits to either deny or accept responsibility for the forced disappearance of the authors' son. According to the Committee's case law, the State party must furnish evidence if it seeks to refute claims made by the author of a communication: it is no use the State party merely denying them, whether explicitly or implicitly.[3] In terms of procedure, the State party appears to be suggesting that proceedings are still in progress, but counsel maintains that all effective remedies in the case have been exhausted: the authors have taken the case to appeal in cassation, but all remedies have proved ineffective and futile. The possibility that the case might be reopened "if new information comes to light" has no bearing on whether the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met.

Issues and proceedings before the Committee

Admissibility considerations

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

6.2 The Committee notes that the same matter is not being examined under any other procedure of international investigation or settlement, as required under article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With regard to exhaustion of domestic remedies, the Committee notes the State party's submission that the case is not definitively closed inasmuch as the judicial investigation may be reopened at any time if new information comes to light. On this point the Committee refers to the authors' statement that the decision to dismiss proceedings was upheld by the Supreme Court of Algiers on 25 July 2000 and that a further such decision has been handed down since then. The Committee also considers that the application of domestic remedies in response to the other complaints introduced repeatedly and persistently by the authors since 1996 has been unduly prolonged. It therefore considers that the authors have met the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 With regard to the complaints under articles 7 and 9 of the Covenant, the Committee notes that the authors have made detailed allegations about their son's disappearance and the ill-treatment their son has suffered. The State party has not replied to these allegations. In this case, the Committee takes the view that the facts described by the authors are sufficient to substantiate the complaints under articles 7 and 9 for the purposes of admissibility. As to the claim under article 2, paragraph 3, the Committee considers that this allegation has also been sufficiently substantiated for the purposes of admissibility.

6.5 With regard to the complaints under article 16, the Committee considers that the question of whether and in what circumstances an enforced disappearance may constitute a refusal to recognize the victim of such an act as a person before the law is closely related to the facts of this case. Consequently, it concludes that such complaints would be more appropriately dealt with when considering the merits of the communication.

6.6 The Committee concludes that the communication is admissible under articles 2, paragraph 3, and 7, 9 and 16 of the Covenant, and proceeds to its consideration on the merits.

Consideration on the merits

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

7.2 The Committee recalls the definition of enforced disappearance in article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court: "Enforced disappearance of persons means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time." Any act leading to such disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to liberty and security of the person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10). It also violates or constitutes a grave threat to the right to life (art. 6).[4] In the present case, the authors invoke articles 7, 9 and 16.

7.3 With regard to the authors' claim of disappearance, the Committee notes that the authors and the State party have submitted different versions of the events in question. The authors contend that their son was arrested on 16 May 1996 by agents of the State - according to the latter, to help with inquiries - and has been missing since that date, while according to the National Observatory for Human Rights their son is not wanted by the security services and there is no warrant for his arrest. The Committee takes notes of the State party's indication that the examining magistrate considered the charge of abduction and, following investigations that failed to establish the identity of the perpetrator of the alleged abduction, decided to dismiss proceedings, a decision that was upheld in cassation.

7.4 The Committee reaffirms[5] that the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has the relevant information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In cases where allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information exclusively in the hands of the State party, the Committee considers an author's allegations sufficiently substantiated in the absence of satisfactory evidence and explanations to the contrary presented by the State party. In the present case, the Committee has been provided with statements from witnesses who were present when the authors' son was arrested by agents of the State party. Counsel has informed the Committee that one of those detained at the same time as the authors' son, held with him and later released, has testified concerning their detention and the treatment to which they were subjected.

7.5 As to the alleged violation of article 9, the information available reveals that the authors' son was removed from his home by agents of the State. The State party has not addressed the authors' claims that their son's arrest and detention were arbitrary or illegal, and that he has not been seen since 16 May 1996. Under these circumstances, due weight must be given to the information provided by the authors. The Committee recalls that detention incommunicado as such may violate article 9[6] and notes the authors' claim that their son was arrested and has been held incommunicado since 16 May 1996 without any possibility of access to a lawyer or of challenging the lawfulness of his detention. In the absence of adequate explanations on this point from the State party, the Committee concludes that article 9 has been violated.

7.6 As to the alleged violation of article 7 of the Covenant, the Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20, on article 7, which recommends that States parties should make provision against incommunicado detention. In the circumstances, the Committee concludes that the disappearance of Mourad Kimouche, preventing him from contacting his family and the outside world, constitutes a violation of article 7 of the Covenant.[7] Further, the circumstances surrounding the disappearance of the authors' son and the testimony that he was tortured strongly suggest that he was so treated. The Committee has received nothing from the State party to dispel or counter such an inference. The Committee concludes that the treatment of the authors' son amounts to a violation of article 7.[8]

7.7 The Committee also notes the anguish and distress caused to the authors by their son's disappearance and their continued uncertainty as to his fate. It is therefore of the opinion that the facts before it reveal a violation of article 7 of the Covenant with regard to the authors themselves.[9]

7.8 As to the alleged violation of article 16 of the Covenant, the question arises of whether and in what circumstances an enforced disappearance may constitute a refusal to recognize the victim as a person before the law. The Committee points out that intentionally removing a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person before the law if the victim was in the hands of the State authorities when last seen and, at the same time, if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3), have been systematically impeded. In such situations, disappeared persons are in practice deprived of their capacity to exercise entitlements under law, including all their other rights under the Covenant, and of access to any possible remedy as a direct consequence of the actions of the State, which must be interpreted as a refusal to recognize such victims as persons before the law. The Committee notes that, under article 1, paragraph 2, of the Declaration on the Protection of All Persons from Enforced Disappearance,[10] enforced disappearance constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law. It also recalls that article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court recognizes that "the intention of removing [persons] from the protection of the law for a prolonged period of time" is an essential element in the definition of enforced disappearance. Lastly, article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance mentions that enforced disappearance places the person concerned outside the protection of the law.

7.9 In the present case, the authors indicate that their son was arrested together with other individuals by members of the National People's Army on 16 May 1996. After an identity check, he was allegedly taken to the Baraki military barracks. There has been no news of him since that date. The Committee notes that the State party has neither contested these facts nor conducted an investigation into the fate of the authors' son. It is of the view that if a person is arrested by the authorities and there is subsequently no news of that person's fate, the failure by the authorities to conduct an investigation effectively places the disappeared person outside the protection of the law. Consequently, the Committee concludes that the facts before it in the present communication reveal a violation of article 16 of the Covenant.

7.10 The authors have invoked article 2, paragraph 3, of the Covenant, which requires States parties to ensure that individuals have accessible, effective and enforceable remedies to uphold these rights. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. It refers to its general comment No. 31,[11] which states that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. In the present case, the information before it indicates that neither the authors, nor their son, have had access to an effective remedy, and the Committee concludes that the facts before it reveal a violation of article 2, paragraph 3, of the Covenant, in conjunction with articles 7, 9 and 16, in respect of the authors' son, and a violation of article 2, paragraph 3, of the Covenant, in conjunction with article 7, in respect of the authors themselves.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of articles 7, 9 and 16 of the Covenant, and of article 2, paragraph 3, in conjunction with articles 7, 9 and 16, in respect of the authors' son, and a violation of article 7 and of article 2, paragraph 3, in conjunction with article 7, in respect of the authors themselves.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including a thorough and effective investigation into the disappearance and fate of their son, his immediate release if he is still alive, and the appropriate information emerging from its investigation, and to ensure that the authors and the family receive adequate reparation, including in the form of compensation. While the Covenant does not give individuals the right to demand the criminal prosecution of another person,[12] the Committee nevertheless considers the State party duty-bound not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and infringements of the right to life, but also to prosecute, try and punish the culprits. The State party is therefore also under an obligation to prosecute, try and punish those held responsible for such violations. The State party is further required to take measures to prevent similar violations in the future. The Committee also recalls the request made by the Special Rapporteur on new communications and interim measures, dated 23 September 2005 (see paragraph 1.3 above), and reiterates that the State party should not invoke the *Charte pour la Paix et la Réconciliation Nationale* against individuals who invoke the provisions of the Covenant or have submitted or may submit communications to the Committee.

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

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

Notes

[1] Communication No. 612/1995, *José Vicente et al. v. Colombia*, Views adopted on 29 July 1997, para. 8.8.

[2] CCPR/C/79/Add.95, para. 10.

[3] Counsel cites communication No. 107/1981, *Elena Quinteros Almeida v. Uruguay*, Views adopted on 21 July 1983.

[4] See communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 31 July 2003, para. 9.3.

[5] See, inter alia, communications Nos. 146/1983 and 148-154/1983, *Baboeram Adhin et al. v. Suriname*, Views adopted on 4 April 1985, para. 14.2; and 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.4.

[6] Communication No. 1128/2002, *Rafael Marqués de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.3. See also general comment No. 8, para. 2.

[7] Communications Nos. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 8.5; and 458/1991, *Mukong v. Cameroon*, Views adopted on 24 July 1994, para. 9.4.

[8] Communications Nos. 449/1991, *Mójica v. Dominican Republic*, Views adopted on 10 August 1994, para. 5.7; and 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 9.6.

[9] Communications Nos. 107/1981, *Elena Quinteros Almeida v. Uruguay*, Views adopted on 21 July 1983, para. 14; and 950/2000, *Sarma v. Sri Lanka*, Views adopted on 31 July 2003, para. 9.5.

[10] See General Assembly resolution 47/133 of 18 December 1992.

[11] Paragraph 15.

[12] Communications Nos. 213/1986, *H.C.M.A. v. The Netherlands*, Views adopted on 30 March 1989, para. 11.6; and 612/1995, *José Vicente et al. v. Colombia*, Views adopted on 29 July 1997, para. 8.8.

AA. Communication No. 1332/2004, *García and another v. Spain** (Views adopted on 31 October 2006 Eighty-eighth session)

Submitted by:	Juan García Sánchez and Bienvenida González Clares (represented by counsel, Mr. José Luis Mazón Costa)
Alleged victims:	The authors
State party:	Spain
Date of communication:	4 November 2002 (initial submission)
Subject matter:	Conviction at second instance overturning acquittal by the lower court, with no possibility of review.
Procedural issues:	Exhaustion of domestic remedies
Substantive issues:	Right to appeal against conviction and sentence before a higher court in accordance with the law.
Article of the Covenant:	14, paragraph 5
Article of the Optional Protocol:	2

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

Meeting on 31 October 2006,

Having concluded its consideration of communication No. 1332/2004, submitted on behalf of Mr. Juan García Sánchez and Ms. Bienvenida González Clares 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 communication and the State party,

Adopts the following:

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

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

1. The authors of the communication, dated 4 November 2002, are Juan García Sánchez, born in 1938, and Bienvenida González Clares, born in 1935. They claim to be victims of a breach by Spain of article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The authors are represented by counsel, Mr. José Luis Mazón Costa.

Factual background

2.1 In February 1996, Juan García Sánchez, a fabric salesman, was ordered to pay damages in excess of 8 million pesetas (€48,080.97) to José González Amoros. Mr. García Sánchez already had outstanding debts of 5 million pesetas (€30,050.61). In December 1996, he decided to abrogate the joint property arrangements between himself and his spouse, Bienvenida González, which covered a single piece of property, the family home. The property was valued at 10 million pesetas (€860,101.21), each of the authors being entitled to half. In early 1997, Bienvenida González acquired her spouse's rights for 5 million pesetas, which Mr. García Sánchez used to pay off various debts, but not the debt he owed Mr. González Amoros.

2.2 Criminal proceedings were brought against the authors for fraudulent bankruptcy, on the grounds that they had concealed assets from their creditors. The Public Prosecutor, in his submissions, requested that the offence be deemed culpable insolvency or concealment of assets. The Criminal Court of Murcia acquitted the authors on 30 November 2000. The judgement was appealed by the prosecution and the Office of the Public Prosecutor. On 5 September 2001, the Provincial High Court of Murcia overturned the judgement handed down at first instance and convicted the authors of culpable insolvency, punishable by one year in prison and a fine. The Provincial High Court ruled that Juan García, in agreement with his spouse, Bienvenida González, had disposed of property so as to reduce his assets to a state of insolvency with intent to defraud Mr. González Amoros of the money due to him.

The complaint

3.1 The authors claim that the State party violated article 14, paragraph 5, of the Covenant, because they were convicted by a court of second instance without the possibility of their convictions or the penalties imposed being reviewed by a higher court. They further contend that the remedy of cassation before the Supreme Court is not applicable against judgements handed down on appeal by the Provincial High Courts, as expressly stipulated in article 847 of the Code of Criminal Procedure.

3.2 The authors acknowledge that they did not submit an application for *amparo* to the Constitutional Court. They consider such application to be ineffective in view of a previous Court ruling that acquittal of a defendant at first instance followed by conviction at second instance without the possibility of appeal does not violate the right to a full review of the conviction to which article 14, paragraph 5, of the Covenant refers. The Constitutional Court justifies the denial of the right to review by a higher court by relying on the presumption that the court of second instance will display greater wisdom, competence and thoroughness than the lower court.

State party's observations on admissibility and on the merits

4.1 The State party, in a note verbale dated 16 February 2005, challenges the admissibility and merits of the communication, maintaining that the authors have not exhausted domestic remedies by failing to apply for *amparo* to the Constitutional Court.

4.2 The State party argues that nowadays an application for *amparo* is a perfectly effective remedy in cases such as the one covered in the communication, especially since the communication is of later date than the decision handed down in *Gómez Vásquez v. Spain*. It maintains that the Constitutional Court, in its judgement of 3 April 2002 (STC 70/02, First Chamber), referred to the Committee's Views and did not declare the appeal inadmissible but ruled on the merits. Likewise, the State party refers to the Constitutional Court's ruling of 9 February 2004, No. 10/2004, on an acquittal at first instance superseded by a conviction on appeal, where the Court ruled that the evidence must be produced again at second instance if conviction depends upon evidence with which the judge must be directly and personally acquainted.

4.3 The State party maintains that article 14, paragraph 5, of the Covenant neither requires the prosecution's right of appeal to be restricted nor calls for the establishment of an endless series of appeals. What is crucial is that the issues raised in criminal proceedings can be reviewed, but that does not mean that the higher court cannot consider appeals submitted by the prosecution.

4.4 The State party indicates that although in the case under consideration the High Court's sentence is based solely on documentary evidence, the Constitutional Court has not had an opportunity to rule on the case, owing to the failure to apply for *amparo*. Likewise, it reiterates that in Spain the prosecution and the defence are equally entitled to appeal. Were the higher court not able to take account of an appeal by the prosecution, as it did in the case at hand, that would run counter to this principle that the parties have an equal right to lodge an appeal.

Authors' comments on the State party's observations

5.1 The authors challenge the State party's arguments in a letter dated 15 September 2005. They say the Constitutional Court has maintained since 1985 that first conviction at second instance does not breach article 14, paragraph 5, of the Covenant. They refer to the Constitutional Court's decision of 28 June 1999, reiterating that the Court's case law on this point was not established by that decision but dates back to 1985.

5.2 The authors contend that the ruling of 9 February 2004 to which the State party alludes is not concerned with acknowledgement of the right to a review of court decisions, but rather a separate issue, the right to a public trial at second instance, which is a different subject from that of the present communication.

5.3 The authors submit that the futility of *amparo* as a remedy in cases relating to review at second instance has been repeatedly discussed by the Committee in its Views, including those on the *Gomaríz Valera* case of 22 July 2005, in which it found the Government of Spain at fault in an identical case.

5.4 In addition, the authors submit that the Constitutional Court explicitly rejects the Committee's jurisprudence, which requires a full legal and factual review of the conviction.

Issues and proceedings before the Committee

Considerations on admissibility

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

6.2 The Committee has ascertained that the same matter has not been submitted to any other procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 On the exhaustion of domestic remedies, the Committee takes note of the State party's claims that domestic remedies have not been exhausted because the alleged violation now before the Committee was not argued before the Constitutional Court, which is said to have amended its case law in decisions dating from 2002 and 2004. The Committee observes that at the time of the authors' conviction on 5 September 2001, the Court had clear case law on the issue.[1] The Committee also observes that the Court's case law as presented to it is concerned with the need to present again at second instance any evidence with which, by its very nature, the judge must, according to the Court's understanding, be directly and personally acquainted, in particular oral testimony and expert opinions. In the case under consideration, the conviction was based entirely on documentary evidence.[2] The Committee recalls its jurisprudence to the effect that only remedies with a reasonable chance of success need to be exhausted and reiterates that, when the case law of the highest domestic court has settled the point, ruling out any chance of a successful appeal to the domestic courts, the authors are not required under the Optional Protocol to exhaust domestic remedies.[3] In the case under examination, the Committee considers that the remedy of *amparo* had no prospect of success with regard to the alleged violation of article 14, paragraph 5, of the Covenant. The Committee therefore considers that domestic remedies have been exhausted and that the communication is admissible in relation to the above-mentioned provision.

Consideration of the merits

7.1 With regard to the merits of the communication, the Committee takes note of the State party's argument that conviction on appeal is compatible with the Covenant. It notes that the authors were found guilty by the Provincial High Court of Murcia after being acquitted by the Criminal Court of Murcia without the possibility of a full review of the conviction.

7.2 Article 14, paragraph 5, of the Covenant stipulates that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. The Committee points out that the expression "according to law" is not intended to leave the very existence of a right of review to the discretion of the States parties.[4] On the contrary, what must be understood by "according to law" is the modalities by which the review by a higher tribunal is to be carried out. Article 14, paragraph 5, not only guarantees that the judgement will be placed before a higher court, as happened in the authors' case, but also that the conviction will undergo a second review, which was not the case for the authors. Although a person acquitted at first instance may be convicted on appeal by the higher court, this circumstance alone cannot impair the defendant's right to review of his or her conviction and sentence by a higher court.[5]

The Committee accordingly concludes that there has been a violation of article 14, paragraph 5, of the Covenant with regard to the facts submitted in the communication.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the authors with an effective remedy that allows for a review of their convictions by a higher court. The State party is under an obligation to take the necessary measures to ensure that similar violations do not occur in future.

10. By becoming a party to the Optional Protocol, Spain recognized the competence of the Committee to determine whether there has been a violation of the Covenant. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and applicable remedy should it be proven that a violation has occurred. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is requested to publish the Committee's Views.

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

Notes

[1] See the decision of 28 June 1999, in which the Constitutional Court held that: "In principle, in the light of our doctrine (…), conviction in a higher court does not in itself involve a violation; nevertheless, there is no constitutional need to make provision for further review of the conviction, which could be endless, particularly considering the function, from the standpoint of the Constitution, of *amparo* with respect to the protection of the fundamental rights in question." STC 120/1999.

[2] STC 10/2004 of 9 February 2004 and STC 167/2002 of 18 September 2002.

[3] See, for example, communication No. 511/1992, *Länsman et al. v. Finland*, Views adopted on 14 October 1993, para, 6.3; communication No. 1095/2002, *Gomaríz v. Spain*, Views adopted on 22 July 2005, para. 6.4; communication No. 1101/2002, *Alba Cabriada v. Spain*, Views adopted on 1 November 2004, para. 6.5; and communication No. 1293/2004, *Maximino de Dios Prieto*, decision, 25 July 2006, para. 6.3.

[4] See, for example, communication No. 64/1979, *Salgar de Montejo v. Colombia*, Views adopted on 24 March 1982, para. 10; communication No. 1073/2002, *Terrón v. Spain*, Views adopted on 5 November 2004, para. 7.4; communication No. 1211/2003, *Luis Oliveró Capellades v. Spain*, Views of 11 July 2006.

[5] Communication No. 1095/2002, *Gomariz v. Spain*, Views adopted on 22 July 2005, para. 7.1

BB. Communication No. 1342/2005, *Gavrilin v. Belarus**
(Views adopted on 28 March 2007 Eighty-ninth session)

Submitted by:	Maksim Gavrilin (not represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	28 October 2004 (initial submission)
Subject matter:	Retroactive application of criminal law establishing a lighter sentence.
Substantive issues:	Imprisonment because of inability to fulfil a contractual obligation; equality before the law; unlawful discrimination; arbitrary arrest; entitlement to take proceedings; fair hearing; subsequent provision for the imposition of a lighter penalty.
Procedural issues:	Incompatibility *ratione materiae;* non-substantiation of claim
Articles of the Covenant:	2, paragraphs 1 and 2; 9, paragraphs 1 and 4; 11; 14; 15, paragraph 1; 26
Articles of the Optional Protocol:	2 and 3

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

Meeting on 28 March 2007,

Having concluded its consideration of communication No. 1342/2005, submitted to the Human Rights Committee by Maksim Gavrilin under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

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

1. The author of the communication is Maksim Gavrilin, a Belarusian citizen born in 1976, currently imprisoned in Belarus. He claims to be a victim of violations by Belarus[1] of his rights under article 2, paragraphs 1 and 2; article 9, paragraphs 1 and 4; article 11; article 14; article 15, paragraph 1; and article 26 of the International Covenant on Civil and Political Rights. He is not represented.

The facts as submitted by the author

2.1 Between January 1996 and April 1997, the author illegally acquired other persons' property, by introducing himself as a real-estate agent and taking deposits for future real-estate transactions. On 25 August 1997, the Frunzensky District Court of Minsk found him guilty of fraud and sentenced him to seven years' imprisonment with confiscation of property (hereinafter, "first judgement" or "first conviction") under article 90 (3) of the Belarus Criminal Code of 1960 (hereinafter, "the old Code"), in force at the time when the crime was committed. The sentencing regime which applied to that offence provided for imprisonment of between five and ten years. He appealed against the first judgement to the Judicial College of the Minsk City Court, requesting it to take into account his personal circumstances and to reduce his sentence, because he had not fulfilled his obligations to repay the deposits because of lack of financial resources, which he spent, and not by deliberate intent. On 24 October 1997, the Judicial College of the Minsk City Court upheld the first judgement.

2.2 In 1999, a new Criminal Code (hereinafter, "the new Code") came into effect; additional changes to this Code were made by the Law "On amending and supplementing certain laws of the Republic of Belarus" of 4 January 2003 (hereinafter, "Law of 4 January 2003"). It established a new prison term regime, which ranged from three to ten years' imprisonment.

2.3 On 3 June 2002, the author was convicted by the Rechitsky District Court of Gomel Region under article 413 (1) of the new Code of having escaped from a prison colony (hereinafter, "second judgement" or "second conviction") in the Gomel region, where he served the term of imprisonment under the first judgement, on 1 December 2000. The Rechitsky District Court sentenced him to one year's imprisonment for escape, added the unexpired term of two years, four months and twenty days from the first judgement and cumulatively sentenced the author to two and a half years' imprisonment. The final sentence was handed down on the basis of the old Code, as it set out a scheme for calculating cumulative sentences, which was more favourable to the author.

2.4 On an unspecified date, the author appealed against the second judgement to the Judicial College of the Gomel Regional Court, requesting it to change the legal qualification of his actions from article 413 (1) of the new Code to article 184 (1) of the old Code and to reduce what he considered an excessive sentence. The Rechitsky prosecutor objected to the second judgement on the grounds that the sentence was too light, given the circumstances of the author's escape and the length of his being on the run. By ruling of 5 July 2002, the Judicial College of the Gomel Regional Court modified the legal qualification of his actions to article 184 (1) of the old Code, because at the time of his escape, on 1 December 2000, the new Code had not yet

come into effect and both Codes set out the same sanction of up to three year's imprisonment. The court did not follow the prosecutor's objection and retained the earlier term of imprisonment of two and a half years'.

2.5 On 17 March 2003, the author was convicted by the Sovietsky District Court of Minsk under article 209 (3) and article 216 (1) of the new Code on numerous counts of frauds and infliction of pecuniary damage committed by him under his own name and a false name between November 2000 and January 2001 (hereinafter, "third judgement" or "third conviction"). The Sovietsky District Court of Minsk applied the principle of "dangerous recidivism"[2] and sentenced him to seven years' imprisonment with confiscation of property for fraud; and to one year and six months' imprisonment for infliction of pecuniary damage. It applied article 72 (3) of the new Code and cumulatively sentenced the author to seven years and three months' imprisonment. Finally, the Sovietsky District Court of Minsk added an unexpired term under the second judgement on the basis of the old Code (which was more beneficial for the author) and handed down a final sentence of seven years and six months' imprisonment.

2.6 One of the counts in the third judgement was related to a fraud that took place in Minsk on 30 November 2000, i.e. the day before the author's escape from prison according to the second judgement. In court the author testified that at the end of September 2000, he left the colony-settlement where he served the sentence under the first judgement without authorization, came to Minsk and resumed his activities as a real-estate agent. Allegedly, he was de facto employed as a manager by the real-estate agency "Tisan", although he did not sign a contract. On an unspecified date, one Zagolko approached this agency for services and the author subsequently visited Zagolko and signed a contract with him with the letterhead of another agency. The author kept these letterheads from the time he planned to register his own real-estate agency under this trade name. On 30 November 2000, he and Zagolko jointly rented a locker in the depository and deposited 1,400 US dollars as a mutual guarantee that the deal would take place. The author stated in court that he withdrew only 100 US dollars, but, when the locker was opened by the depository's personnel on an unspecified date, it was empty. According to the author, he did not intend to commit fraud. The depository's employee testified in court that on 30 November 2000, he registered the locker under Zagolko's name in the presence of Gavrilin, and subsequently saw the latter entering the depository alone a few times, including on 30 November 2000. In a letter to the Committee dated 14 March 2005, the author stated that he admitted in the court of first instance to having visited the depository on that day, hoping that the cassation and review instances would notice the contradictory dates in the second and third judgements and would rescind the latter.

2.7 On an unspecified date, the author appealed the third judgement to the Judicial College of the Minsk City Court, requesting it to reduce the sentence and to exclude the count of alleged fraud committed on 30 November 2000 in Minsk, since he was then serving his sentence in the colony-settlement. Moreover, he should not have been convicted for fraud under article 209 (3) of the new Code because he had not had intended to commit it, and the previous judgements should have been retrospectively reviewed due to the change in the applicable law. On 29 April 2003, the Judicial College of the Minsk City Court upheld the third judgement, stating, inter alia, that there were no grounds for review of his previous judgements under the supervisory procedure, because his sentences fell within the sentencing margin allowed under the new Code, as amended by the Law of 4 January 2003.

2.8 On an unspecified date, the author appealed to the Chairperson of the Minsk City Court, with a request to change the legal qualification of his actions from article 90 (3) of the old Code to article 209 (3) of the new Code and to retrospectively review the first judgement and the ruling of 2 October 1997 in accordance with the Law of 4 January 2003. On 3 May 2003, the Chairperson of the Minsk City Court explained that the author's complaint was unfounded. The sanction under article 209 (3) of the new Code was the same as that under 90 (3) of the old Code (a prison term of between five and ten years' imprisonment) and the author's sentence of seven years' imprisonment fell within the sentencing margin allowed under the new Code, as amended by the Law of 4 January 2003 (a prison term of between three and ten years' imprisonment). As a result, the first judgement was not subject to the mandatory review under the supervisory procedure.

2.9 On an unspecified date, the Chairperson of the Minsk City Court objected to the third judgement and requested the Presidium of the Minsk City Court to review it, in the light of the adoption of another new Law, amending and supplementing the Criminal and Criminal Procedure Codes of 22 July 2003 (hereinafter, "Law of 22 July 2003"). The latter set out a new penalty for fraud, which ranged from 2 to 7 years' imprisonment. On 24 September 2003, the Presidium of the Minsk City Court reduced the author's sentence under the third judgement for fraud (article 209 (3) of the new Code) to six years and nine months' imprisonment. It applied article 72 (2) of the new Code and cumulatively sentenced the author to seven years' imprisonment under both article 209 (3) and 216 (1) of the new Code. Finally, the Presidium of the Minsk City Court added an unexpired term of three months' imprisonment under the second judgement and imposed a final sentence of seven years' imprisonment. It decided that the new Code, as amended by the second Law, classified the crime under article 209 (3) as "grave" and under article 216 (1) as "less grave". On this basis, the court applied article 72 (2) of the same Code,[3] requiring it to apply only one sentence - the highest among the sentences handed down under individual articles - as a cumulative sentence. The Presidium of the Minsk City Court replaced the principle of "dangerous recidivism" invoked by the Sovietsky District Court of Minsk in the author's case with the principle of "simple recidivism", thus excluding the requirement of sentencing him to not less than 2/3 of the maximum term of the heaviest penalty set out in the sanction of article 209 (3) of the new Code. It took into account that the cumulative sentence under the second judgement was handed down on the basis of the old Code, more beneficial for the author.

2.10 On an unspecified date, the author requested the Supreme Court to review the first and the third judgements. On 15 December 2003, the Deputy Chairperson of the Supreme Court explained that the first judgement was not subject to the mandatory review procedure, because his sentence fell within the sentencing margin allowed under the new Code.

2.11 By ruling of the Presidium of the Minsk City Court of 2 June 2004, the legal qualification of the author's actions under the first judgement was changed from article 90 (3) of the old Code to article 209 (3) of the new Code, as amended by the Law 22 July 2003. The court took into account the public danger of the author's actions, his personal qualities and decided to sentence him to the maximum term of imprisonment, i.e. seven years, because he committed the crimes with self-interest.

2.12 On 23 June 2004, the author wrote to the Presidential Administration requesting the President, inter alia, to initiate a review procedure of the Law of 22 July 2003 in the Constitutional Court.[4] On 16 July 2004, he requested the Supreme Court to review the second

and third judgements in the light of Presidium's ruling of 2 June 2004. On 4 March 2005, the Deputy Chairperson of the Supreme Court informed him that there were no grounds to initiate a review of any of his judgements under the supervisory procedure.

2.13 On 15 March 2005, the author requested the Supreme Court to review the third judgement in the light of, inter alia, article 15, paragraph 1, of the Covenant. He challenged the finding of the Sovetsky District Court of Minsk that on 30 November 2000, he had committed a fraud in Minsk, since on that day he was still in prison in the Gomel region. His request was rejected on 6 May 2005. The decision stated that he was in the punishment cell from 27 October to 11 November 2000. In the letter dated 14 March 2005 to the Committee, the author explains that he was permitted to leave the prison colony for a family visit on 22 and 23 November 2000, but overstayed and was brought back on 25 November 2000 and placed into a punishment cell.

The complaint

3.1 The author alleges that he is a victim of violations by Belarus of his rights under article 15, paragraph 1, of the Covenant. He claims that the provisions of the new Code, as amended by the Laws of 4 January and 22 July 2003, establishing a lighter penalty for fraud, should have been applied retrospectively in his case. Under the new Code, a sentence of seven years is the maximum possible, reserved for the most serious cases, whereas his sentence under the old Code was at the lower end of the scale. Thus, he should have benefited from a shorter term of imprisonment under the new Code. He refers to the decisions of the Belarus Constitutional Court of 9 July 1997 and of 21 October 2003. On the basis of article 104 of the Belarus Constitution and article 15, paragraph 1, of the Covenant, the Constitutional Court had found that the principle of retrospective application of criminal law establishing a lighter penalty should apply, inter alia, in cases where a maximum and a minimum of the sentencing margin were reduced by a subsequent law, even if the sentence handed down under the previous law falls within the new margin. Moreover, a law establishing a lesser penalty was defined by the Belarus Supreme Court[5] as a law reducing the maximum or the minimum of the sentencing margin.

3.2 The author further claims that his rights under article 2, paragraph 1, and article 26 of the Covenant were violated, as persons committing the same offence in the same circumstances, but under the new Code, have received more favourable treatment.

3.3 Article 2, paragraph 2, is said to have been violated, because the State party failed to adopt measures for clear and uniform interpretation of the principle of retrospective application of criminal law, guaranteed by article 104 of the Belarus Constitution.

3.4 Article 9, paragraph 4, allegedly was violated, as the state and judicial bodies which are authorized to initiate a review of the author's sentences under the supervisory procedure failed to do so.

3.5 The author raises a complaint about his conviction under the third judgement. First, he says that this conviction is incompatible with the second judgement in which he was convicted of escaping, because the latter judgement recognized that he escaped only on 1 December 2000. He submits that he should not have been convicted on the count of fraud committed on 30 November 2000, and claims that his right to a fair trial under article 14 of the Covenant was violated.

3.6 Finally, the author claims a violation of article 11 of the Covenant, insofar as he was sentenced to deprivation of liberty for a debt which he had failed to repay solely because of lack of financial resources and not by deliberate intent. He claims that his actions should have been qualified under article 151 of the old Criminal Code, i.e. carrying out activities in violation of the registration requirements punishable by up to three year's imprisonment. He concludes, without further substantiation, that his rights under article 9, paragraph 1, were also violated.

The State party's observations on admissibility and the merits

4. On 20 July 2005, the State party reiterated the facts of the case and added that the author's argument that he was detained on 30 November 2000 and thus could not commit fraud on the same day in Minsk is unfounded and not borne out by the case file. He did not challenge this fact in the court of first instance. The State party submits that his guilt was proven beyond doubt by the evidence presented in court, that the courts correctly qualified his actions under the law then in force and imposed appropriate sentences by taking into account the author's actions and personal characteristics.

The author's comments on the State party's observations

5. On 22 and 30 September 2005, and 22 February 2006, the author commented on the State party's observations. He reiterates earlier claims. He also challenges the State party's statement that his actions were correctly qualified under the law then in force. He claims that although a new Criminal Code came into force on 1 January 2001, the events described in some of the counts in the third judgement took place in 2000, whereas the damage caused by those events that took place in 2001 did not amount to "large" damage. Therefore, his actions should have been qualified as a "less grave" crime, thus excluding the principle of "dangerous recidivism".[6]

Further submissions from the State party, and the author's comments

6. Both parties[7] filed additional submissions in which they reiterate their earlier claims.

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. Concerning the exhaustion of domestic remedies, the Committee has noted that according to the information submitted by the author, all available domestic remedies, up to and including the Supreme Court, have been exhausted. In the absence of any State party objection, the Committee considers that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met.

7.3 With regard to the alleged violation of article 11 of the Covenant, the Committee notes that the prohibition of detention for debt does not apply to criminal offences related to civil law debts. When a person commits fraud, negligent or fraudulent bankruptcy, etc., he or she may be punished with imprisonment even when he or she no longer is able to pay the debts. Consequently, the Committee finds this claim incompatible *ratione materiae* with article 11 of the Covenant and thus inadmissible under article 3 of the Optional Protocol. So far as the claim under article 9, paragraph 1, is also linked to the claim under article 11, the Committee equally finds it inadmissible on the same ground.

7.4 With regard to the author's claim that state and judicial bodies authorized to initiate a review of his sentences under the supervisory procedure failed to do so, contrary to article 9, paragraph 4, of the Covenant, the Committee notes that the principle of habeas corpus enshrined in this provision does not apply to the supervisory procedure existing under the State party's law. The latter procedure concerns a review of the final judgement, whereby the legality of a person's detention is a priori reviewed and confirmed by the prior judicial instance(s). Therefore, the Committee finds this part of the communication incompatible *ratione materiae* with article 9, paragraph 4 of the Covenant, and thus inadmissible under article 3 of the Optional Protocol.

7.5 The Committee notes the author's claim that his right under article 14 of the Covenant was violated in relation to his conviction by the Sovetsky District Court of Minsk of, inter alia, committing a fraud in Minsk on 30 November 2000. The Committee notes that the author's claim under article 14 relates, in its essence, to the evaluation of facts and evidence and to the interpretation of domestic legislation. It recalls its jurisprudence that the evaluation of facts and evidence and interpretation of domestic legislation is in principle for the courts of States parties, unless the evaluation of facts and evidence was clearly arbitrary or amounted to a denial of justice.[8] As the author has provided no evidence to show that the domestic courts' decisions suffered from such defects, the Committee considers that this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.6 The Committee considers that the author has not sufficiently substantiated his claim under articles 2 and 26 of the Covenant, for purposes of admissibility. This part of the communication is therefore inadmissible under article 2, of the Optional Protocol.

7.7 The Committee considers that the author's remaining claims have been sufficiently substantiated for purposes of admissibility, and declares them admissible, as raising issues under article 15, paragraph 1, of the Covenant.

Consideration of the merits

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

8.2 The Committee notes that, in view of the retroactive application of a new Code, as amended by the Law of 22 July 2003, to the author's first and third convictions by the Presidium of the Minsk City Court on 2 June 2004 and 24 September 2003, respectively, the main point

raised in the communication is not whether the provision on the retroactivity of a "lighter penalty" in article 15, paragraph 1, of the Covenant applies in the circumstances of the author's case. Rather, the issue is whether, in a case in which the sentence handed down under a previous law falls within the sentencing margin introduced under the later law, the provision of article 15, paragraph 1, of the Covenant requires the State party proportionally to reduce the original sentence, so that the accused may benefit from the imposition of a lighter penalty under the later law.

8.3 In this regard, the Committee refers to its jurisprudence in *Filipovich v. Lithuania*,[9] where it concluded there was no violation of article 15, paragraph 1, because the author's sentence was well within the margin provided by the earlier law and that the State party had referred to the existence of certain aggravating circumstances. The Committee notes that in the present case, the author's sentence under the first conviction was well within the margins provided by both the old Code and the new Code, as amended by the Law of 22 July 2003, and that in determining the sentence, the court took into account the public danger of the author's actions and his personal circumstances. It further notes that when reviewing the author's sentence under the third conviction, the Presidium of the Minsk City Court reduced his sentence for fraud to six years and nine months' imprisonment. In applying the reasoning in *Filipovich mutatis mutandis* to the present case, the Committee cannot, on the basis of the material made available to it, conclude that the author's sentence was handed down in a way incompatible with article 2, paragraph 2, and article 15, paragraph 1, of the Covenant.

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

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

Notes

[1] The Optional Protocol thereto entered into force for the State party on 30 December 1992.

[2] Under article 65 (2) of the new Code, an application of the principle of "dangerous recidivism" means that the sentence should be not less than 2/3 of the maximum term of the heaviest penalty set out in the sanction.

[3] The Sovietsky District Court of Minsk applied article 72 (3) of the new Code while calculating the cumulative sentences.

[4] Under the State party's law, a right to initiate a review in the Constitutional Court belongs to the highest officials within the hierarchy of state and judicial authorities.

[5] Reference is made to the Judicial Bulletin No. 2 of 2001, pp. 30-31 and No. 3 of 2003, pp. 2-3.

[6] See paragraph 2.5 above.

[7] The State party's submission is dated 29 May 2006, and the author's - 27 April and 29 May 2006.

[8] See, inter alia, *Errol Simms v. Jamaica*, communication No. 541/1993, Inadmissibility decision of 3 April 1995.

[9] See *Filipovich v. Lithuania*, communication No. 875/1999, Views adopted on 4 August 2003.

CC. Communication No. 1347/2005, *Dudko v. Australia**
(Views adopted on 23 July 2007 Ninetieth session)

Submitted by: Lucy Dudko (represented by counsel, Mr. Akhmed Glashev)

Alleged victim: The author

State party: Australia

Date of communication: 1 June 2004 (initial submission)

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

Meeting on 23 July 2007,

Having concluded its consideration of communication No. 1347/2005, submitted to the Human Rights Committee on behalf of Ms. Lucy Dudko under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1. The author of the communication, initially dated 1 June 2004, is Lucy Dudko, an Australian, currently imprisoned in the Silverwater Training and Detention Centre, New South Wales, Australia. She claims to be victim of violations by Australia of articles 7, 9, 10, 14 and 17 of the Covenant. She is represented by counsel, Mr. Akhmed Glashev.

Factual background

2.1 In March 1999, a helicopter was hijacked on a tourist flight over Sydney. The hijacker ordered the pilot to land at Silverwater prison, where a Mr. Killick, a convicted bank robber and inmate of the prison, was taken on board. The hijacker and Mr. Killick escaped from the prison

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada and Sir Nigel Rodley.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in adoption of the Committee's decision.

aboard the helicopter and disappeared. Between 25 and 31 March 1999, some 40 articles appeared in the press portraying the author as the hijacker, an accomplice of criminals and a threat to society. Thirteen similar articles were published in April 1999 and 19 articles were published in May 1999, before the news coverage diminished. On 8 May 1999, the author was arrested on suspicion of hijacking an aircraft and unlawfully aiding a particularly dangerous criminal to escape from detention. Mr. Killick was also arrested. Throughout the year 2000, there were numerous media reports which, according to the author, characterised her as a criminal posing a particular danger to society. Some of these media reports were said to have stated that it was essential to stem the flux of Russian immigrants as threats to society. In December 2000, Mr. Killick was sentenced following a plea of guilty to various offences associated with his escape. At sentencing, the sentencing judge, Judge M., remarked that "In my view this was an extraordinary escape to say the very least. It had its genesis in Hollywood fiction. Both the offender and co-offender … learned and rehearsed their respective roles right down to the matter of timing."[1]

2.2 In March 2001, the author's trial commenced. Mr. Killick was neither called as a witness nor attended. Despite the author's argument that she was not the hijacker in question, she was found guilty, by a jury in the District Court of New South Wales, of rescue of an inmate in lawful custody by force, as well as assault on a member of the crew of an aircraft, detention for advantage and two counts of unauthorized possession of a firearm (pistol). The author alleges that before the verdict was handed down, Judge M., who had no involvement in the author's case, gave an interview to the Daily Telegraph newspaper in which he effectively declared that the author had committed the offence. The District Court sentenced her to ten years of imprisonment on the most serious offences, with lesser periods of concurrent imprisonment on the other offences.

2.3 On 20 August 2002, the New South Wales Court of Criminal Appeal rejected the author's appeal. On 2 April 2003, the author's application for legal aid in support of her application to the High Court of Australia for leave to appeal was rejected on the basis that there was no reasonable prospect that leave would be granted; as a result, the author prepared her own application. On 16 March 2004, the High Court (Gummow, Kirby and Heydon JJ.) refused her application for leave to appeal, reasoning that "the only question that would arise on an appeal to this Court would concern [the issue of adverse publicity;] [h]owever, even if it were shown that there had been a failure in that respect, the other evidence of identity … was so overwhelming that the failure could not be shown to have given rise to a miscarriage of justice". The author was unable to attend the High Court hearing despite her wish to be present and was deprived of the opportunity to present her own arguments. The transcript discloses that one judge, Kirby J., questioned the solicitor for the Director of Public Prosecutions, asking whether, despite the fact that the author was in custody, there could be a telecommunications link to the prison so that detained appellants could have the same right as other citizens to appear. The judge noted that long as appellants were allowed to address the Court, he could not see why an appellant in custody should not be heard in the same way as any other appellant. He noted his dissatisfaction with the inequality of the situation that, contrary to the position in New South Wales, in other federal States of the State party detained appellants were brought to Court and could address it, a practice the judge noted could be helpful to the Court. The solicitor for the Director replied that he did not understand the reasons for this practice and was not in a position to comment. Lastly, the author states that she was charged with violating prison rules and transferred to another facility, the Berrima prison, where a stricter regime was in place.

The complaint

3. The author complains, without further provision of detail, that the State party violated articles 7, 9, 10 and 17 of the Covenant. The author further contends that the State party breached article 14, paragraphs 1, 2 and 3, of the Covenant in a number of respects. First, the State party allegedly failed to ensure that she was tried fairly, she was allegedly not tried by an impartial tribunal, and she was allegedly not afforded the presumption of innocence. The author argues that the alleged press interview given by Judge M., given his professional status, effectively portrayed her as guilty and influenced the outcome of the case and the opinion of the jurors. In general, the wide media portrayal of the author is said to have been inflammatory and prejudicial, with the result that the jurors formed a definite opinion as to her guilt and were exposed to an accusatory bias. The author further complains of excessive delay in the proceedings, that she was not allowed to be present at the hearing on her application to the High Court for leave to appeal, and that she was not afforded legal assistance for her application to the High Court for special leave to appeal.

State party's submissions on admissibility and merits

4.1 By note verbale of 31 August 2005, the State party contested the admissibility and merits of the communication. In respect of the claims where the author provided no supporting argumentation, the State party submits that they should be struck out as insufficiently substantiated. In any event, these claims are said to be without merit. As to article 7, the State party argues that detention, in and of itself, is not a violation of article 7, and no evidence is provided nor any allegations made of any instances of torture or cruel, inhuman or degrading treatment or punishment. As to article 9, the State party argues that its detention of the complainant was at no stage unlawful or arbitrary, but on the contrary, was on reasonable grounds and in accordance with procedures are established by law. The author was detained following her arrest, and was tried and convicted by jury and sentenced in accordance with the law. The author had access to judicial review of the decision as evidenced by her appeal to the New South Wales Court of Criminal Appeal. As to article 10, the state party argues that the author has not specified the conditions of her detention that allegedly violate the article.

4.2 On article 14, paragraph 1, requiring a "fair" hearing in a criminal case, the State party submits that the author does not challenge the equality of persons before its courts, access to the courts, lawful establishment of the courts, procedural fairness, or the public nature of criminal trials. The State party argues that it has an independent and impartial judicial system, guaranteed by its Constitution and implemented in practice. Its legal system contains numerous safeguards designed to protect the right of the accused to a fair trial, including the presumption of innocence, procedural and evidentiary rules, trial by jury and public trial, and there is no evidence that the author was denied the benefit of any of these safeguards. In respect of the specific requirement under article 14, paragraph 1, that persons are entitled to be tried by a competent and impartial tribunal, the State party submits that the complainant has not presented any evidence sufficient to suggest the trial court lacked impartiality. There is no allegation that the judge was a party to the case or had a disqualifying interest, nor is any evidence provided to suggest that there are circumstances that would lead a reasonable observer, properly informed, to find bias. The allegation of partiality appears to rest entirely on a comment allegedly made by the trial judge to Mr. Killick following his plea of guilty and subsequent conviction at a separate trial. The alleged conduct of the judge is said to be insufficient to suggest bias towards the author, since it concerned a different defendant in relation to his sentencing. The State party

argues that where a particular judge has been regularly appointed, satisfied the criteria for appointment, taken an oath of impartiality, and the propriety of his participation in the case has not been questioned in domestic proceedings, it is incumbent upon whoever alleges partiality to provide substantial tangible evidence.

4.3 On the claim under article 14, paragraph 2, the State party notes that the trial judge addressing Mr. Killick was in no way involved with the complainant's case, and accordingly challenges the author's standing to make this claim. The State party also says no evidence has been offered to substantiate that such statements were made by Judge M. As to the argument that the presumption of innocence was effectively removed due to the wide publicity which the author's case received in the media, the State party notes that the presumption of innocence is a central tenet of the Australian criminal justice system, and the Australian legal system contains numerous safeguards designed to protect the right of the accused to a fair trial. The claim of prejudicial publicity was contained in the author's appeals to the Criminal Court of Appeal and the High Court, and both courts considered and dismissed the contention. The allegations and the material before the Committee do not reveal any arbitrary or impartial behaviour on the part of the trial judge. Furthermore, the judge's instructions to the jury and the conduct of the trial have been reviewed by two domestic appellate courts and found to be in compliance with domestic law. The communication fails to establish that the publicity which the case received in the media resulted in any bias on the part of the jurors, or in any way affected the fair conduct of her trial. The author has not established that the wide publicity occurred at a time proximate to the trial, or that the judge's directions to the jury regarding the presumption of innocence were insufficient or amounted to a denial of justice. The author has thus failed to advance a sufficiently substantiated claim.

4.4 On the merits of this issue, the State party further notes that the complainant made an application to the trial judge for a permanent stay of proceedings on the basis of pretrial publicity.[2] The judge reached the conclusion that, with proper directions to the jury, the complainant would receive a fair trial, and rejected the application. In summing up with regard to the issue of pretrial publicity, the judge clearly directed the jury that they "must not bring to consideration in this matter any preconceived views or ideas about the matter from what [they] may recall hearing or seeing at or around that time of March through to May of 1999 or even later … touching this particularly or appearing in the media."[3] The Court of Criminal Appeal reviewed the author's allegation that the pretrial publicity "created prejudice in the minds of at least some of the jurors, thus causing a miscarriage of justice".[4] The court found that the assertions of guilt in the media

> *… were particularly prominent in the immediate wake of the escape and became more sporadic and less prominent over time. The worst of the publicity occurred almost two years before the trial itself ... There is now a substantial body of judicial statements of the opinion that jurors accept their responsibility to perform their duties by differentiating between the evidence and what they have heard before the trial … Her Honour gave clear and forceful directions to the jury in this regard.*[5]

The Court of Criminal Appeal emphasized that most of the publicity referred to occurred in 1999 and 2000, while the trial did not commence until March 2001. The trial judge directed the jury clearly and appropriately on the issue of pretrial publicity.

4.5 As to the claims concerning delayed proceedings, denial of legal aid on appeal and inability to be present, the State party argues that the claims are inadmissible for failure to exhaust domestic remedies and for insufficient substantiation. On the issue of legal aid, the State party points out that the provision of legal aid in New South Wales is governed by the Legal Aid Commission Act 1979 (NSW). The author's application for legal aid in relation to her appeal to the High Court was refused by the New South Wales Legal Aid Commission of New South Wales. She was advised of her appeal rights under section 56 of the Legal Aid Commission Act, which provides for an appeal to the Legal Aid Review Committee against the decision to refuse legal aid. No appeal was lodged by the complainant against the decision to refuse legal aid.

4.6 The State party also argues that the author has not given sufficient evidence that its actions resulted in a breach of the right to be tried in one's presence. The author was present throughout her trial and Court of Criminal Appeal proceedings, and has failed to advance any claims showing that her High Court application proceeding *in absentia* caused any unfairness contrary to article 14. The State party recalls the Committee's jurisprudence in *Mbenge v. Zaire*[6] that "this provision and other requirements of due process enshrined in article 14 cannot be construed as invariably rendering proceedings in absentia inadmissible irrespective of the reasons for the accused person's absence".[7] Finally, the communication fails to sufficiently establish that the refusal to grant the author legal assistance resulted in a breach of article 14, paragraph 3. The author fails to make any claims in regard to the determination by the Legal Aid Commission that the proposed appeal for which legal aid was sought had no reasonable prospects of success.

4.7 On the issue of delay, the State party argues that the author fails to provide evidence substantiating her allegation that the judicial proceedings in her case were unduly delayed. The communication sets out only three dates - those of arrest, delivery of the Court of Criminal Appeal judgement, and delivery of the High Court decision. It omits any information concerning the dates of trial, length of trial, the dates on which appeals were lodged and the dates on which they were heard. The author does not assert that she or her counsel made any complaints to the state authorities regarding the delay. The State party recalls that the determination of "undue delay" depends on the circumstances and complexity of the case.

4.8 The State party notes that in the overwhelming majority of cases where the Committee has found a violation of article 14, paragraph 3 (c), the delay experienced by the defendant was in excess of two years. Each level of the courts has time standards duly applied for the conduct of criminal cases. The author was arrested on 9 May 1999, and was taken before the Parramatta Local Court on the same day charged with 14 offences. She was legally represented on that occasion, and at all other hearings in the local court, and did not at any time apply for bail. Her case was brought before the Central Local Court for mention every month until April 2000, at which time a hearing date in July 2000 was fixed for the hearing of defence applications in relation to the committal proceedings. The committal hearing concluded on 25 August 2000, and on this date the case was committed for trial to the Sydney District Court.

4.9 The author first appeared in the District Court on 1 September 2000, and was arraigned on 20 October 2000. On the same day, the trial date was set for 19 February 2001. Pretrial applications were heard on 19 and 20 February 2001, and the trial commenced on 21 February 2001. The evidence concluded on 7 March 2001, and on 9 March 2001 the jury returned verdicts of "guilty' on each count. The case was adjourned to 8 June 2001, when sentencing submissions were heard. The sentence was imposed on 20 July 2001. The State party

noted that District Court requires 90 per cent of trials to commence within 4 months of committal; and 100 per cent of trials to commence within 12 months of committal, and the author's trial started within 6 months.

4.10 The author's appeal to the New South Wales Court of Criminal Appeal was lodged on 30 July 2001. It was initially listed for 10 September 2001, and was adjourned to callovers in October and December 2001, and February and April 2002. On each of those occasions, the author's appeal was not ready to proceed as she (or her legal advisers) had not filed grounds of appeal or submissions in support of the appeal. She lodged grounds of appeal only on 19 April 2002, and submissions on 23 May 2002. The Court of Criminal Appeal heard the case on 21 June 2002, and reserved its decision. The author requested additional time for further submissions in July and August 2002. On 20 August 2002, the Court dismissed the appeal. In the High Court, the complainant did not lodge a notice of application for leave to appeal in the High Court until 15 April 2003. Following the exchange of written submissions, the application for leave to appeal was heard and dismissed in the High Court on 16 March 2004.

4.11 The State party recalls that the author's case was complex, involving 14 charges and a co-defendant, who was tried separately. She was brought before the court at the first available opportunity, on the same day as her arrest, and her case was monitored regularly before the court to ensure its progression. The time taken to finalize her committal, trial and appeals was in accordance with the time standards laid down by the courts for criminal cases. In addition, significant delays were assertedly occasioned by the inaction or lack of preparation of the author or her legal advisers, particularly in relation to the appeal to the Court of Criminal Appeal and the High Court. In all the circumstances of the case, it cannot be said that the matter was unduly delayed.

4.12 Regarding the right to be tried in one's presence, the State party acknowledges that its obligation to conduct a criminal trial in the presence of the accused may be extended to appeal cases where the interests of justice so require.[8] This question must be decided on the basis of a consideration of the trial as a whole, and not on the basis of an isolated consideration.[9] The State party argues that the personal attendance of the defendant at an appeal does not take on the same crucial significance as it does for the trial hearing.[10] Accordingly, proceedings for leave to appeal, and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of a fair trial even though the appellant was not given the opportunity of being heard in person.[11] In this regard, the State party recalls the Committee's decision in *R.M. v. Finland*,[12] where it stated that "the absence of oral hearings in the appellate proceedings raises no issue under article 14 of the Covenant".[13]

4.13 The State party notes that, in the High Court, there was no defence lawyer present, because legal aid had been refused with regard to the leave application. The author herself was not present in the High Court at the leave application because she was in custody, and the practice in New South Wales is that people in custody do not appear in the High Court. However, the author's absence from the leave application assertedly did not render the proceedings unfair, or in any way impinge upon their procedural fairness. She had been present throughout her trial, and at the appeal hearing in the New South Wales Court of Criminal Appeal. She was aware of the proceedings in the High Court, having instigated them herself, and was able to submit written arguments which were considered and referred to by the court.[14] That she was not present at the leave application did not result in any unfairness or otherwise breach article 14 of the Covenant.

4.14 As to the right to be provided with legal assistance, the provision of legal aid, both at trial and on appeal, requires that the defendant must lack sufficient means to pay for legal assistance and that the "interests of justice" require it. A State party has discretion to direct finite legal aid resources to meritorious arguments, taking into account the nature of the proceedings, the powers of the appellate court, the capacity of an unrepresented appellant to present a legal argument, and the importance of the issue at stake in view of the severity of the sentence. In this case, the "interests of justice" did not require that legal aid be provided for the author's application for special leave to the High Court. She was granted legal aid for legal representation in the Local Court, the District Court, and the Court of Criminal Appeal, covering her pretrial, trial and Court of Criminal Appeal proceedings.

4.15 The Legal Aid Commission of New South Wales provides that appeals in criminal matters to the High Court of Australia are subject to both a means and merit test. The merit test considers whether a grant of legal aid is reasonable in the circumstances, including the nature and extent of any benefit that may accrue to the applicant by providing legal aid, the nature and extent of any detriment that the applicant may suffer if legal aid is refused, and whether the appellant has any reasonable prospects of success in the proceedings. In relation to the author's application for further legal aid, advice was sought from Counsel on the prospects of success of the proposed appeal, in accordance with the normal procedure followed by the Commission. Counsel advised that there was no merit in the appeal, and legal aid was refused. The State party submits that the decision not to grant legal aid for the special leave application was not contrary to the interests of justice because it was taken after careful consideration of the relevant factors, and there were no special features of the proceedings which necessitated State-funded legal aid in light of the absence of reasonable grounds of appeal. The author had already had the benefit of review by the Court of Criminal Appeal.

4.16 On the claim that article 17 of the Covenant was breached, the State party argues that no indication is given as to which aspect of the article the author alleges has been breached, nor are any claims of specific conduct advanced in support of the allegation. In the absence of such detail, the communication is said to be insufficiently substantiated. In addition, there are available and effective statute and common law remedies not pursued by the author where she could have sought redress for alleged attacks on their honour, privacy and reputation.

4.17 The State party also asserts that pretrial publicity in the case could not support the author's claim under article 17, which would require an unlawful attack on her honour and reputation. The word "attack" connotes a hostile assault of a certain intensity. The media articles were reportage of news and events in the normal course of reporting.

Author's comments on the State party's submissions

5.1 On 6 November 2005, the author responded to the State party's submissions, arguing that domestic remedies were exhausted for all claims not decided by the High Court, and that the refusal of "appropriate legal assistance" to the author made further pursuit of the claims impossible in view of their complexity. As to articles 7, 9 and 10, the author claims that the claims are sufficiently substantiated, contending that the State party created a "special atmosphere" around the author and engaged in "unacceptable" discussion in the media prior to judgement, and that she was required to wear an orange prison robe that showed she was a "high class criminal".

5.2 In respect of article 14, the author argues that the State party did not provide her with the opportunity to defend herself effectively, and that the trial judge's remarks concerning her co-defendant raises strong inference that her case was not heard fairly. While Judge M. was not the trial judge, he was a known and respected legal figure whose views on a case prior to its definitive conclusion had the capacity of influencing both jurors and the wider public. The State party's argument that domestic law was complied with is of itself no answer to the Covenant claims. Concerning the delay in the trial and appeal, the author disputes that the complexity of the case was such as to justify the length in question, and contends that no delay was attributable to her. Lastly, the author notes the importance of legal assistance for accused. In the proceedings before the High Court, she lacked legal assistance and was unable to participate in person, while the prosecutor took part actively and in person. If the case was sufficiently complex to justify lengthy delay, then the same complexity would justify legal assistance on appeal.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The claims under articles 7, 9, 10 and 17 of the Covenant are inadmissible for lack of sufficient substantiation, pursuant to article 2 of the Optional Protocol. In respect of the denial of legal aid in the High Court, the Committee notes that section 56 of the Legal Aid Commission Act provides for an appeal to the Legal Aid Review Committee against the decision to refuse legal aid. The author, though advised of this option, declined to pursue it and has not provided any explanation for this course. As to the claim that the presumption of innocence was infringed and the author's trial was prejudiced by judicial comment at her co-defendant's sentencing, following a plea of guilty, the Committee notes that this issue was not raised on appeal. Accordingly, both claims are inadmissible for failure to exhaust domestic remedies, under article 5, paragraph 2 (b), of the Optional Protocol.

6.3 In respect of the claim of an unfair trial on account of pretrial publicity, under article 14, paragraph 1, of the Covenant, the Committee notes that the jury was given clear instructions to consider only the evidence at trial. The impact of publicity is primarily a question of fact, and was considered by the trial court and the appeals court. Their judgement does not appear to have been arbitrary or to have amounted to a denial of justice, and accordingly the author's claim is insufficiently substantiated, for purposes of admissibility. As to the claim of unreasonable delay in the legal proceedings, under article 14, paragraph 3 (c), the Committee notes with some concern that there was a delay of 15 months between the arrest of the author and the committal proceedings, and a further six months until the commencement of trial. However, the author has not presented sufficient information to indicate that this delay was excessive, in light of the State party's submissions concerning the complexities of the case and the difficulties occasioned by the trying the parallel case of the co-offender. It follows that both these claims are inadmissible under article 2 of the Optional Protocol.

6.4 As to the issue of the author's inability to participate in person at the High Court proceedings conducted orally, the Committee considers that this claim has been sufficiently

substantiated, for purposes of admissibility, inasmuch as it relates to the right of equality before the courts, protected by article 14, paragraph 1, first sentence, of the Covenant.

Consideration of the merits

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

7.2 In regard to the author's claim of a right to be present at the High Court proceedings, the Committee notes its previous jurisprudence that the disposition of an appeal does not necessarily require an oral hearing. The Committee also notes that the defendant had the opportunity to submit written papers to the High Court, acting *pro se*, and that she failed to appeal her denial of legal aid before the Legal Aid Review Committee.

7.3 However, the High Court did choose to conduct an oral hearing in its consideration of the author's application for leave to appeal. A solicitor representing the Director of Public Prosecutions was present and presented arguments at that oral hearing. A question of fact was put by the court to the solicitor for the Director of Public Prosecutions, and the author had no opportunity, either in person or through counsel, to comment on that question. One member of the High Court noted that there was no apparent reason why a defendant held in custody could not, at a minimum, be enabled to take part in the hearing by means of a telecommunications link, at least where he or she did not otherwise enjoy any representation. The same judge noted that a right to attend appellate hearings is already the practice in several jurisdictions of the State party. The State party offered no explanation, other than to say it was not the practice in New South Wales.

7.4 The Committee observes that when a defendant is not given an opportunity equal to that of the State party in the adjudication of a hearing bearing on the determination of a criminal charge, the principles of fairness and equality are engaged. It is for the State party to show that any procedural inequality was based on reasonable and objective grounds, not entailing actual disadvantage or other unfairness to the author. In the present case, the State party has offered no reason, nor does the file reveal any plausible reason, why it would be permissible to have counsel for the State take part in the hearing in the absence of the unrepresented defendant, or why an unrepresented defendant in detention should be treated more unfavourably than unrepresented defendant not in detention who can participate in the proceedings. Accordingly, the Committee concludes that a violation of the guarantee of equality before the courts in article 14, paragraph 1, occurred in the circumstances of the case.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of article 14, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. The State party is also under an obligation to ensure that similar violations do not occur in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of

the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

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

Notes

[1] As reported in The Daily Telegraph, 22 December 2000, "Killick jailed for 15 years - rehabilitation 'unlikely'".

[2] *Regina v. Dudko* [2002] NSWCCA 336 (20 August 2002) para. 18.

[3] Ibid., para. 18.

[4] Ibid., para. 16.

[5] Ibid., paras. 20-22.

[6] Communication No. 16/77, Views adopted on 25 March 1983.

[7] Ibid., at para. 14.1.

[8] *Delcourt v. Belgium* ECHR Series A, vol. 11 pr. 25 (1970).

[9] *Nielsen v. Denmark*, A. 347/57, 4 YBECHR (1961) p. 548.

[10] *Kamasinski v. Austria* (9783/82) [1989] ECHR 24 (19 December 1989) para. 106-7*; Ekbatani v. Sweden* (10563/83) [1988] ECHR 6 (26 May 1988) para. 31; *Prinz v. Austria* (23867/94) [2000] ECHR 59 (8 February 2000) para. 34; *Belziuk v. Poland,* Judgement of the ECtHR, 25 March 1998 [1998] IIHRL 20, para. 37; *Helmers v. Sweden* judgement of 29 October 1991, Series A No. 212-A, paras. 31-32; *Kremzow v. Austria* (12350/86) [1993] ECHR 40 (21 September 1993) paras. 58-59.

[11] *Ekbatani v. Sweden*, (10563/83) [1988] ECHR 6 (26 May 1988) para. 31.

[12] Communication No. 301/1988.

[13] Communication No. 301/1988, para. 6.4.

[14] Ibid., p. 3.

DD. Communication No. 1348/2005, *Ashurov v. Tajikistan**
(Views adopted on 20 March 2007 Eighty-ninth session)

Submitted by:	Rozik Ashurov (represented by counsel, Solidzhon Dzhuraev)
Alleged victims:	The author's son, Olimzhon Ashurov
State party:	Tajikistan
Date of communication:	7 June 2004 (initial submission)
Subject matter:	Imposition of long-term imprisonment after arbitrary detention; unfair trial; torture
Substantive issues:	Torture, cruel, inhuman or degrading treatment or punishment; arbitrary detention; right to be brought promptly before a judge / officer authorized by law to exercise judicial power; fair hearing; impartial tribunal; right to be presumed innocent; right to be promptly informed of charges; right to adequate time and facilities for the preparation of the defence; right to examine witnesses; right not to be compelled to testify against oneself or to confess guilt; right to have a sentence and conviction reviewed by a higher tribunal.
Procedural issue:	Non-substantiation
Articles of the Covenant:	7; 9, paragraphs 1, 2 and 3; 14, paragraphs 1, 2, 3 (a), 3 (b), 3 (e), 3 (g) and 5
Article of the Optional Protocol:	2

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

Meeting on 20 March 2007,

Having concluded its consideration of communication No. 1348/2005, submitted to the Human Rights Committee on behalf of Olimzhon Ashurov under the Optional Protocol to the International Covenant on Civil and Political Rights,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada and Sir Nigel Rodley.

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

Adopts the following:

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

1. The author of the communication is Rozik Ashurov, a Tajik national of Uzbek origin born in 1934, who submits the communication on behalf of his son, Olimzhon Ashurov, also a Tajik national of Uzbek origin born in 1969, who currently serves a 20 year prison term in a prison in Tajikistan. The author claims that his son is a victim of violations by Tajikistan of his rights under article 7; article 9, paragraphs 1, 2 and 3; and article 14, paragraphs 1, 2, 3 (a), (b), (e), and (g), and 5 of the International Covenant on Civil and Political Rights.[1] He is represented by counsel, Solidzhon Dzhuraev.

The facts as submitted by the author

2.1 The author's son was detained by officers of the Criminal Investigation Department of the Tajik Ministry of Interior (hereinafter, MoI) at the family home in Dushanbe at around 5 a.m. on 3 May 2002, in connection with an armed robbery which had occurred on the night of 5 to 6 May 1999 in the apartment of one Sulaymonov. A criminal case under article 249, part 4, paragraphs (a), (b) and (c) of the Tajik Criminal Code (hereinafter, the CC)[2] was opened on 6 May 1999. On 6 July 1999, an investigator decided to suspend the investigation, because it was not possible to identify a suspect who could be prosecuted.

2.2 At the time of detention, the author's son was not informed of the reasons, nor was the family told where he was being taken. In fact, he was taken to the MoI where for the next three days he was subjected to torture, to force him to confess to the armed robbery of Sulaymonov's apartment. He was deprived of food and sleep; was placed in handcuffs which were then attached to a battery; was systematically beaten; and electric shocks were applied to his genitals and fingers. The author states that, unable to withstand the torture, his son gave a false confession on 5 May 2002. Handcuffed and in the absence of a lawyer, he was forced to sign the protocol of interrogation, and then to write a confession that was dictated by the investigator of the Section of Internal Affairs of Zheleznodorozhny district of Dushanbe, implicating himself and two of his friends, Shoymardonov and Mirzogulomov. The same day, he was forced to sign the protocol of confrontation with Sulaymonov and the protocol of verification of his testimony at the crime scene. The verification process was video taped; marks of torture on his face are visible on the video recording of 5 May 2002.

2.3 The detention protocol was drawn up by the investigator at 11:30 p.m. on 5 May 2002. At no stage were his rights explained to the author's son. In particular, he was not advised of his right to counsel from the moment of detention. Subsequently, he was not allowed to choose counsel. Instead, the investigator appointed his former assistant to represent the author's son during the pretrial investigation. On 6 May 2002, the investigator requested the expert Toirov to tamper with the evidence by certifying that the fingerprints allegedly collected from Sulaymonov's apartment belonged to Olimzhon Ashurov. The latter fact was subsequently confirmed by Toirov himself in his written explanation to the Minister of Interior and

acknowledged by the MoI letters of 10 February and 11 March 2004, addressed to the author's son and his counsel. On an unspecified date, the arrest of the author's son was endorsed by the prosecutor on the basis of the evidence presented by the investigator.

2.4 The trial took place in the Dushanbe city court from October 2002 to April 2003 (hereinafter, the "first trial"). The author's son complained about being subjected to torture by the MoI officers. On 4 April 2003, the court referred the case to the Dushanbe City Prosecutor for further investigation, instructing him to examine Ashurov's torture allegations and to clarify gaps and discrepancies in the investigation of the case. The court decided that Ashurov should remain in custody. It transpires from the decision that the court found clear contradictions between the circumstances of the armed robbery described in Ashurov's indictment and the testimonies of Sulaymonov before the court. The court noted that the investigation had not established the identity of the person standing trial: Ashurov's lawyer presented to the court certificate No. 005668, confirming that from 7 December 1996 to 15 July 1999, his client served a sentence in Kyrgyzstan. An inquiry by the Tajik Judicial College in Kyrgyzstan confirmed that Ashurov indeed was imprisoned in Kyrgyzstan, having been sentenced by the Osh Regional Court on 26 March 1997.

2.5 Contrary to the court ruling of 4 April 2003, the very investigator who attended Ashurov's mistreatment by MoI officers and who was suspected of having tampered with earlier evidence, was effectively commissioned to conduct further investigations into the case. The author states that this investigator once more tampered with evidence, destroying certain key documents in the case file. These documents included a certificate issued by the head of colony No. 64/48 in Uzbekistan, which confirms that from 5 May 1997 to 5 August 1999, Ashurov's accomplice Shoymardonov served a sentence handed down by the Surkhandarya Regional Court in the Uzbek prisons Nos. 64/48 and 64/1.

2.6 The author states that the deadline for his son's preventative detention expired on 12 August 2003; examination of the case materials by Ashurov and his counsel was completed on 31 August 2003; and the case was sent to court on 23 September 2003. Nonetheless, the investigator de facto illegally extended the term of his son's placement in and continued to backdate investigative actions, without officially reopening the investigation.

2.7 When the trial presided by the Deputy Chairperson of the Dushanbe city court resumed in October 2003 (hereinafter, the "second trial"), the author's son and his counsel submitted two petitions complaining about torture and tampering with evidence by the investigator. They requested the court to inform them of the legal grounds for keeping Ashurov in custody between 31 August and 23 September 2003; to allow them to study all case file documents, and to instruct the investigative bodies to translate the indictment into Russian, as neither the accused, nor one of the two counsel for Ashurov mastered Tajik. Both petitions were ignored.

2.8 On 13-15 October 2003, the court hearing was conducted in the absence of the first counsel, who spoke Tajik, and without an interpreter. In the absence of the Tajik speaking counsel, the judge changed the transcript of the proceedings to state that on 13 October 2003, the accused and his other counsel, who did not speak Tajik, had the opportunity to study all case file documents, most of which were in Tajik. Ashurov and both of his counsel repeatedly requested the court to allow them to study all case file materials, with the help of an interpreter. All requests were rejected. For unknown reasons, the judge then sought to exclude the

Tajik-speaking counsel from further participation in the case, allegedly saying that it would not matter which of the two counsel represented him, because he "would be found guilty in any event". The judge acted in an accusatory manner and effectively replaced the passive and unprepared prosecutor. He followed the indictment verbatim and rejected all key arguments and requests of the defence. He asked leading questions to prosecution witnesses, corrected and completed their answers and instructed the court's secretary to record only those testimonies establishing Ashurov's guilt. Ashurov and both of his counsel three times moved for the court to step down but these motions were rejected.

2.9 At the trial, witnesses who had consistently before and during the first trial stated that they did not know or could not identify Ashurov as the perpetrator retracted their statements and implicated him in the crime. Although the defence team could not participate in the final hearing and Ashurov's guilt was not proven in the court, on 11 November 2003, he was convicted of armed robbery and was sentenced to 20 years' imprisonment.

2.10 During the second trial, the court was also partial and biased in evaluating facts and evidence in Ashurov's case. Contrary to what is stated in the judgement of 11 November 2003, neither Ashurov, nor Shoymardonov and Sulaymonov, were in Dushanbe on that day. All three were at that time serving prison terms in other countries. In addition to certificate No. 005668, the defence team presented additional evidence, confirming that Ashurov was released from prison in Kyrgyzstan on 17 July 1999, i.e. more than two months after the armed robbery in Tajikistan occurred. The defence requested the court to examine two witnesses that could have confirmed that Ashurov was permanently at that prison from 5 August 1998 to 17 July 1999. The request was rejected, as the court held that Ashurov did not really serve the sentence there, that he managed to obtain a passport in Tajikistan on 30 December 1998, and flew from Dushanbe to Khudzhand between January and March 1999.

2.11 The defence team also requested additional interviews of the investigator and the MoI officers who subjected Ashurov to torture and a screening of video recording of 5 May 2002. This was rejected by the court. The court ignored the defence's documentary evidence and testimony of defence witnesses and based its judgement on Ashurov's coerced confession.

2.12 Ashurov's appeal to the Judicial College of the Supreme Court of 20 November 2003 and 29 January 2004 was dismissed on 10 February 2004.

2.13 On an unspecified date, and on appeal from Ashurov's counsel, the Deputy General Prosecutor initiated a review procedure before the Presidium of the Supreme Court, requesting the repeal of Ashurov's sentence. The counsel requested the Presidium of the Supreme Court to attend the consideration of the case, to present material evidence that had disappeared from the case file. Counsel did not receive a reply to his request. On 12 September 2004, the Presidium of the Supreme Court dismissed the Deputy General Prosecutor's request.

The complaint

3.1 The author claims that his son is a victim of violation of his rights under article 7 of the Covenant, as during the first three days following his detention, he was tortured by the MoI officers to make him confess, in violation of article 14, paragraph 3 (g). All challenges to the voluntary character of the confessions he and counsel made in court were rejected.

3.2 The author further claims that article 9, paragraphs 1, 2 and 3, was violated in his son's case, as he was detained on 3 May 2002 without being informed of the reasons and the detention protocol was drawn up only on 5 May 2002. His pretrial detention was endorsed by the public prosecutor and subsequently renewed by the latter on several occasions, except for the period from 31 August to 23 September 2003 when his placement into custody was without any legal basis.

3.3 Article 14, paragraph 1, is said to have been violated, because the judge presiding over the second trial conducted the trial in a biased manner, asked leading questions, instructed the court secretary to modify the trial's transcript against the truth and only partially evaluated facts and evidence.

3.4 Ashurov's presumption of innocence, protected by article 14, paragraph 2, was violated, because during the second trial on 13 October 2003, the presiding judge commented that "he would be found guilty in any event". That the main prosecutorial evidence - i.e. the match between the fingerprints collected at the crime scene and those of the author's son - had been forged by the expert upon pressure from the investigator, was recognized by the State party's authorities themselves in February 2004. Moreover, Ashurov was serving a sentence in Kyrgyzstan and his accomplice Shoymardonov was serving a prison term in Uzbekistan when the armed robbery occurred.

3.5 The author further claims that his son is a victim of a violation of article 14, paragraph 3 (a). Being a native Uzbek speaker, he could not, during the pretrial investigation, understand the indictment available only in Tajik language. Moreover, the first three days of the second trial were conducted in Tajik and without an interpreter, although neither Ashurov nor one of the two lawyers of the defence team mastered Tajik.

3.6 Article 14, paragraph 3 (b), is said to have been violated, because Ashurov was deprived of his right to legal representation from the moment of arrest. Subsequently, he was de facto denied this right during the pretrial investigation. During the second trial, Ashurov and his defence were only given 1-2 hours to study the case materials in the Tajik language, while the presiding judge sought to exclude the counsel who did speak Tajik from further participation in the case.

3.7 During the trial, the author's son and his counsel's motions for the examination of witnesses on his behalf were rejected by the court without any justification, contrary the guarantee of article 14, paragraph 3 (e).

3.8 Finally, the author claims that the Judicial College of the Supreme Court refused to consider the defence's documentary evidence, thus not properly reviewing his son's conviction and sentence within the meaning of article 14, paragraph 5.

Absence of State party cooperation

4. By notes verbales of 20 January 2005, 15 February 2006 and 19 September 2006, the State party was requested to submit to the Committee information on the question of admissibility and the merits of the communication. The Committee notes that this information has still not been received. It regrets the State party's failure to provide any information with regard to the admissibility or the merits of the author's claims, and recalls that it is implicit in the Optional

Protocol that States parties make available to the Committee all information at their disposal.[3] In the absence of any observations from the State party, due weight must be given to the author's allegations, to the extent that these have been sufficiently substantiated.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case 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. Concerning the requirement of exhaustion of domestic remedies, the Committee has noted that according to the information submitted by the author, all available domestic remedies up to and including the Supreme Court have been exhausted. In the absence of any State party's objection, the Committee considers that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met.

5.3 With regard to the author's allegation under article 14, paragraph 5, that his son's right to have his sentence reviewed by a higher tribunal according to law was violated, the Committee considers that the author has not substantiated this claim, for the purposes of admissibility. Hence, this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.4 The Committee considers that the author's remaining claims have been sufficiently substantiated for purposes of admissibility, and declares them admissible.

Consideration of the merits

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

6.2 The Committee has taken note of the author's allegations that his son was beaten and subjected to torture by the MoI investigators, to make him confess, and that torture marks were visible on the video recoding of 5 May 2002. The author also brought the allegations of torture repeatedly and without success to the attention of the authorities. In the absence of any State party information, due weight must be given to the author's allegations. In light of the detailed and uncontested information provided by the author, the Committee concludes that the treatment that Olimzhon Ashurov was subjected to was in violation of article 7 of the Covenant.

6.3 As above-mentioned acts were inflicted on Olimzhon Ashurov to force him to confess a crime for which he was subsequently sentenced to 20 years' imprisonment, the Committee concludes that the facts before it also disclose a violation of article 14, paragraph 3 (g), of the Covenant.

6.4 The author has claimed that his son was arrested on 3 May 2002 without being informed of the reasons and the detention protocol was drawn up only on 5 May 2002. His pretrial detention was prolonged by the public prosecutor on several occasions, except for the period from 31 August to 23 September 2003 when his preventive detention had no legal basis. The Committee notes that the matter was brought to the courts' attention and was rejected by them without explanation. The State party has not advanced any explanations in this respect. In the circumstances, the Committee considers that the facts before it disclose a violation of the author's son's rights under article 9, paragraphs 1 and 2, of the Covenant.

6.5 The Committee notes that the pretrial detention of the author's son was approved by the public prosecutor in May 2002, and that there was no subsequent judicial review of the lawfulness of his detention until April 2003.[4] The Committee recalls that article 9, paragraph 3, entitles a detained person charged with a criminal offence to judicial control of his/her detention. It is inherent in the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with.[5] In the circumstances of the case, the Committee is not satisfied that the public prosecutor can be characterized as having the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3, and concludes that there has been a violation of this provision.

6.6 The Committee notes the author's claim that the trial of his son was unfair, as the court was not impartial,[6] and the judge presiding over the second trial conducted it in a biased manner, asked leading questions, gave instructions to modify the trial's transcript in an untruthful way and sought to exclude the Tajik-speaking lawyer from participation in the case. The Committee has noted the author's contention that his son's counsel requested the court, inter alia, properly to examine the torture claim; to allow the defence sufficient time to study the case file with the help of an interpreter; to instruct the investigative bodies to translate the indictment into Tajik; and to call witnesses on his behalf. The judge denied all requests without giving reason. On appeal, the Supreme Court did not address the claims either. In the present case, the facts presented by the author, which were not contested by the State party, show that the State party's courts acted in a biased and arbitrary manner with respect to the above mentioned complaints and did not offer Ashurov the minimum guarantees of article 14, paragraph 3 (a), (b) and (e). In the circumstances, the Committee concludes that the facts before it disclose a violation of article 14, paragraphs 1, and 3 (a), (b) and (e), of the Covenant.

6.7 In relation to the author's claim that his son was not presumed innocent until proved guilty, the author has made detailed submissions which the State party has failed to address. In such circumstances, due weight must be given to the author's allegations. The author points to many circumstances which he claims demonstrate that his son did not benefit from the presumption of innocence.[7] The Committee recalls its jurisprudence that it is generally not for itself, but for the courts of States parties, to review or to evaluate facts and evidence, or to examine the interpretation of domestic legislation by national courts and tribunals, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence or interpretation of legislation was manifestly arbitrary or amounted to a denial of justice.[8] The Committee also recalls its general comment No. 13, which reiterates that by reason of the principle of presumption of innocence, the burden of proof for any criminal charge is on the prosecution, and the accused must have the benefit of the doubt. His guilt cannot be presumed until the charge has

been proven beyond reasonable doubt. From the uncontested information before the Committee, it transpires that the charges and evidence against the author's son left room for considerable doubt, while their evaluation by the State party's courts was in itself in violation of fair trial guarantees of article 14, paragraph 3. There is no information before the Committee that, despite their having being raised by Ashurov and his defence, these matters were taken into account either during the second trial or by the Supreme Court. In the absence of any explanation from the State party, these concerns give rise to reasonable doubts about the propriety of the author's son's conviction. From the material available to it, the Committee considers that Ashurov was not afforded the benefit of this doubt in the criminal proceedings against him. In the circumstances, the Committee concludes that his trial did not respect the principle of presumption of innocence, in violation of article 14, paragraph 2.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it disclose violations of the rights of the author's son under article 7; article 9, paragraphs 1, 2 and 3; and article 14, paragraphs 1, 2, 3 (a), (b), (e) and (g), of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, i.e. immediate release, appropriate compensation, or, if required, the revision of the trial with all the guarantees enshrined in the Covenant, as well as adequate reparation. The State party is under an obligation to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, Tajikistan has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive, within ninety days, information from the State party about the measures taken to give effect to the Committee's Views. The State party is requested also to give wide publicity to the Committee's Views.

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

Notes

[1] The Optional Protocol entered into force for the State party on 4 April 1999.

[2] At the time of consideration of the case of the author's son by the Tajik courts, the punishment provided under this article was a term of 15-20 years' imprisonment with confiscation of property or death penalty.

[3] See, inter alia, *Khomidova v. Tajikistan*, communication No. 1117/2002, Views adopted on 29 July 2004; *Khalilova v. Tajikistan*, communication No. 973/2001, Views adopted on 30 March 2005; and *Aliboeva v. Tajikistan*, communication No. 985/2001, Views adopted on 18 October 2005.

[4] See paragraph 2.4 above.

[5] *Kulomin v. Hungary*, communication No. 521/1992, Views adopted on 22 March 1996, para. 11.3, *Platonov v. Russian Federation*, communication No. 1218/2003, Views adopted on 1 November 2005, para. 7.2.

[6] See paras. 2.7-2.11 above.

[7] See paras. 2.3, 2.5, 2.8-2.9 above.

[8] *Romanov v. Ukraine*, communication No. 842/1998, inadmissibility decision of 30 October 2003; *Arutyuniantz v. Uzbekistan*, communication No. 971/2001, Views adopted on 30 March 2005, para. 6.5.

EE. Communication No. 1353/2005, *Afuson v. Cameroon**
(Views adopted on 19 March 2007 Eighty-ninth session)

Submitted by:	Mr. Philip Afuson Njaru (represented by counsel, Mr. Boris Wijström)
Alleged victim:	The author
State Party:	Cameroon
Date of communication:	24 January 2005 (initial submission)
Subject matter:	Unlawful arrest; ill-treatment and torture; threats from public authorities; failure to investigate
Procedural issues:	None
Substantive issues:	Unlawful and arbitrary detention; torture, or cruel, inhuman or degrading treatment and punishment; liberty and security of the person; freedom of expression
Articles of the Covenant:	7; 9, paragraphs 1 and 2; 10; 19, paragraph 2; 2, paragraph 3
Articles of the Optional Protocol:	5, paragraph 2 (b)

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

Meeting on 19 March 2007,

Having concluded its consideration of communication No. 1353/2005, submitted to the Human Rights Committee on behalf of Mr. Philip Afuson Njaru under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Ms. Ruth Wedgwood.

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

1. The author of the communication is Mr. Philip Afuson Njaru, a national of Cameroon. He claims to be a victim of violations by Cameroon of articles 7; 9 paragraphs 1 and 2; 10; paragraph 1; and 19, paragraph 2, all read in conjunction with article 2, paragraph 3, of the International Covenant on Civil and Political Rights. He is represented by counsel, Mr. Boris Wijkström of the World Organization Against Torture (OMCT). The Covenant and the Optional Protocol to the Covenant both entered into force for the State party on 27 September 1984.

The facts as presented by the author

2.1 The author is a journalist and well-known human rights advocate in Cameroon. Since 1997, the author has been a victim of systematic acts of persecution by various agents of the State. He recounts these incidents as follows. On 1 May 1997, Mr. H.N., Chief of Post for the Immigration Police in Ekondo-Titi (Ndia Division), in the presence of police constable P.N.E., warned the author that he would "deal with him", should he continue to publish "unpatriotic" articles, accusing police officers of corruption and alleging that constable P.N.E. had raped a pregnant Nigerian woman.

2.2 On 18 May 1997, Mr. H.N. met the author at the local government office at Ekondo-Titi Sub-Division, where he asked him why he had not reacted to summons by the police. When the author replied that he had never received any official summons, Mr. H.N. asked him to come to his office on 28 May 1997, warning him that this was the very last time that he was inviting him and that the author would be arrested and subjected to torture, should he fail to report to his office.

2.3 On 2 June 1997, the author was again approached by Mr. H.N. and constable P.N.E., who asked him whether he had received the summons. When the author answered in the negative, Mr. H.N. stated that he "would deal with him seriously".

2.4 On 12 October 1997, Mr. H.N. and Mr. B.N., Chief of Post for the Brigade Mixte Mobile, stopped their police car next to the author, who was standing on the street in Ekondo-Titi. Mr. H.N. asked the author why he had never come to the police station, despite several summons, and again criticized him for having written press articles denouncing police corruption in the district. When the author answered that he had only received oral summons, which were of no legal relevance, Mr. H.N. again threatened to arrest and torture him. He then assaulted the author, beating and kicking him to unconsciousness, removed the author's press ID, and left.

2.5 A medical report dated 15 October 1997, issued by the District Hospital of Ekondo-Titi (Ndia), states: "Patient in agony with tenderness around the mandobulo-auxillary joint, thoraco-abdominal tenderness, swollen tender leg muscles. Conclusion: Polytrauma." As a result of his continuous head and mouth pain and hearing loss in his left ear, the author consulted a oral surgeon at the Pamol Lobe Estate Hospital on 17 December 1998, who, in a letter dated 4 April 1999, confirmed that the author's jaw bone was broken and partially dislocated and that his left ear drum was perforated, recommending surgery and antibiotics as well as anti-inflammatory treatment. Another medical report, issued by the District Hospital,

dated 29 August 2000, states that the author suffers from memory lapses, stress, depression and distorted facial configuration and that his symptoms have not clinically improved since his torture on 12 October 1997.

2.6 The author complained about the events of 12 October 1997[1] to the prosecutor of the Ndian Division, South West Province (letters sent in October 1997 and on 5 January 1998), to the Delegate-General for National Security (letter dated 2 February 1998), to the Attorney General of Buea, South West Province (letter dated 9 September 1998), and to the Ministry of Justice in Yaoundé (letters dated 19 and 28 November 2001). No investigation has to date been initiated by any of these authorities. The Attorney General of Buea informed the author that his complaint had disappeared from the Registry.

2.7 On 20 February 1998, constable P.N.E. and two other plain-clothed armed officers of the immigration service located the author at the District Hospital of Ekondo-Titi and told him that Mr. H.N. urgently wanted to see him in his office, without producing a summons addressed to him. Shortly thereafter, Mr. H.N. came to the hospital, arrested and handcuffed the author and brought him to the police station, where he asked the author to disclose his sources for several articles about bribery of the police by Nigerian foreigners and torture during resident permit controls. When the author refused to do so, Mr. H.N. slapped his face several times, threatened to detain him for an indefinite time, to parade him naked in front of women and female children, and to kill him. Following this incident, the author was regularly summoned to the police station, but never showed up because he feared for his life. On 20 April 1998, he sent a complaint about the incident to the Delegate-General for National Security and, on 19 November 2001, to the Minister of Justice. No investigation was initiated.

2.8 On 22 May 1998, constable P.N.E. came to Bekora Barombi, where the author was in hiding. The author refused to accompany him to receive a summons by the immigration police, arguing that it was the police's duty to serve summons. On 28 May 1998, the author returned to Ekondo Titi. The same day, Mr. H.N. stopped his car in front of the author and drove off. Two minutes later, two plain-clothed armed policemen approached the author and gave him the summons carrying an "urgent" stamp and re-dated three times (22 May, 28 May and 8 June 1998), each of the extensions signed by Mr. H.N. The author subsequently went into hiding again. On 8 May 1999, an Immigrations Police commissioner, J.A., arrested the author after the latter had published an article accusing him of corruption.

2.9 In or around May 1999, the author was threatened and harassed by soldiers of the 11th Navy Batallion in Ekondo-Titi after he had published a newspaper article, alleging ill-treatment of women and girls by members of that battalion during tax recovery raids in Ekondo-Titi. On 22 May 1999, Captain L.D., commander of the battalion, asked the author to stop writing such articles and to disclose his sources. When the author refused, soldiers told him that they would shoot him for his accusations. On 27 May 1999, armed soldiers took up position around the author's house. The author managed to escape to Kumba. He complained about the events of 22 May 1999 in a letter dated 27 November 2000 to the National Human Rights Commission. More recently, the author was threatened by Mr. L.D. in relation to other articles, including an article on abuses of the civilian population in Ekondo-Titi by soldiers of a Buea-based military battalion.

2.10 On 8 June 2001, armed policemen ordered the author and his friend, Mr. I.M., to leave a bar in Kumba where they were having a drink. Police constable J.T. seized the author, pushed him to the ground, and inflicted him with blows and kicks. When Mr. I.M. tried to intervene, the policemen assaulted him as well. The author was brought to the Kumba police station without any explanation. During the trip, a trainee police officer beat and kicked him on his head and leg, hit him with the butt of his gun and threatened to "deal with him". Upon arrival at the police station, the police commissioner of Kumba, Mr. J.M.M., told him to go home. When the author asked for a written explanation as to why he had been arrested and ill-treated, he was pushed out of, and not readmitted to, the police station.

2.11 A medico-legal certificate issued by the Ministry of Public Health on 9 June 2001 states that the author "presents […] left ear pains, chest pains, waist and back pains, bilateral hips and leg pains all due to severe beating by police". On 9 June 2001, the author complained about these events to the State Counsel, Legal Department (Kumba), which forwarded the letter to the judicial police in Buea, and, on 19 November 2001, to the Minister of Justice. On 6 November 2001, the judicial police informed the author that his complaint had not been received and that, consequently, no judicial proceedings had been initiated.

2.12 On 7 October 2003, six armed policemen and a police inspector confronted the author in a carpentry shop. The inspector refused to disclose his name or the reason for searching the author, and threatening him with a baton. Outside the store, the author was threatened and pushed to the floor by two policemen. He reported the incident to the commander of the judicial police in Kumba, the provincial chief of the judicial police, and to the anti-riot police ("GMI") in Buea; he also sent a complaint to the State Counsel, Legal Department in Kumba.

2.13 On 18 November 2003, the judicial police commissioner Mr. A.Y. called the author, asking him to come to his office in Buea. On 19 December 2003, the author reported to Mr. A.Y., who expressed anger at the author's late arrival, subjected him to tiring and intimidating questioning and asked him to stop writing articles denouncing the police.

The complaint

3.1 The author submits that his beating on 12 October 1997, resulting in a fractured jaw and hearing damage, was so severe that it amounts to torture within the meaning of article 7. The repeated threats against his life by the police, often accompanied by acts of brutality, caused him grave psychological suffering, which itself is said to violate article 7. He claims that, in light of the systematic practice of torture and unlawful killings in Cameroon,[2] he was fully justified in fearing that those threats would be acted upon. In accordance with the findings of various international bodies, these threats, as well as the State party's failure to put an end to them, were incompatible with the prohibition of torture and other forms of ill-treatment.[3]

3.2 The author submits that the blows and kicks that he received during the trip to the Kumba police station on 8 June 2001, resulting in severe pain to his head, chest, ears and legs, were inflicted while in detention, thereby violating article 10, in addition to article 7, of the Covenant.

3.3 The author contents that his arrests on 20 February 1998, 8 May 1999 and 8 June 2001, without a warrant or explanation as to the reasons for his arrest, were unlawful and arbitrary, in breach of article 9.

3.4 The author argues that the above acts were intended to punish him for the publication of articles denouncing corruption and violence of the security forces, as well as to prevent him from freely exercising his profession as a journalist. These measures were not provided by law, but rather violated constitutional guarantees such as the prohibition of torture and cruel, inhuman or degrading treatment or punishment,[4] and pursued none of the legitimate aims under article 19, paragraph 3.

3.5 On admissibility, the author submits that the same matter is not being examined by another procedure of international investigation or settlement, and that domestic remedies are unavailable to him, given that no investigation of his allegations of police abuse was initiated, despite his repeated complaints to different judicial authorities. Moreover, he claims that judicial remedies are ineffective in Cameroon, as confirmed by several United Nations bodies.[5]

3.6 For the author, the lack of effective remedies constitutes in itself a violation of the Covenant. By way of remedy, he claims compensation commensurate with the gravity of the breaches of his Covenant rights, full rehabilitation, an inquiry into the circumstances of his torture, and criminal sanctions against those responsible.

State party's failure to cooperate

4. By notes verbales of 1 February 2005, 19 May and 20 December 2006, the State party was requested to submit information on the admissibility and merits of the communication. The Committee notes that this information has not been received. The Committee regrets the State party's failure to provide any information with regard to the admissibility or substance of the author's claims. It recalls that under the Optional Protocol, the State party concerned is required to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that it may have taken. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.[6]

Issues and proceedings before the Committee

Consideration of admissibility

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

5.2 With respect to the requirement of exhaustion of domestic remedies, the Committee notes that the State party has not contested the admissibility of any of the claims raised. In addition, it notes the information and evidence provided by the author on the complaints made to several different bodies, none of which, it would appear, have been investigated. Accordingly, the Committee considers that it is not precluded from considering the communication by the requirements of article 5, paragraph 2 (b), of the Optional Protocol. As the Committee finds no other reason to consider the claims raised by the authors inadmissible, it proceeds with its consideration of the claims on the merits, under article 7; article 9, paragraphs 1 and 2; article 10,

paragraph 1; article 19, paragraph 2; and article 2, paragraph 3, as presented by the author. It also notes that an issue arises under article 9, paragraph 1, with respect to the death threats to which the author was subjected by the security forces.

Consideration of merits

6.1 As to the claim of a violation of articles 7 and 10 of the Covenant with regard to his alleged physical and mental torture by the security forces, the Committee notes that the author has provided detailed information and evidence, including several medical reports, to corroborate his claims. He has identified by name most of the individuals alleged to have participated in all of the incidents in which he claims to have been harassed, assaulted, tortured and arrested since 1997. He has also provided numerous copies of complaints made to several different bodies, none of which, it would appear, have been investigated. In the circumstances, and in the absence of any explanations from the State party in this respect, due weight must be given to his allegations. The Committee finds that the abovementioned treatment of the author by the security forces amounted to violations of article 7 alone and in conjunction with article 2, paragraph 3, of the Covenant.

6.2 As to the claim of violations of article 9, as they relate to the circumstances of his arrest, the Committee notes that the State party has not contested that the author was arrested on three occasions (20 February 1998, 8 May 1999, and 8 June 2001) without a warrant and without informing him of the reasons for his arrest or of any charges against him. It also notes that the author made complaints to several bodies which, it would appear, were not investigated. For these reasons, the Committee finds that the State party has violated article 9, paragraphs 1, and 2 alone and in conjunction with article 2, paragraph 3 of the Covenant.

6.3 The Committee notes the author's claim that he was subjected to threats on his life from police officers on numerous occasions and that the State party has failed to take any action to ensure that he was and continues to be protected from such threats. The Committee recalls its jurisprudence that article 9, paragraph 1 of the Covenant protects the right to security of the person also outside the context of formal deprivation of liberty.[7] In the current case, it would appear that the author has been repeatedly requested to testify alone at a police station and has been harassed and threatened with his life before and during his arrests. In the circumstances, and in the absence of any explanations from the State party in this respect, the Committee concludes that the author's right to security of person, under article 9, paragraph 1, in conjunction with article 2, paragraph 3 of the Covenant has been violated.

6.4 As to the claim of a violation of the author's right to freedom of expression and opinion, with respect to his persecution for the publication of articles denouncing corruption and violence of the security forces, the Committee notes that under article 19, everyone shall have the right to freedom of expression. Any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraphs 3 (a) and (b) of article 19 and it must be necessary to achieve the legitimate purpose. The Committee considers that there can be no legitimate restriction under article 19, paragraph 3, which would justify the arbitrary arrest, torture, and threats to life of the author and thus, the question of deciding which measures might meet the "necessity" test in such situations does not arise.[8] In the circumstances of the author's

case, the Committee concludes that the author has demonstrated the relationship between the treatment against him and his activities as journalist and therefore that there has been a violation of article 19, paragraph 2, in conjunction with article 2, paragraph 3 of the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose violations of articles 7; 9, paragraphs 1, and 2, and 19, paragraph 2, in conjunction with article 2, paragraph 3 of the Covenant.

8. The Committee is of the view that the author is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy. The State party is under an obligation to take effective measures to ensure that: (a) criminal proceedings are initiated seeking the prompt prosecution and conviction of the persons responsible for the author's arrest and ill-treatment; (b) the author is protected from threats and/or intimidation from members of the security forces; and (c) he is granted effective reparation including full compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

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

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

Notes

[1] The author submits that these events are referred to in the report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 1998/38, Addendum, Visit by the Special Rapporteur to Cameroon, 11 November 1999, Annex II, at para. 37.

[2] Reference is made to the Concluding Observations of the Human Rights Committee on the third periodic report of Cameroon, sixty-seventh session, 4 November 1999.

[3] The author refers, inter alia, to the conclusions and recommendations of the Committee against Torture: Cameroon, twenty-first session, 5 February 2004, to the report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 1998/38, Addendum, Visit by the Special Rapporteur to Cameroon, 11 November 1999, and to the interim report by the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment, 3 July 2001, at para. 8.

[4] The author refers to the Constitution of 2 June 1972, as amended by Law No. 96-06 of 18 January 1996, Preambular.

[5] The author refers to the report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 1998/38, Addendum, Visit by the Special Rapporteur to Cameroon, 11 November 1999, at paras. 60 and 68, and to the Concluding Observations of the Human Rights Committee on the third periodic report of Cameroon, sixty-seventh session, 4 November 1999, at para. 27.

[6] The author refers to the Committee's jurisprudence: communication No. 1208/2003, *Kurbonov v. Tajikistan*, Views adopted on 16 March 2006, and communication No. 760/1997, *J.G.A. Diergaardt et al. v. Namibia*, Views adopted on 25 July 2000, para. 10.2.

[7] Communication No. 821/1998, *Chongwe v. Zambia*, Views adopted on 25 October 2000, communication No. 195/1985, *Delgado Paez v. Colombia*, Views adopted on 12 July 1990, communication No. 711/1996, *Dias v. Angola*, Views adopted on 18 April 2000. Communication No. 916/2000, *Jayawardena v. Sri Lanka*, Views adopted on 22 July 2002.

[8] Communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994.

FF. Communication No. 1361/2005, X. *v. Colombia*[*]
(Views adopted on 30 March 2007 Eighty-ninth session)

Submitted by:	X (represented by counsel)
Alleged victim:	The author
State party:	Colombia
Date of communication:	13 January 2001 (initial submission)
Subject matter:	Discrimination in granting pension transfer in the case of homosexual couples
Procedural issues:	Failure to substantiate the alleged violations adequately
Substantive issues:	Equality before the courts; arbitrary or unlawful interference in privacy; equality before the law and right to equal protection of the law without discrimination
Articles of the Covenant:	2, paragraph 1, 3, 5, 14, paragraph 1, 17 and 26
Articles of the Optional Protocol:	2 and 3

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

Meeting on 30 March 2007,

Having concluded its consideration of communication No. 1361/2005, submitted on behalf of X under the Optional Protocol to the International Covenant on Civil and Political Rights,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Sir Nigel Rodley and Mr. Ivan Shearer.

An individual opinion co-signed by Committee members Mr. Abdelfattah Amor and Mr. Ahmed Tawfik Khalil, is appended to the present document.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Rafael Rivas Posada did not participate in the adoption of the present decision.

Bearing in mind all the information submitted to it in writing by the authors of the communication and the State party,

Adopts the following:

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

1. The author of the communication dated 13 January 2001 is a Colombian citizen. He claims to be the victim of violations by Colombia of articles 2, paragraph 1; 3; 5, paragraphs 1 and 2; 14, paragraph 1; 17 and 26 of the Covenant. The Optional Protocol entered into force for Colombia on 23 March 1976. The author is represented by counsel.

The facts as presented by the author

2.1 On 27 July 1993, the author's life partner Mr. Y died after a relationship of 22 years, during which they lived together for 7 years. On 16 September 1994, the author, who was economically dependent on his late partner, lodged an application with the Social Welfare Fund of the Colombian Congress, Division of Economic Benefits (the Fund), seeking a pension transfer.

2.2 On 19 April 1995, the Fund rejected the author's request, on the grounds that the law did not permit the transfer of a pension to a person of the same sex.

2.3 The author indicates that according to regulatory decree No. 1160 of 1989, "for the purposes of pension transfers, the person who shared married life with the deceased during the year immediately preceding the death of the deceased or during the period stipulated in the special arrangements shall be recognized as the permanent partner of the deceased"; the decree does not specify that the two persons must be of different sexes. He adds that Act No. 113 of 1985 extended to the permanent partner the right to pension transfer on the death of a worker with pension or retirement rights, thus putting an end to discrimination in relation to benefits against members of a de facto marital union.

2.4 The author instituted an action for protection (*acción de tutela*) in Bogotá Municipal Criminal Court No. 65, seeking a response from the Benefits Fund of the Colombian Congress. On 14 April 1995, the Municipal Criminal Court dismissed the application on the grounds that there had been no violation of fundamental rights. The author appealed against this decision in Bogotá Circuit Criminal Court No. 50. On 12 May 1995, this court ordered the modification of the earlier ruling and called on the Procurator-General to conduct an investigation into errors committed by staff of the Fund.

2.5 In response to the refusal to grant him the pension, the author instituted an action for protection in Bogotá Circuit Criminal Court No. 18. This court rejected the application on 15 September 1995, finding that there were no grounds for protecting the rights in question. The author appealed against this decision to the Bogotá High Court, which upheld the lower court's decision on 27 October 1995.

2.6 The author indicates that all the actions for protection in the country are referred to the Constitutional Court for possible review, but that the present action was not considered by the

Court. Since Decree No. 2591 provides that the Ombudsman can insist that the matter be considered, the author requested the Ombudsman to apply for review by the Constitutional Court. The Ombudsman replied on 26 February 1996 that, owing to the absence of express legal provisions, homosexuals were not allowed to exercise rights recognized to heterosexuals such as the right to marry or to apply for a pension transfer on a partner's death.

2.7 The author instituted proceedings in the Cundinamarca Administrative Court, which rejected the application on 12 June 2000, on the grounds of the lack of constitutional or legal recognition of homosexual unions as family units. The author appealed to the Council of State, which on 19 July 2000 upheld the ruling of the Administrative Court, arguing that under the Constitution, "the family is formed through natural or legal ties … between a man and a woman". This decision was notified by edict only on 17 October 2000, and became final on 24 October 2000.

2.8 The author considers that he has exhausted domestic remedies. He emphasizes that all the actions for protection in the country are referred to the Constitutional Court for possible review, but that the present action was not considered by the Court.

2.9 The author asks for his personal data and those of his partner to be kept confidential.

The complaint

3.1 Regarding the alleged violation of article 2, paragraph 1, the author states that he has suffered discrimination owing to his sexual orientation and his sex. He states that Colombia has failed to respect its commitment to guarantee policies of non-discrimination to all the inhabitants of its territory.

3.2 The author alleges a violation of article 3, since a partner of the same sex is being denied the rights granted to different-sex couples, without any justification. He states that he fulfilled the legal requirements for receiving the monthly pension payment to which he is entitled and that this payment was refused on the basis of arguments excluding him because of his sexual preference. He points out that if the pension request had been presented by a woman following the death of her male partner, it would have been granted, so that the situation is one of discrimination. The author considers that the State party violated article 3 by denying a partner of the same sex the rights which are granted to partners of different sexes.

3.3 The author also claims a violation of article 5, paragraphs 1 and 2, of the Covenant, because the actions of the State party displayed a failure to respect the principles of equality and non-discrimination. According to the author, the State party ignored the Committee's decisions regarding the prohibition of discrimination on grounds of sexual orientation,[1] and Colombian law was applied restrictively, preventing the author from obtaining the transfer of his partner's pension, thus putting his means of subsistence and his quality of life at risk.

3.4 Regarding the alleged violation of article 14, paragraph 1, the author maintains that his right to equality before the courts was not respected, since the Colombian courts rejected his request on several occasions because of his sex. He refers to the dissenting opinion of Judge Olaya Forero of the Administrative Court in the case, in which she stated that the Court was subjecting homosexuals to unequal treatment.

3.5 The author claims a violation of article 17, paragraph 1, alleging negative interference by the State party, which failed to recognize his sexual preference so that he was denied the fundamental right to a pension which would assure his subsistence. Regarding the alleged violation of article 17, paragraph 2, he maintains that his private life weighed more heavily in the decisions of the judicial authorities than the legal requirements for receipt of a pension. The judges had refused to grant protection or *amparo* on the sole grounds that he was a homosexual.

3.6 Regarding the violation of article 26, the author states that the State party, through the decision of the Benefits Fund and subsequently in the many court actions, had an opportunity to avoid discrimination based on sex and sexual orientation, but failed to do so. He claims that it is the duty of the State to resolve situations which are unfavourable to its inhabitants, whereas in his case the State had in fact worsened them by increasing his vulnerability in the difficult social circumstances prevailing in the country.

State party's observations on the admissibility and merits of the communication

4.1 In a note verbale dated 25 November 2005, the State party submitted its observations on the admissibility and merits of the communication.

4.2 Regarding the admissibility of the communication, the State party reviews in detail the remedies of which the author made use, concluding that these have been exhausted, with the exception of the special remedies of review or reconsideration, which he did not use in good time. The State party maintains that it is not for the Committee to examine the findings of fact or law reached by national courts, or to annul judicial decisions in the manner of a higher court. The State party considers that the author is seeking to use the Committee as a court of fourth instance.

4.3 Regarding domestic remedies, the State party notes that the Fund applied article 1 of Act No. 54 of 1990, which provides that "… for all civil law purposes, the man and the woman who form part of the de facto marital union shall be termed permanent partners". It concludes that Colombian legislation has not conferred recognition in civil law on unions between persons of the same sex. It also notes that the Cundinamarca Administrative Court considered that the systematic and consistent application of the 1991 Constitution together with other rules did not provide the administration with any grounds for granting the author's request. The State party points out that the system of administrative justice offers special remedies such as review and reconsideration, which the author could have sought, but which were not used in good time, as the deadlines laid down for doing so had passed.

4.4 Regarding the actions for protection instituted by the author, the State party considers that the purpose of the application lodged in Municipal Criminal Court No. 65 was not to protect the right to transfer of the pension but to protect the right of petition. Consequently, it considers that that remedy should not be viewed as one of those which offered the State an opportunity to try the alleged violation. The second action for protection did have the purpose of protecting some of the allegedly violated rights, and was denied by the judge on the grounds that the author was not in imminent danger and had another appropriate means of judicial protection.

4.5 Regarding the review of the rulings on protection by the Constitutional Court, the State party confirms that the rulings were submitted to the Court but not selected. It confirms that

review by the Court is not mandatory, since the Court is not a third level in the protection procedure. It also forwards the comments made by the Ombudsman, who did not insist that the Constitutional Court should review the rulings in question. The State party refers to the Constitutional Court's ruling on a constitutional challenge to articles 1 and 2 (a) of Act No. 54 of 1990, "defining de facto marital unions and the property regime between permanent partners", and attaches part of the ruling.[2]

4.6 The State party concludes that the author has exhausted domestic remedies and that his disagreement with the decisions handed down prompted him to turn to the Committee as a court of fourth instance. The State party seeks to show that the decisions taken at the domestic level were based on the law and that the judicial guarantees set out in the Covenant were not ignored.

4.7 On the merits, the State party presented the following observations. Regarding the alleged violation of article 2, paragraph 1, of the Covenant, the State party maintains that the Committee is not competent to make comments on the violation of this article, since this refers to a general commitment to respect and provide guarantees to all individuals. It refers to the Committee's jurisprudence in communication No. 268/1987, *M.B.G. and S.P. v. Trinidad and Tobago*, and concludes that the author cannot claim a violation of this article in isolation if there is no violation of article 14, paragraph 1.

4.8 Regarding the alleged violation of article 3, the State party holds that this article does not have the scope claimed by the author, since this provision is designed to guarantee equal rights between men and women, in the context of the historical factors of discrimination to which women have been subjected. The State party refers to the ruling of the Constitutional Court in the case, and endorses the Court's observations, in particular the following. De facto marital unions of a heterosexual nature, insofar as they form a family, are recognized in law in order to guarantee them "comprehensive protection" and, in particular, ensure that "the man and the woman" have equal rights and duties (Constitution, arts. 42 and 43). A variety of social and legal factors were taken into account by the drafters of the law, and not only the mere question of whether a couple live together, particularly as living together may be a feature of couples and social groups of many different kinds or with several members, who may or may not be bound by sexual or emotional ties, and would not in itself oblige the drafters of the law to establish a property regime similar to that established under Act No. 54 of 1990. The legal definition of de facto marital union is sufficient to recognize and protect a group that formerly suffered from discrimination but does not create a privilege which would be unacceptable from the constitutional point of view. The State party also refers to the views of the Ombudsman along the same lines, and concludes that there has been no violation of article 3 of the Covenant.

4.9 Regarding the alleged violation of article 5, paragraphs 1 and 2, the State party maintains that it has not been expressly substantiated, as the author has not specified in what way a State, a group or person was granted the right to engage in activities or perform acts aimed at the destruction of any of the rights and freedoms recognized in the Covenant.

4.10 The State party reiterates the statement of the Constitutional Court to the effect that the purpose of the rules governing this regime was simply to protect heterosexual unions, not to undermine other unions or cause them any detriment or harm, since no intent to harm homosexuals may be found in the rules. Regarding article 5, paragraph 2, the State party points out that none of the country's laws restricts or diminishes the human rights set out in the

Covenant. On the contrary, there are provisions which, like Act No. 54 of 1990, extend rights in respect of social benefits and property to the permanent partners in de facto marital unions, though this is not provided for in article 23 of the Covenant, which refers to the rights of the couple within marriage.

4.11 Regarding the alleged violation of article 14, paragraph 1, the State party points out that court orders handed down in the course of proceedings or an action for protection are valid only *inter partes*. It considers that these allegations lack substance because all the court decisions adopted in relation to the applications made by the author display equality not only before the law but also vis-à-vis the judicial system. At no time were restrictions placed on his ability to go to law and make use of all the machinery available to him to invoke the rights he claimed had been violated. What the author calls violations do not represent some whim of the courts but the strict discharge of their judicial role under social security legislation, in which the duty of protection focuses on the family, viewed as a unit composed of a heterosexual couple, as the Covenant itself understands it in article 23.

4.12 Regarding the alleged violation of article 17, the State party maintains that the author has not explained the grounds on which he considers that this article was violated, or cited any evidence that he was the victim of arbitrary or unlawful interference with his privacy. Consequently, it considers that the author has not substantiated this part of his communication.

4.13 Regarding the alleged violation of article 26, the State party points out that it has already discussed the relevant points in relation to articles 3 and 14, since the same matters of fact and of law are involved. The State party concludes that no violation of the Covenant has taken place, and that the communication should be declared inadmissible under article 2 of the Optional Protocol.

4.14 The State party does not oppose the author's request for his identity and that of his late partner to be kept confidential, although it does not agree with the author that such action is necessary.

Comments by the author

5.1 In his comments dated 26 January 2006, the author states that it can be seen from the State party's observations that Colombian legislation does not recognize that a person who has cohabited with another person of the same sex has any rights in relation to social benefits. He refers to the rulings of the Administrative Court and the Council of State. Regarding the State party's observation that he should have sought the remedies of review and reconsideration, he indicates that the jurisdiction for such remedies is the Council of State itself, which had already examined the issue and clearly and categorically concluded that there were no grounds for a claim under Colombian law. However, the judicial remedies relating to fundamental rights or human rights had also been exhausted through the action for protection. The author points out that the Ombudsman had declined to request the Constitutional Court to review the application for protection on the grounds that the application was inadmissible. He maintains that the State party's reply shows that there is no possibility of protection in this case under the country's Constitution, laws, regulations or procedures.

5.2 The author states that article 93 of the Constitution acknowledges that the views and decisions of international human rights bodies constitute guides to interpretation which are binding on the Constitutional Court. He maintains that under this provision the State party should have taken the Human Rights Committee into account as such a body, and in particular the Committee's decisions in case No. 488/1992, *Toonen v. Australia,* and case No. 941/2000, *Young v. Australia*.

5.3 The author concludes that domestic remedies have been exhausted and that Colombian legislation contains no remedy which would protect the rights of homosexual couples and halt the violation of their fundamental rights.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 The Committee notes that the State party considers that the author has exhausted domestic remedies.

6.2 Regarding the allegations relating to article 3, the Committee notes the author's arguments that a same-sex couple is denied the rights granted to different-sex couples, and that if the pension request had been submitted by a woman following the death of her male partner, the pension would have been granted - a discriminatory situation. However, the Committee points out that the author does not allege that discrimination is exercised in the treatment of female homosexuals in situations similar to his own. The Committee considers that the author has not sufficiently substantiated this complaint for the purposes of admissibility, and concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.3 Regarding the claims under article 5 of the Covenant, the Committee finds that this provision does not give rise to any separate individual right.[3] Thus, the claim is incompatible with the Covenant and inadmissible under article 3 of the Optional Protocol.

6.4 As to the claim under article 14, the Committee finds that it is not sufficiently substantiated for the purposes of article 2 of the Optional Protocol and this part of the complaint must therefore be declared inadmissible under article 2 of the Optional Protocol.

6.5 The Committee considers that the remainder of the author's complaint raises important issues in relation to articles 2, paragraph 1, 17 and 26 of the Covenant, declares it admissible and proceeds to examine the merits of the communication.

Consideration of the merits

7.1 The author claims that the refusal of the Colombian courts to grant him a pension on the grounds of his sexual orientation violates his rights under article 26 of the Covenant. The Committee takes note of the State party's argument that a variety of social and legal factors were taken into account by the drafters of the law, and not only the mere question of whether a couple live together, and that the State party has no obligation to establish a property regime similar to that established in Act No. 54 of 1990 for all the different kinds of couples and social groups,

who may or may not be bound by sexual or emotional ties. It also takes note of the State party's claim that the purpose of the rules governing this regime was simply to protect heterosexual unions, not to undermine other unions or cause them any detriment or harm.

7.2 The Committee notes that the author was not recognized as the permanent partner of Mr. Y for pension purposes because court rulings based on Act No. 54 of 1990 found that the right to receive pension benefits was limited to members of a heterosexual de facto marital union. The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation.[4] It also recalls that in previous communications the Committee found that differences in benefit entitlements between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry or not, with all the ensuing consequences.[5] The Committee also notes that, while it was not open to the author to enter into marriage with his same-sex permanent partner, the Act does not make a distinction between married and unmarried couples but between homosexual and heterosexual couples. The Committee finds that the State party has put forward no argument that might demonstrate that such a distinction between same-sex partners, who are not entitled to pension benefits, and unmarried heterosexual partners, who are so entitled, is reasonable and objective. Nor has the State party adduced any evidence of the existence of factors that might justify making such a distinction. In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author's right to his life partner's pension on the basis of his sexual orientation.

7.3 In the light of this conclusion, the Committee is of the view that it is not necessary to consider the claims made under articles 2, paragraph 1, and 17.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, considers that the facts before it disclose a violation by Colombia of article 26 of the Covenant.

9. In accordance with the provisions of article 2, paragraph 3 (a), of the Covenant, the Committee finds that the author, as the victim of a violation of article 26, is entitled to an effective remedy, including reconsideration of his request for a pension without discrimination on grounds of sex or sexual orientation. The State party has an obligation to take steps to prevent similar violations of the Covenant in the future.

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

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

Notes

[1] The author seems to be referring to the Committee's decisions in communications Nos. 488/1992, *Toonen v. Australia*, and 941/2000, *Young v. Australia*.

[2] Constitutional Court, C-098 of 1996.

[3] See communications Nos. 1167/2003, *Rayos v. Philippines*, Views of 27 July 2004, para. 6.8, and 1011/2001, *Madafferi and Madafferi v. Australia*, Views of 26 July 2004, para. 8.6.

[4] See communication No. 941/2000, *Young v. Australia*, Views of 6 August 2003, para. 10.4.

[5] See communications Nos. 180/1984, *Danning v. Netherlands*, Views of 9 April 1987, para. 14, and 976/2001, *Derksen and Bakker v. Netherlands*, Views of 1 April 2004, para. 9.2.

Appendix

Separate opinion by Mr. Abdelfattah Amor and Mr. Ahmed Tawfik Khalil (dissenting)

The author, X, lost his partner, who was of the same sex as him, after a 22-year relationship and having lived together for seven years. He considers that, like the surviving partners of heterosexual married or de facto couples, he is entitled to a survivor's pension, but the law of the State party does not allow this.

The Committee has upheld the author's claim, finding that he has suffered discrimination within the meaning of article 26 of the Covenant on grounds of sex or sexual orientation, inasmuch as the State party has failed to explain how "a distinction between same-sex partners and unmarried heterosexual partners is reasonable and objective" and has not "adduced any evidence of the existence of factors that might justify making such a distinction".

On the basis of the Committee's conclusion, there is apparently no distinction or difference between same-sex couples and unmarried mixed-sex couples in respect of survivor's pensions, and for the State party to make such a distinction, unless it can be explained and substantiated, constitutes discrimination on grounds of sex or sexual orientation and amounts to a violation of article 26. Not surprisingly, then, the Committee calls on the State party to reconsider the author's request for a pension "without discrimination on grounds of sex or sexual orientation". The State party is further required, in the standard wording, "to take steps to prevent similar violations of the Covenant in the future".

The Committee's decision in fact repeats the conclusion reached in 2003 in *Young v. Australia* (communication No. 941/2000), in what is clearly a perspective of establishment and consolidation of consistent case law in this area, binding on all States parties to the Covenant.

We cannot subscribe either to this approach or to the Committee's conclusion, for several legal reasons.

In the first place article 26 does not explicitly cover discrimination on grounds of sexual orientation. Such discrimination might - conceivably - be covered, but only by the phrase "other status" at the end of article 26. Hence matters involving sexual orientation can be addressed under the Covenant only on an interpretative basis. Clearly any interpretation within reasonable limits, and to the extent that it does not distort the text or attribute to the text an intent other than that of its authors, can be derived from the text itself. There is reason to fear, as will be seen below, that the Committee has gone beyond mere interpretation.

Secondly, and still by way of introductory remarks, no interpretation, even one grounded in legal experience at the national level, can ignore current enforceable international law, which does not recognize any human right to sexual orientation. That is to say, the scope of the Committee's pioneering and standard-setting role should be circumscribed by legal reality.

The main point is that, whatever interpretation is given to article 26, it must relate to non-discrimination and not to the creation of new rights which are by no means clearly implied by the Covenant, not to say precluded given the context in which the instrument was conceived.

The Committee has always taken a very rigorous line in its efforts to interpret the concept of non-discrimination. Thus it finds that "not every differentiation based on the grounds listed in article 26 of the Covenant amounts to discrimination, as long as it is based on reasonable and objective grounds" (*Jongenburger-Veerman v. Netherlands*, communication No. 1238/2004). In *O'Neill and Quinn v. Ireland* (communication No. 1314/2004) the Committee recalled its settled case law (see communications Nos. 218/1986 *Vos v. Netherlands*; 425/1990 *Doesburg Lannooij Neefs v. Netherlands*; 651/1995 *Snijders v. Netherlands*; and 1164/2003 *Abad Castell-Ruiz et al. v. Spain*), "that not every distinction constitutes discrimination, in violation of article 26, but that distinctions must be justified on reasonable and objective grounds, in pursuit of an aim that is legitimate under the Covenant".

It is not always easy to assess whether the grounds for distinction or differentiation are reasonable and objective or whether the aim is legitimate under the Covenant, and the difficulties involved are naturally of varying magnitude. This is an area where interpretation is dogged by the risk of subjectivity, particularly when - consciously or not - it is locked into a teleological approach, for the issues that arise may then be only marginal to the Covenant or even, in some cases, lie outside it, which may mean that legal discourse gives way to other types of discourse that legitimately belong in non-legal domains or at best on the boundaries of the legal domain. Thus the establishing of similarities, analogies or equivalences between the situation of heterosexual married or de facto couples and homosexual couples may well entail not only observation of facts but also interpretation, and can therefore be of no help in construing the law in a reasonable and objective manner.

Provisions of the Covenant cannot be interpreted in isolation from one another, especially when the link between them is one that cannot reasonably be ignored, let alone denied. Thus the question of "discrimination on grounds of sex or sexual orientation" cannot be raised under article 26 in the context of positive benefits without taking account of article 23 of the Covenant, which stipulates that "the family is the natural and fundamental group unit of society" and that "the right of men and women of marriageable age to marry and found a family shall be recognized". That is to say, a couple of the same sex does not constitute a family within the meaning of the Covenant and cannot claim benefits that are based on a conception of the family as comprising individuals of different sexes.

What additional explanations must the State provide? What other evidence must it submit in order to demonstrate that the distinction drawn between a same-sex couple and a mixed-sex couple is reasonable and objective? The line of argument adopted by the Committee is in fact highly contentious. It starts from the premise that all couples, regardless of sex, are the same and are entitled to the same protection in respect of positive benefits. The consequence of this is that it falls to the State, and not to the author, to explain, justify and present evidence, as if this was some established and undisputed rule, which is far from being the case. We take the view that in this area, where positive benefits are concerned, situations that are widespread can be presumed to be lawful - absent arbitrary decisions or manifest errors of assessment - and situations that depart from the norm must be shown to be lawful by those who so claim.

Similarly, and still in the context of interpreting Covenant provisions in the light of other Covenant provisions, we would point out that article 3, on equality between men and women, must be interpreted in the light of article 26, but cannot be applied to equality between heterosexual couples and homosexual couples.

On the other hand, there is no doubt that article 17, which prohibits interference with privacy, is violated by discrimination on grounds of sexual orientation. The Committee, both in its final comments on States parties' reports and in its Views on individual communications, has rightly and repeatedly found that protection against arbitrary or unlawful interference with privacy precludes prosecution and punishment for homosexual relations between consenting adults. article 26, in conjunction with article 17, is fully applicable here because the aim in this case is precisely to combat discrimination, not to create new rights; but the same article cannot normally be applied in matters relating to benefits such as a survivor's pension for someone who has lost their same-sex partner. The situation of a homosexual couple in respect of survivor's pension, unless the problem is viewed from a cultural standpoint - and cultures are diverse and even, as regards certain social issues, opposed - is neither the same as nor similar to the situation of a heterosexual couple.

In sum, the law's flexibility yields many good things, but it can at times lead to extremes that strip an instrument of its substance and substitute something other, a content different from that intended by the author and different from that reflected in the spirit and letter of the text. The choices made in the process of interpretation are valid only in the context and within the limits of the provision being interpreted. Of course States still have the right and the capacity to establish new rights for the benefit of those under their jurisdiction. It is not for the Committee, in this regard, to substitute itself for States and make choices it is not entitled to make.

(*Signed*): Abdelfattah Amor

(*Signed*): Ahmed Tawfik Khalil

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

GG. Communication No. 1368/2005, *Britton v. New Zealand**
(Views adopted on 16 March 2007, Eighty-ninth session)

Submitted by:	E.B. (represented by counsel, Mr. Tony Ellis)
Alleged victims:	The author, his daughters, S. and C., and his son, E.
State party:	New Zealand
Date of communication:	24 December 2004 (initial submission)
Subject matter:	Denial of access to children after prolonged access proceedings
Procedural issues:	Exhaustion of domestic remedies - parental standing - sufficient substantiation, for purposes of admissibility - exhaustion of domestic remedies
Substantive issues:	Fair trial - arbitrary interference with the family - protection of the family unit - rights of children - equality before the law and non-discrimination
Articles of the Optional Protocol:	1; 2 and 5, paragraph 2 (b)
Articles of the Covenant:	2; 14, paragraph 1; 17, 23; 24 and 26

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

Meeting on 16 March 2007,

Having concluded its consideration of communication No. 1368/2005, submitted to the Human Rights Committee by E.B. under the Optional Protocol to the International Covenant on Civil and Political Rights,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

An individual opinion signed by Committee member Ms. Ruth Wedgwood is appended to the present document.

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

Adopts the following:

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

1. The author of the communication, dated 24 December 2004, is E.B.,[1] a New Zealand national. The author advances the communication on his own behalf and on behalf of two daughters, S., [], and C., [], as well as his son, E., []**[2]**. He claims he is a victim of breaches by New Zealand of articles 2; 14, paragraph 1; 17, 23; 24 and 26 of the Covenant. He also invokes violations of articles 17, 23 and 24 of the Covenant on behalf of his children. The author is represented by counsel, Mr. Tony Ellis.

Factual background

2.1 In 2000, the author and his wife, with whom he had had two daughters (born in 1990 and 1994) and one son (born in 1997), separated. From 4 November 2000, the author's wife refused him access to the children. On 30 November 2000, the author applied to the Family Court for access to his children.

2.2 In May 2001, the author's wife made an initial statement to the police, alleging that the author had sexually abused the two daughters. In June 2001, she began making a further statement to the police, eventually completing it in October 2001 after several interviews were held. The police investigation of these claims ran from June 2001 to October 2002. Four evidential video interviews with the two daughters were undertaken on 27 June 2001 (with C), 21 August 2001 (with S), 1 July 2002 (with S) and 24 October 2002 (with C). In June 2002 and again in March 2003, a clinical psychologist prepared report directed under section 29A of the Guardianship Act.[3] On 30 January 2003, the police determined that no charges would be laid against the author.

2.3 From 24 to 28 March 2003, the Family Court heard the original application filed in November 2000. Before oral evidence was given by the author, his wife and the clinical psychologist, the evidential videos were replayed, as were the videos of interviews of the author by the police in the presence of the parties and counsel.

2.4 On 24 June 2003, the Family Court dismissed the application for access under section 16B of the Guardianship Act 1968.[4] The judge was not satisfied, on the balance of probabilities, that the author did in fact sexually abuse the children. The judge considered however that the author posed "an unacceptable risk" to the safety of the children. He considered that "whatever in fact took place" between the author and the children "had a lasting and profound impact on them". The children had expressed the wish not to have contact with their father. In the circumstances, the judge concluded that it would not be in the welfare of the children to grant access to the author. The judge also noted that the proceeding had unfortunately become prolonged, and that "[t]hroughout these proceedings there has been a concern about delays in getting this matter on for hearing". The judge noted the difficulties posed in resolving access issues when sexual abuse allegations required police investigation.

2.5 In reaching his decision, the judge carefully evaluated and weighed all the available evidence. Upon hearing and seeing the parties give evidence, he decided to give credence to the author's wife, who was prepared to acknowledge shortcomings and her responsibility for what had happened during the marriage, whereas, according to the judge, the author himself was unprepared to concede that he had in any way overstepped boundaries of propriety in the contacts with his children, although evidence indeed suggested that these boundaries had been crossed. In addition, the judgement noted incidents during a number of instances of supervised access the author had with his daughters in the spring of 2001, for which the author was charged with three alleged breaches of the protection order (even though each charge was later dismissed).

2.6 The author appealed to the High Court, inter alia on the basis that the provisions of the Covenant and the European Convention on Human Rights, as interpreted in *Sahin v. Germany*,[5] disclosed a fundamental parental human right of access to children which had been insufficiently taken into account. On 7 November 2003, the High Court upheld the Family Court's decision with respect to access to the two daughters, but decided that the Family Court should reconsider its decision with respect to access to the son, notably as no allegations of abuse against him had been made. As of the date of submission of communication, over a year later, reconsideration of the son's situation had yet to take place, on account of "systemic judicial delays".

2.7 The author applied to the Court of Appeal for leave to appeal the High Court's decision with respect to the daughters, seeking a declaration of inconsistency of the relevant provisions of the Guardianship Act with the Covenant. The appellant cited to the Court the Committee's Views in *Hendriks v. The Netherlands*,[6] where the Committee observed: "… the law should establish certain criteria so as to enable the courts to apply to the full the provisions of article 23 of the Covenant. It seems essential, barring exceptional circumstances, that these criteria should include the maintenance of personal relations and direct and regular contact between the child and both parents".

2.8 The Court of Appeal, on 6 April 2004, refused leave to appeal, holding that a declaration of inconsistency could only be made with respect to the New Zealand Bill of Rights Act. In any event, it held that neither the Family Court's decision nor the process it followed in reaching it was inconsistent with article 23 of the Covenant. It considered the Committee's Views in *Hendriks* inapposite to the present case, as the Views "do [...] not expressly require that a Court considering access address individually all forms of indirect access [such as by phone and in writing] before refusing access completely".

2.9 On 21 April 2004, the son, E., made allegations of sexual abuse against the author. The police reopened the investigation into the author, and an interview was conducted. In May 2004, the Family Court adjourned the access application with respect to the son, which had been remitted by the High Court, on account of the police investigation. In September 2004, the police decided not to lay charges against the author.

2.10 Thereafter, in November 2004, counsel for the author's wife recommended that the Family Court obtain an updated psychological report in relation to the son. In May 2005, the Court approved the brief for a psychologist, on the basis of a draft prepared by counsel for E. In June, a psychologist was appointed to prepare this updated report under section 29A of the Guardianship Act. In September 2005, the Court received the updated report and released it to counsel. In

March 2006, the author's counsel advised the Court's registrar that report would be critiqued. In April 2006, E's lawyer (Lawyer for the Child) was appointed as lawyer to assist the Court in the critique process. In June 2006, the author's counsel applied to the Court that it was inappropriate for the Lawyer for the Child to be appointed as lawyer to assist the Court in the critique process, given the differing roles and responsibilities of each. In a minute of 19 June 2006, the Court agreed with the application.

2.11 On 6 July 2006, the Family Court Judge, by minute to all counsel, raised his concerns at the time the matter was taking to progress to hearing. He requested all counsel to focus on the need to complete all steps, tender any relevant evidence and have the issues heard. As at 30 August 2006, the Court continued to await completion of the critique of the updated report, which has been delayed by the absence overseas for seven weeks of the medical professional in question.

The complaint

3.1 The author claims violations of articles 2; 14, paragraph 1; 17, 23; 24 and 26 of the Covenant on his own behalf, and violations of articles 17, 23 and 24 on behalf of his children.

3.2 The author complains of a two-fold violation of the right to a fair trial guaranteed in article 14. Firstly, given the nature of the parental and child interests at stake, the protracted proceedings violate the right to duly expeditious determinations. The tardiness of the police in investigating the two abuse complaints, each eventually proving to be unfounded, was particularly causative of delay. Relying on the Committee's Views in *Fei v. Colombia*,[7] the author argues that the lapse of two years to determine the access application for the daughters and the lapse of over three years - and growing - to determine the application for the son is in breach of rights of prompt trial.

3.3 Second, the author argues that there has been a separate violation of article 14 on the basis that the author's appeal was not heard before a lawful, competent court, on the basis that the High Court judge in question was not lawfully appointed. The author argues that the judge continued to act five years after the formal retirement age of 68, while applicable legislation only permits two years of additional work.

3.4 The author alleges a violation of article 17, on the basis that the State has failed to prevent arbitrary interference with the family resulting in parental alienation from the children. On the basis of European case law,[8] he argues that there were no exceptional circumstances requiring complete termination of parental rights of access. The resultant destruction of the family unit breaches both his and his children's rights under this provision. By parallel reasoning, the author argues a violation of articles 23, for failure to respect the family as a fundamental group. He similarly argues a violation of article 24, on account of the children's inability to have access to both parents.

3.5 The author further argues a violation of article 26, on the basis that the Court of Appeal's construction of the Guardianship Act creates an unjustified distinction between persons found not to have committed sexual abuse, who are provided lesser legal protection than those that

have been found to have so acted. This is as the Act requires a Court on an access application to consider a series of specific issues where domestic violence or abuse has taken place,[9] but otherwise the matter is left to the court's residual discretion under section 16B(6) of the Guardianship Act.

3.6 The author argues a violation of article 2 in conjunction with the foregoing substantive articles on three distinct bases. First, he argues that the State party has failed to provide for an effective remedy for the breaches of substantive rights detailed in this case. Secondly, the Court of Appeal decided it had no jurisdiction to grant a declaration that New Zealand law was inconsistent with the Covenant, or to grant an effective remedy based thereon. Thirdly, the State party has failed to ensure that the Covenant's guarantees are either expressly incorporated in its law, or ensuring that its law was interpreted so as to respect and give effect to the Covenant rights of the author and his children.

State party's submissions on admissibility and merits

4.1 By submissions of 22 April 2005 and 22 August 2005, the State party contested the admissibility of most of, and the merits of all of, the communication.

4.2 The State party argues that author has not exhausted domestic remedies with respect to the claim under article 14, paragraph 1, to the effect that the author's appeal to the High Court was not before a competent, independent and impartial tribunal. The judge, Justice Neazor, could have been asked to rescue himself on the basis of an alleged lack of competence to hear the appeal. The point could, and should, also have been raised in the application for leave to appeal to the Court of Appeal. It also remains open to the author to file an application for declaratory judgement in the High Court, in order to enable the domestic courts to consider the issue. In any event, the State party disputes that Justice Neazor was without jurisdiction in the High Court, supplying a copy of his warrant of appointment, dated 7 May 2003, for one year, covering the proceedings in this case.

4.3 The State party also argues that domestic remedies remain with respect to all claims made on behalf of the youngest child, E. In November 2003, the High Court remitted the issue of the author's access to E. back to the Family Court. The State party notes that rehearing has yet to take place, arguing it was necessary to await the outcome of the author's application for leave to appeal in respect of the other children, and for the police to investigate the new allegations of abuse. Despite the adjournment, the Family Court's judges and registrars have kept the case under review with regular assessments. As at the date of submission, the State party noted that a psychologist's report was sought for September 2005 and a hearing would likely take place within months thereafter.

4.4 The State party argues that the claims under articles 2, 17, 23 and 24 are vague, general, based on assertions and founded on an insufficient evidentiary basis to amount to a proper claim under the Optional Protocol.

4.5 The State party also argues that the claim concerning under article 26 of the Covenant concerning section 16B of the Guardianship Act is insufficiently substantiated, for purposes of admissibility. The State party notes that section 16B of the Act deals, from the view of promoting the welfare of children, both with cases where sexual abuse has been made out as

well as cases like the author's, where abuse is not made out but a real risk remains. It is unclear what detriment the author has suffered as a result of having become a person with the "status" of having been found by the Family Court not to have abused his children. The State party also argues, to the extent an issue is raised under article 26, that more limited appeal rights of matters within Family Court jurisdiction, as opposed to general civil and criminal matters, reflect the specialist nature of the former's jurisdiction, as well as the different sorts of decisions made in each jurisdiction. It notes that one significant difference is that because circumstances of the parties can change in family law cases, successive proceedings can be brought in relation to the same issues - thus, for example, an unsuccessful party can renew an application for access to children at any time.

4.6 Finally, the State party, "without necessarily disputing the standing of the author as a non-custodial parent to raise issues on behalf of the three children", argues that the communication falls within the Committee's decision in *Rogl v. Germany*,[10] where the Committee relied in part on the fact that the child in question, aged 15, had not given any indication of agreeing that there had been a violation of the child's rights, to declare a parental claim inadmissible.

4.7 As to the merits of the claim of undue delay under article 14, paragraph 1, of the Covenant, the State party submits that the time taken to determine the author's application for access and to determine his appeal and application for leave to appeal was not excessive in the circumstances. First, the State party argues that a substantial part of the time taken by the Family Court to determine the application at first instance was necessary in order to allow the police investigation to proceed, arguing that the postponement of the hearing until completion of the investigation was necessary for the proper administration of justice. The State party also argues, second, that the author's application was factually and legally complex and procedurally intensive, requiring a five day hearing at first instance, further written submissions and a lengthy judgement. Third, the State party argues that the complexity of the proceedings and the proper appellate role of the courts made for an appropriate duration of that component of the proceedings.

4.8 With respect to the youngest child, E., where the proceedings were remitted, the State party argues that the rehearing was postponed pending the outcome of the appeal to the Court of Appeal, given the possible interlinkage of issues. The new allegations of sexual abuse in April 2004, also required investigation until September 2004, during which time all parties agreed to adjournment of the proceedings. The State party argues that since then, the case has been under constant review and that given serious allegations of abuse, careful balancing is necessary to ensure both the safety and welfare of children and the administration of justice.

4.9 On the claims under articles 17, 23 and 24 in general, the State party noted that the judge assessed, as a factual matter, that although allegations of sexual abuse had not been made out the author posed an unacceptable risk to the welfare of the children, and accordingly denied access. The State party invites the Committee to defer to this evidentiary assessment, there being no evidence of bad faith or other manifest unfairness.

4.10 As to the specific claim under article 17, the State party notes that the actions taken were lawful and in accordance with applicable legislation. It also concedes that the dismissal of the application for access could constitute "interference" within the meaning of article 17, though argues that such interference was in the best interests of the child. Section 16B of the Guardianship Act seeks to ensure that children are afforded the highest level of safety where

there is family violence and/or allegations of abuse. The decision to refuse access was not arbitrary, as it was considered necessary by the Family Court to protect the children, and it was proportionate to the real risk posed by the author to his children.

4.11 As to the claims under article 23 and 24, the State party additionally argues that the regime established under section 16B of the Guardianship Act, setting out a residual capacity for the Court to assess real risk even if abuse allegations have not been established, is quite different from the broad discretion that was criticised by the Committee in its Views in *Hendriks*. The State party also refers to article 9 of the Convention on the Rights of the Child, for the proposition that no parental right of contact is absolute, and that protection of children from unacceptable risk is an exceptional circumstance which justifies departure from the usual position under article 23 that children should have direct and regular contact with parents. The State party also argues that if the author considered that circumstances had changed, it was open to him to bring a fresh application to the Family Court.

4.12 As to the claims under article 2, the State party argues that in the absence of a substantive breach of the Covenant, a breach of article 2 is not established. Its law is in compliance with the Covenant, as remedies exist to address any issue of compliance with Covenant rights. The right to fair trial and non-discrimination are expressly implemented by legislation. The courts also apply unincorporated international obligations in relation to the exercise of official powers, such as determination of the application for access. Arguments on protection of the family and children under the Covenant were raised before and considered by both appellate courts. The unavailability of a declaration of inconsistency with the Covenant is, so argues the State party, irrelevant to the availability of an adequate remedy, as required by article 2 - the unavailability of one particular kind of remedy does not necessarily lead to such a conclusion, as the Covenant is not prescriptive as to the manner in which a State party meets its obligations. The Court of Appeal also left open the existence of a declaration of inconsistency with the New Zealand Bill of Rights Act (which implements a number of Covenant rights), though there being no breach of the Bill of Rights on the facts it was unnecessary to decide definitively.

Author's comments on the State party's submissions

5.1 On 17 November 2005, the author disputed the State party's submissions on the issue of delay and denies that the length of time required for the two police investigations was justified. Although the issues were, albeit sensitive, neither factually nor legally complex, the first investigation took 18 months, the second six months. The author points out that there were no independent witnesses that would prolong the investigation. He emphasizes the importance of prompt justice where the rights of children are at issue, and argues instead that the reason an investigation requiring evidential interview(s) of a child and an interview of each parent can take 18 months is due to inadequate police resources and lack of appropriate prioritization. The author emphasizes the systemic difficulties at issue by reference to a series of media articles examining serious staff shortages in the police and Governmental moves to sharply increase police staff. The author notes that the State party's reply provided no detail whatsoever as to the process and mechanics of the police investigations in the author's cases which would explain the length of delay, and notes the concern expressed by the Family Court itself on the delay in this case.

The High Court was also troubled with the delay, the judge explicitly noting his regret that the parties had had to wait for the decision and attributing that to unspecified events during preparation of the judgement that were beyond his control.

5.2 Referring to the jurisprudence of the European Court of Human Rights in *Zawadka v. Poland*,[11] the author argues that the procedural delays have determined the issue or at least very substantially prejudiced the author, who has not seen his son for half of the latter's natural life. The State party has not taken reasonable steps to facilitate contact, but rather is responsible for prolonged delay. A violation of article 14, paragraph 1, of the Covenant thus continues to occur, and the possibility of appealing the Family Court decision, once rehearing takes place, holds out the prospect of further delay.

5.3 At the appellate stage, the author notes that the rehearing directed by the Family Court has still not taken place, despite the passage of two years, a plainly prolonged period. The State party has failed to give, in the author's view, sufficient priority to child access applications. The explanation of the State party - that a psychologist's brief was concluded in May 2005, that the interview would take place in September 2005, and that the hearing would take place a few months thereafter - reveals either a shortage of psychologists or an extraordinary length of time for the process, either way a responsibility of the State party. The author points out that both the High Court and Court of Appeal delivered judgement within one month, undermining any claim that the cases were factually and legally complex.

5.4 As to exhaustion of domestic remedies with respect to E., the author argues that the State party cannot be responsible for protracted delay in the domestic judicial process and then hold non-exhaustion against the author. There are no effective remedies for the delays which have already occurred, and, in any event, there are no Covenant remedies available in the State party for breaches of the Covenant. It is not appropriate for Covenant remedies to depend on a prior breach of the New Zealand Bill of Rights Act, where that legislation does not reflect all the provisions of the Covenant and in any event gives way to inconsistent legislation.

5.5 On the issue of the lawfulness of the appointment of the High Court judge, the author notes that the issue had been advanced before the High Court and the Court of Appeal, without a concluded view yet being reached.

5.6 As to the overlapping claims under articles 17, 23 and 24, the author notes that he was denied total access to the children by the court, without lesser forms of intervention, such as parental training, indirect access or denial of access for a limited time, being considered. The total denial of access lacks a reasoned judgement, and is wholly disproportionate and arbitrary in the circumstances. The author rejects the State party's argument that the finding that the author posed an "unacceptable risk" amounting to what it described as exceptional circumstances which justified a departure from the usual position under article 23, as circular, vague and uncertain. He observes that largely on the basis of a psychologist report prepared without any observation of the author and his children together, coupled with a vague and undefined residual concern by the Family Court judge despite the absence of a finding of abuse, he was denied any direct or indirect contact with his children.

5.7 On the issue of differing appeal jurisdiction available to the author in the Family Court, as opposed to that of the general civil and criminal courts, the author argues that there is nothing

justifying such differentiation, which lacks objective and reasonable grounds, and does not pursue a legitimate Covenant basis. Moreover, the possibility of repeat applications invoked by the State party is equally applicable in numerous proceedings in the general courts, for example, bail and parole proceedings and applications for injunctions. The author notes that no other commonwealth jurisdictions operate such a truncated appeal system for family matters.

5.8 As to the question of the application of section 16B of the Guardianship Act in his case, the author notes that he was worse off not having been found to have abused his daughters than if he had been - had he been so found, the court would have been required to consider the series of specific matters listed in the section 16B of the Act before making a decision on access. Without such a finding, the author was not entitled as a matter of right to, and did not receive the benefit of, consideration of those issues by the judge before it denied him access. The result is, in the author's view, both arbitrary and discriminatory.

5.9 As to the article 2 issue, the author points out that the New Zealand Bill of Rights Act only partially reflects the Covenant, not addressing articles 17 or 26. The State party's courts have not considered the autonomous meanings of the Covenant's provisions.

Supplementary submissions of the parties

6. On 25 November 2005, the author made supplementary submissions, providing further support to the argument of systemic delay in the State party's courts, of which he claims to be victim. The author forwards a copy of the Judicature Amendment Bill, tabled in Parliament in May 2005, whose object is expressed as being alleviating the Court of Appeal's workload and increasing access to it, in order to avoid "an erosion of access to justice". The same Bill also removes limitations of appeal to the Supreme Court, which previously provided limited rights of appeal on family matters as compared to commercial issues, a distinction rejected by the author as discriminatory.

7. On 28 April 2006, the State party argued that the author's supplementary submission raised certain new issues not raised in the original communication, and requested that, in accordance with the Committee's approach in *Jazairi v. Canada*,[12] they be declared inadmissible as an abuse of process for not having been raised earlier. The State party further argues that the author raises a number of matters that do not directly relate to or address the author's circumstances and the issues raised by his communication, including the issue of the correct interpretation of judicial appointment provisions being pursued in other litigation unrelated to the author's case. The issue of acting Judges' warrants has been raised before the domestic courts since the communication was lodged, and the courts are yet to reach a concluded view. On 26 September and 20 October 2006, the State party updated the Committee on factual developments up to 1 September 2006.

Issues and proceedings before the Committee

Consideration of admissibility

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

8.2 As to the issue of the appointment of the High Court judge who heard the author's appeal to that Court, the Committee notes, on the basis of the information before it, that the issue of the lawfulness of such appointments was not raised before the domestic courts in the context of the proceedings that are pending before the Committee. It follows that this issue under article 14, paragraph 1, of the Covenant is inadmissible, for failure to exhaust domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol.

8.3 The author has advanced claims under articles 17, 23 and 24 of the Covenant on behalf of his children. In this respect, the Committee notes that while, in principle, a non-custodial parent has sufficient standing to raise such issues on behalf of his or her child(ren)[13], it should be recalled that at the time of submission of the communication, the author's children were, respectively, 14, 10 and 7 years old. Nothing in the file indicates that the author ever sought to obtain his children's authorization to act on their behalf, although it transpires from the material before the Committee (see para 2.4) that the children had expressed the desire not to have contact with their father. In the circumstance, the Committee considers that absent such authorization, the author has no standing to advance claims under articles 17, 23 and 24 on behalf of his children.

8.4 As to the claim under article 26, the Committee is of the view that the author has not made out a sufficiently substantiated argument as to discrimination suffered by him in the present case, and considers that the claims advanced under this head are better addressed in the context of the claims under articles 17 and 23 of the Covenant. Similarly, the Committee considers insufficiently substantiated the claim under article 2 of the Covenant. It follows that these claims are inadmissible under article 2 of the Optional Protocol.

8.5 As to the objections to the remaining claims based on insufficient substantiation, the Committee considers that in the light of its jurisprudence on issues in respect of family relations the claims are sufficiently substantiated for an examination of the merits. The Committee also notes, in connection with the State party's general objection concerning the evaluation of facts and evidence, that its task is not to re-evaluate the facts as determined by the domestic courts, but to assess whether the facts as so determined and the decisions based thereon comport with the requirements of the Covenant. The Committee accordingly proceeds to the examination on the merits of the admissible claims under articles 14, 17 and 23 of the Covenant.

Consideration of the merits

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

9.2 As to the claim of undue delay under article 14, paragraph 1, the Committee recalls its jurisprudence that the right to a fair trial guaranteed by this provision includes the expeditious rendering of justice, without undue delay.[14] The Committee recalls that the issue of delay must be assessed against the overall circumstances of the case, including an assessment of the factual and legal complexity of the case. The Committee notes, in this respect, that the resolution of the author's application for access with respect to the older two children, S. and C., lasted from the application in November 2000 until the Court of Appeal's refusal of leave in April 2004, a period of 3 years and 4 months. Within this timeframe, the allegations of abuse made against the

author occupied the police from May 2001, when the author's wife made a statement to police, to January 2003, when the police decided not to prosecute - a period of one year and 8 months. The Committee notes, with respect to the youngest child, E., that the access application also commencing November 2000 was, at least as of September 2006 (the most recent information before the Committee) still unresolved. In this connection, the police investigation of the second set of abuse claims lodged after the author's success in the High Court ran from April to September 2004, a period of six months.

9.3 The Committee refers to its constant jurisprudence that "the very nature of custody proceedings or proceedings concerning access of a divorced parent to [the parent's] children requires that the issues complained of be adjudicated expeditiously".[15] The failure to so ensure may readily itself dispose of the merits of application, notably when - as in the present case - the children are of young age, and irreparably harm the interests of a non-custodial parent. The onus is thus on the State party to ensure that all State actors involved in the resolution of such issues, be they the courts, the police, child welfare authorities and others, are sufficiently well resourced and structured and establish their priorities in order to ensure sufficiently prompt resolution of such proceedings and safeguard the Covenant rights of the parties.

9.4 In the present case, the State party has not demonstrated to the Committee the justification for the protracted delay in the resolution of the both sets of applications. In particular, the State party has not shown the necessity of police investigations of the extended period of time that occurred in this case in respect of allegations which, while certainly serious, were not legally complex and which at the factual level involved assessment of oral testimony of a very limited number of persons. The procurement of psychological reports to assist the court has also been particularly prolonged. The Committee notes further the concerns expressed by the domestic courts as to the passage of time in the proceedings. It follows, given the priority accorded to resolution of such matters and in light of the Committee's jurisprudence in comparable cases (see *Fei*), that the author's right to an expeditious trial under article 14, paragraph 1, of the Covenant was violated with respect to the application concerning S. and C., and continue to be violated given the still outstanding (as of September 2006) resolution of the application concerning E.

9.5 As to the author's own claims under articles 17 and 23 of the Covenant, the Committee notes that the Family Court found that it could not be shown that the author had abused his children. Nonetheless, the judge decided, on the basis of all the evidence available to and reviewed by him (see paragraphs 2.4 and 2.5 above), that to reinstate the author's access to his children would amount to an "unacceptable risk to the welfare of the children". The Committee notes that the trial judge in the Family Court proceeded to a full and balanced evaluation of the situation, on the basis of testimony of the parties and expert advice, and that, while acknowledging the far reaching nature of the decision to deny the author's application for access, the trial judge decided that it was in the children's best interest to do so. In the particular circumstances of the case, the Committee cannot conclude that the trial judge's decision violated the author's rights under articles 17, paragraph 1, and article 23, paragraph 1, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by the State party of the author's rights under article 14, paragraph 1, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, which includes the expeditious resolution of the access proceedings in relation to E. The State party should also ensure that such violations do not recur in the future.

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

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

APPENDIX

Individual opinion (dissenting) of Committee member Ms. Ruth Wedgwood

This case concerns a family court proceeding and criminal investigation arising from allegations that a father presented a serious danger to the welfare of his young children. The Committee has concluded that so far as the Covenant is concerned, the family court judge was entitled to deny visitation rights to the father. The Committee has rejected the claim by the father, as author of this communication, that the judge's actions violated articles 17 and 23 of the International Covenant on Civil and Political Rights.

The claim of any parent to continued contact with a child deserves great weight under the standards of articles 17 and 23 of the Covenant. Nonetheless, the Committee has appropriately declined to substitute its own judgement for that of the Family Court. The court engaged in detailed fact-finding concerning allegations of inappropriate sexual activity by the father in regard to the children, and assessed whether continued contact with the parent would endanger the well-being of the affected children.

Though the Court acted within its competence in refusing the father's claim for visitation, the Committee announces that there was a violation of article 14 of the Covenant because, it is said, the Family Court at Wanganui, New Zealand took too long in reaching this conclusion and because the State party's ultimate decision in respect of the author's son was further delayed.

The dreary facts of this case are not fully explicated in the Views of the Committee. In particular, the potential gravity of harm to a child surely has some bearing on the appropriate process of investigation and assessment, as well as the remedy granted.

First, it should be noted that the author's application to the Family Court for access to his children was not the first step in this confrontation. (Compare Views of the Committee, at paragraph 2.1). Rather, in May 2000, the wife had moved for an order of protection against the author, after he allegedly threatened to shoot her and the children, and to put "the children in the car and gassing himself and the children".[16] The author was previously convicted for unlawfully discharging a shotgun at another person. The author declined to participate in the four month court proceeding on the protection order. A final order of protection in favour of the wife and children was entered in August 2000. Only thereafter, did the author apply for access to the children, despite the final protection order.

In considering the author's application for visitation with the children, the Family Court was confronted by several disturbing allegations. The eight-year-old daughter (designated as "C" in the court's judgement and in the Committee's Views) reported in two interviews in June 2001 and October 2002 that her father had had genital contact and sexual intercourse with her on a number of occasions. The eleven-year-old daughter (designated as "S") also stated that her father had touched her sexually on repeated occasions.

In a June 26, 2002 report, a clinical psychologist informed the court that the older daughter "reported significant fear of ER. She did not want any contact with him".[17] In another report dated March 19, 2003, this same daughter "remained opposed to any contact with ER".[18]

So, too, the younger girl ("C") stated in March 2003 that "she did not want any contact because she did not trust him to keep her safe".[19] A younger brother ("E"), who had allegedly witnessed the father's kitchen table massage of the younger daughter "advised he did not want to see his father".[20]

On June 2003, the New Zealand Family Court rendered a detailed judgement of 57 pages, analysing the interviews and psychological evaluations of the children. The Court's evaluation also included the psychological assessment of both parents, testimony by both parents, and affidavits from four other persons. The judge took note of the evidentiary standard of New Zealand law that "the more serious the allegation … the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probability". [21] In part, because there was no corroborative medical evidence of the claimed incidents of abuse, the Court ultimately decided that it could not find, by a balance of probabilities, that the father had sexually abused the children.

However, the Court did find that the father's admitted actions and "lack [of] insight as to how the children have been affected" justified the denial of any right of visitation with the children. The judge noted that he found "on the evidence that ER was aware FR [his former wife] had concerns about his lack of boundaries with the children, such as going to bed naked with them and having them sit on his knee while he was sitting on the toilet but he continually ignored those concerns". The judge further noted the psychologist's conclusion that "It was unclear whether ER would ever accept the children's concerns as legitimate concerns" and that "[a]ll the children appeared to be rejecting contact with ER".[22]

The Court reviewed testimony that in cases of inappropriate sexual activity, even a supervised access arrangement could be detrimental to the children.[23] In addition, the Court noted that ER had been "convicted twice for breaches of [a] protection order" with "three other charges dismissed",[24] which might present difficulties for the feasibility of effectively supervised visits.

Each of the factors noted in section 16B (5) of the New Zealand Guardianship Act 1968 applicable to violent conduct was in fact examined by the Court insofar as they also applied to the admitted instances of inappropriate conduct by the father.

The Committee now finds this process of evaluation to have taken unduly long, but in so concluding, fails to take adequate account of the real problems involved in parallel civil and criminal proceedings. A criminal proceeding has critical safeguards for the defendant. The right against self-incrimination can be seriously jeopardized by the mandatory processes of a civil proceeding. Therefore, it is appropriate to allow a criminal investigation to be resolved before a civil matter is heard, even in family court. After the criminal complaint against the father was closed by the police on January 2003, the Family Court Judge held a five-day hearing in March 2003 on the application for visitation, receiving written submissions on 11 April 2003, and issued his opinion on 24 June 2003 as to both the daughters and the son. This was not an undue delay.

The Committee chides the State party for the length of time taken in the police examination. But the allegation of an adult's sexual abuse of young children warrants the caution of a careful and deliberate investigation. The consequences to a defendant of such allegations and the damage to children from a failure to take precautionary measures are both so grave, that a hurried investigation is not appropriate.

In the police investigation, an initial written statement by the children's mother was followed by several police interviews, and a 52-page written statement.[25] The children were questioned in five separate videotaped interviews, and affidavits were received from persons familiar with the mother. A police investigation typically calls for officers trained in the handling of children. The suggestion that this case could be handled quickly because it allegedly involved the "assessment of oral testimony of a very limited number of persons", see Views of the Committee, at paragraph 9.4, does not give weight to the difficulty of assessing delicate facts in the close confines of a family, and the trauma to children that can be caused by the very process of investigation.

The Committee has also concluded that there was undue delay in the Family Court's later proceeding in regard to the son. This additional matter began after the High Court reversed the denial of the father's visitation with the son, and after the author's son (then six years old) alleged sexual abuse regarding the father on 21 April 2004.

According to the State party, "all parties agreed to adjournment of the proceedings" for five months, to permit a further police investigation of the son's allegation.[26] The author's wife then requested an updated psychological report, and the report was received in September 2005. It was not until March 2006 that author's counsel requested a "critique" of the report and then asserted in June 2006 that the son's lawyer could not appropriately assist the court in this critique. It would thus seem that any delay in the disposition of this later allegation is not wholly attributable to the state. The finding of a violation under article 14 is not made out, just because a case could have been handled more quickly.

I do join with my colleagues in concluding that there are indeed serious doubts as to the standing of the father to raise the rights of his children in this proceeding, for there is no indication in the record that the children wished to join in the matter. At the time this communication was filed on 24 December 2004, the children were 14, 10, and 7 years old, and were sufficiently articulate to be interviewed by a psychologist. Since they stated that they wished to have nothing further to do with their father, it seems implausible that they would wish him to act in their stead in a complaint before this Committee.

The Covenant protects the family as "the natural and fundamental group unit of society". Article 17 of the Covenant prohibits "arbitrary or unlawful interference with … family", and article 23 provides that the family is "entitled to protection by society and the State".

Yet these articles also permit, and indeed may require, the protection of children against violence and abuse, as well as other significant risks to their well-being. Numerous states that subscribe to the Covenant give weight to "the best interests of the child" in devising solutions to allegations of serious parental misconduct.[27]

This was not a simple custody dispute, but rather a case where an erroneous decision could have threatened the fundamental health and welfare of a child. It is not appropriate for us to deride the conscientious attempt of the State party to reach a just result in this case.

(*Signed*): Ruth Wedgwood

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

Notes

[1] Names withheld by agreement of the parties.

[2] The dates of birth of the children have been deleted at the request of the parties.

[3] Section 29A of the Guardianship Act provided, at material times, as follows: "29A. Reports from other persons:

> (1) On any application for guardianship or custody (other than interim custody) or access or on an application made under section 12 (1) of the Guardianship Amendment Act 1991, the Court may, if it is satisfied that it is necessary for the proper disposition of the application, request any person whom it consider qualified to do so to prepare a medical psychiatric, or psychological report on the child who is the subject of the application."

[4] Section 16B of the Guardianship Act provided, at material times, as follows:

> (1) This section applies to any proceedings relating to an application made under this Act for an order relating to the custody of, or access to, a child [...]
>
> (2) Where … it is alleged that a party to the proceedings has used violence against the child or a child of the family or against the other party to the proceedings, the Court shall, as soon as practicable, determine … whether the allegation of violence is proved.
>
> (3) […]
>
> (4) Where … the Court is satisfied that a party to the proceedings ["the violent party"] has used violence against the child or a child of the family or against the other party to the proceedings, the Court shall not:
>
> (a) make any order giving the violent party custody of the child to whom the proceedings relate; or

(b) make any order allowing the violent party access (other than supervised access) to that child, - unless the Court is satisfied that the child will be safe while the violent party has custody of or, as the case may be, access to the child.

(5) In considering … whether or not a child will be safe while a violent party has custody of, or access (other than supervised access) to, the child, the Court shall, as far as is practicable, have regard to the following matters:

(a) The nature and seriousness of the violence used;

(b) How recently the violence occurred;

(c) The frequency of the violence;

(d) The likelihood of further violence occurring;

(e) The physical and emotional harm caused to the child by the violence;

(f) Whether the other party to the proceedings:

(i) Considers that the child is safe while the violent party has custody of, or access to, the child; and

(ii) Consents to the violent party having custody of, or access to, the child;

(g) The wishes of the child, if the child is able to express them, and having regard to the age and maturity if the child;

(h) Any steps taken by the violent party to prevent further violence occurring;

(i) Such other matters as the Court considers relevant.

(6) Notwithstanding subsection (2) of this section, where […]

(a) The Court is unable to determine, on the basis of the evidence presented to it by or on behalf of the parties to the proceedings, whether or not the allegation of violence is proved; but

(b) The Court is satisfied that there is a real risk to the safety of the child - the Court shall make such order under this Act as it thinks fit in order to protect the safety of the child.

[5] Application No. 30943/96, judgement of 11 October 2001.

[6] Communication No. 201/1985, Views adopted on 27 July 1988.

[7] Communication No. 514/1992, Views adopted on 4 April 1995.

[8] *Görgülü v. Germany*, application No. 74969/01, judgement of 26 February 2004, at para. 48: "The Court recalls that it is in a child's interests for its family ties to be maintained, as severing such ties means cutting a child off from its roots, which can only be justified in very exceptional circumstances."

[9] See the matters listed in subsection 5 of section 16B of the Guardianship Act, *infra*.

[10] Communication No. 808/1998, decision adopted on 25 October 2000.

[11] Application No. 48542/88, judgement of 12 October 2005, at paras. 62 to 64: "The key consideration is whether those [national] authorities have taken all necessary steps to facilitate contact [between children and non-custodial parents] as can reasonably be demanded in the special circumstances of each case. Other important factors in proceedings concerning children are that time takes on a particular significance as there is always a danger that any procedural delay will result in the de facto determination of the issue before the court, and that the decision-making procedure provides requisite protection of parental interests" [internal citations omitted].

[12] Communication No. 958/2000, decision adopted on 26 October 2004.

[13] *Balaguer Santacana v. Spain* communication No. 417/1990, Views adopted on 15 July 1994, at paras. 6.1 and 9.2.

[14] *Muñoz Hermoza v Peru*, communication No 203/1986, Views adopted on 4 November 1988; *Fei v. Colombia*, op. cit., and *González del Río v. Peru*, communication No. 263/1987, Views adopted on 28 October 1992.

[15] *Fei v. Colombia*, op. cit., at para. 8.4, and *Balaguer Santacana*, op. cit.

[16] Reserved Judgement of Judge A.P. Walsh, in matter between E.R., Applicant, and F.R., Respondent, Family Court at Wanganui, New Zealand, June 24, 2003, at pp. 2-3 (slip opinion). The Committee has given a different set of initials to the father, who is the author of the complaint before us, calling him "E.B.".

[17] Id., at p. 20 (slip opinion).

[18] Id., at p. 25.

[19] Id.

[20] Id.

[21] Id. at p. 45.

[22] Id. at p. 56.

[23] Id. at p. 37.

[24] Id. at p. 54.

[25] Id. at p. 7.

[26] See Views of the Committee, at para. 4.8.

[27] Cf. articles 3 and 9, United Nations Convention on the Rights of the Child, 1577 UN Treaty Series, 28 International Legal Materials 1456 (1989). New Zealand joined the Rights of the Child Convention on 6 April 1993.

HH. Communication No. 1381/2005, *Hachuel v. Spain**
(Views adopted on 25 July 2007, Ninetieth session)

Submitted by:	Jaques Hachuel Moreno (represented by José Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	14 November 2003 (initial submission)
Subject matter:	Initial conviction by an appeal court, with no possibility of subsequent review
Procedural issues:	Exhaustion of domestic remedies
Substantive issues:	Right to review of conviction and sentence by a higher court in accordance with the law, in the case of a conviction by an appeal court that sets aside an acquittal by the court of first instance
Articles of the Covenant:	14, paragraph 5
Articles of the Optional Protocol:	5, paragraph 2 (b)

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

Meeting on 25 July 2007,

Having concluded its consideration of communication No. 1381/2005, submitted to the Human Rights Committee on behalf of Jaques Hachuel Moreno under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

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

1.1 The author of the communication is Jaqcues [sic] Hachuel Moreno, an Argentine national born in Tangiers in 1929. He claims to be a victim of a violation by Spain of article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by counsel, Mr. José Luis Mazón Costa.

1.2 On 16 August 2005 the Special Rapporteur on New Communications and Interim Measures decided that the admissibility and merits of the communication should be examined jointly.

Factual background

2.1 The author states that he was involved in the conflict that affected the Banco Español de Crédito (Banesto), which ended with the bank being placed in administration in December 1993. In November 1994, the prosecutor's office attached to the National High Court charged the bank's president, Mr. Mario Conde, and nine others with offences of misappropriation. According to the author, no complaint had been directed at him. The author testified in this trial in January, September and November 1995. In December 1995 and May 1996 the court in charge of the investigation dismissed requests for the author to be criminally investigated. Nevertheless, on 18 June 1996 the National High Court decided that the author should be investigated in connection with the "Carburos Metálicos" operation, in which a number of people had allegedly appropriated money from Banesto through commercial operations with companies linked to the accused persons.

2.2 The trial of the accused persons was complex. In the course of the hearings, which lasted two years, statements were taken from 470 people. The evidence consisted in the interpretation of various commercial documents and letters, and statements by the accused, witnesses and experts. Assessment of the evidence was a key part of the trial. On 31 March 2000, the National High Court acquitted the author of the offence of misappropriation in the Carburos Metálicos operation, considering the offence to be time-barred. The court considered that between the date of the events (6 April 1990) and the author's first statement after having been charged (30 November 1995), the prescription period of five years laid down for the offence the accused was charged with had ended.

2.3 The prosecutor's office appealed against the judgement. On 29 July 2002 the criminal division of the Supreme Court set aside the author's acquittal, sentenced him to four years' imprisonment for misappropriation, and ordered him to pay Banesto the sum of 1,344 million pesetas, which amount the author had voluntarily paid to Banesto following his acquittal. The Supreme Court considered that the prescription period applying to the author had been interrupted by the initiation of a prosecution in November 1994, and because in December 1994 one of the other accused had referred to the author. The author was released on 20 September 2002 owing to his advanced age (he was then 73 years old) and the fact that he suffered from a very serious coronary disease.

2.4 On 29 July 2002 the author lodged an application for *amparo* before the Constitutional Court claiming, inter alia, violation of his right to a second hearing, as he had been convicted for the first time by the appeal court that reviewed the judgement handed down at first instance. The

author considers that it is not necessary to exhaust this remedy, which was pending at the time the author submitted his complaint to the Committee, given the settled jurisprudence of the Constitutional Court, which denies the right to appeal against conviction when it is handed down for the first time by the Supreme Court.

The complaint

3.1 The author alleges a violation by the State party of article 14, paragraph 5, of the Covenant, on the grounds of failure to respect his right to a review by a higher tribunal of his conviction, which was first handed down at second instance by the Supreme Court. He states that Spain did not enter any reservations to article 14, paragraph 5, of the Covenant to exclude its application to cases of convictions handed down for the first time by an appeal court following acquittal at first instance. He adds that Spanish law provides for situations in which judgements handed down by a division of the Supreme Court are examined by a panel of judges belonging to the Court itself. He refers to the Committee's decisions on communications Nos. 986/2001 and 1007/2001,[1] in which it found that the review by the Supreme Court had been incomplete.

3.2 On the exhaustion of domestic remedies, the author considers that the application for *amparo* before the Constitutional Court has no prospect of success, owing to the said court's settled jurisprudence that it does not recognize the right to a second hearing in cases where a person was convicted by the appeal court following acquittal by the court of first instance.

State party's observations on admissibility and the merits

4.1 In a note dated 27 June 2005, the State party alleged that the communication was inadmissible on the grounds that the author had not included the Constitutional Court judgement in his application for *amparo* and had not shown that he had exhausted domestic remedies or raised the complaint now before the Committee in his application for *amparo* before the Constitutional Court.

4.2 In a note dated 1 February 2006, the State party indicated that in its judgement of 19 April 2004 the Constitutional Court had rejected the application for *amparo* lodged by the author. In the view of the Constitutional Court, the fact that some States parties had introduced reservations to article 14, paragraph 5, of the Covenant was not a decisive factor in the interpretation of that provision, since no objections to those reservations had been raised by other States parties, and they had not been called into question by the Human Rights Committee. According to the State party this provision does not require a re-examination of the facts by a higher court when a person has been acquitted at first instance, nor does it prohibit re-examination; however, the review may result in a conviction. According to the State party, the "reservations" entered by certain States parties to article 14, paragraph 5, of the Covenant are interpretative declarations aimed at retaining the possibility that the review might result in a conviction at the appeal stage; the aim is not to exclude the application of the provision but to clarify what the Covenant means in the first place. It is inconceivable that States which have signed Protocol 7 to the European Convention on Human Rights should retain a practice - conviction for the first time at the review stage - that was directly prohibited by the Covenant. These States do not interpret article 14, paragraph 5, of the Covenant in the same way as the author. The State party refers to the individual opinion of one of the Committee's members in communication No. 1095/2002, holding that the Committee should take into account

the practice of States parties to Protocol 7 to the European Convention on Human Rights, in the sense that it is inconceivable that those States parties, in ratifying the Protocol, intended to act in a manner at variance with their obligations under article 14, paragraph 5, of the Covenant.[2]

4.3 The State party also maintains that article 14, paragraph 5, of the Covenant cannot be interpreted as excluding appeal by the prosecution. Either the right of appeal by the prosecution, and thus the possibility of securing a conviction by the higher court, is recognized; or it is denied, thus preventing the prosecution from challenging the sentence; or an indefinite and interminable series of appeals is set in motion. The purpose of the right referred to in article 14, paragraph 5, is to protect the right to a defence; in the author's situation his right to a defence was not breached, since his claims were considered and ruled upon by two separate judicial bodies.

4.4 The State party asserts that the author's right to a defence was not breached, in line with the purpose of article 14, paragraph 5, since the decision to convict did not introduce new facts or new evidence. If the decision had introduced new facts or new evidence, the right to a defence would have been breached. In this connection, the State party indicates that on 22 March 2004 the author secured the annulment by the Constitutional Court of another conviction, handed down for the first time by the Madrid Provincial High Court, on the basis of a reinterpretation of evidence.

4.5 The State party asserts that it makes full provision for review of conviction by means of appeal, and that this situation has been recognized by the European Court of Human Rights, which in its decision of 30 November 2004 on applications Nos. 74182, 74186 and 74191 of 2001[3] stated, in respect of the cases heard by the Supreme Court at first instance, that the applicants were able to lodge an application for *amparo* before the Constitutional Court against the decision of the criminal division of the Supreme Court, and thus to avail themselves of a remedy before a higher national tribunal.

4.6 According to the State party, the only discrepancy between the acquittal at first instance and the decision to convict handed down by the Supreme Court was the issue of whether the offence was time-barred in the author's situation; this was precisely the issue that was the subject of the application for *amparo* before the Constitutional Court. The court of first instance, the National High Court, found that the facts and the author's responsibility for the offence of aggravated misappropriation were established, but considered that the offence was time-barred. The Supreme Court did not alter the established facts, but found that the offence could not be considered as time-barred since, in the case of offences committed by a company or an artificial person, criminal prosecution of the artificial person affects all those directly related to that person. Interpretation of the issue of prescription was the sole ground of the application for *amparo*, and on this matter the Constitutional Court carried out a full review of the Supreme Court judgement. The State party quotes the paragraphs of the Constitutional Court judgement that relate to review of the issue of prescription and concludes that, even if it were to be understood that a conviction cannot be handed down for the first time in a ruling in cassation, the final review carried out by the Constitutional Court was sufficient and complete in relation to article 14, paragraph 5, of the Covenant.

Author's comments

5.1 The author insists that domestic remedies have been exhausted, since he lodged an application for *amparo* that was rejected by the Constitutional Court. He adds that the Constitutional Court judgement contains an individual opinion in which one of the judges considered that neither the fact that the reservations entered by some States parties to article 14, paragraph 5, of the Covenant were not objected to by other States parties or called into question by the Committee, nor the fact that Protocol 7 to the European Convention on Human Rights makes an exception of cases where the accused has been tried in the first instance by the highest tribunal, was a decisive factor, since Spain had not entered reservations to the Covenant and was not a State party to Protocol 7 to the European Convention on Human Rights.

5.2 The author states that the Committee has already ruled on the incompatibility of conviction for the first time at first instance by an appeal court. He cites in this regard the Committee's Views concerning the communications *Gomaríz v. Spain* and *Terrón v. Spain*.[4]

5.3 The author asserts that it would not be difficult for the State party to recognize the right of appeal against convictions handed down for the first time by the Supreme Court, since its domestic legislation provides for solutions to similar cases, such as judgements on cases tried in sole instance by the administrative division of the Supreme Court, which can be appealed in a special division of the same court.

5.4 In the author's view, the remedy of *amparo* cannot be considered as a suitable remedy for reviewing matters of fact and of law relating to his conviction, as is argued by the State party. According to the Constitutional Court Act, the Court can never review the facts on which the contested sentence is based. Nor can it review the legal elements constituting the offence of which the accused was convicted. The sole aim of an application for *amparo* is to assess whether there has been a breach of the fundamental rights guaranteed by the State party's Constitution.

5.5 The author underlines that the State party has entered no reservation to article 14, paragraph 5, of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 93 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 that the same matter is not being examined by any other procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 On the exhaustion of domestic remedies, the Committee takes note of the State party's claim that domestic remedies have not been exhausted. It notes that on the date of submission of the communication - 14 November 2003 - an *amparo* application before the Constitutional Court was pending. That application was rejected on 19 April 2004. The Committee recalls its jurisprudence that, save in exceptional circumstances, the date used for determining whether remedies may be deemed exhausted is the date of the Committee's consideration of the communication.[5] It also recalls its jurisprudence that it is necessary to exhaust only those remedies that have a reasonable prospect of success; in complaints similar to that of the author, the Committee has considered that the remedy of *amparo* had no prospect of success in relation to the alleged violation of article 14, paragraph 5, of the Covenant.[6] Consequently, the Committee considers that the author has exhausted domestic remedies and that the communication is admissible.

Consideration of the merits

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

7.2 The Committee takes note of the State party's arguments that conviction in cassation is compatible with the Covenant, and that the conviction by the Supreme Court was effectively reviewed by the Constitutional Court by means of the remedy of *amparo*. The Committee recalls its jurisprudence that the absence of any right of review in a higher court of a conviction handed down by an appeal court, where the person was found not guilty by a lower court, is a violation of article 14, paragraph 5, of the Covenant.[7] In the present case, the Supreme Court convicted the author of the offence of misappropriation, considering that prescription did not apply, and set aside the judgement handed down at first instance by the National High Court, which had acquitted him on the grounds that the offence was time-barred. The Committee notes that the Constitutional Court considered the facts of the case in the course of its review of the constitutional issues raised. However, the Committee cannot agree that that consideration meets the standard set by article 14, paragraph 5, for a review of the conviction.

8. The Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy which allows a review of his conviction and sentence by a higher tribunal. The State party has an obligation to take the necessary measures to ensure that similar violations do not occur in future.

10. By becoming a party to the Optional Protocol, Spain recognized the competence of the Committee to determine whether there has been a violation of the Covenant. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to furnish them with an

effective and applicable remedy should it be proved that a violation has occurred. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

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

Notes

[1] Communications Nos. 986/2001, *Semey v. Spain*, Views of 30 July 2003, and 1007/2001, *Sineiro Fernández v. Spain*, Views of 8 July 2003.

[2] Communication No. 1095/2002, *Gomaríz v. Spain*, Views of 22 July 2005, individual opinion of Ms. Wedgwood.

[3] European Court of Human Rights, section IV, *Saiz Oceja v. Spain*, *Hierro Moset v. Spain* and *Planchuelo Herreras Sánchez v. Spain*, complaints Nos. 74,182/01, 74,186/01 and 74,191/01, judgement of 30 November 2004, para. 1.

[4] Communications Nos. 1095/2002, *Gomaríz v. Spain*, Views of 22 July 2005, para. 7.1; and 1073/2002, *Terrón v. Spain*, Views of 5 November 2004, para. 7.4.

[5] Communication No. 1228/2003, *Lemercier and another v. France*, decision of 27 March 2006, para. 6.4.

[6] Communication No. 1325/2004, *Conde v. Spain*, Views of 31 October 2006, para. 6.3.

[7] Communications Nos. 1332/2004, *García and another v. Spain*, Views of 31 October 2006, para. 7.2; and 1325/2004, *Conde v. Spain*, Views of 31 October 2006, para. 7.2.

II. Communication No. 1416/2005, *Al Zery v. Sweden**
(Views adopted on 25 October 2006, Eighty-eighth session)

Submitted by:	Mohammed Alzery (represented by counsel, Ms. Anna Wigenmark)
Alleged victim:	The author
State party:	Sweden
Date of communication:	29 July 2005 (initial submission)
Decision on admissibility:	8 March 2006
Subject matter:	Expulsion on national security grounds, immediately executed following unreviewable executive decision and abusive "security" treatment, of an Egyptian national from Sweden to Egypt with the involvement of foreign agents
Substantive issues:	Torture or cruel, inhuman or degrading treatment or punishment - exposure to a real risk of torture or cruel, inhuman or degrading treatment or punishment and/or manifestly unfair trial in a third State - no respect for due process in process of expulsion of an alien - ineffective domestic remedies against alleged violations - frustration of the right to effective complaint
Procedural issues:	Proper authorization of counsel - examination by another international procedure of investigation or settlement - applicability of State party's procedural reservation - abuse of rights of submission - undue delay in submission of communication - substantiation, for purposes of admissibility
Articles of the Covenant:	2, 7, 13 and 14

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Ms. Elisabeth Palm did not participate in adoption of the Committee's decision.

Pursuant to rule 91 of the Committee's rules of procedure, Committee members Ms. Ruth Wedgwood and Mr. Ahmed Tawfik Khalil also did not participate in the adoption of the Committee's decision.

Articles of the Optional Protocol: 1, 2, 3 and 5 paragraph 2 (a)

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

Meeting on 25 October 2006,

Having concluded its consideration of communication No. 1416/2005, submitted to the Human Rights Committee on behalf of Mr. Mohammed Alzery under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1. The author of the communication, dated 29 July 2005, is Mr. Mohammed Alzery, an Egyptian national born on 23 September 1968. He claims to be victim of violations by Sweden of articles 2; 7; 13 and 14 of the Covenant, and of article 1 of the First Optional Protocol. He is represented by counsel (see, however, paragraphs 4.1 and 5.1 *et seq.*, *infra*).

Interlocutory decisions

2.1 On 24 October 2005, the Committee, through its Special Rapporteur on New Communications, decided to separate consideration of the admissibility and merits of the communication. In order to be in a position appropriately to resolve the admissibility issues raised, counsel was also requested to demonstrate, in the light of the State party's submissions set out in paragraph 4.1, *infra*, that the power of attorney dated 29 January 2004, in conjunction with the power of attorney dated 7 April 2004, continued to subsist and authorize prosecution of the communication before the Committee.

2.2 The Committee, acting through its Special Rapporteur on New Communications, also decided to direct counsel, further to the powers conferred by Rule 102, paragraph 3, of the Committee's Rules of Procedure, to maintain the confidentiality of certain of the State party's submissions, until further decision of the Special Rapporteur, the Committee's Working Group or the plenary Committee.

2.3 On 16 January 2006, the Committee, through the Special Rapporteur on New Communications, in the light of counsel's comments on the State party's submissions (see paragraphs 5.1 *et seq., infra*) and of the material before the Committee related to the author's situation, requested, pursuant to Rule 92 of its Rules of Procedure, that the State party take necessary measures to ensure that the author was not exposed to a foreseeable risk of substantial personal harm as a result of any act of the State party in respect of the author.

Factual background

3.1 The author, a chemistry and physics teacher, received his education at Cairo University. During his studies he was active in an organization involved in Islamist opposition inter alia

distributing flyers, participating in meetings and lectures and read the Koran for the children in his village. The author acknowledges opposition to the government but disputes any contention he supported violence. In 1991, he completed his studies and decided the same year to leave the country, having been harassed and repeatedly arrested by the Egyptian Security Services because of his activities in the organization. At one point, he contends he was seized and tortured (hung up-side-down by the ankles, beaten and "dipped" head first in water). Before being released, he states he was forced to sign an agreement forswearing future involvement in the organization, failing which the next arrest would be "forever".

3.2 The author states that he left Egypt in order to avoid being arrested and tortured. Using his own passport but a false visa, he entered Saudi Arabia where he lived until 1994 when he in turn departed for Syria. In 1999, he felt forced to leave Syria since a number of Egyptian nationals had been extradited back to Egypt. He obtained a false Danish passport and departed for Sweden where he arrived in 4 August 1999. He immediately sought asylum in his own name and admitted to having used a false passport in order to be able to enter the country. The author submitted in support of his claim for asylum that he had been physically assaulted and tortured in Egypt; that he had felt that he was being watched and his home had been searched; that after his departure from Egypt (to Saudi Arabia and then Syria) he had been sought at his parents' home; that he feared being brought before a military court if returned to Egypt on charges of being member of an illegal organization; and that he was afraid that he would be arrested and tortured. He was detained from 4 to 18 August 1999 due to uncertainty as to his identity. Deciding not to prolong detention, the then Immigration Board decided that although there was uncertainty as to the author's identity and he had utilised a false passport which created a risk of absconding, his placement under surveillance would suffice in lieu of detention.

3.3 In order to establish his identity, the author states that he indirectly contacted an Egyptian lawyer who procured a high school report, which was faxed to the authorities in Sweden. In the same facsimile message, the lawyer provided an affidavit to the effect that the author was one of the accused in 1996 proceedings concerning membership in a forbidden organization likely to be handled by a military tribunal. An article in the newspaper al-Sharq al-Awsat described the case and named the author, stating that he had been charged in his absence. The article stated that the organization in question supported a continued armed struggle against the Egyptian government and that members would be tried before a military court, depriving them the right to a fair trial, inter alia as a conviction in a military court could not be appealed. The author denied any ties to the organization, but states that he feared arrest on false accusations if returned to Egypt. He also states that the Swedish Embassy in Cairo could not confirm that there was such a case as the newspaper had alleged or that Mr. Alzery was one of the suspects.

3.4 The Swedish Migration Board considered the author's application for asylum and permanent residence on first instance. On 31 January 2001, a statement was requested from the Swedish Security Police, whose functions include assessment of whether asylum cases are of a nature that consideration must be given to national security before a residence permit is granted. In April 2001, the Security Police commenced an investigation, and interviewed the author in June 2001. During the interview, he stated that he had never been involved with the movement he was accused of being involved in, and that he strongly rejected any violence as a mean to reach any political goal. He however believed that he would be arrested and tortured if returned to Egypt because of these wrongful accusations. The author was allowed to read the transcript of the hearing in September 2001, but was not informed of the conclusions drawn from this interview.

3.5 On 30 October 2001, the Security Police submitted its report, recommending that the application for permanent residence permit be rejected "for security reasons". On 12 November 2001, the Migration Board, while of the view that the author could be considered in need of protection, referred the matter to the Government for a decision pursuant to the Aliens Act, given the security issues involved. Having received the Migration Board's case file, the Aliens Appeals Board, while sharing the Migration Board's view of the merits, also considered that the Government should decide the case.

3.6 On 12 December 2001, a senior official of the Swedish Ministry for Foreign Affairs met with a representative of the Egyptian government. The purpose was to determine whether it would be possible, without violating Sweden's international obligations, including under the Covenant, to order the author's return to Egypt. Having considered the option of obtaining assurances from the Egyptian authorities in respect of his future treatment, the Government had made the assessment that it was both possible and meaningful to inquire whether guarantees could be obtained that the author would be treated in accordance with international law upon his return to Egypt. Without such guarantees, his expulsion to Egypt would not have been an alternative. The state secretary of the Swedish Ministry for Foreign Affairs presented an Aide-Mémoire to the official which read:

> "It is the understanding of the Government of the Kingdom of Sweden that [the author and another individual] will be awarded a fair trial in the Arab Republic of Egypt. It is further the understanding of the Government of the Kingdom of Sweden that these persons will not be subjected to inhuman treatment or punishment of any kind by any authority of the Arab Republic of Egypt and further that they will not be sentenced to death or if such a sentence has been imposed that it will not be executed by any competent authority of the Arab Republic of Egypt. Finally, it is the understanding of the Government of the Kingdom if Sweden that the wife and children of [another individual] will not in anyway be persecuted or harassed by any authority of the Arab Republic of Egypt."

3.7 The Egyptian Government responded in writing: "We herewith assert our full understanding to all items of this memoire, concerning the way of treatment upon repatriate from your government, with full respect to their personal and human rights. This will be done according to what the Egyptian constitution and law stipulates." In oral discussions with representatives from the Egyptian government, the Swedish Government also requested that the Embassy would be allowed to attend the trial. The author states that it remains unclear what other kind of follow-up mechanisms were discussed and decided upon prior to the expulsion. While the Swedish Government had since indicated that there had been discussions about the right to visit the author in prison, this remained unconfirmed.

3.8 On 18 December 2001, the Government decided that the author should not be granted a residence permit in Sweden on security grounds. The Government noted the content of the guarantees that had been issued by a senior representative of the Egyptian government. Although in the light of the circumstances and the author's contentions as to his past conduct, his fear of persecution was considered to be well founded, entitling him protection in Sweden, the Government considered that he could be excluded from refugee status. In its decision, the Government concluded on the basis of intelligence services information that the author was involved, in a leading position and role, in the activities of an organization implicated in terrorist activities, and that he should be refused protection.

3.9 The Government separately assessed whether there was a risk that the author would be persecuted, sentenced to death, tortured or severely ill treated if returned, such circumstances constituting an absolute statutory bar to removal. The Government was of the view in this respect that the assurances procured were sufficient to comply with Sweden's obligations of non-refoulement. The Government ordered the author's immediate expulsion.

3.10 In the afternoon of 18 December 2001, a few hours after the decision to expel was taken, Swedish Security Police detained the author. According to the State party, no force was used in the arrest. He was informed that his application for asylum had been rejected and was then brought to a Stockholm remand prison. At the time of his arrest, the author was on the phone with (then) legal counsel, but the call was cut short. In the detention centre, he allegedly asked permission to call his lawyer but this request was rejected. After a few hours in detention, he was transferred by vehicle to Bromma airport. He was then escorted to the police station at the airport, where he was handed over to some ten foreign agents in civilian clothes and hoods. Later investigations by the Swedish Parliamentary Ombudsman, disclosed that the hooded individuals were United States' and Egyptian security agents.

3.11 The author states that the hooded agents forced him into a small locker room where they exposed him to what was termed a "security search", although Swedish police had already carried out a less intrusive search. The hooded agents slit the author's clothes with a pair of scissors and examined each piece of cloth before placing it in a plastic bag. Another agent checked his hair, mouths and lips, while a third agent took photographs, according to Swedish officers who witnessed the searches. When his clothes were cut off his body, he was handcuffed and chained to his feet. He was then drugged per rectum with some form of tranquilliser and placed in diapers. He was then dressed in overalls and escorted to the plane blindfolded, hooded and barefooted. Two representatives from the Embassy of the United States of America were also present during the apprehension and treatment of the applicant. In an aircraft registered abroad, he was placed on the floor in an awkward and painful position, with chains restricting further movement. The blindfold and hood stayed on throughout the transfer including when he was handed over to Egyptian military security at Cairo airport some five hours later. According to his (then) Swedish counsel, the blindfold remained on until 20 February 2002, and was only removed for a few days in connection with visits by the Swedish Ambassador on 23 January 2002 and an interview with a Swedish journalist in February 2002.

3.12 When the author's (then) counsel met State Secretary Gun-Britt Andersson in January 2002, after the visit by the Ambassador, she assured him that the men had not complained of any ill treatment. In a hearing before the Swedish Standing Committee on the Constitution in April 2002, the (then) Foreign Minister stated that: "I still believe that we can trust the Egyptian authorities. If (it turns out that) they cannot be trusted, we will have to get back to this issue. But everything we have seen so far indicates that we can trust them." In its follow-up report of 6 May 2003 to the Human Rights Committee, the Swedish Government also stated that it: "[i]s the opinion of the Swedish Government that the assurances obtained from the receiving State are satisfactory and irrevocable and that they are and will be respected in their full content. The Government has not received any information which would cast doubt at this conclusion".[1]

3.13 The visit of the Ambassador to the author at the Tora prison was not in private, neither were any of the subsequent visits undertaken during the author's time in that prison. The author advanced complaints about the treatment in the presence of not only the Ambassador but also of

the warden and five other Egyptian men. Egyptian personnel took notes, in the Ambassador's view in order to assess the interpretation from Arabic to English. It was regularly the case, and accepted by the visitors from the Embassy, that prison security personnel or the warden were present and even participated in the discussions with the author. On many occasions, the Swedish representatives asked direct questions of the Egyptian prison personnel present, or they spontaneously commented on the author's statements.

3.14 Shortly after the first meeting, the Ambassador asked for a meeting with the Egyptian Security Services to discuss the allegations of ill-treatment made. The interlocutor rejected the accusations as something to be expected from "terrorists". Swedish authorities accepted this explanation and did not act on it any further. The next visit occurred after the passage of five weeks. In a diplomatic report of 2 February 2002 from the Swedish Ambassador to his Ministry for Foreign Affairs, he informed: "We agreed about the following routines for the visits by the Embassy: Visits shall take place once a month at a time to our own choice. We shall inform [redacted] a few days in advance that we want to conduct the visit so that his office can arrange the technical details. [Redacted] stated in this regard that if the rumours about torture etc. continue we will have to jointly discuss different ways to have such rumours refuted." The letter also disclosed that the United Nations Special Rapporteur on torture had approached the Swedish Government in a letter asking for information about the monitoring system put in place in order to secure the rights of the author and another individual.

3.15 After the January meeting, the author was transferred to another section of the Tora prison controlled by the Egyptian Security Services (rather than General Intelligence). He states that for a further five weeks he was interrogated and this time harshly ill-treated, including electric shocks applied to genitals, nipples and ears. The torture was monitored by doctors who also put ointment on the skin after torture in order not to leave any scars. He was forced to confess to crimes he had not committed, and was questioned about activities such as arranging meetings for the forbidden organization he was active for and opposing "the system". Despite the reprisals, the author continued to attempt to convey information as to the treatment suffered, as detailed in the Ambassador's report following a second visit on 7 March 2002:

> "At the next meeting none of the men spoke out about the torture. They did however give signals and indications that something was not right: I therefore wanted to ask: Had they been tortured or maltreated since my last visit? [Another individual] replied evasively that it would be good if I could come as often as possible. I then asked him to take off his shirt and undershirt and turn around. No signs of maltreatment were visible. [The other individual] then explained that there were no marks on his body. One of the Egyptian officials observed afterwards that [the other individual] was clearly trying to hint by means of his evasive formulations that he had in fact been maltreated, without coming out and saying so directly …. The following can be noted from the other information the two men provided during the conversation: …. They both avoided answering my question concerning their daily routine. In conclusion I asked whether there was anything else they wished to say to me. The answer was a hope that I would come back soon, along with the comment that "it's hard being in prison. In summary, nothing emerged to change my judgement from my first visit that [the author and the other individual] are doing reasonably well under the circumstances. There was nothing to suggest torture or ill treatment."

3.16 The author states that, for an extended period, he and the other individual were not allowed to meet other prisoners and were kept in isolation in cells continually deprived of light. On 20 February 2002, he was moved to another correction centre where he was kept in small isolation cell measuring 1.5 by 1.5 metres until the second week of December 2002. On three or four occasions in 2002, he was called to hearings before a prosecutor for decision on his continued detention. At the first hearing in March 2002, the author complained of the torture and ill-treatment that he had suffered. He was not provided with hearing records. Although represented by a lawyer at the time, the latter did not react to his statement, which left the author to speak on his own behalf at subsequent hearings. According to Embassy records, between October 2002 and May/June 2003, the author met the prosecutor every fourteen days and thereafter every 45 days. The decision to keep him in detention was always upheld, the prosecutor relying on emergency laws but without formally charging the author.

3.17 On 16 June 2002, the author's (then) Swedish counsel communicated to the European Court of Human Rights that he intended to file a complete application on the author's behalf within a reasonable time. On 9 September 2002, the Swedish Ambassador, during a visit to the author, requested the prison authorities to allow the author to sign a power of attorney sent to the Embassy by the author's then Swedish counsel, for purposes of an application to the European Court of Human Rights. On 26 September 2002, the Ambassador informed counsel by fax that as the author was detained, he did not have a right to sign the power of attorney. The Egyptian Embassy, for its part, did however not answer a request by counsel for assistance. In late 2002, the author was partially informed of the reason for his detention. He was alleged to be one of some 250 members of a forbidden organization, with respect to which criminal proceedings had been instituted in 1993. According to the author, many co-accused had been in detention for years without trial, a number of them had been sentenced to death and executed and others had not been freed even after an acquittal in court. He feared he would suffer similar fate. From December 2002 until October 2003, the Ministry of Interior ordered his detention.

3.18 On 27 October 2003, he was released from detention without charge. According to the Swedish Embassy, an Egyptian court directed release, but the author was not present and cannot corroborate the matter. Since his release, the author's physical health has improved, he has completed complementary university studies in pedagogy that he commenced in prison and he has married. Deciding to go into business, he built a small breeding farm.

3.19 In early 2004, the author's (then) Swedish counsel provided the Swedish Foreign Ministry with allegations that the author had provided him concerning his subjection to, inter alia, torture in Egypt both before and after the Embassy's first visit on 23 January 2002. There had however been no incidents of torture or other cruel treatment after 20 February 2002. Moreover, during a visit by Embassy staff in early 2004, the author made similar allegations. According to the Embassy's report from that visit, the incidents of torture had occurred after the Embassy's first visit to him in detention. He had not provided any information regarding the treatment prior to the Embassy's first prison visit. On 19 March 2004, the author's (then) Swedish counsel lodged an application with the European Court of Human Rights, arguing that the author's expulsion had resulted in his being tortured and ill-treated and faced the risk of being sentenced to death or killed during the torture. He further argued that he had not had access to court or an effective remedy with respect to the allegations of terrorist activities against him, and that his expulsion order had not been examined by a court. On 26 October 2004, a Chamber of the European Court, by a majority, declared the case inadmissible on the basis that it had been introduced out of

time.[2] In the absence of a satisfactory explanation by counsel for the delay in filing, the Court took 19 March 2004 as the date of introduction of the complaint and declared it inadmissible accordingly.

3.20 With respect to post-expulsion proceedings in Sweden, the Ministry of Justice, on 12 April 2002, conducted a judicial appraisal of the way in which the Security Police had dealt with the enforcement and accepted, in principle, the Security Police's procedures. In a complaint on 25 May 2004, an investigation was filed with the Stockholm district prosecutor as to whether representatives of the Swedish Government had committed a criminal offence in connection with the Government's decision on 18 December 2001 to expel inter alia Mr. Alzery, and whether any offence had been committed when the decision was enforced. As far as the complaint concerned Ministerial representatives of the Government, it was handed over to the Parliament's Standing Committee on the Constitution, which has jurisdiction to lodge criminal charges, such as serious neglect of Ministerial duties, before the Supreme Court. On 17 February 2005, the Committee decided that the portion of the complaint that had been referred to it by the Stockholm district prosecutor required no action.

3.21 As to the remaining issues, the Stockholm district prosecutor decided on 18 June 2004 not to initiate a preliminary investigation regarding whether a criminal offence had been committed in connection with the enforcement of the expulsion decision. The reasons adduced for the decision were that there was no ground for assuming that a criminal offence under public prosecution had been committed by a member of the Swedish police in connection with the enforcement. The district prosecutor referred the case to the Prosecutor-Director at the Stockholm Public Prosecution Authority for a decision on whether to initiate a preliminary investigation regarding events taking place on an aircraft registered abroad.

3.22 On 3 November 2004, the Prosecutor-Director's declined to take further action. He noted that the Security Police had been tasked with the enforcement of the expulsion decision and carried the responsibility for it. It was therefore up to the Security Police to ensure that the security measures that were taken, either by the Security Police or those who assisted it, were compatible with the applicable Swedish legal provisions. The question was therefore whether representatives of the Security Police had failed in their exercise of public authority, which effectively amounted to a review of the district prosecutor's decision. The Prosecutor-Director's referred to the anti-terrorism mandate of the Security Police, considering that to be able to perform its task, other methods than those used in regular police service were sometimes required. The expulsion had been decided upon by the Government and the persons concerned had been deemed by it to present a risk to the security of the realm. Considering that, particularly at the time in question, there were strict requirements in respect of security and protective measures, what had occurred could not be considered to be in breach of the general principles applying to police interventions. The Prosecutor-Director therefore shared the opinion of the district prosecutor that there were no grounds for assuming that a criminal offence under public prosecution had been committed by Swedish police personnel. The decision was deemed to include measures taken by foreign personnel in view of the fact that such personnel had not been engaged in any independent activities.

3.23 With respect to acts occurring on a foreign registered aircraft, the Prosecutor-Director considered that, according to the Act on Air Traffic, a pilot on an aircraft registered abroad was obliged to supervise the capacity of the aircraft to operate also in Swedish territory. The

supervision entailed a right to take measures motivated by security concerns. There was no reason to assume that a criminal offence under public prosecution had been committed by the pilot of the foreign aircraft.

3.24 In an effort to clarify the facts transpiring after the author's return, the State party advises that on 18 May 2004, it raised allegations of ill-treatment with the Egyptian authorities at the highest level. An envoy voiced Swedish concerns as to the alleged ill-treatment suffered in the early weeks following return and requesting an inquiry including international medical expertise. The Egyptian Government dismissed the allegations but agreed to undertake an investigation. In June 2004, the then Swedish Minister for Foreign Affairs wrote to the Egyptian authorities, suggesting that the investigation be carried out with or by an independent authority, involving the judiciary and medical expertise and preferably international expertise in the area of torture investigations. She also offered the assistance of Swedish expertise. In July 2004, the Egyptian authorities rejected the allegations of ill-treatment and referred to Egyptian investigations. In December 2004, the issue was discussed of a possible international inquiry under the auspices of the United Nations High Commissioner for Human Rights. On 11 May 2005 the Swedish Foreign Minister addressed a letter to the High Commissioner, describing inter alia unsuccessful efforts that had been undertaken on the Swedish part to bring about an investigation in Egypt for the purpose of independently establishing the facts in view of the allegations of torture and ill-treatment that followed on the expulsion of the two Egyptian nationals to that country. A request was directed to the High Commissioner that her Office carry out an investigation into the matter as a basis for an assessment of the effectiveness and implementation of the diplomatic assurances provided by Egypt. The Minister declared that the Government was prepared to lend its full support to the investigation and to provide financial resources, if need be. The High Commissioner responded by letter of 26 May 2005. Referring to the decision of the Committee against Torture in the case of *Agiza v. Sweden*,[3] the High Commissioner stated inter alia that she found no grounds on which her Office could possibly supplement that Committee's assessment and findings in any meaningful way. In conclusion, the High Commissioner stated that she was not prepared to undertake the proposed investigation. The State party details a number of further Ministerial and senior official contacts with Egyptian counterparts in ongoing attempts to procure independent, impartial investigation of the facts.

3.25 On 21 March 2005, the Parliamentary Ombudsman reported on his *proprio motu* investigation into pre-expulsion aspects of the author's case, revealing serious shortcomings in the way the case was handled by the Security Police, in respect of whom the Ombudsman expressed extremely grave criticism.[4] The author himself was not a party to this investigation, but his former Swedish counsel was interviewed by the Ombudsman. The mandate of the Ombudsman was to investigate if the Swedish Security Police had committed any crime or in any other way acted unlawfully during the execution of the expulsion order. Early in the proceedings the Ombudsman elected not to conduct a criminal investigation. The Ombudsman does not give reasons for this decision but the State party suggests that the reasons seem related to the fact that there was no senior official of the Security Police who had been assigned command of the Bromma operation, that the officials present had relatively subordinate ranks and that none of them felt that they bore the ultimate responsibility for the operation and that they might have felt under pressure given the urgency accorded by the Cabinet to prompt execution the day the decision had been taken. Counsel disagrees, citing media comments by the Ombudsman that the earlier prosecutorial decision not to initiate criminal proceedings had been an important factor in his own decision. Whatever the reason, due to the election not to conduct a

criminal investigation, the Ombudsman was able to procure compulsory testimony for informational purposes from police officers, whose testimony could otherwise have been withheld on grounds of the right to be free from criminal self-incrimination.

3.26 In his conclusions, the Ombudsman criticized the failure of the Security Police to maintain control over the situation at Bromma airport, allowing foreign agents free hand in the exercise of public authority on Swedish soil. Such relinquishment of public authority was unlawful. The expulsion was carried out in an inhuman and unacceptable manner. The treatment was in some respects unlawful and overall had to be characterized as degrading. It was questionable whether there was also a breach of article 3 of the European Convention. In any event, the Security Police should have intervened to prevent the inhuman treatment. In the Ombudsman's view, the way in which the Security Police had dealt with the case was characterised throughout by passivity - from the acceptance of the offer of the use of an American aircraft until completion of the enforcement. One example cited was the failure of the Security Police to ask for information about what the security check demanded by the Americans would involve. The Ombudsman also criticised inadequate organization, finding that none of the officers present at Bromma airport had been assigned command of the operation. The officers from the Security Police who were there had relatively subordinate ranks. They acted with remarkable deference to the American officials. Regarding the foreign agents, the Ombudsman considered that he lacked legal competence for initiating prosecution.

3.27 On 4 April 2005, the Swedish Prosecutor-General decided not to resume the preliminary investigation, following a complaint from the Helsinki Committee for Human Rights (Swedish Section). With reference inter alia to the powers of the Parliamentary Ombudsmen to prosecute, the obligation of courts, administrative authorities and state/municipal officials to provide the Ombudsmen with any requested information and the powers of the Prosecutor-General to inter alia review the decisions of a subordinate prosecutor, the conclusion was reached that it was not possible to review the Parliamentary Ombudsman's decision to refrain from using his powers to prosecute. It could also be seriously questioned whether the Prosecutor-General could make a new assessment of the issue of whether to start or resume a preliminary criminal investigation when the matter had already been determined by the Parliamentary Ombudsman. This was the situation, particularly if no new circumstances were at hand. The Prosecutor-General went on to state that, in any event, several of the persons that would have to give statements within the framework of a resumed preliminary criminal investigation had already been interviewed by the Parliamentary Ombudsman and submitted information under the obligation to state the truth provided by Swedish law for such proceedings. Therefore, the option to conduct a preliminary investigation under the Code of Judicial Procedure was no longer available.

3.28 On 21 September 2005, Parliament's Standing Committee on the Constitution reported on an investigation that had been initiated in May 2004 at the request of five members of Parliament that the Committee examine the Government's handling of the matter that lead to, inter alia, Mr. Alzery's expulsion to Egypt. With respect to the assurances procured, the Committee was of the view that a more detailed plan for a monitoring mechanism had not been agreed with the Egyptian authorities and appears not to have existed at all prior to the decision to expel. This shortcoming was reflected in the actual monitoring of the guarantee, which was not consistent with the recommendations issued later on by the United Nations Special Rapporteur on issues relating to torture or the practice established by the Red Cross. A major flaw was naturally that the first visit to the men was not carried out earlier. However, the shortcomings in the actual monitoring were, in the Committee's opinion, mainly a consequence of the lack of planning in

advance. The prerequisites for meaningful monitoring would have been better in place, if appropriate monitoring had been planned and agreed upon with the Egyptian authorities before the men were expelled. The difficulties that the monitoring would entail should reasonably have been anticipated prior to the decision to rely on the guarantee and, as a consequence, to expel the men to their home country. The Committee noted that an essential element for the assessment that the guarantee should be relied on, the Government had stressed its confidence in Egypt's intention to demonstrate that it is a serious participant in the international community by living up to the obligations it had assumed, including under Security Council Resolution 1373 adopted weeks prior to the expulsion. The Committee further noted that it lacked the opportunity to assess whether the men were subjected to torture or other treatment in breach of the conventions. However, a great deal implied that such treatment took place. It concluded that in any event the assurances should not have been accepted.

3.29 With respect to the immediate execution of the expulsion order, the Committee noted that while such a process had been provided by law, it had questioned whether fears that the men would request interim measures before an international body before there was time to enforce the expulsion decisions influenced the decision-making. Such concerns could naturally not be allowed to come into play. The Committee noted that the decisions had been notified to the expellees through the enforcement authority, while counsels had been notified by registered letters. This procedure was considered satisfactory provided that decisions were provided to counsel in a more rapid manner.

3.30 With respect to events at Bromma airport, the competence of the Committee did not extend to investigation of the actions of the Security Police; rather, the Committee focused on whether the (then) Foreign Minister, Anna Lindh, exerted undue influence on the Security Police at the time of the expulsion by indicating a preference for a certain course of action. The Committee noted that the Foreign Minister, at the presentation of the matter at the Foreign Ministry on 17 December 2001, was informed of the alternative that entailed that an American aircraft was used in the enforcement, and the Security Police, when deciding on the choice of transport, also took into account what they had come to believe was the Foreign Minister's position in that regard. It had not been possible to establish with complete clarity whether the Foreign Minister was provided with the said information during the presentation, or whether the information was available at that time in other parts of the Government Offices. The Security Police had kept a journal of its meetings with the Ministries. No corresponding documentation existed within the Government Offices.

3.31 According to the Committee, it was not satisfactory that the procedures for preparing government matters left room for considerable uncertainty as to what happened. Since this was the case, subsequent scrutiny was made considerably more difficult. However, it did not seem in dispute that an opportunity of foreign assistance, if with nothing other than so-called slot-times, had been mentioned during the presentation to the Foreign Minister, which raised an issue of the administrative authorities' independence. Under Swedish law, no authority (including Parliament) may determine how an administrative body shall decide in a particular case in a matter concerning the exercise of public authority against an individual. At the same time, Swedish law requires that the head of the Foreign Ministry shall be kept informed when a question of importance for the relations to another state or to an intergovernmental organization is raised at another state authority.

3.32 Concerning the Government's decision that expulsions be enforced immediately, the Committee noted that it had been questioned if the Foreign Minister, by voicing during the presentation prior to the Cabinet meeting her preference for enforcement on the same day that the decisions were issued, encroached on the rule of independence of administrative bodies. In the Committee's view, this was essentially a question of what the Foreign Minister heard and said, what she meant and how that should be perceived. Given that due to her death, her opinion could no longer be obtained, the Committee therefore lacked the opportunity to determine the issue. It emphasized that the Security Police bore responsibility for how the enforcement came to be conducted.

3.33 As to exhaustion of domestic remedies, the author notes that there was no possibility in law of appealing or reviewing the expulsion decision of 18 December 2001. As to the claim submitted to the European Court, the author argues, not least given the general importance of the case, that the procedural delays by his lawyer and the inadmissibility decision by the European Court should not be a reason for the Human Rights Committee to reject the case. The result would be that no review of the case by an international human rights body would be possible. In any event, it is submitted that there are strong reasons justifying the delay in submission of the claim. Upon return to Egypt, the author was at once imprisoned, interrogated and tortured, first by Egyptian general intelligence and later by state security services. When the European Court claim was first filed in 2002, then counsel was not only of the view that he required a written power of attorney due to the language on the application form, but also he wanted to be certain that the author approved of such a course. There were serious security issues to consider, as an international complaint implicating Egypt could expose Mr. Alzery to further ill treatment and torture. Counsel had neither access to the author nor wished to enmesh the latter's family, of simple background, in a vulnerable and potentially dangerous situation. After meeting with the author subsequent to his release, then counsel sought to procure permission of the author to return to Sweden, given that no charges were filed, as there would be little possibility for him of an ordinary life in Egypt. Unsuccessful negotiations to this end prolonged the delay in filings to the European Court.

The complaint

4.1 The author claims to be victims of violations of articles 2, 7, 13 and 14 of the Covenant, and of article 1 of the Optional Protocol.

4.2 The author's principal claims, under article 7 of the Covenant, are two-fold. Firstly, his expulsion breached article 7 on the basis that Sweden was or should have been aware that he faced a real risk of torture in the circumstances, notwithstanding the assurances procured. Second, he argues that the treatment he was subjected to within Swedish jurisdiction violated this article and that the ineffectiveness of the subsequent investigations failed to comply with the procedural obligations imposed by that article.

Breach of the prohibition of refoulement (article 7 of the Covenant)

4.3 The author argues that, in the circumstances of the case, Sweden was in breach of its obligation under article 7 not to expose an individual to a real risk of torture at the hands of third parties. He observes that the existence of such a real risk is made out at the time of expulsion, and does not require proof of actual torture having subsequently occurred although information as to subsequent events is relevant to the assessment of initial risk. In his case, he argues that the

evidence as to subsequent treatment was strongly probative of the initial existence of a real risk of torture. He argues that the assurances procured, coupled with monitoring mechanisms insufficient to protect him against, or even detect, ill treatment, were insufficient protection against the risk of harm. He contends that the prohibition on refoulement is absolute, and not subject to balancing against countervailing considerations of national security or the kind of conduct an individual is suspected of. For these conclusions, the author refers to the judgement of the European Court of Human Rights in *Chahal v. United Kingdom*[5] and the Decision of the United Nations Committee against Torture in *Agiza v. Sweden*.[6]

4.4 As to the actual or constructive knowledge of Sweden at the time of removal, the author argues that Sweden was well aware of the human rights situation in Egypt. In its annual reports thereon, the Swedish Government expresses concerns as to torture of suspected terrorists in particular by the security police. It also criticizes the use of military tribunals for civilians. Other sources credibly contend that the police and security service practice torture of detainees with virtually complete immunity and that suspected terrorists run a particularly high risk of being subjected to torture or cruel or inhuman treatment or punishment. The author refers to the concluding observations on related matters in Egypt by the Human Rights Committee and the Committee against Torture covering an extended period of years,[7] as well as critical reports from national human rights organizations and international sources. The Government was also aware that the Egyptian President had declared, and continually renewed, a state of emergency dating from 1981, and that numerous laws protecting human rights were set aside, inter alia permitting trial of civilians by military tribunal. The Government was also aware that Egypt had not accepted the individual complaint jurisdiction of any treaty body, or the invitation of any international monitoring bodies, including the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

4.5 In his January 2001 report to the Commission on Human Rights,[8] the Special Rapporteur cited thirty-two cases of death in custody, apparently as a result of torture, occurring between 1997 and 1999. Confessions extracted under torture were commonly used as evidence in political trials and form the basis for convictions. Victims of torture had no effective remedy and little opportunity for redress: most applied for and received financial compensation from civil courts, in effect an admission on the part of the authorities that torture has taken place. But very few victims could convince the authorities to institute criminal proceedings against their torturers: in the handful of such cases reaching the courts in recent years almost all resulted in acquittals or derisory punishments. Finally, according to the Special Rapporteur, while reports of torture of political detainees had decreased recently, torture of ordinary criminal offenders in police stations remained rife.

4.6 The author argues that Sweden was aware not only of a general risk of torture, ill treatment and unfair trial, but of a personal risk in the author's case. The case material is clear that the Swedish Government was aware that it would be in breach of its non-refoulement obligation if it expelled the author without more - it was on precisely this basis that the Swedish Government decided to engage in negotiations with representatives from the Egyptian government, and, after having received the assurances in question from Egypt, decided to reject the request for asylum and to execute the expulsion order immediately. According to the author, the assurances procured were not sufficiently effective, even to theoretically protect him from torture or ill treatment. In addition to the Government's knowledge of the human rights situation in Egypt, the author was being expelled for being a security risk and under accusation of being responsible for terrorist acts in Egypt, exposing him to clear risk of torture and incommunicado detention. He

argues that Sweden was also aware of Egypt's rejection to other States' attempts to procure analogous assurances and establish effective follow-up mechanisms in expulsion cases according to the principles laid out in the *Chahal* decision.[9]

4.7 In addition, the decision to expel the author was taken not only after negotiations with the Egyptian authorities on the content of the assurances, but also after having sought the opinion of the British, United States and German Embassies in Cairo. Nor did Sweden seek to propose any amendments to the draft assurances proposed by the Egyptian side after the December meeting. Sweden ought also to have been aware of the fact that a number of other persons of Egyptian origin had been returned to and held in Egypt. In October 2001, for example, two inhabitants in Bosnia with dual Bosnian and Egyptian citizenship were deprived of their citizenship and deported from Bosnia to Egypt where they were sentenced to long imprisonments and allegedly subjected to torture. The author argues that it is thus unclear what real value the Government could in fact afford the assurances since they did not afford him any special, positive, treatment, as compared with other suspected terrorists. Rather, he was to be treated like any one else suspected of being threat to national security. All laws in force, including state security laws, were thus fully applicable to Mr. Alzery.

4.8 The author contends that the assurances were deficient in a number of specific respects. They did not provide for legal counsel to be appointed immediately upon return, for counsel to be present during interrogations, for sufficiently frequent private and unmonitored independent meetings or for access to independent medical examinations. By contrast, upon return to Egypt, the author was handed over to the Egyptian General Intelligence with five weeks elapsing prior to the first visit. The Ambassadorial visit was then agreed with the prison commandant in advance when the visits should take place. Visits were less frequent during the summer vacation months and Christmas when there were intervals of two months. None of the visits in prison took place in private. Rather, the author was taken to the commandant's office, with up to ten officials present. On numerous occasions, officials were invited to participate in the conversation with the men, on other occasions they spontaneously commented on what had been said. The Embassy did not insist that the author be examined by a physician, much less one with specific experience of torture victims. Nor did it ask for permission to bring a doctor to the prison to perform any medical examination. The author was forced to speak with the Embassy staff through an interpreter, despite speaking Swedish almost fluently. Nor were Embassy staff allowed to visit him in the cell where he was being held. The author also claims that it was also clear from the Embassy reports that Embassy officials lacked experience and knowledge of how a torture victim behaves and speaks, what questions should be asked, overall of how to get as true a picture as possible. The author contends that it was careless of the Swedish authorities to approach the Egyptian authorities for an assessment of the veracity of the statements claiming ill-treatment. The Embassy visits aside, the author was only visited once by an attorney - in relation to his first appearance before a prosecutor.

4.9 After the first Ambassadorial visit when the author and the second detainee had complained of the treatment to the Swedish ambassador, the author contends that they were subjected to cruel and inhuman treatment as soon as the ambassador had left the prison. In consequence, they did not further raise the issue of ill-treatment until March 2003. During the winter of 2002-2003, the Swedish Ministry for Foreign Affairs appointed a special envoy, with responsibility for follow-up concerning the cases. When visiting the author and the second detainee in March 2003, ill-treatment allegations were renewed by the second detainee. Speaking

thereafter, separately, to the author, the latter did not make any statement about the treatment but according to the Embassy report only asked it he had to answer the questions posed to him and that he already had said all the wanted to say.

4.10 The author thus argues that there were no real follow-up procedures in place at the time of the expulsion, and no adequate mechanisms were established afterwards that could protect him from ill-treatment. In the author's view, Sweden in fact did not even seek the opportunity to effectively monitor the agreement. The only thing that was agreed upon between Sweden and Egypt was the right for Swedish representatives to be present in any new trials that might take place. There is nothing in the agreements describing the right to visits in prison, or the regularity of such visits, nor how these visits were to take place or what would happen, what mechanisms would be put in place, if there were any signs of a violation of the agreement. In the author's view, the State party lacked both the competence and desire to appropriately monitor the author's situation, despite the concerns expressed from a variety of national and international quarters. Instead of remedying the situation, the Swedish Government contended that the monitoring was functioning and that there was nothing to suggest that Egypt had breached the agreement.

4.11 The author suggests that the reason for the lack of follow-up mechanism was that Sweden believed it could rely merely on the good faith of the Egyptian government to avoid being criticised for violating its international obligations. In the hearing before the Committee on the Constitution, the Swedish State Secretary expressly stated that Sweden, after the expulsion, could not interfere in what Sweden believed was the internal concern of a state as the author was an Egyptian national, detained in Egypt. The Ambassador had earlier explained that the reason he did not ask to visit the men until five weeks after they returned to Egypt was that if he did, it would be seen as a sign of lack of confidence in Egypt respecting the agreement. The author argues that since Sweden had entered an agreement with Egypt, it not only felt obliged to trust that it would be respected, but also acted in a manner so that the weaknesses in agreement would not be exposed. The behaviour shows the inherent deficiencies in diplomatic agreements regarding the protection of the human rights of the individual. Diplomacy cannot effectively protect against illegal ill treatment of an individual. And as mentioned above, since both states risk being accused of having violated the absolute prohibition against torture, there is no incitement to reveal indications or information about ill-treatment. In May 2004, when Sweden unsuccessfully sought an investigation, the Egyptian authorities were unsympathetic to the suggestion that the claims of mistreatment be investigated by any foreign independent person or body. The Swedish authorities, while expressing their disappointment, were unable to further act. The author notes in this regard that the assurance is of no legal value in Egypt and cannot be enforced or utilised as a legal document by him.

4.12 The author questions whether the Swedish Government acted in good faith in expelling him. In addition to the immediate execution of the expulsion order, which denied recourse to international remedies, shortly after the terrorist attacks of 11 September 2001, the author notes that the Swedish Government had little hesitation in permitting a covert Central Intelligence Agency (CIA) operation to occur on Swedish soil. The Swedish security police was informed that there would be a security check of the men, but they did not ask what this would entail. They were also informed, and accepted, that the CIA agents would be masked and hooded. There were no senior Swedish officers present at Bromma airport, and those who were assigned to carry out the expulsion, relinquished authority and control to the foreign agents involved. The author adopts the view of the Parliamentary Ombudsman that the treatment already suffered on Swedish soil could have been anticipated because of the then global situation. He also emphasizes that the

operation he was subjected to was a joint Egyptian and United States' operation, with United States' and Egyptian agents both at Bromma airport and on the aircraft. The author suggests that the risk of ill treatment was thus already wholly clear and realized on Swedish territory, and accordingly the need for prompt and effective follow-up upon arrival was vital.

Treatment suffered at Bromma airport (article 7 of the Covenant)

4.13 The author alleges that the treatment he suffered at Bromma airport, as described in paragraph 3.11, *supra,* was imputable to Sweden by the latter's failure to prevent it though within its power, and further violated his rights under article 7 of the Covenant. Moreover, the deficient and ineffective investigation of the treatment constituted a procedural violation of the same article. As to whether the treatment was imputable to Sweden, he notes that Swedish authorities allowed the treatment to take place, without seeking to prevent or stop it.

Inadequate investigation of alleged violations of torture or other cruel, inhuman or degrading treatment or punishment (article 7 of the Covenant)

4.14 As to the investigation, the author argues that the treatment was not investigated promptly and independently, and allocated no individual responsibility, even at the level of a reprimand, upon conclusion. The unlawful acts by the foreign agents had not been subjected to any criminal investigation, despite complaints to the appropriate authorities. For his part, the Ombudsman's mandate did not extend to investigation or prosecution of foreigners' illegal acts on Swedish territory. The author notes that the criminal complaint lodged in 2004 covered all possible criminal acts taking place at Bromma airport, including by foreign agents and, by way of command, the Swedish government. The prosecutor however promptly terminated the investigation. The previous investigation by the Ministry of Justice in April 2002 had also drawn the conclusion that nothing criminal had taken place at Bromma airport. Despite the investigation and findings presented by the Ombudsman in March 2005, the prosecuting authorities stood by their previous legal assessment and refused to re-open the investigation, arguing that it could not overrule the decision by the Ombudsman not to press charges against any Swedish law enforcement personnel. The main reason however for the Ombudsman not prosecuting was that because the prosecutor previously had decided not to press charges, he had conducted the investigations as an open investigation and not a criminal investigation, and had thus not informed the police officers who gave statements that what they said could be used against them in a court of law. Further, as the Ombudsman stated, he considered the Security police to have learned from the experience and thus in the course of the investigation not to change his investigation from a purely informative one to a criminal proceeding.

4.15 The author observes that the Ombudsman's investigation did not examine the issue of the command responsibilities of senior officials. Nor did the Ombudsman hear any foreign agents, as this was not his mandate. In the author's view, the Ombudsman's criticisms of illegality - specifically of foreign agents acting on Swedish soil without the proper consent and the treatment amounting at least to degrading treatment under international law - should have been sufficient for the Prosecutor-General to reopen the criminal investigation.

Exposure to risk of a manifestly unfair trial (article 14 of the Covenant)

4.16 The author argues that his expulsion further violated article 14 of the Covenant, on the basis that in the circumstances of the case he was exposed to a risk of an unfair trial. The author recalls that he had left Egypt in 1991 on account of the persecution of individuals involved with organizations involved in Islamist opposition and the treatment he had already been subjected to. He feared that he would be detained under the emergency laws in place and interrogated under torture as many others in such situation had been. The author argues that the Swedish Government sought to exclude him from refugee protection on the grounds of his alleged association with Islamist groups in Egypt, although the Government could not prove such a connection.

4.17 The author contends that, at the time of his expulsion, the Swedish Government was unaware of his legal status in Egypt, believing for reasons unknown to the author that he had been convicted and sentenced to seven years in prison. Only in March 2003 did the Embassy report to the Government that it believed to have received information as to the author's correct status, specifically, that dating from 1993 he was suspected along with 250 others of being a member in a forbidden organization that engages in terrorist activities. He recalls that he was himself not informed about the case until late 2002, and was never prosecuted or tried for any criminal or security threatening activities.

4.18 The author argues that despite these facts, the Swedish Government has both publicly and in closed hearings consistently maintained that the author did in fact have terrorist links and responsibility for serious crimes, also raising issues under the presumption of innocence. Before the Parliamentary Committee on the Constitution, it was suggested that the author held a leading position in a terrorist organization in Egypt and was involved in serious crimes. He suggests that he was caught up in a general anti-terror hysteria, noting that has never seen the full security police evaluation of his case. The author argues that his release without charge, despite interrogation and torture upon his return to Egypt, confirms his innocence of the terrorist association claimed.

4.19 The author notes that in its negotiations with Egypt, the Swedish Government never demanded that the author should be tried in a civilian court, only that he would be given a fair trial. He suggests this resulted from previous experiences where Egypt had resisted attempts of other States seeking to procure assurances of a civilian court trial.[10] The mechanics of how a fair trial could be secured were not discussed, with Sweden simply requesting to attend any new trial. The author notes that the person expelled at the same time as he had been and covered by the same assurance subsequently received a trial in a military court in patently unfair circumstances, which Sweden was not permitted to monitor. Nor was any Swedish representative present at the hearings before the prosecutor regarding the author. In the author's view, Sweden was well aware that there was no other legal avenue for him to have his case heard than before a military tribunal or an emergency court, with an attendant real risk of unfair trial. Such trials, routinely utilised since 1992 in terrorism-related cases, are sometimes held en masse and routinely fail to meet international fair trial standards even where the death penalty resulted. Evidence, including confessions, procured under duress, threats and torture is permitted, while individuals detained under emergency laws who do not receive a trial are only released after having confessed or given the requested information, often of names of other individuals, who are in turn arrested and interrogated. The author argues that a 2005 statement by the Swedish Minister for Foreign Affairs to the effect that the person expelled with Mr. Alzery should be given a trial in a civilian

court as the military proceedings had not been fair shows that Sweden had originally accepted that military tribunals in Egypt could be fair and that the author would be tried before such a court.

4.20 The author acknowledges that the Committee's jurisprudence to date has not extended protection against refoulement to circumstances of unfair trial, but invites the Committee to follow the approach of the European Court of Human Rights which has done so[11]. He emphasizes that there is a close link between the right to a fair trial and the right not to be tortured as prolonged detention, often incommunicado, prior to trial carries an acknowledged heightened risk of torture. This is particularly so where, as in this case, evidence extracted under torture is routinely utilised in subsequent proceedings. He recalls that although he received visits by Swedish representatives while in custody, this did not eliminate the risk and actual torture he was subjected to during the first two months.

4.21 In light of the foregoing, the author argues that Sweden, by expelling him on the basis of unfounded allegations of terrorist activities not provided to him for a response and failing to secure that he would in fact be provided a fair, non-military trial violated his rights under article 14 of the Covenant. In conclusion, he notes that his case could readily have been handled as an extradition, which would have provided review in the Swedish courts. He also contends that due to the seriousness of the alleged crimes, he could also have been prosecuted in Sweden under its personal and universal jurisdiction for such crimes.

Inadequate process of expulsion of an alien and insufficient, ineffective remedy (articles 2 and 13 of the Covenant)

4.22 The author argues that the procedure followed in his expulsion violated articles 13 and 2 of the Covenant. The author notes that under the Aliens Act, as it then stood, an asylum matter may be referred to the Government if it is judged to be a matter of public or national security or if the matter may be of importance for the nation's relationship with a foreign power or an intergovernmental organization. Such reference provides the Government complete discretion to weighing considerations of national security and the individual's right to protection. The national security issue is not adjudged by any court of law or other independent body before the Government's decision. The Government is the first and last instance - its decision cannot be appealed. Since matters dealt with under this procedure are classified, the information on which the decision is based (the evaluation by the Security Police) is normally withheld from the asylum seeker, counsel and the general public. While selected information can be revealed to the asylum seeker and his attorney, under strict non-disclosure orders, the grounds for the assessment are often only described in generalities and are not revealed to such an extent that they can be met or challenged by the individual. In the author's case, the only portion of the assessment by the Security Police provided, under non-disclosure order, was information he had given himself when being interviewed by the Security police. Nor, as a rule, does the affected individual have any right to present his case to the ministers or those government officials who take the decision, further curtailing his opportunities to submit any reasons against expulsion. The author specifically asked for a private meeting in order to present his case to the Government, but this request was rejected.

4.23 With reference to the Committee's previous criticism of such a denial of hearing in the context of the examination of the State party's fourth periodic report,[12] the author argues that this process fails to satisfy the requirements of article 13 of the Covenant. While acknowledging that

article 13 permits States parties to expel an asylum seeker without an opportunity to submit the reasons against expulsion and without having an opportunity to have the case reviewed if there are "compelling reasons of national security", the author argues that such an exception should be construed narrowly in order to respect the purpose and spirit of the Covenant. It should also be read in conjunction with the established principles regarding procedural right for the individual asylum-seeker deriving from the Convention on the Status of Refugees 1951 and its Protocols. In its Handbook and in recently developed guidelines concerning the expulsion rules in the convention, the Office of the United Nations High Commissioner for Refugees (UNHCR) sets out minimum procedural safeguards to which asylum seekers should be entitled to, even if suspected of the most serious crimes. These guidelines set out that given the severe consequences of exclusion for an individual and its exceptional nature, it is essential that rigorous procedural safeguards in relation to this issue are built into the refugee status determination procedure. Reference should be made to the procedural safeguards considered necessary in refugee status determination in general, which include the consideration of each case; opportunity for the applicant to consider and comment on the evidence on the basis of which exclusion may be made; provision of legal assistance; availability of a competent interpreter, where necessary; reasons for exclusion to be given in writing; right to appeal an exclusion decision to an independent body; and no removal of the individual concerned until exhaustion of all legal remedies against decision to exclude.

4.24 The author argues that these standards were not met in his case, and that the information on which the Government based its security assessment must have been false. Nor is membership of a criminal organization - which the author denies - in itself a sufficient ground to impute acts of the organization, without more substantiation, to an individual and oust refugee protection. The author notes that prior to arrest and expulsion on 18 December 2001 he had not been detained, subjected to particular security controls or otherwise treated as a real security risk : he had been legally in Sweden and allowed to work and could in principle live a free and normal life in that country. The Migration Board referred his asylum claim to the Government after the Security Police made the assessment that he was considered to constitute a security risk. However, the dominant portion of the information concerning his alleged dangerousness was withheld from him and counsel. Without access to the full assessment by the Security Police, the author suggests that the only reason he was expelled was because he was on a form of "wanted" list in Egypt, and presumably also in the United States of America. Since the nature of the accusations was never revealed and it was not known what information the Swedish Security Police in Sweden believed to be credible, it was very difficult for the author to refute the accusations, including raising concerns about the risk of information being compromised for example by being procured through torture. Emphasizing that even after lengthy detention in Egypt he was never charged, the author suggests that the Swedish Government relied too readily on information from its security services, which had itself relied on foreign intelligence, without exercising due diligence in its use. At the time of expulsion and to this day, the author remains unaware as to why he was considered to constitute a security risk in Sweden.

4.25 The author describes as "one-sided" the Government's general competence in matters of national security in connection with an application for asylum, even if the individual faces a risk of torture or other cruel or inhuman punishment, the death penalty or other persecution. In the drafting history of the current Aliens Act, as well as in the Government commission report

presented in 1999 proposing a change in the jurisdiction and rules of procedure in asylum matters, reviewers warned that: "If … a person can present an arguable claim of a violation of Covenant rights, and if the Government has then made the decision as the first and only instance, the individual has been deprived of the right to an effective remedy prescribed in Article 13 (of the European Convention)."[13]

4.26 Inviting the Committee to take an analogous approach, the author further refers to Recommendation 98(13) of the Committee of Ministers of the Council of Europe, which described Article 13 (right to an effective remedy) in relation to Article 3 (prohibition against torture) as follows:

> "1. An effective remedy before a national authority should be provided for any asylum seeker, whose request for refugee status is rejected and who is subject to expulsion to a country about which that person presents an arguable claim that he or she would be subjected to torture or inhuman or degrading treatment or punishment.
>
> 2. In applying paragraph 1 of this recommendation, a remedy before a national authority is considered effective when:
>
> 2.1. That authority is judicial; or, if it is a quasi-judicial or administrative authority, it is clearly identified and composed of members who are impartial and who enjoy safeguards of independence;
>
> 2.2. That authority has competence both to decide on the existence of the conditions provided for by Article 3 of the Convention and to grant appropriate relief;
>
> 2.3. The remedy is accessible for the rejected asylum seeker; and
>
> 2.4. The execution of the expulsion order is suspended until a decision under 2.2 is taken."

4.27 The author commends to the Committee the approach on this issue taken by the Committee against Torture in the companion case of *Agiza v. Sweden*, where the Committee stated (at 13.8):

> "The Committee observes that, in the normal course of events, the State party provides, through the operation of the Migration Board and the Aliens Appeals Board, for review of a decision to expel satisfying the requirements of article 3 of an effective, independent and impartial review of a decision to expel. In the present case, however, due to the presence of national security concerns, these tribunals relinquished the complainant's case to the Government, which took the first and at once final decision to expel him. The Committee emphasizes that there was no possibility for review of any kind of this decision. The Committee recalls that the Convention's protections are absolute, even in the context of national security concerns, and that such considerations emphasize the importance of appropriate review mechanisms. While national security concerns might justify some adjustments to be made to the particular process of review, the mechanism chosen must continue to satisfy article 3's requirements of effective, independent and impartial review. In the present case, therefore, on the strength of the information before it, the Committee concludes that the absence of any avenue of judicial or independent administrative review

of the Government's decision to expel the complainant does not meet the procedural obligation to provide for effective, independent and impartial review required by article 3 of the Convention [against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment]."

4.28 In addition to failing to meet the requirements of article 13, the author argues that the Government's competence as the first and last decision making body in his case, including where issues of torture are in play, breaches article 2 of the Covenant, as interpreted in general comments 20 and 31, which requires an effective remedy. The exclusion of review possibility falls short of the requirement for accessible, effective and enforceable remedy for breach of a Covenant right.

Violation of the right to effective individual complaint (First Optional Protocol, article 1)

4.29 The author argues that the execution of the Government's decision within a matter of hours, and without advice to either the author or counsel, both denied him the effective exercise of the right of complaint, including seeking interim measures of protection, guaranteed by article 1 of the Optional Protocol. In consequence, irreparable harm resulted. The author points out that on 14 December 2001 his (then) Swedish counsel had advised the Government of his intention to pursue international remedies in the event of an adverse decision. He argues that the precipitate haste of the expulsion was intended to avoid such an eventuality. He adds that in the days prior to expulsion, counsel was not provided with full security reports, any detail as to the negotiations with Egypt or the timetabling of the Government's decision; indeed, officials specifically declined to acquiesce to counsel's requests for relevant records. When counsel's call with the author was cut off on 18 December 2001, the former was advised upon contacting the Ministry of Foreign Affairs that no decision had been taken. Advice by certified letter of the decision only reached counsel after the expulsion.

4.30 The Security Police, for its part, had also planned the swiftest possible execution of the expulsion order. Although the Security Police had informed the Ministry of Foreign Affairs that it had an aircraft ready to transport the author to Egypt on 19 December 2001, this was rejected by Government as not prompt enough. The Security Police then presented the Government with a proposal it had received from the United States, namely that the Central Intelligence Agency had an aircraft that had airspace clearance to Cairo on 18 December, which could be utilised by Sweden. The author argues that it was thus clear that the Security Police both knew that the decision to expel was going to be taken that day and were ready to act as soon as it was taken. Taking these facts together, and relying on the decision in *Agiza v. Sweden* that equivalent events constituted a breach of the right to exercise effective complaint under article 22 of the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Convention against Torture"), the author argues that a parallel violation of article 1 of the Optional Protocol is disclosed.

State party's submissions on admissibility

5.1 By note verbale of 10 October 2005, the State party disputed the admissibility of the communication on three bases. Firstly, it questioned whether the communication was in fact submitted on behalf of the alleged victim, suggesting that Mr. Alzery might only have recently

become aware that a communication had been filed in his name. It remained unclear whether current counsel for the author had been properly authorized by her client to bring his case before the Committee, (*infra,* para. 7).

5.2 Secondly, the State party argued that the communication was inadmissible by virtue of its reservation in respect of communications where the same matter was being or had been examined under another procedure of international investigation or settlement. The State party noted that the author submitted claims of torture, ill-treatment and death, as well as absence of access to court and to effective remedies to the European Court of Human Rights, which declared the case inadmissible for introduction out of time. The State party argued that both complaints concerned the same matter, based on the same facts and the same legal arguments. The reservation was further intended to avoid "appeal" from the European Court to the Committee. In the State party's view, it might be questioned whether a decision by the Committee not to consider the present communication inadmissible on this basis might not undermine respect for the Court and its decision. In contrast to the situation in *O.F. v. Norway*,[14] where the Committee had found that a procedural reservation did not preclude a communication where the European Commission's Secretariat had advised of likely admissibility problems, the European Court here had explained at length its decision to declare the case inadmissible.

5.3 Thirdly, the State party raised the issue of delay in submission of the communication amounting to an abuse of process. It noted that while delay per se did not amount to abuse, in certain circumstances, the Committee expected reasonable justification for delay.[15] The State party drew the Committee's attention to the fact that the author appeared to have waited until the decision of the Committee against Torture in the parallel case of *Agiza v. Sweden* on 20 May 2005 before submitting the case. In the State party's view, the delay between the expulsion on 18 December 2001 and submission of the communication on 29 July 2005 was excessive and without acceptable justification. This was particularly so with regard to the time period between the author's release in October 2003 and July 2005, and even more so for the period between the European Court's decision in October 2004 and July 2005. The State party saw no apparent reason why the Committee was not approached as soon as possible after the European Court's decision - the facts of his case had already been presented to the Court and the legal arguments made before the Court could also have been used before the Committee.

5.4 The State party also recalled the detailed reasoning of the European Court analysing the delay before it, and suggested that this reasoning had bearing in the present context. Against this background and considering that the Committee's jurisprudence had accepted that a communication can be time-barred, the State party contended that there was a risk of undermining respect for the European Court and its decisions if the communication is proceeded with. In the interests of legal certainty and avoiding a state of uncertainty, therefore, the State party argued that an abuse of submissions is disclosed.

5.5 In addition, as to the claims concerning alleged failure to take necessary measures in respect of events at Bromma airport (art. 7) and concerning the treatment of torture in domestic legislation (art. 7), the State party argued that these claims are insufficiently substantiated, for purposes of admissibility. As to the claim under article 14, the State party failed to understand the lack of fair trial given that no trial took place, in Egypt or in Sweden. The claim was thus hypothetical and the author had insufficient status as a victim. Moreover, as no charge was laid which could attract the application of article 14, the claim was inadmissible *ratione materiae.*

Counsel's comments on State party's submissions on admissibility

6.1 By letter of 10 January 2006, counsel for the author responded, disputing the State party's submissions. As to the question of ongoing authority to act, counsel argued that she retains plenary power to advance the communication on Mr. Alzery's behalf. She argued that the power of attorney of January 2004 to Mr. Alzery's former Swedish counsel granted him the right to act in all cases and instances on behalf of Mr. Alzery and to appoint any person whom he wished to represent Mr. Alzery. Any objection to the existing counsel's power of attorney therefore had to invalidate the original January 2004 authority. Counsel argued however that it is a general principle of law that a power of attorney was valid until it had been withdrawn, as demonstrated by sufficient, objective evidence, which had not been shown in the present case. Counsel further argued that the onus of proof should be on the State party to demonstrate such a change in circumstances. In any event, she supplied a written declaration from Mr. Alzery's original counsel confirming current counsel's continuing authority to act.

6.2 Counsel went on to question the propriety of the State party contacting an opposing applicant in an ongoing legal matter in order to ask sensitive questions about the complaint, rather than to turn to that person's legal representative. Counsel argued that such conduct put Mr. Alzery "at great risk", and argued that the State party thus sought to put pressure on Mr. Alzery and to determine whether and, if so, how he remained in contact with his lawyer. The circumstances of Mr. Alzery's release militated against the possibility of accurately demonstrating Mr. Alzery's intent without risk to him, particularly with reference to events transpiring when Swedish counsel visited (see paragraph 3.19, *supra*). In light of circumstances, counsel's willingness and ability to contact him was also substantially restricted. Counsel disputed, moreover, that the Swedish Embassy had been in regular contact with Mr. Alzery.

6.3 Counsel argued that once Mr. Alzery's former counsel was informed by the Ministry of Foreign Affairs of its contact with Mr. Alzery concerning the communication (see paragraph 4.1, *supra*), a senior Ministry official confirmed that he believed that it was probable that Mr. Alzery's phone was tapped but that the Embassy had made the assertion that discussing these matters over the phone was without risk for Mr. Alzery. In October 2005, in what counsel believed to be a safe communication with Mr. Alzery, Mr. Alzery's former counsel asked about the telephone call from the Embassy and whether it was true that Mr. Alzery had stated that he did not know of and did not want any examination by the Committee. After having been assured that Mr. Alzery wanted to pursue his complaint to the Human Rights Committee, Mr. Alzery advised that the person who called him was the interpreter employed by the Embassy. The men thus spoke Arabic but, according to Mr. Alzery, the interpreter was not translating their conversation into Swedish, which Mr. Alzery spoke well. He could not hear anyone asking questions or talking in the background. According to Mr. Alzery, the interpreter brought up the *Agiza* decision of the Committee against Torture, suggesting that decision could be a "good opportunity" also for him. The interpreter then pursued the subject by asking if Mr. Alzery had any plans on using the decision by the Committee against Torture, to which Mr. Alzery responded that his lawyer in Sweden took care of all his legal matters.

6.4 As to the argument that the Committee's competence to consider the communication was precluded by the State party's reservation, counsel referred to the Committee's jurisprudence that dismissal of a case on purely procedural grounds, such as the six month rule applied by the European Court in this case, did not amount to an "examination" of the case within the meaning of such a reservation. In any event, the current communication raised claims with respect to

articles 13 and 7 of the Covenant (in relation to treatment at Bromma airport and the State party's alleged failure to promptly and independently investigate the violations) that had not been raised by the European Court. The complaint also elaborated much further on articles 2, 14 and 7 of the Covenant (concerning the non-refoulement principle) than had been possible before the European Court. Counsel rejected that Mr. Alzery had ever sought or intended to use the international complaints mechanisms in a fashion inconsistent with the object and purposes of the treaties, or that a decision by the Committee would in any way undermine respect for the European Court.

6.5 With respect to the argument of an unjustified delay in submission of the communication, counsel argued that in the circumstances of the case, it had been submitted in timely fashion. Counsel noted at the outset that Mr. Alzery was expelled unexpectedly and without the possibility to turn to any national or international body to challenge or stay execution of the expulsion. Mr. Alzery had, through his then lawyer, made clear to the Swedish Government that if a decision to expel were to be taken he would turn to an international body such as the European Court. The possibility that the Government would decide to execute an expulsion decision immediately, without informing counsel, was at the time so unorthodox that it was entirely unforeseeable. Equally atypical was the decision to use and rely on diplomatic assurances. Counsel contends that had Mr. Alzery or his lawyer been informed of the use of diplomatic assurances before the expulsion, he would immediately have sought interim measures at the international level.

6.6 Counsel argued that ever since the decision of 18 December 2001, the circumstances of the Mr. Alzery's case had been exceptional and surrounded by secrecy and clandestine behaviour, with none of a number of international and national investigations undertaken since then having been able to investigate in full all dimensions of the case. Neither had Mr. Alzery been accepted as a complainant or party to any investigation. Some of these examinations were also flawed because of misinformation or unwillingness on the Swedish government's part to submit information, creating an uncertain legal situation for Mr. Alzery. Counsel emphasizes that Mr. Alzery was only released in October 2003, with the strict limits on communication making contact by counsel risky, difficult and infrequent. In addition, counsel sought to exhaust alternatives to a national or international complaint that would not be as intrusive or dangerous for Mr. Alzery, including the effort to procure an investigation of the High Commissioner for Human Rights and to reach an agreement for his return to Sweden. The decision to turn to the Committee thus had to be considered with due diligence for Mr. Alzery's well being, in the light of the investigations concluding after the European Court's decision of October 2004.

Supplementary submissions of the parties on the admissibility of the communication

7. By note verbale of 10 February 2006, the State party advised that in light of counsel's comments upon its submission on the admissibility of the communications, it saw no reason to maintain the doubt expressed as to whether counsel had been actually authorized by her client to advance the communication. It accordingly withdrew its objection in this regard.

Decision on admissibility

8.1 At its eighty-sixth session, on 8 March 2006, the Committee considered the admissibility of the communication. Firstly, with respect to the State party's argument that the Committee's jurisdiction to consider the case was excluded by the terms of the State party's reservation, the

Committee recalled its constant jurisprudence that where a complaint to another international instance, such as the European Court of Human Rights, was dismissed on procedural grounds without examination of the merits, it could not be said to have been "examined", so as to exclude the Committee's competence.[16] In the present case, the European Court having dismissed the application on the procedural ground of failure to comply with the six-month rule for submission of the application, the Committee was likewise not precluded from further consideration of the communication. The Committee further observed that, contrary to the State party's suggestion, such a conclusion involves no disrespect for the European Court, on the basis that the Committee's admissibility criteria did not include the basis upon which the European Court based its decision. It follows that the communication was not inadmissible on this ground.

8.2 Secondly, with respect to the State party's argument that the communication should be dismissed as an abuse of process on the grounds of being time-barred, the Committee noted that the author's (then) counsel had initiated correspondence with the European Court of Human Rights, a choice of forum appropriately and properly open to him, less than six months after the expulsion. In view of the complexities of the case, including the scarcity of detail known about his treatment, general condition and willingness to proceed with a complaint, that period could not be viewed as undue. From the decision of inadmissibility rendered by the European Court of Human Rights in October 2004 to the submission of the communication to the Committee in July 2005, a further eight months had elapsed. In the circumstances and in light of the Committee's previous practice with respect to passage of time, the Committee was not persuaded that the lapse of time was sufficiently egregious or otherwise defined by extraordinary circumstances (such as the intervening election in *Gobin v. Mauritius*[17]) to amount to an abuse of process. The complaint was thus not inadmissible on this ground.

8.3 Thirdly, the State party raised the issue as to whether the communication was properly submitted on behalf of Mr. Alzery. The Committee noted that the State party subsequently withdrew its objection to this aspect of the admissibility of the communication. The Committee observed, moreover, with respect to the terms of the authorization, that its practice was not to construe powers of authority in strict or formalistic terms. Rather, it sought to give effect to the de facto authority which the complainant sought to confer on counsel. Applying such an approach, there can be little doubt that Mr. Alzery had conveyed an authority to act sufficiently wide at the time it was given to encompass a communication to the Committee. At the same time, a power of authority could be revoked either explicitly or implicitly by subsequent events which were inconsistent with the original conferral of authority.

8.4 As to whether such a revocation had occurred in the present case, the Committee noted that the State party's original argument rested on what Mr. Alzery was said to have confided to an Arabic-speaking member of the Swedish Embassy's staff speaking to him by telephone for the first occasion in a considerable period of time. In view of the strictness of the conditions of his release and, in particular, events following apparent monitoring of Mr. Alzery's previous telephone contact with a national human rights organization (see paragraph 3.19, *supra*), Mr. Alzery's statement as a reflection of his true intent had to be treated with considerable caution. Taking into account both the gravity of the alleged violations, as well as the importance for international review of the merits of such a case should the national investigations undertaken be shown, on the merits, to have been inadequate or ineffective, the Committee considered that the State party had not discharged its burden of demonstrating that the power of attorney originally conferred no longer continued to subsist. It followed that, even if the State party had

not withdrawn this objection to admissibility, the Committee would not have considered the communication inadmissible on the basis of counsel not having been properly authorized by Mr. Alzery.

8.5 The Committee further considered that the author had substantiated, for purposes of admissibility, his arguments related to breach of the prohibition of refoulement, his treatment suffered at Bromma airport and inadequate investigation of alleged violations of torture or other cruel, inhuman or degrading treatment or punishment (all article 7 of the Covenant); exposure to risk of a manifestly unfair trial (article 14 of the Covenant); inadequate process of expulsion of an alien and insufficient, ineffective remedy (articles 2 and 13 of the Covenant); and violation of the right to effective individual complaint (First Optional Protocol, article 1). On 8 March 2006, it therefore declared the communication admissible.

State party's submissions on the merits

9.1 By submissions of 10 October 2005 and 5 May 2006, the State party addressed the merits of the communication. As to the claim of a breach of article 7 on account of the author's refoulement to Egypt and exposure to a real risk of torture and other ill-treatment, the State party refers to the decision of the Committee against Torture in the companion case of *Agiza v. Sweden*, where that Committee found a breach of article 3 of the Convention against Torture. The State party accepts that finding and sees no reason to contest the corresponding claim under the Covenant, without however conceding that the author was in fact tortured or ill-treated. If such treatment occurred, primary responsibility lay with the Egyptian authorities and represented a breach of their bilateral undertakings. The State party, referring to its desire to ascertain what actually took place, however invokes the fruitless efforts at the highest levels to achieve an impartial, independent investigation with international expertise into the course of factual events in Egypt subject to the expulsion (*supra*, at para. 3.24). The State party observes that it is not content with the responses of the Egyptian Government, but that, in the process of carefully considering what possible further action to take, it is of the utmost importance that some confirmation is received that such action is in line with the author's own wishes. To date, the State party has received contradictory information about these wishes. Naturally, further measures must not risk affecting or jeopardizing the author's safety or welfare in any way, and it is necessary, in the circumstances, that the Egyptian Government cooperates and concurs in any further investigative efforts. In addition, the State party refers to the findings of its Parliamentary Committee on the Constitution and its efforts to develop an instrument within the Council of Europe on appropriate use of diplomatic assurances. After the relevant body of the Council of Europe decided not to pursue work in this area, the State party has no intention of further pursuing this issue of a formal instrument on assurances internationally. In the light of these efforts, the State party leaves to the Committee the question of whether there has been a violation of article 7 in this respect.

9.2 Concerning the claims under article 7 concerning the alleged ill-treatment at Bromma airport, the State party refers to the findings of the Parliamentary Ombudsman (*supra*, para. 3.23 *et seq.*) expressing extremely grave criticism of the Security Police and serious shortcomings in the way the case was handled. It notes however that the Parliamentary Ombudsman found that degrading treatment had taken place and not torture, though his criticism nonetheless remained valid. The State party also rejects that what transpired amounted to torture as defined by article 1 of the Convention against Torture.[18] The State party notes that after the release of the Parliamentary Ombudsman's findings, an independent "Enforcement Committee" concluded that

there was a need for clear guidelines for enforcement of expulsion orders of aliens. This was followed in October 2004 circular memorandum of the National Police Board, which in February 2005 was incorporated into the Board's regulations with immediate effect. These regulations require, inter alia, a police officer in charge of enforcement to intervene immediately if an alien is treated by foreign authorities in breach of Swedish notions of justice. Swedish police are explicitly held responsible for enforcement when assisted by a foreign authority, while security checks carried out on Swedish territory must be carried out by Swedish police. Further, the State party details training and reorganization of the Security Police, strengthening of specialist resources for such situations and clarifying lines of responsibility. While unable to report or comment on reasons for foreign officials' actions in this case, the State party accepts that certain steps taken at Bromma airport were too far-reaching in relation to the actual risks involved. On this basis, the State party leaves to the Committee the assessment of this article 7 issue.

9.3 As to the alleged failure, also in breach of article 7, properly and independently to investigate the treatment at Bromma airport, to hold any individual responsible or to investigate acts of foreign agents, the State party observes that these events were considered by the ordinary apparatus of criminal prosecution, referring to the three sets of reasoned decisions by the Stockholm district prosecutor, the Prosecutor-Director and the Prosecutor-General. Special measures of investigation by bodies with competence to engage criminal proceedings were also taken by the Parliamentary Ombudsman, who decided not to initiate a preliminary criminal investigation, and the Parliamentary Standing Committee on the Prosecution, which decided not to take further action on criminal complaints against relevant Ministers. In accordance with Swedish law, these proceedings were undertaken promptly and independently after complaints were filed, and thus there is no violation of article 7 in this respect.

9.4 Concerning the claim that torture and other ill-treatment are insufficiently proscribed in Swedish law, the State party recalls that the Covenant does not require specific definitions of these notions to be incorporated. After careful assessment of Swedish criminal law, the State party concluded that the Convention against Torture did not require amendments to domestic criminal legislation. All acts of (as well as attempts of and complicity in) torture and cruel, inhuman or degrading treatment or punishment are offences under domestic law, punished appropriately grave penalties, consistent with article 7 of the Covenant. On the alleged lack of fair trial, the State party notes that no criminal charges were brought against the author after his return, nor did he stand trial there. There was thus no violation of his rights under article 14.

9.5 As to the lack of an effective remedy against the Cabinet-level decision on the author's asylum application, the State party accepts the finding of the Committee against Torture in *Agiza* that this amounted to a breach of the procedural obligation in article 3 of the Convention against Torture and thus does not contest the corresponding claim under the Covenant. The State party notes, however, that as from 31 March 2006, a new system for judicial examination of asylum claims has been established in the form of Migration Courts and a Supreme Migration Court. Under this system, the Supreme Migration Court, on oral hearing, may determine the existence of an impediment to enforcement of the expulsion decision, such as a risk of torture, which would be binding on the Government. The new legislation also provides for automatic issuance of a residence permit, absent extraordinary circumstances, to an alien where an international body deciding on an individual complaint concludes the individual cannot be removed. On the claim that the author's expulsion was inconsistent with article 13 as he was not permitted to present his case to the Ministers and/or officials who took the decision, the State party notes that

the expulsion decision was reached according to law, and that article 13 affords an exception for national security circumstances, which existed in the present case. There was thus no violation of article 13 of the Covenant.

9.6 On the alleged lack of opportunity to seize the Committee of the case, in breach of article 1 of the Optional Protocol, the State party accepts the finding of the Committee against Torture in the *Agiza* case that immediate execution of the expulsion order frustrated the effective right of communication and thus it sees no reason to contest the corresponding claim before the Committee. It notes the Standing Committee's conclusions in its report of 21 September 2005 on this matter that concerns an individual might seek interim measures before an international body could not be allowed to come into play and that expulsion decisions being notified to expellees by the enforcement authority, while counsel was notified by letter, was acceptable provided that counsel was notified more quickly.

Counsel's comments on the State party's submissions on the merits

10.1 On 16 June 2006, counsel responded to the State party's submissions on the merits. As to the sufficiency of the investigations undertaken with respect to the treatment at Bromma airport, counsel notes that the Swedish Government was aware from an early stage as to what had transpired at the airport, indeed the Ministry of Justice had compiled a report on the matter. The State party however kept these issues confidential and out of public and parliamentary domain for several years. It was only until the 2004 transmission of a television programme providing details on these matters that a criminal complaint was first lodged and formal criminal investigations began. It is thus misleading to speak of prompt investigations. Furthermore, counsel argues that even accepting the State party's reasons for the Ombudsman's decision not to initiate a criminal investigation (see *supra*, para. 3.27), this represents a systemic lack of control for which the Security Police is organizationally responsible. The Ombudsman's decision to undertake an investigation of informational nature, with officials required to give testimony, also meant that not only the Ombudsman but also other prosecuting authorities were unable to prosecute the officials responsible, on account of self-incrimination.

10.2 Concerning the State party's suggestions of wariness as to further action vis-à-vis the Egyptian authorities (see *supra*, para. 9.1), counsel states the author already informed the Swedish Government of his willingness to participate in a full and comprehensive investigation if performed independently and capable of guaranteeing his safety. This remains the position, although the author has always declined, on grounds of personal safety, an investigation being carried out by Egyptian police, particularly if it had as its object of punishment of individual officers. He is concerned that bilateral negotiations between Sweden and Egypt, anyway initiated late, are not in his interest and that a bilateral investigation could expose him to great risk, with the State retaining the legal power to arbitrarily detain him on security grounds.

10.3 As to the argument under article 14, counsel argues that the fact that the author did not in fact receive a trial is no answer to his claims. He suffered interrogation and abuse in detention, meeting only repeatedly a prosecutor who ordered further imprisonment. There was no presence or monitoring by the Embassy of these sittings, nor did the Embassy establish contact with a national human rights group engaged in monitoring the proceedings, despite being made aware of this fact. He was provided a lawyer for the first such hearing, but was not allowed to meet him before. A privately-retained lawyer was not able to visit him in prison. Egyptian law only allows public counsel after formal charges are laid. He was never presented with any evidence he could

examine or informed in detail about the accusations against him. Counsel argues that the State party was aware of the serious risk that his legal rights as an accused would not be respected and that there were no follow-up mechanisms in place to exercise already minimal control over proceedings after the author was returned.

10.4 As to the argument under article 13 and the State party's invocation of the national security exception, counsel argues this provision was inapplicable in this case. Referring to the Swedish Government's recent grant of visas to Hamas politicians, its belief at the time (*supra*, para. 4.17), that Mr. Alzery was subject to a relatively low possible sentence of seven years imprisonment under Egyptian law for the offence that the author was suspected of and that there was never sufficient evidence for him to be charged, let alone convicted, of an offence, counsel argues that no case for the national security exception in article 13 could be made out. In any event, the lack of due diligence in investigating the case and reliance on international intelligence for justification of the expulsion failed to meet even the basic level of due process afforded by article 13.

10.5 Finally, counsel submits that torture rather than any lesser form of ill-treatment was suffered at each stage of the author's forcible return (treatment at Bromma airport, silently consented to by the Swedish police, treatment in flight and treatment in Egypt upon return). In any event, counsel observes that the assessment of qualification of severity lies independently with the Committee rather than any domestic authorities, and that the Committee has consistently been reluctant to distinguish strictly between categories of ill-treatment.

Consideration of the merits

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

11.2 The Committee notes at the outset that, with respect to a number of claims, the State party concedes violations of the Covenant or the Optional Protocol, on the basis of parallel findings of the Committee against Torture in the case of *Agiza v. Sweden* made with respect to substantially similar provisions of the Convention against Torture. While such a concession is relevant to the Committee's determination, it must nevertheless independently ascertain that in the circumstances of the case violations of the relevant provisions of the Covenant or the Optional Protocol occurred.

11.3 The first substantive issue before the Committee is whether the author's expulsion from Sweden to Egypt exposed him to a real risk of torture or other ill-treatment in the receiving State, in breach of the prohibition on refoulement contained in article 7 of the Covenant. In determining the risk of such treatment in the present case, the Committee must consider all relevant elements, including the general situation of human rights in a State. The existence of diplomatic assurances, their content and the existence and implementation of enforcement mechanisms are all factual elements relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment exists.

11.4 The Committee notes that, in the present case, the State party itself has conceded that there was a risk of ill-treatment that - without more - would have prevented the expulsion of the author consistent with its international human rights obligations (see *supra*, at para. 3.6). The State

party in fact relied on the diplomatic assurances alone for its belief that the risk of proscribed ill-treatment was sufficiently reduced to avoid breaching the prohibition on refoulement.

11.5 The Committee notes that the assurances procured contained no mechanism for monitoring of their enforcement. Nor were any arrangements made outside the text of the assurances themselves which would have provided for effective implementation. The visits by the State party's ambassador and staff commenced five weeks after the return, neglecting altogether a period of maximum exposure to risk of harm. The mechanics of the visits that did take place, moreover, failed to conform to key aspects of international good practice by not insisting on private access to the detainee and inclusion of appropriate medical and forensic expertise, even after substantial allegations of ill-treatment emerged. In light of these factors, the State party has not shown that the diplomatic assurances procured were in fact sufficient in the present case to eliminate the risk of ill-treatment to a level consistent with the requirements of article 7 of the Covenant. The author's expulsion thus amounted to a violation of article 7 of the Covenant.

11.6 On the issue of the treatment by the author at Bromma airport, the Committee must first assess whether the treatment suffered by the author at the hands of foreign agents is properly imputable to the State party under the terms of the Covenant and under applicable rules of State responsibility. The Committee notes that, at a minimum, a State party is responsible for acts of foreign officials exercising acts of sovereign authority on its territory, if such acts are performed with the consent or acquiescence of the State party (see also article 1 of the Convention against Torture). It follows that the acts complained of, which occurred in the course of performance of official functions in the presence of the State party's officials and within the State party's jurisdiction, are properly imputable to the State party itself, in addition to the State on whose behalf the officials were engaged. Insofar as the State party accepts the finding of its Parliamentary Ombudsman that the treatment suffered was disproportionate to any legitimate law enforcement purpose, it is evident that that the use of force was excessive and amounted to a breach of article 7 of the Covenant. It follows that the State party violated article 7 of the Covenant as a result of the treatment suffered by the author at Bromma airport.

11.7 As to the claim under article 7 relating to the effectiveness of the State party's investigation into the treatment suffered at Bromma airport, the Committee notes that the State party's authorities were aware of the mistreatment suffered by the author from the time of its occurrence; indeed its officials witnessed the conduct in question. Rather than submit conduct whose criminal character was plainly well arguable to the appropriate authorities, the State party waited over two years for a private criminal complaint before engaging its criminal process. In the Committee's view, that delay alone was insufficient to satisfy the State party's obligation to conduct a prompt, independent and impartial investigation into the events that took place. The Committee further notes that as a result of the combined investigations of the Parliamentary Ombudsman and the prosecutorial authorities, neither Swedish officials nor foreign agents were the subject of a full criminal investigation, much less the initiation of formal charges under Swedish law whose scope was more than capable of addressing the substance of the offences. In particular, the Committee notes that the decision of the Parliamentary Ombudsman to effect an informational investigation including substantial compelled testimony. While the thoroughness of the investigation for that purpose is not in doubt, the systemic effect was to seriously prejudice the likelihood of undertaking effective criminal investigations at both command and operational levels of the Security Police. In the Committee's view, the State party is under an obligation to ensure that its investigative apparatus is organized in a manner which preserves the capacity to investigate, as far as possible, the criminal responsibility of all relevant officials, domestic and

foreign, for conduct in breach of article 7 committed within its jurisdiction and to bring the appropriate charges in consequence. The State party's failure to so ensure in this case amounts to a violation of the State party's obligations under article 7, read in conjunction with article 2 of the Covenant.

11.8 As to the claim concerning the absence of independent review of the Cabinet's decision to expel, given the presence of an arguable risk of torture, the Committee notes that article 2 of the Covenant, read in conjunction with article 7, requires an effective remedy for violations of the latter provision. By the nature of refoulement, effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning. The absence of any opportunity for effective, independent review of the decision to expel in the author's case accordingly amounted to a breach of article 7, read in conjunction with article 2 of the Covenant.

11.9 Regarding the claim under article 14 concerning exposure to a risk of a manifestly unfair trial, the Committee notes that the State party sought to rely simply on the receiving State's incorporation, in the diplomatic assurances , of an undertaking to afford the author a fair trial. Given both that no trial in fact occurred and in view of the Committee's findings set out above that State party exposed the author at the point of expulsion to grave violations of the Covenant, the Committee does not consider it necessary to make a separate finding on this issue.

11.10 Concerning the claim under article 13, the Committee accepts that the decision to expel the author was reached in accordance with the State party's law as it then stood and was thus "in pursuance of a decision reached in accordance with law", within the meaning of article 13 of the Covenant. The Committee notes that in the assessment of whether a case presents national security considerations bringing the exception contained in article 13 into play allows the State party very wide discretion.[19] In the present case, the Committee is satisfied that the State party had at least plausible grounds for considering, at the time, the case in question to present national security concerns. In consequence, the Committee does not find a violation of article 13 of the Covenant for the author's failure to be allowed to submit reasons against his expulsion and have the case reviewed by a competent authority.

11.11 Inasmuch as the claim of a breach by the State party of its obligations under the Optional Protocol is concerned, the Committee refers to its established jurisprudence that a State party is obliged, upon adhering to the Optional Protocol, to permit the exercise in good faith of the right of complaint to the Committee conferred by the Optional Protocol, and to refrain from steps which would render decision on the communication nugatory and futile.[20] In the present case, the Committee notes that the author's (then) counsel had expressly advised the State party in advance of the Government's decision of his intention to pursue international remedies in the event of an adverse decision (see *supra*, para. 4.29). Counsel was incorrectly advised after the decision had been taken that none had been reached, and the State party executed the expulsion in the full knowledge that advice of its decision would reach counsel after the event. In the Committee's view, these circumstances disclose a manifest breach by the State party, of its obligations under article 1 of the Optional Protocol.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Sweden of article 7, read alone and in conjunction with article 2 of the Covenant. The Committee reiterates its conclusion that the State party also breached its obligations under article 1 of the Optional Protocol.

13. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. The State party is also under an obligation to avoid similar violations in the future. In this respect, the Committee welcomes the institution of specialized independent migration courts with power to review decisions of expulsion such as occurred in the present case.

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

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

Notes

[1] CCPR/CO/74/SWE/Add.1.

[2] *Alzery v. Sweden*, application No. 10786/04.

[3] Committee against Torture, communication No. 233/2003, Views adopted on 20 May 2005.

[4] Report No. 2169-2004.

[5] Application No. 70/1995/576/662, Grand Chamber judgement of 15 November 1996.

[6] Op. cit.

[7] CCPR/CO/76/EGY (2002), A/54/44 (1999) and CAT/C/CR/29/4 (2002).

[8] E/CN.4/2001/66.

[9] *Hani El Sayed Sabaei Youssef v. Home Office* [2004] EWHC 1884 (Queens Bench, Field J.).

[10] See, for example, *Bilasi-Ashri v. Austria*, European Court of Human Rights, 26 November 2002.

[11] See *Colozza v. Italy*, judgement of 12 February 1985, Series A No. 89, p 16, § 32; *Soering v. United Kingdom*, application No. 1/1989/161/217, judgement of 7 July 1989, at 113; and *Mamatkulov et al. v. Turkey*, Applications nos. 46827/99 and 46951/99, Grand Chamber judgement of 4 February 2005.

[12] UN Doc. CCPR/C/79/Add.58 (1995), at para 16.

[13] SOU 1999:16 Ökad rättssäkerhet i asylärenden ("Protection of individual rights in asylum matters"). Final report of committee on new jurisdiction and rules of procedure in alien matters (NIPU), pp. 330-331.

[14] Communication No. 158/1983, decision of 26 October 1984.

[15] See *Gobin v. Mauritius*, communication No. 787/1997, inadmissibility decision of 16 July 2001.

[16] See, for example, *Weiss v. Austria*, communication No. 1086/2002, Views adopted on 3 April 2003, and *Linderholm v. Croatia*, communication No. 744/1997, decision adopted on 23 July 1999.

[17] Op. cit.

[18] Article 1 of the Convention provides as follows:

> 1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

[19] See, for example, *Borzov v. Estonia*, communication No. 1136/2002, Views adopted on 26 July 2004.

[20] *Piandiong et al. v. The Philippines*, communication No. 869/1999, Views adopted on 19 October 2000, and *Weiss v. Austria*, communication No. 1086/2001, Views adopted on 3 April 2003.

JJ. Communication n° 1439/2005, *Aber v. Algeria**
(Views adopted on 13 July 2007, Ninetieth session)

Submitted by:	Sid Ahmed Aber (represented by counsel, Nassera Dutour)
Alleged victim:	The author, his father Abdelkader Aber and his sister Zina Aber
State party:	Algeria
Date of communication:	24 May 2005 (initial submission)
Subject matter:	Enforced disappearance, incommunicado detention, torture and cruel, inhuman or degrading treatment, inhumane detention conditions
Procedural issues:	None
Substantive issues:	Prohibition of torture and cruel, inhuman or degrading treatment or punishment; right to liberty and security of person; arbitrary arrest and detention; respect for the inherent dignity of the human person; right to recognition as a person before the law
Articles of the Covenant:	7, 9, 10, 16 and 2, paragraph 3
Articles of the Optional Protocol:	5, paragraph 2 (a)

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

Meeting on 13 July 2007,

Having concluded its consideration of communication No. 1439/2005, submitted by Sid Ahmed Aber (represented by counsel, Nassera Dutour) on his own behalf and on behalf of his father Abdelkader Aber and his sister Zina Aber under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

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

1.1 The author of the communication, received on 24 May 2005, is Sid Ahmed Aber, an Algerian citizen born in Algeria in 1962 and currently living in France. He claims that he, his father Abdelkader Aber, who died in 1999, and his sister Zina Aber, a resident of Algeria, are victims of violations by Algeria of article 7, article 9, article 10, article 16 and article 2, paragraph 3, of the Covenant. The Covenant and the Optional Protocol entered into force for Algeria on 12 December 1989. The author is represented by counsel, Nassera Dutour.

1.2 On the basis of information received by the Committee, on 23 November 2005, the Special Rapporteur on new communications and interim measures drew the State party's attention to the right to submit individual communications to the Committee, under the Optional Protocol to the Covenant, and recalled that an individual and his relatives should not be subjected to intimidation for having submitted a communication to the Committee.

Factual background

2.1 During the night of 9 February 1992, the author, a former General Secretary of the Bir el Djir mayor's office in Oran, was arrested at his home by plain clothes members of the military security forces. Shocked by the violent arrest that he witnessed, Abdelkader Aber, the author's father, had a heart attack. The author was taken to the Oran police station, where he was beaten and tortured for several hours to make him admit to belonging to armed groups. He eventually gave in and made a false confession. He signed the written statement of his testimony without even reading what was in it. He was then detained in a cell at the police station for three days without any legal grounds.

2.2 On 12 February 1992, the author was transferred to the Reggane detention camp in southern Algeria. There, he was detained in an 8 m^2 tent with a dozen other prisoners, in degrading and inhuman conditions. There were no sanitary facilities. On 27 June 1992, the author was transferred to the Oued Namous camp, in the south-west of the country, where the conditions of detention were also very difficult. In October 1993, the authorizations granted by prefects for detainees' families to visit the camp were suspended.

2.3 In February 1994, the author was transferred secretly to the Tamanrasset camp in Aïn M'Guel. The transfer took place in inhuman conditions, with prisoners shackled and handcuffed during their transport in a military aircraft. Again, the conditions of detention in this camp were degrading. The military authorities did not tell the author's family about his detention in the camp. It was only thanks to a telephone call from the relative of a detainee - a resident of Algiers who had permission to visit - that the author's family found out about his detention in that camp.

2.4 On 23 November 1995, after an amnesty decree by President Zerroual was announced, the author was released after three years and nine months in detention, without any judgement or judicial decision having been adopted. His detention left him with severe physical sequelae (acute back pain, deviated nasal septum and impaired vision). After his release, he was placed under judicial supervision, stripped of his civil rights and subjected to regular harassment by police officers from the Oran police station.

2.5 On 11 October 1997, the author was abducted in Oran by three members of the military security forces. He was taken to the Magenta detention centre belonging to the Military Security Directorate, known to be a torture centre. He was interrogated by Colonel Hamou and Commander Boudia about a terrorist attack that had taken place on 1 October 1997. During the interrogation, he was thrown to the ground, kicked and insulted. The next morning, he was interrogated again and beaten for several hours with wire, plastic tubing, clubs and electric cables. He was also given electric shocks. At the end of that first day of torture, the author could not talk or move. The next day, he endured another torture session. His torturers threatened to rape him, immersed his head in a bathtub of dirty water, strangled him with a rope and applied electric shocks to his genitals. For about three months, the author was regularly subjected to such torture. During the last two months, the pain was so severe that he was unable to sleep for more than 10 minutes at a time.

2.6 After his first three months of detention at the Magenta centre, he was transferred to a "dark room" as a punishment for having tried to communicate with the other detainees. He spent three months in this cell in complete darkness, isolated, surrounded by rats and infested with lice. During those three months, his only meal was a piece of bread or a ladle of soup every other day. After these three months of solitary confinement, the author was again interrogated and tortured. He was forced to drink several litres of bleach solution. He was also beaten and hung from the ceiling by his wrist. The conditions of detention were degrading and insanitary. Moreover, he was sometimes deprived of food for up to a week.

2.7 It was only 13 days after his abduction that the author's family found out where he was being held, thanks to the testimony of another Magenta centre detainee who was released on 24 October 1997. The author's family were intimidated by the authorities: Abdelkader Aber, his father, was summoned twice to the Oran police station, on 16 and 25 December 1997. Zina Aber, the author's sister, took several steps to find her brother. On 22 December 1997, she petitioned the general in command of Oran's second military region and the Chairman of the Algerian League for the Defence of Human Rights. On 3 January 1998, she also filed a petition with the principal State prosecutor of the Algiers Supreme Court and sent a letter to the Ministry of Justice. All these steps were in vain, as the authorities kept denying the author's detention at the Magenta centre, saying that he had escaped and that "State services are not responsible".

2.8 On 23 March 1998, the authorities released the author from the Magenta centre, on condition that he "not talk to the press, file a complaint or communicate with people", on pain of death. He was given a document that he signed without even taking the time to read it. Upon his release, he stayed with his sister, Zina Aber. When he saw his parents again, his father was so shocked by the author's physical state that he had a second heart attack, which left him paralysed. The author's father died a few months later, on 9 March 1999.

2.9 On 25 March 1998, the author and his sister, with whom he was staying, were summoned to the police station. The police officer who attended them suggested that, in order not to be bothered any more, the author should sign a written statement saying that he had been detained in good conditions at the Magenta centre and had not been tortured. The author signed the statement.

2.10 The author's family was summoned on 31 March 1998, 1 December 1998 and 22 December 1998 to the police station and the gendarmerie in Oran. Fearing for his life, the only step that the author took was to send a letter to the principal State prosecutor of Oran's

Department of Prosecutions on 15 April 1998, applying for "State protection and an end to his harassment by the security services". In reply, on 23 June 1998 he received an official notification from the principal State prosecutor of Oran's Department of Prosecutions inviting him to address his application to the Directorate-General of National Security in Algiers. In December 1998, the author was summoned to a meeting with a lawyer. Gendarmes questioned him about his detention in the Magenta centre. He then talked about the torture that he had suffered and signed a statement. However, no action was taken on the case.

2.11 In May 2002, having finally obtained a passport, the author left for France, where he was granted political asylum on 28 April 2003.

The complaint

3.1 With regard to article 7, the author claims that conditions of detention in the Reggane and Oued Namous camps between 1992 and 1994, which were particularly harsh (see paragraph 2.2 above), were "on the borderline between cruel, inhuman or degrading treatment and torture". He also claims that his detention incommunicado at the Tamanrasset camp from 1994 to 1995, then his enforced disappearance and detention incommunicado at the Magenta centre in 1997, constitute a violation of article 7. He recalls that the Committee has recognized that being subjected to enforced disappearance may be regarded as inhuman or degrading treatment.[1] He emphasizes that at the Magenta centre he was subjected to grave acts of torture, inflicted by agents acting under the authority of the State, and that he now suffers from many physical and psychological sequelae: he had to have an operation on his nose and has had to get dentures and spectacles. Lastly, he believes that the death threats and physical intimidation to which he was subjected by agents of the State both before and after his release from the Magenta centre should be considered a violation of article 7.

3.2 Concerning the author's family, he claims that his father, Abdelkader Aber, was particularly affected by the abduction, long years of detention, torture, threats and intimidation suffered by his son. He had two heart attacks, both linked to those events. Zina Aber, the author's sister, took most of the steps to find her brother and it was she who therefore endured the most intimidation by soldiers and police. Under such pressure, she developed many health problems and had a miscarriage and a nervous breakdown. The author recalls that the Committee has acknowledged that the disappearance of a relative may constitute for the family a violation of article 7.[2]

3.3 With regard to article 9, paragraph 3, the author recalls that between his arrest on 9 February 1992 and his release on 23 November 1995, he was never brought before a judge or other officer authorized by law to exercise judicial power. His abduction and his subsequent detention incommunicado at the Magenta centre from 1997 to 1998 also took place without a judgement, in violation of the guarantees set forth in article 9. He invokes the Committee's case law whereby any unacknowledged detention of a person constitutes a complete negation of the right to liberty and security guaranteed under article 9.[3]

3.4 The author considers that the conditions of detention (insalubrity, absence of sanitary facilities, lack of food and overcrowded cells) in the various centres in which he stayed constitute a violation of article 10.

3.5 With regard to article 16, the author believes that his enforced disappearance is inherently a negation of the right to recognition everywhere as a person before the law. He invokes the 18 December 1992 Declaration on the Protection of All Persons from Enforced Disappearance.[4]

3.6 With regard to article 2, paragraph 3, the author recalls that he was denied his rights under threat by agents acting on behalf of the State. To be released from the Magenta centre, he had to sign a document that required him to say that he had been well treated during his detention. Moreover, the incommunicado nature of his detention in the Oued Namous and Magenta centres did not allow either the author or his family access to an effective remedy.

3.7 With regard to the exhaustion of all available domestic remedies, the author recalls that under the Committee's consistent case law only effective, useful and available remedies within the meaning of article 2, paragraph 3, need to be exhausted.[5] In the case at hand, the conditions surrounding the author's various detentions show that he was unable to seek a judicial remedy without seriously risking his life and his family's safety. The author considers that at the time of his release from the Magenta centre, there were no "available" remedies within the meaning of article 2, paragraph 3, of the Covenant, article 5 of the Optional Protocol and the Committee's case law.

3.8 The author asks the Committee to request the State party to order independent inquiries with a view to bringing the perpetrators of these crimes before the competent judicial authorities, in accordance with article 2, paragraph 3, of the Covenant. He also requests appropriate reparation for himself and his family.

State party's observations on the admissibility and merits of the communication

4.1 By note verbale dated 19 April 2006, the State party notes that the author was prosecuted by Oran's Department of Prosecutions for having, along with other persons, caused a riot and pelted police cars with stones in February 1992. Along with his co-defendants, the author was tried before the Oran criminal court, which acquitted and discharged all the accused on 4 February 1992. After an appeal by the Public Prosecutor's Office, the Oran court upheld the decision on appeal.

4.2 Concerning the reference to the author's stay in administrative detention centres, the State party stresses that the fight against terrorism required that special measures be taken to tackle the insurrectionary and subversive situation that arose in 1992. Thus, article 5 of the decree proclaiming the state of emergency stipulated that the Minister of the Interior could order "the placing in security centres, in a specified place, of any adult whose activity threatens public order, public safety or the proper functioning of public services". All the people affected by this exceptional, temporary measure, which was enforced in accordance with the provisions of Algerian law, were released after their details had been taken. Families were regularly informed about the places and conditions of detention of their relatives. On 29 October 1995, all security centres were closed.

4.3 The State party asserts that the implementing regulations for the Charter for Peace and National Reconciliation adopted by referendum on 29 September 1995 make provision for all victims of the national tragedy and extend the State's social protection to their beneficiaries.

As an example, it mentions the procedure for reinstating or compensating persons who were dismissed from their jobs as an administrative measure for reasons linked to the national tragedy.

Author's comments on the State party's observations

5.1 In his comments dated 16 June 2006, the author notes that the State party invoked article 5 of decree No. 92/44 proclaiming the state of emergency in Algeria, but does not explain how the author posed a threat that could have justified his detention for almost four years. He recalls that he was cleared by the Oran criminal court on 4 February 1992 and was only free for a few days before being transferred for no reason to the Reggane detention camp on 12 February 1992. Thus, when in March 1992 the Oran court upheld the decision to acquit and discharge him, the author had already been transferred to a "security centre". The author disputes the State party's argument that his detention took place "in accordance with the provisions of Algerian law". He notes that the State party provides no evidence to support its claim that "families were regularly informed about the places and conditions of detention of their relatives". The author's family can testify that it never knew that the author had been transferred in February 1994 to the Tamanrasset camp, where he was detained incommunicado until 23 November 1995, and not until 29 October 1995, the date on which the State party claims that all security centres were closed.

5.2 With regard to the serious accusations concerning the author's enforced disappearance and the numerous acts of torture to which he was subjected at the Magenta centre, the author notes that the State party provides no explanations on the subject. He recalls that under the Committee's case law, the State party must furnish evidence to refute the author's allegations. In any case, denial, whether explicit or implicit, will not help the State party.[6]

5.3 With regard to the State party's response detailing the rehabilitation measures put in place by the implementing regulations for the Charter for Peace and National Reconciliation adopted by referendum on 29 September 1995, the author notes that the information given does not shed any light on the accusations against the State party.

Issues and proceedings before the Committee

Admissibility considerations

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

6.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 As far as the author's family are concerned, the Committee recognizes that the incommunicado detentions and ill-treatment to which the author was subjected might have caused his family anguish and stress. Nevertheless it considers that a direct causal link between such suffering and the author's ill-treatment has not been adequately substantiated. In these circumstances, the Committee considers that the author has failed to substantiate, for the

purposes of admissibility, the allegation that the facts before it disclose a violation of article 7 in respect of his family. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.4 The Committee notes that the State party has not raised any objection to the admissibility of the remainder of the communication. On the basis of the information available to it, the Committee concludes that there is no obstacle to the admissibility of the communication and it therefore finds it admissible.

Consideration of the merits

7.1 The Committee has considered the present communication in the light of all the written information communicated to it by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee recalls that the burden of proof does not rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone has the relevant information.[7] It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information exclusively in the hands of the State party, the Committee may consider an author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party.

7.3 As to the alleged detention incommunicado, the Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20, on article 7, which recommends that States parties should make provision against detention incommunicado. It notes that the author says that he was transferred in February 1994 to the Tamanrasset camp, where he was detained incommunicado until 23 November 1995. The author also says that he was abducted on 11 October 1997 and detained incommunicado until 23 March 1998. The Committee notes that the State party simply invokes article 5 of the decree proclaiming the state of emergency, which authorized "the placing in security centres, in a specified place, of any adult whose activity threatens public order, public safety or the proper functioning of public services" and claims that the families of detainees were informed about the places and conditions of detention of their relatives. The Committee considers that the State party has not responded to the author's sufficiently detailed allegations. In the circumstances, the Committee concludes that keeping the author in captivity and preventing him from communicating with his family and the outside world constitutes a violation of article 7 of the Covenant.[8]

7.4 As to the alleged torture at the Magenta centre, the Committee notes that the State party has not responded to these allegations. It considers that in the absence of a reply from the State party, the circumstances surrounding the author's detention and his allegations that he was tortured several times at the Magenta centre strongly suggest that he was subjected to ill-treatment. The Committee has received nothing from the State party to counter these allegations. The Committee concludes that the treatment of the author at the Magenta centre amounts to a violation of article 7.

7.5 With regard to the alleged violation of article 9, the information before the Committee shows that the author was arrested on 11 October 1997 in Oran by agents of the State party. In the absence of adequate explanations by the State party concerning the author's allegations that his detention incommunicado until 23 March 1998 was arbitrary or unlawful, the Committee finds a violation of article 9, paragraph 1.[9]

7.6 With regard to the alleged violation of article 9, paragraph 3, the Committee recalls that the right to be brought "promptly" before a judicial authority means within a few days and that incommunicado detention per se may be a violation of article 9, paragraph 3.[10] It takes note of the State party's argument that the author was tried before the Oran criminal court, which acquitted him on 4 February 1992. According to the State party, this decision was upheld on appeal by the Oran court in March 1992. However, the Committee notes that the author was meanwhile arrested on 9 February 1992, despite his acquittal, and kept in detention until 23 November 1995. The Committee also notes the author was never brought before a judge during his second period of detention from 11 October 1997 to 23 March 1998. The Committee considers that these two periods of detention, of three years and eight months and of five months respectively, constitute, in the author's case and in the absence of satisfactory explanations from the State party or any other justification in the file, a violation of the right set forth in article 9, paragraph 3.

7.7 With regard to the alleged violation of article 10, the Committee takes note of the author's allegations that the conditions of detention in the various centres in which he was detained were inhuman. In the Reggane detention camp where the author was detained from February to June 1992, he was held in an 8 m^2 tent with a dozen other prisoners, in degrading and inhuman conditions. There were no sanitary facilities. From June 1992 to February 1994, the author was held at the Oued Namous camp where the detention conditions were also very difficult. In October 1993, authorizations for visits were suspended. In February 1994, the author was transferred to the Tamanrasset camp in inhuman conditions, with prisoners shackled and handcuffed during their transport in a military aircraft. During his second period of detention at the Magenta centre from October 1997 to March 1998, he spent three months in a cell in complete darkness, isolated, surrounded by rats and infested with lice. During those three months, his only meal was a piece of bread or a ladle of soup every other day. The Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity.[11] In the absence of information from the State party on the author's conditions of detention in the various centres in which he stayed, the Committee finds a violation of article 10, paragraph 1.[12]

7.8 The author invokes article 2, paragraph 3, of the Covenant, which requires States parties to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights enshrined in the Covenant. The Committee attaches importance to States parties' establishment of appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. It refers to its general comment No. 31, which states that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.[13] In the present case, the information before it indicates that the author did not have access to such effective remedies, and the Committee concludes that the facts before it reveal a violation of article 2, paragraph 3, of the Covenant in conjunction with articles 7 and 9.

7.9 In the light of the above findings, the Committee does not consider it necessary to deal with the complaint in respect of article 16 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations of article 7 and of article 9, paragraphs 1 and 3, read alone and in conjunction with article 2, paragraph 3, and of article 10, paragraph 1, of the Covenant.

9. The Committee considers that the author is entitled, in accordance with article 2, paragraph 3 (a), of the Covenant, to an effective remedy. The State party is under an obligation to take appropriate steps to (a) institute criminal proceedings, in view of the facts of the case, for the immediate prosecution and punishment of the persons responsible for the ill-treatment to which the author was subjected, and (b) provide the author with appropriate reparation, including compensation. The State party is, further, required to take measures to prevent similar violations in the future.

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

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

Notes

[1] See communication No. 449/1991, *Mojica v. Dominican Republic*, Views adopted on 15 July 1994, para. 5.7; communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 8.5; and communication No. 542/1993, *Tshishimbi v. Zaire*, Views adopted on 25 March 1996, para. 5.5.

[2] See communication No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14; and the concluding observations on the second periodic report of Algeria, CCPR/C/79/Add.95, 18 August 1998, para. 10.

[3] See communication No. 8/1977, *Weismann and Perdomo v. Uruguay*, Views adopted on 3 April 1980, para. 16; communication No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 10; communication No. 181/1984, *Arévalo v. Colombia*, Views adopted on 3 November 1989, para. 11; communication No. 563/1993, *Bautista v. Colombia*, Views adopted on 27 October 1995, para. 8.5; and communication No. 612/1995, *Chaparro et al. v. Colombia*, Views adopted on 29 July 1997, para. 8.6.

[4] See also the concluding observations on the second periodic report of Algeria, CCPR/C/79/Add.95, 18 August 1998, para. 10.

[5] See, for instance, communication No. 147/1983, *Arzuada Gilboa v. Uruguay*, Views adopted on 1 November 1985, para. 7.2.

[6] See communication No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 11.

[7] See communication No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 7.2; and communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

[8] See communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 8.5; and communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.4.

[9] See communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.5.

[10] See communication No. 1128/2002, *Marques de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.3; and communication No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.6.

[11] See general comment No. 21, on article 10, paras. 3 and 4.

[12] See communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2.

[13] See paragraph 15.

KK. Communication n° 1445/2006, *Polacek v. Czech Republic**
(Views adopted on 24 July 2007, Ninetieth session)

Submitted by:	Mrs. Libuse Polacková and Mr. Joseph Polacek (not represented by counsel)
Alleged victim:	The authors
State party:	The Czech Republic
Date of communication:	20 December 2005 (initial submission)
Subject matter:	Discrimination on the basis of citizenship with respect to restitution of property
Procedural issues:	Another international instance of investigation, abuse of the right of submission
Substantive issues:	Equality before the law and equal protection of the law
Article of the Covenant:	26
Articles of the Optional Protocol:	3, and 5, 2 (a)

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

Meeting on 24 July 2007,

Having concluded its consideration of communication No. 1445/2006, submitted to the Human Rights Committee by Mrs. Libuse Polacková and Mr. Joseph Polacek 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 communication, and the State party,

*Adopts the following***:**

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

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

1. The authors of the communication are Mrs. Libuse Polacková and Mr. Joseph Polacek**,** both United States nationals of Czech origin and both born in 1925. They claim to be victims of violations by the Czech Republic of their rights under article 26 of the International Covenant on Civil and Political Rights.[1] They are not represented by counsel.

Factual background

2.1 In August 1968, the authors escaped from Czechoslovakia. They remained in France prior to emigrating to the United States in 1970, where they acquired US citizenship, thereby losing their Czech citizenship pursuant to a bi-lateral treaty, the 1928 Naturalization Treaty. In the meantime, in Czechoslovakia, the authors were sentenced in absentia to a prison term for having fled the country, and their property (a chalet and a plot of land) was confiscated by the State. In 1975, it was sold to a prominent member of the then Communist party.

2.2 On 23 April 1990, the Czech and Slovak Republic passed Act No. 119/1990 Coll. on Judicial Rehabilitation, which rendered null and void all sentences handed down by Communist courts for political reasons. Persons whose property had been confiscated were, under section 23 (2) of the Act, eligible to recover their property, subject to conditions to be spelled out in a separate restitution law. On 1 February 1991, Act No. 87/1991 on Extra-Judicial Rehabilitation was adopted.

2.3 Under Act No. 87/1991, a person claiming restitution of property had to: be a Czech-Slovak citizen; be a permanent resident in the Czech Republic; and to prove the unlawfulness of the acquisition by the current owner of the property in question. The first two requirements had to be fulfilled during the time period in which restitution claims could be filed, between 1 April and 1 October 1991.

2.4 On 12 July 1994, a judgment of the Constitutional Court (No. 164/1994), annulled the condition of permanent residence and established a new time frame of six months for the submission of restitution claims, beginning on 1 November 1994. The Supreme Court and the Constitutional Court supported an interpretation of this judgement to the effect that the newly entitled persons were persons who, during the original period of time (1 April to 1 October 1991), met all the other conditions, including the citizenship condition, with the exception of permanent residence.

2.5 The authors sought restitution of their former property pursuant to this new law. In 1991 and 1995, they requested the current owner of their house voluntarily to return it. As he refused to do so, they initiated judicial proceedings against him: they filed complaints at district court, a regional court, and the Constitutional Court. On 23 May 1996, 19 September 1996 and 10 September 1997, respectively, all three instances denied the authors' claims on the grounds that they were not entitled persons under law, as they had not been citizens of the Czech Republic before or on 1 October 1991 at the latest, as required by the Act No. 87/1991.

2.6 In or around 1997, the authors made an application to the European Court of Human Rights (ECHR). On 10 July 2002, the ECHR rejected their application, on the grounds that the facts of the case did not fall within the scope of Article 1 of Protocol No. 1 to the European Convention, and that article 14 of the European Convention on Human Rights is not autonomous. It concluded that their application was inadmissible *ratione materiae*.

2.7 The authors contend that there were thousands of Czechs who obtained restitution of their property who retained their Czech citizenship after emigrating to countries which did not have dual citizenship rules like that of the United States. The authors' refer to the Committee's jurisprudence against the Czech Republic and recall that it has consistently found violations of the Covenant in situations similar to theirs.

The complaint

3. The authors claim that the failure to return their property on the ground that they were not of Czech citizens by 1991 violates article 26 of the Covenant.

The State party's submission on admissibility and merits

4.1 On 8 July 2003, the State party commented on the admissibility and merits of the communication. On the facts, the State party submits that despite the Naturalization Treaty, those who wished to acquire Czech citizenship (for the purpose of obtaining restitution of property) could have done so between 1990 and the time limit for raising restitution claims (1 October 1991). In fact, all applications for citizenship submitted between 1990 and 1992 were granted by the Minister of the Interior. There is no indication that the authors ever submitted such an application.

4.2 On admissibility, the State party submits that the case is inadmissible for abuse of the right of submission, due to the delay of eight years and three months the authors waited after the decision of the Constitutional Court of 10 September 1997 before submitting their case to the Committee. Even if the authors' case to the ECHR is taken into account, this still leaves a delay of three years and five months after the ECHR's decision of 10 July 2002. While acknowledging that there is no explicit time limit for the submission of communications to the Committee, the State party refers to the limitation period of other international instances, notably the Committee on the Elimination of Racial Discrimination (CERD) - six months following exhaustion of domestic remedies - to demonstrate the unreasonable length of time the authors waited in this case.

4.3 On the merits, the State party refers to its observations made in earlier property cases considered by the Committee[2], in which it outlined the political circumstances and legal conditions pertaining to the proposal for, and passing of, the restitution law. The purpose of the law was twofold: to mitigate, to the extent possible, injustices committed by the former Communist regime; and to allow for comprehensive economic reform with a view to introducing a well-functioning market economy. The restitution laws were among those laws which sought to transform the whole society. The citizenship requirement was envisaged to ensure that returned property would be looked after.

4.4 The State party invokes the judgements of the Constitutional Court, which upheld the constitutionality of the restitution law, specifically the precondition for citizenship. It argues that the authors themselves were responsible for the failure to obtain restitution of their property, as they failed to apply for citizenship within the deadline (see paragraph 3.1). Even if the authors had satisfied the citizenship condition, it is not clear whether they would have been successful in obtaining restitution of their property, given that the District Court rejected their claims on the ground that they were not entitled persons under the restitution laws. Having found that they were not so entitled, it did not consider whether they complied with the other requirements of the restitution laws[3].

The authors' comments

5.1 On 2 October 2006, the authors commented on the State party's submission. They deny that they had a right to acquire Czech citizenship between 1990 and 1991 for the purposes of obtaining restitution of their property. They quote from the law in question, No. 88/1990 of 28 March 1990, which states, in its article II, § 3b) that,

> "State citizenship cannot be granted in case it would be in contradiction to international obligations, which have been assumed by Czechoslovakia."

According to the authors, this is a reference to the Naturalization Treaty between the United States and the former Czechoslovakia.

5.2 The authors deny that the submission of their case three years after the decision of the European Court of Human Rights (ECHR) is an abuse of the right of submission. They claim that they diligently pursued their claims through the domestic courts, putting up with significant delays prior to applying to the ECHR. Finally, they argue that the restitution of small personal properties has nothing to do with economic reform and that none of the properties had been acquired lawfully and in good faith.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee notes that a similar claim filed by the authors was declared inadmissible by the European Court of Human Rights on 10 July 2002. However, article 5, paragraph 2 (a), of the Optional Protocol does not constitute an obstacle to the admissibility of the instant communication, since the matter was no longer pending before another procedure of international investigation or settlement, and the Czech Republic has not entered a reservation to article 5, paragraph 2, (a), of the Optional Protocol.

6.3 As to the State party's argument that the submission of the communication to the Committee amounts to an abuse of the right of submission under article 3 of the Optional Protocol, the Committee notes that the authors diligently pursued their claim through the domestic courts until the decision of the Constitutional Court in 1997, whereupon they filed a claim to the ECHR. It notes that this Court adopted its decision on 10 July 2002 and that the authors submitted their case to the Committee on 20 December 2005. Thus, a period of three years and five months passed prior to addressing the Committee. The Committee notes that there are no fixed time limits for submission of communications under the Optional Protocol and that mere delay in submission does not of itself, except in exceptional circumstances, involve an abuse of the right to submit a communication.[4] The Committee does not regard the delay to have been so unreasonable as to amount to an abuse of the right of submission, and declares the communication admissible.

Consideration of merits

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

7.2 The issue before the Committee is whether the application to the authors of Act No. 87/1991 amounted to a violation of their rights to equality before the law and to equal protection of the law, contrary to article 26 of the Covenant.

7.3 The Committee reiterates its jurisprudence that not all differentiations in treatment can be deemed to be discriminatory under article 26. A differentiation which is compatible with the provisions of the Covenant and is based on objective and reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.[5] Whereas the citizenship criterion is objective, the Committee must determine whether its application to the authors was reasonable in the circumstances of the case.

7.4 The Committee recalls its Views in the cases of *Simunek*, *Adam, Blazek* and *Des Fours Walderode*,[6] where it held that article 26 of the Covenant had been violated: "the authors in that case and many others in analogous situations had left Czechoslovakia because of their political opinions and had sought refuge from political persecution in other countries, where they eventually established permanent residence and obtained a new citizenship. Taking into account that the State party itself is responsible for the author's ... departure, it would be incompatible with the Covenant to require the author … to obtain Czech citizenship as a prerequisite for the restitution of [his] property or, alternatively, for the payment of appropriate compensation".[7] The Committee further recalls its jurisprudence[8] that the citizenship requirement in these circumstances is unreasonable.

7.5 The Committee considers that the precedent established in the above cases also applies to the authors of the present communication. It notes the State party's confirmation that the only criteria considered by the domestic courts in dismissing the authors' request for restitution

was that they did not fulfil the citizenship criterion. Thus, the Committee concludes that the application to the authors of Act No. 87/1991, which lays down a citizenship requirement for the restitution of confiscated property, violated their rights under article 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 26 of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, which should be restitution, or otherwise, compensation. The Committee reiterates that the State party should review its legislation to ensure that all persons enjoy both equality before the law and equal protection of the law.

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

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

Notes

[1] The Covenant was ratified by Czechoslovakia in December 1975 and the Optional Protocol in March 1991. The Czech and Slovak Federal Republic ceased to exist on 31 December 1992. On 22 February 1993, the Czech Republic notified its succession to the Covenant and Optional Protocol.

[2] Communication No. 586/1994, *Adam v. the Czech Republic*, adopted on 23 July 1996.

[3] That the liable persons had acquired the disputed property either in contravention of the regulations then in force, or on the basis of an unlawful advantage (Section 4, subsection 2 of Act No. 87/1991).

[4] See communication No. 787/1997, *Gobin v. Mauritius*, Inadmissibility decision of 16 July 2001, para. 6.3, communication No. 1434/2005, *Claude Fillacier v. France*, Inadmissibility decision of 27 March 2006, para. 4.3 and communication No. 1101/2002, *José María Alba Cabriada v. Spain*, Views adopted on 1 November 2004, para. 6.3.

[5] See communication No. 182/1984, *Zwaan-de Vries v. The Netherlands,* Views adopted on 9 April 1987, para. 13.

[6] See communication No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996, para. 12.6, communication No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, paragraph 5.8, and communication No. 747/1997, *Des Fours Walderode v. Czech Republic*, Views adopted on 30 October 2001, para. 8.3.

[7] See footnote 7.

[8] See communication 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, para. 11.6.

LL. Communication No. 1454/2006, *Lederbauer v. Austria**
(Views adopted on 13 July 2007, Ninetieth session)

Submitted by:	Wolfgang Lederbauer (represented by counsel, Alexander H.E. Morawa)
Alleged victim:	The author
State party:	Austria
Date of communication:	27 September 2005 (initial submission)
Subject matter:	Disciplinary dismissal of civil servant for managing private company
Substantive issues:	Right to a fair and public hearing by an independent and impartial tribunal - Delay in proceedings - Right to equality before the law and equal protection of the law
Procedural issues:	Admissibility *ratione personae* and *ratione materiae* - Level of substantiation of claim - State party reservation to article 5 (2) (a) of the Optional Protocol - Exhaustion of domestic remedies
Articles of the Covenant:	14, paragraph 1; 26
Articles of the Optional Protocol:	1, 2, 3 and 5, paragraph 2 (a) and (b)

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

Meeting on 13 July 2007,

Having concluded its consideration of communication No. 1454/2006, submitted to the Human Rights Committee on behalf of Mr. Wolfgang Lederbauer under the Optional Protocol to the International Covenant on Civil and Political Rights,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

The text of an individual opinion signed by Committee member Ms. Ruth Wedgwood is appended to the present document.

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

Adopts the following:

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

1. The author of the communication is Wolfgang Lederbauer, an Austrian national. He claims to be a victim of violations by Austria[1] of his rights under article 14, paragraph 1, read alone as well as in conjunction with article 2, paragraph 1, and article 26 of the International Covenant on Civil and Political Rights (the Covenant). He is represented by counsel, Alexander H.E. Morawa.

Factual background

2.1 In 1981, the author joined the staff of the Austrian General Audit Office (GAO) (*Rechnungshof*). He was assigned to a department auditing public hospitals. In 1985, he invented a system of ecologically sound wall elements for soundproofing highways and railroad tracks which he named "Ecowall". He informed the GAO of his invention and designated his wife to act as trustee of the patents.

2.2 In 1989, the author founded, and his wife became the sole shareholder of, a limited liability company named "Econtract". When he and his wife divorced, the ownership of the company and the patents were transferred to the author, who appointed Mr. E.L. as chief executive officer and informed the GAO of the changed circumstances.

2.3 In 1993, when the GAO inquired into his involvement in the marketing of licenses to install "Ecowall" systems, the author submitted a statement to the President of the GAO, in which he criticized the fact that innovations in the soundproofing of transportation corridors were impeded by the predominance of a few large corporations. Subsequently, "Econtract" made several bids for projects in Austria, including the construction of soundproofing of a track operated by the Federal Railroad Corporation.

2.4 In 1994, the author and E.L. each contacted the chairperson of a Parliamentary Inquiry Commission established to look into alleged irregularities related to the construction of a public motorway, Mr. W., to inform him about "Ecowall" as an alternative to the standard soundproofing systems marketed by other corporations. Unknown to E.L., a journalist of the magazine "Profil" had listened to his conversation with Mr. W. Despite the author's assurances that he had fully informed the GAO and its President about his ownership of the "Ecowall" patents and of "Econtract", "Profil" and other newspapers subsequently published articles criticizing the alleged incompatibility with his function as a senior staff member of the GAO.

2.5 On 30 August 1994, the President of the GAO temporarily suspended the author, as there were sufficient grounds to suspect that his private business activities, in particular his involvement in marketing the "Ecowall" project, were incompatible with his function as a civil servant and in breach of Article 126 of the Federal Constitution Act, which provides that members of the GAO must not participate in the management of profit-oriented companies,[2] as well as Section 43 (1) and (2) of the Federal Civil Servants Act.

2.6 On 1 September 1994, without hearing the author, the President of the GAO issued a decree ("first decree") prohibiting the author from participating in the management and administration of "Econtract" and from further engaging in the marketing of "Ecowall". On 20 September 1994, the author appealed against the decree. The GAO did not take action until 2 June 2000, when the author filed a complaint regarding the inactivity of the GAO with the High Administrative Court, which in turn ordered the GAO to take action within three months. On 18 September 2000, the GAO issued a new decree ("second decree") merely repeating the previous one. On 18 October 2000, the author appealed to the High Administrative Court, arguing that the GAO had not provided him with an opportunity to be heard, nor investigated to what extent it had known about his involvement with "Econtract". On 31 October 2000, he supplemented his appeal, asking the Court to hold an oral hearing. By letter of 30 June 2005, the President of the third Senate of the High Administrative Court asked him whether he still was interested in obtaining a decision on his appeal against the decree, which could not alter the final decision taken in the disciplinary proceedings. On 14 July 2005, the author reiterated his interest in a decision by the Court, which then revoked the decree on 27 September 2005.

2.7 On 10 October 1994, the President of the GAO filed a disciplinary complaint against the author, based on Article 126 of the Federal Constitution Act, Sections 43 (1) and (2) *et seq.* of the Federal Civil Servants Act, and the following charges: Participation in the management of "Econtract"; failure to provide medical justification for sick leave and to report for duty during regular office hours on certain days; and non-compliance with instructions received from his superiors. On 11 November 1994, the Disciplinary Commission instituted disciplinary proceedings against him. On 23 December 1994, the author complained to the Constitutional Court alleging violations of his rights to equal treatment before the law and to a lawful judge. On 6 March 1995, the Constitutional Court decided not to deal with the complaint. On 31 May 1995, the President of the GAO amended the disciplinary complaint against the author with additional charges.

2.8 On 13 October 1994, the Disciplinary Commission permanently suspended the author, based on Article 126 of the Federal Constitution Act, and reduced his salary by one-third. On 19 December 1994, the Disciplinary Appeals Commission rejected his appeal. On 6 February 1995, he appealed this decision to the High Administrative Court, requesting an oral hearing and arguing that the GAO had been informed about his involvement with "Econtract" and that it took action only after the media criticized his activities, and without hearing him as a party. On 29 November 2002, the Court rejected the appeal. At the same time, it found that the issue of an oral hearing did not arise, as the matter fell outside the scope of article 6 of the European Convention on Human Rights.

2.9 On 21 December 1995 and 6 March 1996, the author asked for his suspension to be lifted, arguing that it gradually became a de facto punishment. The Disciplinary Appeals Commission rejected his requests on 25 January and 10 April 1996, respectively. On 7 June 1996, he complained to the High Administrative Court; this complaint was dismissed on 19 December 2002.

2.10 On 20 May 1997, after the author had requested the President of the National Council (the lower house of Parliament) and the leaders of the four political parties in Parliament to investigate his case, the Disciplinary Commission "hastily" issued a decision scheduling a

disciplinary hearing. The Commission was chaired by Mr. P.S., who worked at the GAO as head of the department responsible for auditing the Austrian Federal Railway Administration and the public High-Speed Railway Corporation.

2.11 On 30 May 1997, the author challenged the chairman of the Disciplinary Commission, P.S., for bias, as P.S. was auditing the same agencies which routinely installed those conventional soundproofing materials which the author had criticized and sought to improve with his invention. On 3 July 1997, he filed a complaint against the decision of the Disciplinary Commission scheduling a disciplinary hearing with the Constitutional Court, alleging violations of his rights to equal treatment and to a fair trial before a lawful judge and again challenging P.S. The Constitutional Court refused to deal with the complaint, which was subsequently transferred to the High Administrative Court and dismissed by the Court on 27 June 2001.

2.12 On 6 October 1997, the author requested access to the case file before the Disciplinary Commission based on "a reasonable suspicion" that certain documents had been suppressed or ignored. On 14 October 1997, the Commission rejected his request arguing that its members were "entitled to keep their individual reasoning and voting […] secret from the parties of the disciplinary proceedings. This is a fortiori required since […] members of the Disciplinary Commission and the parties are members of the staff of the same government agency and therefore presumably in constant contact with one another. Their professional contacts could be adversely affected by the parties' knowledge about their reasoning and voting […], which would contravene the legitimate interest of each member of the Disciplinary Commission to avoid disturbances in their work environment. […] Alleged discrepancies of the disciplinary file or other irregularities may be raised in an appeal." The decision of the Disciplinary Commission was not subject to appeal.

2.13 Following the media coverage of the author's activities and the initiation of disciplinary proceedings against him, "Econtract" received no further orders for the "Ecowall" system. A freight company filed criminal charges against the author and E.L. over an unpaid bill. On 18 November 1998, the Regional Criminal Court of Vienna convicted the author of negligently causing the insolvency of a company and sentenced him to a suspended prison term of five months. On 6 July 1999, the Vienna Court of Appeals dismissed his appeal.

2.14 Based on a notification from the Vienna Regional Criminal Court that Criminal proceedings had been initiated against the author, the President of the GAO, on 9 November 1998, brought another disciplinary complaint against the author, charging him with negligently causing the insolvency of a company as well as damage to his creditors.

2.15 In the meantime, it was discovered that a memorandum from a staff member of the GAO dated 18 February 1993, on the compatibility of the author's private business activities with his official function had been removed from his personnel file, together with accompanying documents. Among these documents were a statement of the author, received by the GAO on 16 July 1993, explaining the extent of his involvement with "Econtract" and, in particular, a draft order concluding that the author's business activities were incompatible with Article 126 of the Federal Constitutional Act.

2.16 On 27 January 1999, the author requested the Disciplinary Commission to reopen the first set of disciplinary proceedings with a view to discontinuing them, arguing that the newly

discovered documents proved that the GAO had been fully informed, as early as 1993, about his involvement with "Econtract", that he had complied with his reporting duties, and that he could reasonably expect that the fact that no order had been issued prohibiting him to continue his activities meant that the GAO did not find these activities objectionable.

2.17 On 23 February 1999, the Disciplinary Commission initiated a second set of disciplinary proceedings against the author. His appeal against this decision was dismissed by the Disciplinary Appeals Commission on 13 June 1999. On 24 August 1999, the Disciplinary Commission informed the author that it would not hold any further oral hearings and that it would render a written decision. On 26 August 1999, the author requested an oral hearing and again challenged the chairman, P.S., who was subsequently replaced by another chairman.

2.18 On 13 December 1999, the Disciplinary Commission found the author guilty of disciplinary offences and dismissed him from civil service. It observed that it "was obliged to adhere to the legally binding findings of fact of a criminal court," and that it had based its decision only on the charges for which the author had been found guilty by the criminal courts. It added that the author's oral testimony would not have led to the discovery of additional facts relevant to the Commission's decision.

2.19 The author appealed this decision on 1 and 14 January 2000, invoking due process rights, and requested an oral hearing before the Disciplinary Appeals Commission, which dismissed his appeal on 13 June 2000 without hearing him, considering that Article 6 of the European Convention on Human Rights was inapplicable in disciplinary proceedings. On 21 July 2000, the author filed a complaint with the Constitutional Court, alleging breaches of his rights to equal treatment and to a fair trial and challenging as unconstitutional that the Disciplinary Commission should be bound by the findings of criminal courts. On 25 September 2001, the Constitutional Court dismissed the complaint, arguing that it had no prospect of success and since it did not raise issues of constitutional law.

2.20 Parallel to the proceedings before the Constitutional Court, the author, on 21 July 2000, appealed to the High Administrative Court, claiming that the decision confirming his dismissal from civil service was made without a fair and public hearing, including an oral hearing, as required by article 6 of the European Convention. He submitted that dismissal from service was such a severe disciplinary sanction that it came within the scope of Article 6 of the European Convention and warranted a right to be heard in person. The author asked the Court to hold an oral hearing, arguing that, in the absence of such hearing, he would be deprived of an opportunity to present his defence.

2.21 On 31 January 2001, the High Administrative Court dismissed the appeal. Based on the assumption that the author's competencies in the GAO included auditing "construction projects in the area of roads and railroads," it concluded that his private business activities were closely related to his official duties as an auditor. By reference to the judgement of the European Court of Human Rights in *Pellegrin v. France*, the Court rejected his request for an oral hearing, observing that article 6 of the European Convention was inapplicable, given that the author was a civil servant exercising competencies of a public-law character. On 5 June 2001, the author requested the High Administrative Court to review its judgement and challenged the members of the Senate that had decided his case for bias. On 22 January 2002, a differently constituted Court rejected the challenge.

2.22 On 31 December 2002, the author asked the High Administrative Court to reopen the proceedings concerning his suspension and dismissal, claiming procedural irregularities and a violation of his right to an oral hearing. On 27 February 2003, the Court rejected the request to reopen the proceedings concerning his suspension, arguing that the author had sufficient opportunity to submit his arguments in writing and that there was no duty to hear him as a party or to ask him for further written observations. On 27 March 2003, it rejected his request to reopen the proceedings concerning his dismissal, for the same reasons.

2.23 On 1 January 2000,[3] 12 December 2000 and 13 March 2001,[4] and 4 March 2002,[5] the author submitted complaints to the European Court of Human Rights, alleging breaches of his rights under article 6 of the European Convention on Human Rights, in particular his right to a fair trial within a reasonable period of time. The Court joined several of these applications and rejected them as inadmissible *ratione materiae*,[6] by reference to *Pellegrin v. France*.[7]

The complaint

3.1 The author claims that the composition and lack of independence of the Disciplinary Commission, the rejection of his repeated requests for an oral hearing before the Disciplinary Commission, the Disciplinary Appeals Commission and the High Administrative Court, the lack of publicity of the proceedings before the Disciplinary Commission and the Disciplinary Appeals Commission, and the long delays in the proceedings before the High Administrative Court, as well as between the filing of the disciplinary complaint and the initiation of disciplinary proceedings, violated his rights under article 14, paragraph 1, read alone as well as in conjunction with article 2, paragraph 1, and article 26 of the Covenant.

3.2 The author submits that the members of the Disciplinary Commission trying his case were neither independent nor impartial. Pursuant to Section 98 (2) of the Federal Civil Servants Act, members of disciplinary commissions must belong to the same government department as the accused. Although Section 102 (2) of the Act provides that commission members are "independent, while performing their duties," the author considers this presumption a mere fiction, since: (a) the members of the Disciplinary Commission trying his case continued to serve as civil servants under the authority of the President of the GAO and continued to be bound by his orders, save in matters related to the disciplinary proceedings; (b) they were colleagues on the same career track as the author, competed with him for promotions and regularly interacted with him professionally; (c) they were potentially exposed to the internal politics within the GAO and to pressure from the very persons who had initiated the disciplinary proceedings against him.

3.3 The author submits that the chairperson of the Disciplinary Commission was biased against him, as head of the section in the GAO that audits public railroad companies, given the author's criticism of the practice of purchasing overpriced soundproofing walls, while ignoring alternative solutions such as his invention. One of the projects for which "Econtract" had submitted a bid, concerned the soundproofing of a rail track operated by the public railroad company that P.S. had audited. He criticizes that, although he challenged P.S. "at the very beginning of the hearings" and in his initial complaint to the Disciplinary Commission and the

Constitutional Court against the order dated 20 May 1997 of the Disciplinary Commission scheduling a disciplinary hearing, P.S. was not replaced until the very end of the proceedings, after the last formal hearing had taken place.

3.4 The author argues that the appeals bodies' failure to replace P.S. earlier in the proceedings amounts to a violation of his right to an independent and impartial tribunal, protected by article 14, paragraph 1. The fact that, unlike the general workforce, civil servants were excluded from having their case reviewed by the ordinary courts constitutes a violation of article 26.

3.5 In the author's view, the rejection of his repeated requests for an oral hearing by the Disciplinary Commission, the Disciplinary Appeals Commission and the High Administrative Court, on the ground that article 6 of the European Convention on Human Rights is inapplicable in disciplinary proceedings, violated his right to an oral hearing under article 14, paragraph 1.[8] Neither the Disciplinary Appeals Commission nor the High Administrative Court qualified or acted as tribunals within the meaning of article 14 in his case. While the Disciplinary Appeals Commission rejected his appeal without a hearing, the High Administrative Court's review was limited to questions of law.

3.6 The author recalls that article 14, paragraph 1, requires a number of conditions including expeditious procedure[9] and that unreasonable procedural delays violate that provision.[10] He also recalls that it took the High Administrative Court more than seven years to decide on his complaint against the decision suspending him from office, which is unreasonable delay. No action was taken by the Court between 6 February 1995, when he filed the complaint, and 17 July 2002, when the Court held its first session. No remedy was available to challenge the Court's inactivity.

3.7 The author submits that the six and a half years it took the High Administrative Court to decide on his complaint against the Disciplinary Appeals Commission's decision of 10 April 1996 rejecting his request to lift his suspension also is unreasonable delay. No action was taken by the Court between 7 June 1996, when he filed the complaint, and 19 December 2002, when judgement was given.

3.8 For the author, the delay of two years and seven month between the filing of the disciplinary charges against him (10 October 1994) and the decision of the Disciplinary Commission scheduling a first hearing (20 May 1997) was equally unreasonable. As the accused, he was under no obligation to accelerate the proceedings against him. However, it was only after he approached members of Parliament that the Disciplinary Commission scheduled the hearing. No reasons for the delay were given during the domestic proceedings. The delay was therefore entirely attributable to the State party.

3.9 As regards his complaint against the first decree of the President of the GAO, the author recalls that it was only because, on 2 June 2000, he filed a complaint with the High Administrative Court that this decree was renewed. No procedural steps were taken by the Court between 18 October 2000, when he complained against the second decree, and 27 September 2005, when the Court repealed it.

3.10 The author claims that the overall length of disciplinary proceedings (almost 11 years) is unreasonable, given that he did everything possible to accelerate consideration of his appeals.[11]

3.11 Since the proceedings before the Disciplinary Commission and the Appeals Commission were held in camera, in accordance with Section 128 (1) of the Federal Civil Servants Act, and by reference to general comment No. 13,[12] the author argues that there were no exceptional circumstances which would have justified excluding the public or to limit the hearings to only a particular category of persons, as the accusations against him had been published in newspapers and involved his private conduct, not official duties involving matters of sensitive and confidential nature. The restriction on the publicity of the disciplinary proceedings, combined with the absence of any hearings before the High Administrative and Constitutional Courts, deprived him of a possibility to defend himself by making his position known, thereby violating his right to a public hearing under article 14, paragraph 1.

3.12 On admissibility, the author submits that the same matter is not being, and has not been, examined under another procedure of international investigation or settlement. The European Court of Human Rights declared his applications inadmissible *ratione materiae* by reference to *Pellegrin v. France*, and thus without an examination of the substance of his complaints.[13]

3.13 The author claims to have exhausted all available domestic remedies. There was no remedy to challenge the composition of the Disciplinary Commission; challenging the constitutionality of Section 98 (2) of the Federal Civil Servants Act on the composition of disciplinary commissions was futile in the light of the Constitutional Court's jurisprudence on the constitutionality of the establishment and composition of disciplinary authorities at the federal, provincial and municipal levels. With regard to the delays in the proceedings before the High Administrative Court, no remedies are available for challenging the Court's inactivity.

3.14 As regards the applicability of article 14, paragraph 1, to disciplinary proceedings, the author recalls that the concept of a 'suit at law' is based on the nature of the right and obligations in question rather than the status of the parties.[14] Accordingly, the Committee applied article 14, paragraph 1, to proceedings involving civil or public servants, whether the proceedings related to their status or not.[15] He also recalls the Committee's statement, in *Perterer v. Austria*, "that whenever a judicial body is entrusted with the task of deciding on the imposition of disciplinary measures, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee."[16]

State party's observations on admissibility and merits

4.1 On 13 April 2006, the State party challenged the admissibility of the communication, arguing that the author did not exhaust domestic remedies, that his communication is inadmissible *ratione materiae*, and that the same matter has been examined by the European Court of Human Rights. The Austrian reservation concerning article 5, paragraph 2 (a), of the Optional Protocol thus precluded the Committee from considering the author's claims.

4.2 The State party submits that the author failed to exhaust domestic remedies, insofar as he claims unreasonable length of proceedings. Under Section 73 (1) of the Code of General Administrative Procedure, authorities, including the Disciplinary Commission, were obliged to act on his requests and appeals within six months, failing which a request for transfer of jurisdiction to the higher authority can be filed under Section 73 (2). The author never filed such a request, although he was represented by counsel. According to the State party, article 132 of

the Federal Constitutional Act provided for the possibility to file a complaint regarding the inactivity of administrative authorities (hereafter "inactivity complaint") with the High Administrative Court. The author only filed one such complaint challenging the inactivity of the GAO to decide on his appeal against the decree dated 1 September 1994. The State party recalls that the European Court of Human Rights considered the above possibilities to expedite proceedings to be effective remedies.[17]

4.3 By reference to the jurisprudence of the European Court of Human Rights,[18] the State party argues that the disciplinary proceedings against the author fall outside the scope of article 14 of the Covenant, as they concern a dispute between an administrative authority and a member of the civil service whose function requires direct involvement in the exercise of powers and duties assigned to him under public law. Disputes concerning the recruitment, career and termination of service of civil servants only constituted a determination of one's "rights and obligations in a suit at law" within the meaning of article 14, paragraph 1, if they concerned a "purely economic right," such as payment of fees, or an "essentially economic right". This follows from the requirement in the French text of article 14, paragraph 1, that the rights and obligations to be determined must be of a civil character. The author's proceedings were not "civil" merely because they also raised an economic issue,[19] i.e. the financial repercussions of his dismissal. Neither did the disciplinary proceedings constitute a determination of a criminal charge against the author, in the absence of a sufficiently severe sanction which would justify the qualification of the disciplinary measure as a criminal charge. Lastly, the author contradicted himself when denying that the disciplinary authorities and the High Administrative Court are tribunals within the meaning of article 14, and at the same time invoking *Perterer v. Austria*. The State party concludes that his claims under article 14, read alone and in conjunction with articles 2 and 26, of the Covenant are inadmissible *ratione materiae*.

4.4 The State party invokes its reservation to article 5, paragraph 2 (a), on the ground that the same matter has been examined by the European Court of Human Rights. That the Court found the author's applications incompatible with the provisions of the European Convention showed that it rejected his claims on substantive rather than purely formal grounds, after at least a cursory examination of the merits. It had based its decision on article 35 (3) of the European Convention, setting out grounds of merit, rather than on article 35 (1) and (2), which contained formal grounds of inadmissibility. The author's claims are therefore inadmissible under articles 3 and 5 of the Optional Protocol, read in combination with the Austrian reservation.

5.1 On 16 August 2006, the State party commented on the merits and again challenged the admissibility of the communication for non-exhaustion of domestic remedies, lack of victim status, and inapplicability of article 14 of the Covenant. It argues that the author failed to raise his claims before the domestic courts, insofar as they relate to the absence of an oral hearing in the proceedings concerning his suspension, the composition of the Disciplinary Commission as such, and the length and lack of publicity of the proceedings. His argument that challenging the constitutionality of the composition of Disciplinary Commissions would have been futile in the light of the Constitutional Court's jurisprudence was incorrect, as the decisions cited by him date back to 1956 and only dealt with formal requirements for establishing disciplinary commissions. Before the domestic organs, the author never challenged the composition of the Disciplinary Commission or of the Appeals Commission as such, but criticized only the participation of the

chairman of the Disciplinary Commission, P.S., in the first and second sets of disciplinary proceedings. Rather than contesting the lack of publicity of the disciplinary proceedings, in his complaints of 21 July 2000 to the Constitutional and High Administrative Courts, he explicitly acknowledged that: "Restricting public attendance to three civil servants as persons of confidence (§ 124 (3) of the Federal Civil Servants Act) still satisfies the requirements of publicity and can be logically understood in the light of the possibility of excluding the public pursuant to article 6 (1) of the European Convention on Human Rights […]. National security is hardly ever at stake in disciplinary proceedings, as a result of which it is not admissible to exclude the public altogether. To a lesser extent, though, the interests of the State are affected, which justify a restriction […]."

5.2 Under Section 118 (2) of the Federal Civil Servants Act, the first set of disciplinary proceedings against the author was stayed *ex lege* by virtue of his dismissal in the second set of proceedings, the effect of which was similar to an acquittal. The author's claims concerning the first set of proceedings thus became moot. Similarly, the claim about the absence of an oral hearing in the proceedings concerning the decree prohibiting him from engaging in activities related to "Econtract" became moot following the revocation of the second decree by the High Administrative Court on 27 September 2005. The author therefore lacked victim status with regard to the above claims.

5.3 The State party argues that the author has not substantiated the following claims, for purposes of admissibility or, subsidiarily, on the merits:

(a) He failed to substantiate that the High Administrative Court lacks the attributes of a tribunal within the meaning of article 14 of the Covenant. The Court was an independent body that dealt not only with questions of law but also with questions of fact;

(b) He did not advance sufficient grounds for assuming that the members of the Disciplinary and Appeals Commissions lacked independence and impartiality. These requirements were ensured under the Federal Civil Servants Act, which has the rank of constitutional law and provides for important safeguards regarding the composition (participation of staff representatives, appointment of members for five years) and working methods (distribution of work one year in advance, confidentiality of deliberations and voting) of disciplinary commissions. That members belong to the same organization enabled them to take an informed decision and placed them in a better position than outsiders to evaluate charges. The confidentiality of deliberations and voting also applied vis-à-vis superiors and colleagues, thereby strengthening members' independence and impartiality;

(c) P.S. was immediately replaced by another chairperson after he was challenged by the author. The proximity between his responsibility at the GAO and the author's invention should not give rise to doubts about impartiality, as the issue before the Disciplinary Commission was not the author's invention itself, but the compatibility of his activities with article 126 of the Federal Constitutional Act;

(d) As reflected in the 1,200-page verbatim record, in the first set of disciplinary proceedings, an oral hearing was conducted for 26 days with a new chairman and in the presence of the author, his lawyer and two persons of confidence nominated by him;

(e) There was no need for an oral hearing in the second set of disciplinary proceedings, as the disciplinary authorities were bound by the facts established by final judgment of the Regional Criminal Court of Vienna. It was therefore possible to decide the case merely on the basis of the file, without prejudice to the principles of a fair trial. Conducting another oral hearing would only have led to delays in the proceedings. From the author's perspective that the Disciplinary Appeals Commission and the High Administrative Court were no tribunals within the meaning of article 14, these bodies would not have been required to conduct oral hearings in the first place;

(f) The length of the different and interlocked proceedings was attributable to their complexity, as reflected by the 38-page decision dated 29 November 2002 of the High Administrative Court rejecting the author's appeal against his permanent suspension. The author filed numerous complaints against individual procedural steps of the disciplinary authorities. The proceedings concerning his suspension from office, while lasting from February 1995 to November 2002, ceased to have any effect on the author as of 31 January 2001, when the High Administrative Court upheld his dismissal from service. The total length of the proceedings (11 years) ultimately meant that the author's position improved considerably in terms of pension entitlements;

(g) It was in the interest of official secrecy and in accordance with article 14, paragraph 1, to exclude the public from the disciplinary proceedings. Article 20 (3) of the Federal Constitutional Act requires civil servants to observe secrecy "concerning all facts that have come to their knowledge exclusively on account of their official activities." The exclusion of the public also served to protect the author against undesired publicity concerning any socially inadequate acts performed by him. In accordance with Section 124 (3) of the Federal Civil Servants Act, he was entitled to nominate a maximum of three civil servants to attend the hearings as persons of confidence. The fact that he availed himself of this possibility showed that he did not have any objections against his disciplinary proceedings being conducted exclusively by civil servants.

5.4 The State party concludes that the Committee is not a "fourth instance" and that the author has not substantiated that the alleged defects in the disciplinary proceedings were manifestly arbitrary or amounted to a denial of justice.

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

6.1 On 15 December 2006, the author commented, arguing that the State party overlooks that insofar as his claims of unreasonable delay relate to the proceedings before the High Administrative Court, none of the remedies for expediting proceedings were applicable. In the proceedings concerning the first decree of the President of the GAO, he did lodge an inactivity complaint. As regards the 31-month delay between the filing of the disciplinary complaint and the initiation of the disciplinary proceedings, it would be unreasonable to expect that the author would actively participate in the conduct of disciplinary proceedings against him. He was under no duty to accelerate what amounts to his own "indictment" after the "prosecuting" authority had failed to act.

6.2 The author submits that Section 124 (3) of the Federal Civil Servants Act allows for challenging only one member of the senate of the disciplinary commission trying the case. Although he was restricted to only one formal challenge, which he directed against P.S., he also raised objections as to the independence and impartiality of the other members of the Disciplinary Commission, as reflected in several transcripts of closed hearings of the Commission. He thus did everything possible to make his challenge of the entire Disciplinary Commission known.

6.3 The author denies to have consented to the absence of a public hearing in his 21 July 2000 submissions to the Constitutional and High Administrative Courts (see paragraph 5.2 above). The passage quoted by the State party merely recited the prevailing legal opinion under domestic law - it cannot be interpreted as a waiver of his right to a public hearing.

6.4 On admissibility *ratione materiae*, the author submits that the State party's insistence on a restrictive reading of article 14, paragraph 1, in the light of the practice under the European Convention on Human Rights is contrary to the object and purpose of the Covenant and belies that the European Court of Human Rights clearly understood the temporary and imperfect nature of the *Pellegrin* criteria, which it considered likely to evolve into a broader concept of protection.

6.5 The author argues that the reservation to article 5, paragraph 2 (a), of the Optional Protocol is inapplicable, because the European Court of Human Rights merely considered the elements necessary to identify him as a "civil servant" under the *Pellegrin* standard and did not proceed to an examination of the substance of his complaint.

6.6 On the merits, the author submits that constitutional guarantees that civil servants in a dependent and subordinate position are independent during their term as member of a disciplinary commission were purely fictitious, in the absence of an actual "culture of independence." The five-year appointment of Disciplinary Commission members falls short of the judicial guarantees in place for judges, since Commission members remained under the full authority of the agency that prosecutes a disciplinary defendant and to which they return full-time once their term has ended. The participation of staff representatives in the Disciplinary Commission was no guarantee that the Commission as a whole fulfilled the minimum requirements of independence, especially since their status did not afford them any additional safeguards of independence. The fact that members of disciplinary commissions deliberate in private was irrelevant for their independence and impartiality.

6.7 The author complains that the State party extracts artificial omissions, when it considers that his claim of partiality on the part of the chairman, P.S., refers only to the first "set" of disciplinary proceedings, which was ultimately stayed, but not to the second "set" of proceedings. There was only one set of disciplinary proceedings, during which a new charge was introduced, and which was therefore conducted in two stages or parts. He challenged the chairman at both stages of the domestic proceedings and his claim under article 14, paragraph 1, extends to both stages, as far as the lack of independence and impartiality of the chairman and commission is concerned.

6.8 The author rejects the State party's argument that there was no need for an oral hearing because the disciplinary authorities were bound by the facts established by the criminal court. The legal issue of his criminal conviction, i.e. whether he negligently caused the insolvency of his company, was different from the issue of the disciplinary proceedings, i.e. whether he managed a company in violation of article 126 of the Federal Constitutional Act. Article 126 did not preclude staff of the GAO from holding management positions in private companies that work in areas unrelated to the auditing competencies of the GAO. The mere finding of the criminal court that the author managed "a" company was therefore insufficient to ascertain whether he managed a company within the meaning of article 126. The fact that only formal hearings were held during the first part of the disciplinary proceedings, while no hearing took place at all during the second part of the proceedings, made it impossible to evaluate the severity of the offence, the necessary level of sanction and the degree of guilt, as required by Section 93 (1) of the Federal Civil Servants Act. Similarly, the absence of an oral hearing deprived him of an opportunity to advance any mitigating circumstances, in accordance with Section 32 (2) of the Penal Code. Even assuming that the Disciplinary Commission was bound by the facts established by the criminal court, the finding of guilt and the imposition of an adequate sanction remained within its own powers, thus requiring a hearing of the author.

6.9 With respect to the length of the proceedings, the author submits that the matter was not particularly complex, nor did it require extensive investigation, as it solely related to the question of whether promoting his invention by owning and allegedly managing a company was incompatible with his function as a civil servant at the GAO. That the proceedings were complex and interlocked was a matter to be resolved by the State party by timely and effectively organizing its judicial and administrative organs. He merely defended himself against the disciplinary charges within the available procedural structure and exercised his right to appeal unfavourable decisions.

6.10 The author rejects the State party's claim that he benefited from the length of proceedings in terms of pension entitlements. Apart from the distress caused by 11 years of uncertainty about his professional status, he lost any entitlement to retirement benefits due to his dismissal from civil service.

6.11 As regards the right to a public hearing, the author argues that the public cannot ipso facto be excluded from all disciplinary trials against all civil servants by virtue of a blanket prohibition of publicity in the "interest of official secrecy". Whether the exclusion of the public was in conflict with his interests was irrelevant because publicity was an absolute right that needed not be claimed by a defendant by reference to specific "interests". Rather, publicity must be secured unless it can be demonstrated that the exclusion of the public was justified under article 14, paragraph 1. The State party failed to provide any such justification in his case.

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2 With regard to the State party's *ratione materiae* objection, the Committee recalls that the concept of a "suit at law" under article 14, paragraph 1, of the Covenant is based on the nature of the right in question rather than the status of one of the parties.[20] The imposition of disciplinary measures against civil servants does not of itself necessarily constitute a determination of one's rights and obligations in a suit at law, nor does it, except in cases of sanctions that, regardless of their qualification in domestic law, are penal in nature, amount to a determination of a criminal charge within the meaning of the second sentence of article 14, paragraph 1.[21] In *Perterer v. Austria*, which also concerned the dismissal of a civil servant by a disciplinary commission, while observing that the decision on a disciplinary dismissal need not necessarily be determined by a tribunal, the Committee considered that whenever a judicial body is entrusted with the task of deciding on the imposition of disciplinary measures, it must respect the guarantee of equality of all persons before the courts, as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee.[22] In this case, the Committee notes the State party's argument that the author himself submitted that neither the Disciplinary Appeals Commission nor the High Administrative Court "qualified or acted" as tribunals within the meaning of article 14, paragraph 1. However, the Committee does not view the author's statement as a blanket denial of the judicial character of the Disciplinary Appeals Commission, nor of the High Administrative Court, but rather as an allegation that neither one of those bodies complied with the requirements of article 14, paragraph 1, in this case. Furthermore, it notes that the State party itself emphasized that the High Administrative Court was a tribunal within the meaning of article 14, paragraph 1. The Committee therefore declares the communication admissible *ratione materiae* insofar as the author claims to be a victim of violations of his rights under article 14, paragraph 1.

7.3 The State party invokes its reservation to article 5, paragraph 2 (a), of the Optional Protocol. The issue before the Committee is whether the "same matter" has already been "examined" by European Court of Human Rights. The Committee recalls its jurisprudence that the "same matter" within the meaning of article 5, paragraph 2 (a), must be understood as relating to the same author, the same facts and the same substantive rights.[23] As regards the length of proceedings, the author could only raise delays occurring prior to 4 March 2002, the date of submission of his last application (No. 13874/02), to the European Court of Human Rights. Any delays occurring after that date are therefore *ab initio* not covered by the State party's reservation. Insofar as his claims under article 14, paragraph 1, relate to events before 4 March 2002, the issue is whether the present communication relates to the same substantive rights as the author's applications to the European Court. In its decisions of 26 February and 14 June 2002, the European Court declared his applications of 13 March 2001 (No. 73230/01) and 4 March 2002 (No. 13874/02) incompatible *ratione materiae* with article 6 of the European Convention. The Committee observes that, despite a considerable degree of convergence between article 6 of the Convention and article 14, paragraph 1, of the Covenant, the scope of application of both articles, as developed in the jurisprudence of the Court[24] and the Committee,[25] differs with respect to proceedings before judicial bodies entrusted with the task of deciding on the imposition of disciplinary measures. It recalls its jurisprudence that, if the rights invoked before the European Court of Human Rights differ in substance from the corresponding Covenant rights, a matter that has been declared inadmissible *ratione materiae* by the European

Court has not, in the meaning of the respective reservations to article 5, paragraph 2 (a), been "examined" in such a way that the Committee is precluded from considering it.[26] It follows that the Austrian reservation does not bar the Committee from examining the author's claims under article 14, paragraph 1.

7.4 With regard to the author's claim that the absence of an oral hearing in the proceedings concerning his suspension and dismissal violated his right to a fair hearing under article 14, paragraph 1, the Committee notes his argument that only "formal" hearings were held during the first set of proceedings and that, in the second set of proceedings, the disciplinary authorities were not bound by the facts established by the Vienna Regional Criminal Court due to the different legal issues at stake in the criminal and disciplinary proceedings. In any event, he would have been given an opportunity to present any mitigating factors and his position with regard to his guilt and the sanction to be imposed on him. It notes the State party's reference to the 26-day hearing in the presence of the author and his lawyer during the first set of proceedings and its view on the binding character of the findings of the criminal court. The Committee recalls that it is generally for the courts of States parties to the Covenant to review the facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.[27] The author has not substantiated, for purposes of admissibility, that the decisions of the High Administrative Court of 31 January 2001, 29 November 2002 and 27 February and 27 March 2003 suffer from any such defects. The Committee concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.5 Insofar as the author claims that the absence of an oral hearing in the proceedings concerning the second decree of the President of the GAO also constitutes a violation of his right to a fair hearing under article 14, paragraph 1, the Committee recalls that the High Administrative Court revoked the decree on 27 September 2005. This claim has therefore become moot, and this part of the communication is inadmissible *ratione personae* under article 1 of the Optional Protocol.

7.6 As regards the exclusion of the public from the proceedings before the Disciplinary Commission and the Appeals Commission, the Committee notes that the author, while claiming his right to an oral hearing, did not allege violations of his right to a public hearing in his submissions to the High Administrative Court of 6 February 1995 (further appeal against suspension), 21 July 2000 (further appeal against dismissal), 18 October 2000 (appeal against the second decree of the GAO President), 31 October 2000 (request for oral hearing in the proceedings concerning the second decree) and 31 December 2002 (request to reopen the dismissal and suspension proceedings before the High Administrative Court). Nor did he do so in his complaints to the Constitutional Court. In the appeal of 21 July 2000, the author, while arguing that article 6 of the European Convention requires a public oral hearing, submitted that restricting public attendance at the oral hearing to three civil servants acting as persons of confidence of the accused still satisfies the requirements of article 6, paragraph 1, of the European Convention. While it may be that this statement reflects the predominant legal opinion in Austrian law, without constituting a waiver of the author's right to a public hearing, it is also true that the statement cannot be understood as challenging the absence of a public hearing. It

follows that the author has failed to exhaust domestic remedies with regard to the alleged absence of a public hearing. This part of the communication is therefore inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.7 With regard to the claim that the chairman of the third Senate of the Disciplinary Commission, P.S., was not replaced until the end of the first set of the disciplinary proceedings, although he was challenged at their beginning, the Committee notes several documents which seem to prove the contrary. Thus, in a memorandum dated 3 June 1997, signed by P.S. and his successor as chairman of the third Senate of the Disciplinary Commission, H.A., it is stated that the author challenged P.S. in a letter of 30 May 1997 within the prescribed time limit; in accordance with the distribution of business of the Disciplinary Commission at the GAO, the President of the first Senate, H.A., was to substitute the President of the third Senate, P.S. In a note dated 3 June 1997, H.A. confirms that he contacted the author and his lawyer to inform them that due to his substituting the former chairman, P.S., an oral hearing scheduled for 12 June 1997 had to be postponed. A meeting of the third Senate of the Disciplinary Commission was held on 12 June 1997 to discuss procedural matters. The minutes of this meeting identify H.A. as chairperson. Similarly, the minutes of the oral hearing held on 20 October 1997 indicate H.A. as chairperson. The Committee also notes that it is uncontested that, in the second set of proceedings, P.S. was replaced after he was challenged by the author on 26 August 1999. It therefore considers that the author has failed to substantiate, for purposes of admissibility, how the alleged bias of P.S. would have affected his right under article 14, paragraph 1, to an independent and impartial tribunal, and concludes that this claim is inadmissible under article 2 of the Optional Protocol.

7.8 With regard to the alleged lack of independence and impartiality of other members of the third Senate of the Disciplinary Commission, the Committee takes note of the author's arguments that Section 124 (3) of the Federal Civil Servants Act allowed him to challenge only one member of the Senate, that he sought to make his challenge of the other members known, and that it would have been futile to challenge the constitutionality of Section 98 (2) of the Federal Civil Servants Act. It also notes that the State party's argument that the Constitutional Court decisions invoked by the author in support of his futility claim are inapplicable, as they date back to 1956 and do not address the question of whether or not civil servants who belong to the same agency as the accused can be considered independent and impartial Commission members. In this regard, the Committee recalls that, in addition to ordinary judicial and administrative appeals, authors must also avail themselves of all other judicial remedies, including constitutional complaints, to meet the requirement of exhaustion of domestic remedies.[28] It considers that the author has not shown that the Constitutional Court's jurisprudence invoked by him would *ab initio* have precluded any prospect of success of a complaint challenging the constitutionality of Section 98 (2) or other relevant provisions of the Federal Civil Servants Act. The author has therefore failed to exhaust domestic remedies to challenge the independence and impartiality of the Disciplinary Commission as such. This part of the communication is thus inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.9 Insofar as the author claims that his exclusion from any possibility to have his case reviewed by the ordinary courts, on account of his status as a civil servant, constitutes a violation of article 26 of the Covenant, the Committee notes that civil servants in many civil law jurisdictions may not have their case reviewed by ordinary courts, but by other judicial review mechanisms. This in itself cannot be considered to constitute unjustified differential treatment, and the Committee considers that the author has failed to substantiate this claim, for purposes of admissibility. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.10 As regards the author's claim that the delay between the filing (10 October 1994) of the disciplinary complaint and the Disciplinary Commission's decision (20 May 1997) to schedule the first disciplinary hearing violated article 14, paragraph 1, of the Covenant, the Committee notes the State party's argument that the author should have filed a complaint under article 132 of the Federal Constitutional Act to challenge the failure of the Disciplinary Commission to schedule such a hearing. It also notes the author's reply that he was not required actively to participate in the initiation of disciplinary proceedings against himself. However, the Committee recalls that the disciplinary proceedings against the author were initiated on 11 November 1994. From this date, he could have filed an inactivity complaint with the High Administrative Court without actively participating in the initiation of disciplinary proceedings against himself. Insofar as the author argues that he could not reasonably be expected to accelerate his own "indictment" by lodging an inactivity complaint, the Committee considers that this circumstance is insufficient to absolve him from the requirement to exhaust all available remedies, given that disciplinary proceedings had already been initiated and that the adoption of the decision scheduling a first hearing was a formality. If the author now seeks to invoke the delay before the Committee, he should have provided the courts of the State party with an opportunity to remedy the alleged violation. The Committee concludes that the author has failed to exhaust all available domestic remedies. This part of the communication is therefore inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.11 Insofar as the author alleges that delays in the proceedings before the High Administrative Court concerning the second decree of the GAO President was unreasonable, in breach of article 14, paragraph 1, the Committee observes that the prohibition ceased to have any effects on him as of 31 January 2001, when the High Administrative Court confirmed his dismissal. By the same token, the final decisions of the High Administrative Court of 31 January 2001 and 29 November 2002 upholding the dismissal and the suspension based on article 126 of the Federal Constitutional Act, removed any legal uncertainty about the compatibility of his private business activities with his function as a GAO auditor. The Committee considers that the author has failed to substantiate, for purposes of admissibility, that the High Administrative Court's delay in revoking the second decree on 27 September 2005 had any detrimental effects on his legal position that would amount to a violation of article 14, paragraph 1. It follows that this claim is inadmissible under article 2 of the Optional Protocol.

7.12 With regard to the delays in the proceedings before the High Administrative Court concerning the author's suspension and his request to lift the suspension, the Committee has taken note of the State party's argument that these proceedings ceased to have any effect on the

author from 31 January 2001, when his dismissal became final. It nevertheless considers that, even if one subtracts the duration of the proceedings following this date, the author has advanced sufficient arguments to substantiate, for purposes of admissibility, that the remaining delays were unreasonable. It also recalls that the author has argued that no remedies were available to him for challenging the inactivity of the High Administrative Court. This appears to be correct, as Article 132 of the Federal Constitutional Act invoked by the State party does not apply to the High Administrative Court. The Committee concludes that the communication is admissible, insofar as the author claims that the delays in the proceedings before the High Administrative Court concerning his suspension and his request to lift the suspension, as well as the overall length of the proceedings, raise issues under article 14, paragraph 1.

Consideration of the merits

8.1 The Committee recalls that the right to a fair hearing under article 14, paragraph 1, entails a number of requirements, including the condition that the procedure before the national tribunals must be conducted expeditiously.[29] This guarantee relates to all stages of the proceedings, including the time until the final appeal judgement. Whether a delay is unreasonable must be assessed in the light of the circumstances of each case, taking into account, inter alia, the complexity of the case, the conduct of the parties, the manner in which the case was dealt with by the administrative and judicial authorities, and any detrimental effects that the delay may have had on the legal position of the complainant.[30]

8.2 In assessing the reasonableness of the delay between 6 February 1995, when the author appealed his suspension to the High Administrative Court, and 29 November 2002, when the High Administrative Court upheld the suspension of the author, the Committee takes into consideration the author's uncontested argument that the High Administrative Court took no procedural action whatsoever during the entire period in question, during which his salary was reduced by one third. Even assuming that the thoroughness of the High Administrative Court's judgment of 29 November 2002 indicates the complexity of the case, the Committee does not consider that this circumstance justifies a delay of more than seven and a half years, during which, up to the date of his dismissal on 31 January 2001, the author was subjected to a salary reduction and to the legal uncertainty about his professional situation. The Committee concludes that the delay in the proceedings before the High Administrative Court concerning the author's suspension was unreasonable and in breach of article 14, paragraph 1, of the Covenant.

8.3 In the light of the foregoing, the Committee need not consider whether the delays in the proceedings before the High Administrative Court concerning the author's request to lift his suspension, as well as the overall length of the proceedings, reveal violations of article 14, paragraph 1.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 14, paragraph 1, of the International Covenant on Civil and Political Rights.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including appropriate compensation. The State party is under an obligation to prevent similar violations in the future.

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

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

APPENDIX

Individual opinion of Committee member Ms. Ruth Wedgwood (dissenting)

1.1 The International Covenant on Civil and Political Rights was the work product of States parties, but also of several prominent individuals. Among them was Mrs. Eleanor Roosevelt, widely admired as a social reformer and as the widow of a wartime president. Alongside her ambition for supporting democracy and civil rights, Mrs. Roosevelt had a practical sense of what can be accomplished at an international level in the enhancement of human rights.

1.2 In its proposed reading of article 14 of the Covenant, the Human Rights Committee should not ignore Mrs. Roosevelt's words of caution. Indeed, as a matter of law, her words constitute a central part of the treaty negotiating record, and have juridical significance. In an era when administrative agencies were already beginning to assume broad tasks of governance, Mrs. Roosevelt cautioned that the Covenant and its implementing committee could not become a venue for supervising every regulatory agency and administrative decision. The language of article 14 was shaped by her to that end, and the Committee cannot neglect this negotiating history except at peril to its larger vocation of addressing serious wrongs.

1.3 In this case, an Austrian civil servant named Wolfgang Lederbauer has complained to the United Nations Human Rights Committee about the process by which he was suspended and dismissed from his post with the General Audit Office of his national government. The cause of his suspension was the rather evident conflict between his public work as an auditor in an agency that investigated the national railway administration, and his private economic activities in seeking to sell a particular form of soundproofing for highways and railroads. Despite his public responsibility as an auditor, Mr. Lederbauer went so far as to intervene with a parliamentary leader to promote his product as an alternative for soundproofing highways. He did so despite the flat prohibition of article 126 of the Austrian Federal Constitutional Act that members of the General Audit Office could not "participate in the management and administration of any … enterprises operating for profit".

1.4 Mr. Lederbauer was suspended from his job as an auditor on the basis of this violation of article 126. Subsequently, he was also convicted in an Austrian regional criminal court for "negligently causing the insolvency of a company" and was sentenced to a suspended prison term of five months. After his criminal appeal was denied, the Disciplinary Commission of the Austrian civil service formally dismissed him from his position as auditor, finding that it "was obliged to adhere to the legally binding findings of fact of a criminal court".

1.5 Mr. Lederbauer has since complained to the Human Rights Committee about a host of procedural issues relating to his suspension and discharge. The Committee has elaborated an intricate 22 page opinion that reviews the thrusts and parries of his quarrel with the Austrian civil service, on purely procedural grounds.

1.6 The Committee dismisses all of the author's complaints, except for one. Namely, the Committee finds that there was undue delay in resolving one of the author's five appeals to the High Administrative Court of Austria. The author appealed his order of suspension on 6 February 1995, and the final decision of the High Administrative Court was not rendered until 29 November 2002. The order of suspension was rendered moot, of course, once the author

was formally dismissed as a civil servant, and this dismissal was affirmed by the High Administrative Court on 31 January 2001. The Committee concludes that this interval was an "unreasonable" delay and that the author is to be awarded an "appropriate remedy, including appropriate compensation". See Views of the Committee, paragraphs 8.1, 8.2, and 10.

1.7 Though the High Administrative Court did allow the case to lie upon its docket for a long interval, the finding of actionable delay is rather doubtful against a factual background in which the author was making repeated and conspicuous attempts to impede and revisit every decision reached in his suspension and discharge. At various points in time, the author filed five separate appeals to the High Administrative Court, three appeals to the Constitutional Court, and five appeals to the Disciplinary Appeals Commission. This is over and above the several proceedings before the Austrian Disciplinary Commission. If anything, the time taken and confusion engendered by overlapping proceedings may stand as an indication of the hazards of permitting the interlocutory appeal of each interim decision. In the interval before he addressed himself to the United Nations Human Rights Committee, the author and his counsel also brought four separate complaints to the European Court of Human Rights, which dismissed each complaint as falling outside the scope of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

1.8 In the particular interval said to constitute a violation of the Covenant, in the duration of the appeal before the High Administrative Court from 6 February 1995 to 29 November 2002, or more properly, 31 January 2001, it is also noteworthy that some of the time was consumed by the criminal prosecution pending against Mr. Lederbauer. An appellate court might reasonably wish to await the conclusion of a criminal case before proceeding on a related civil matter.

1.9 In assessing this interval, there is one other point of particular note. Despite an active, indeed swashbuckling, style of litigation, Mr. Lederbauer and his counsel never requested that the High Administrative Court expedite its decision, or even sent a letter of inquiry to the Court. The State party has informed the Committee that Article 132 of the Federal Constitutional Act would have been available as a formal legal remedy to demand a speedy decision from the High Administrative Court. This representation by the State party is discounted by the Committee without reference to any written authority on Austrian administrative law. But regardless of the applicability of Article 132, there is no persuasive ground to find "unreasonable" delay under the Covenant when neither the author nor his counsel ever lifted a pen or pencil to write a letter to the clerk of the High Administrative Court to request delivery of an expedited decision.[31] Especially in the confusion of their many overlapping proceedings, some burden properly rests on the litigants to untangle the web.

2. There is, however, a far more important set of issues that needs to be soberly assessed by the Human Rights Committee, if not in this case, then in the future. This includes the intended scope of the Covenant and its problematic application to administrative agencies and administrative processes, where a matter has not been brought to court. In addition, there is the unavoidable issue of how to allocate the limited material resources of this Committee in the face of serious situations of human rights abuse around the world. It is doubtful that the framers of the Covenant intended that the Committee should sit in review of the thousands, indeed hundreds of thousands, of routine administrative law decisions taken annually around the globe, especially where the meeting time of the Committee permits the consideration of

perhaps 100 communications per year. The Committee has not yet approached how it could adapt its methods of work to accommodate a flood of administrative law cases, in a way that would not divert scarce resources from its most important work. At a minimum, it might require crafting a means to decide communications in a fashion that takes account of the relative importance of the issue at stake. The Committee has not yet seen a plethora of administrative law appeals, but it has embarked down a path in a scattered series of cases that may lead to that result, perhaps without taking full account of the problems inherent in the jurisprudence, and indeed the tension that exists in both the language and negotiating history of the Covenant.

3.1 One should, for initial instruction, revert to the language of the Covenant. The wording of the Covenant varies in its several treaty languages, and each is an authentic text, thus posing a particular challenge. The variations signal not only the problems of translation, but the differences in how legal systems conceptualize civil and private rights. In the English language text of the Covenant, article 14 (1) states in its first sentence that "All persons shall be equal before the courts and tribunals." Article 14 (1) thereafter states in its second sentence that "In the determination of any criminal charge against him, or *of his rights and obligations in a suit at law*, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law" (emphasis added). There is an evident and important difference between the textual provisions applied in article 14 to criminal charges and to "suits at law". Only in criminal cases, is there any explicit language that regulates the issue of delay and prompt adjudication. Article 14 (3) (c) directly guarantees the right of a criminal defendant "To be tried without undue delay." In civil cases, to deduce a similar rule requires finding that time limits are implicit in the idea of a "fair" hearing or "competent" tribunal. This difference in language may have consequences, certainly as to the egregiousness of delay required before a matter is actionable.

3.2 In addition, there is the question of what constitutes a "suit at law". This is a phrase missing from the French text, which speaks instead of "*contestations sur ses droits et obligations de caractère civil*".[32] The French text, like the Spanish, may seem to turn more directly upon the nature of the right rather than the forum of its adjudication, though one should also recall that the forms of action at English common law were not endless in their variation. It is noteworthy that the phrase "contestations sur ses droits et obligations de caractère civil" was also adopted in the European Convention for the Protection of Human Rights and Fundamental Freedoms. In that setting, in the well-known case of *Pellegrin v. France*, the European Court of Human Rights has ruled that the phrase "caractère civil" does not include issues of employment law pertaining to public servants who exercise a portion of the state's sovereign power, as for example, the police. See *Pellegrin v. France, Cour européenne des Droits de l'Homme, 8 décembre 1999, Rec. 1999-VIII, No. 28541/95.*

3.3 Though the Human Rights Committee has not adverted to the *Pellegrin* case in its recent decisions, it is noteworthy that in the seminal case of *Y.L. v. Canada,* No. 112/1981, 8 April 1986, the Committee sounded a similar note. In *Y.L. v. Canada*, the Committee suggested that the application of article 14 (1) in non-criminal cases would depend either on the nature of the right or on the particular forum. The scope of article 14 (1) in non-criminal matters was arguably limited to civil law issues, rather than public law, and matters heard in a "court" or "tribunal".[33] The Committee often quotes the test from *Y.L. v. Canada* in a more abbreviated form, noting that it is the nature of the right, rather than the status of the parties, that is important.

But it is well to remember that the nature of the right was not seen as a trivial question in the original formulation. Rather, in the formulation of *Y.L. v. Canada*, there may be governmental decisions not amenable to review under article 14 (1), of the Covenant, because of that article's limited scope.[34]

4.1 In considering that there may be issues of administrative law not amenable to review in this Committee, the negotiating history of article 14 is especially telling.[35] The original treaty text proposed in the Human Rights Commission in 1947 in a Secretariat draft would have guaranteed individuals in non-criminal cases "access to independent and impartial tribunals for the determination of rights and duties under the law" with a "right to consult with and to be represented by counsel". See E/CN.4/21 annex A (Secretariat), art. 27.

4.2 The United States representative initially offered a proposal that was similar - to guarantee that "Every person has the right to have any civil claims or liabilities determined without undue delay by a competent and impartial tribunal, before which he has the opportunity for a fair hearing, and has the right to consult with and to be represented by counsel." See E/CN.4/21 annex C, article 10, and E/CN.4/AC.1/8 (referring to Secretariat text article 27).

4.3 In its second session, the drafting group of the Human Rights Commission considered a third text that spoke of a Covenant right of access to a tribunal, for the resolution of civil law matters. It read: "In the determination of his rights and obligations, everyone is entitled to a fair hearing before an independent and impartial tribunal and to the aid of counsel." See E/CN.4/37 (USA), article 10.

4.4 But then, on 1 June 1949, the American representative Mrs. Eleanor Roosevelt warned that the Covenant guarantee of a hearing before an independent and impartial tribunal might be too broad, if it were applied to all "rights or obligations". Mrs. Roosevelt recast and limited the text to refer only to "civil suits" instead of "rights and obligations". See E/CN.4/253. Mrs. Roosevelt explained the reason for the change in stark terms:

> "The reason for that was that many civil rights and obligations, such as those connected with military service and taxation, were generally determined by administrative officers rather than by courts; the original text, on the other hand, appeared to suggest that all such rights and obligations must necessarily be determined by an independent and impartial tribunal. The United States amendment would obviate such an interpretation." (E/CN.4/SR.107, pp. 2-3) (emphasis added)

Mrs. Roosevelt's change was apparently intended to preserve the role of administrative processes in which the decision-maker might be part of an executive branch and not meet strict requirements of independence and impartiality.

4.5 In response, the French representative, the distinguished statesman René Cassin, proposed striking the word "civil" from the phrase "civil rights and obligations" - on a ground that would have broadened the guarantee in its substantive coverage - for the word "civil" did "not include fiscal, administrative and military questions, in which matters it was possible to appeal, in the final instance, to court". E/CN.4/SR.107, p. 6.

4.6 The Egyptian representative, Mr. Omar Loutfi, agreed that "civil" was "too narrow in that it did not include matters dealing with taxation or military service, for instance". E/CN.4/SR.107, p. 7. Mr. Karim Azkoul of Lebanon also offered the same view. See E/CN.4/SR.107, p. 8.

4.7 In subsequent deliberations, on 2 June 1949, the Danish representative Dr. Max Sorensen expressed the concern that the proposal that "everyone should have the right to have a tribunal determine his rights and obligations" was "much too broad in scope; it would tend to submit to judicial decision any action taken by administrative organs exercising discretionary power conferred on them by law. He appreciated that the individual should be ensured protection against any abuse of power by administrative organs but the question was extremely delicate and it was doubtful whether the Commission could settle it there and then". See E/CN.4/SR.109, at p. 3.

4.8 The Guatemalan representative, Mr. Carlos Garcia Bauer, echoed the concern adverted to by France, Egypt, and Lebanon "that civil suits did not cover all the cases contemplated … for example, commercial and labour questions". See E/CN.4/SR.109, at p. 7.

4.9 Mrs. Roosevelt entered the colloquy again, and did not express any opposition to striking the word "civil". In seeming response to the concern that all administrative actions would be automatically regulated by the strictures of the Covenant, or that administrative discretion would be lost, she noted that the insertion of the words "in a suit at law" was "to emphasize the fact that appealing to a tribunal was an act of a judicial nature". See E/CN.4/SR.109, at 8. In other words, it was the appeal to a tribunal, not the underlying matter, which constituted a suit at law. The coverage of the Covenant was limited to cases where a right or obligation was tried or reviewed in a court or tribunal.

4.10 Finally, on 2 June 1949, the French representative René Cassin offered a change that built on Mrs. Roosevelt's language, stating that:

> "The Danish representative's statement had convinced him that it was very difficult to settle in that article all questions concerning the exercise of justice in the relationships between individuals and governments. He was therefore prepared to let the words 'or of his rights and obligations' … be replaced by the expression 'or of his rights and obligations in a suit at law'." (See E/CN.4/SR.109, p. 9)

4.11 Thus, the word "civil" was dropped in the English language version, and the reach of article 14 (1) in administrative matters was seemingly limited to the ultimate stage of appeal to a judicial tribunal. This was incorporated in the text offered and approved on 2 June 1949 (see E/CN.4/286, and E/CN.4/SR.110, p. 5).

4.12 The Yugoslav representative Mr. Jeremovic later reiterated the view that there should be no implication that all civil matters had to be heard by an independent tribunal. Issues such as "infringement of traffic regulations" were "usually considered within the jurisdiction of the police or similar authorities and were dealt with as matters of administrative procedure". See E/CN.4/SR.155 Part II, p. 5. A later Philippines proposal for deletion of the phrase "suit at law" was defeated by 11 votes to 1, with one abstention. See E/CN.4/SR.155 Part II, p. 8.

4.13 This preliminary survey of a complicated negotiating history is offered on the premise that the Committee, in its construction of the meaning of article 14, should have reference not merely to its own view of desirable practice, but also to what the States parties at the time thought they were enacting. This does not deny the possibility of a "progressive development" of the law and it is not a simplistic "founder's syndrome". But it does mark the claim that the Committee may wish to pay heed to the negotiating history of a complicated text, as an important starting place in its construction of the Covenant. The expectations of States parties when they ratify a Covenant certainly deserve some weight.

4.14 In the context of the present case, the negotiating history of the Covenant offers little support to the view that there is any strict time limit on an overall administrative process, or that any stage other than the appeal to a court is covered within the ambit of article 14 (1).[36] In using factually specific grounds as the basis for dismissing a variety of claims advanced by Mr. Lederbauer, one assumes that the Committee does not mean to alter this important distinction.[37] In addition, one also hesitates to permit the inference that every time a State party seeks to assure independence and impartiality in an administrative organ, that this automatically converts the organ into a court or tribunal within the meaning of the Covenant.[38]

5.1 Finally, it may be worthwhile to review several nuances of the Committee's decisions under article 14 in administrative law settings. This halting and occasional line of cases cautions against any facile belief that the Committee can sit as a fourth instance body in reviewing innumerable matters of administrative process.

5.2 The first major case, *Y.L. v. Canada*, No. 112/1981, submitted on 7 December 1981 and decided on 8 April 1986, *supra*, concerned the challenge mounted by a Canadian soldier dismissed from the army for alleged mental disorders. His appeal was heard and denied in proceedings before the Canadian Pension Commission, Entitlement Board, and Pension Review Board. The complainant argued that the Canadian Pension Review Board was not independent and impartial and lacked fair process. The State party defended on the claim that the proceedings before the Pension Review Board were not a "suit at law" within the meaning of the Covenant and that, in any event, the soldier could have challenged the results before the Federal Court of Appeal.

5.3 As noted above, the working group of the Committee concluded in its discussion of admissibility that it might be important to determine whether the service member's rights and obligations were considered to be "civil rights and obligations" or instead as "rights and obligations under public law". See Views of the Committee, *Y.L. v. Canada*, No. 112/1981, at paragraph 5. This is the distinction that the European Court of Human Rights later found to be central under article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in the *Pellegrin* case. The majority of the United Nations Human Rights Committee further observed that "it is correct to state" that the guarantees of the second sentence of article 14 (1) *"are limited* to criminal proceedings *and to any 'suit at law*'". Views of the Committee, *Y.L. v. Canada*, at paragraph 9.1 (emphasis added).

5.4 Ultimately, the majority of the Committee disposed of the case by observing that the author had had a further review available to him in the Canadian Federal Court of Appeal. In its characterization of the scope of article 14 (1), the Committee adopted a two-part test that draws upon the equal authentic texts of the several languages of the Covenant. We ought not to forget its second part.

5.5 The Committee stated:

> "In the view of the Committee, the concept of a 'suit at law' or its equivalent in the other language texts is based on the nature of the right in question rather than on the status of one of the parties (governmental, parastatal or autonomous statutory entities), *or else* on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon, especially in common law systems where there is no inherent difference between public law and private law, and where the courts normally exercise control over the proceedings either at first instance or on appeal specifically provided by statute or else by way of judicial review."

See Views of the Committee, *Y.L. v. Canada*, No. 112/1981, at paragraph, 9.2 (emphasis added).

5.6 The first prong seemingly adverts to a distinction between private rights and public rights. The second prong seems to permit (as well as limit) the Covenant's further extension to adjudications in judicial forums where a particular state system may allow review of a broader portfolio of rights. The majority ultimately concluded that the author's failure to take an appeal to the Canadian Federal Court of Appeal precluded any violation.

5.7 Three members of the Human Rights Committee went further and stated in *Y.L. v. Canada* that the Covenant did not apply to the dispute of the soldier, for two reasons. These reasons are the nature of the right, and the forum of the decision. First, in Canada, "the relationship between a soldier, whether in active service or retired, and the Crown has many specific features differing essentially from a labour contract under Canadian law". Individual Opinion of Bernhard Graefrath, Fausto Pocar, and Christian Tomuschat, concerning the admissibility of communication No. 112/1981, *Y.L. v. Canada*, at paragraph 3. Second, the Pension Review Board, said the concurring members, "is an administrative body functioning within the executive branch of the Government of Canada, lacking the quality of a court". Thus, said the concurring members, "[n]either of the two criteria which would appear to determine conjunctively the scope of article 14, paragraph 1, of the Covenant is met".

5.8 In the next major case, *Casanovas v. France*, No. 41/1990, decided 7 July 1993, a complaint was brought by the former head of the fire brigade of the city of Nancy, France, who had been dismissed for alleged incompetence. The *Tribunal Administratif* granted the fire chief's appeal and reinstated him. However, a second proceeding against the fire chief led again to his dismissal. This time, the *Tribunal Administratif* closed a preliminary inquiry and declined to move the matter up on the calendar, citing other cases that dated from four years prior. The European Commission of Human Rights in the meantime ruled the fire chief's complaint to be inadmissible under the European Convention for the Protection of Human Rights and Fundamental Freedoms because the Convention "does not cover procedures governing the dismissal of civil servants". See Views of the Committee, *Casanovas v. France*, at paragraph 2.5.

5.9 In the proceeding before the United Nations Human Rights Committee, France noted that the European Commission had been faced with identical treaty language under the European Convention, and argued that the Committee should construe the Covenant's category of "caractère civile" in a parallel way. France also argued that article 14 (1) had no provision imposing time limits in non-criminal matters.

5.10 Curiously, the Committee examined only the first prong of the test from *Y.L. v. Canada*, finding that the appropriate measure was "the nature of the right in question rather than on the status of one of the parties". Views of the Committee, *Casanovas v. France*, No. 441/1990, 7 July 1993, paragraph 5.3. In its review of admissibility, the Committee offered no reason for its conclusion that the employment relationship of a French fire chief to a municipality should be construed in a different fashion than the relationship of a Canadian soldier to his national government. The Committee later concluded, in a separate ruling on the merits, that the French Administrative Tribunal's delay of two years and nine months in deciding the case was not a violation of article 14(1), in part because the "Tribunal did consider whether the author's case should have priority over other cases." Views of the Committee, *Casanovas v. France*, No. 441/1990, 19 July 1994, at paragraph 7.4.

5.11 Subsequently, the Human Rights Committee again examined the application of article 14 in *Nicolov v. Bulgaria*, No. 824/1998, filed 14 January 1997, and decided 24 March 2000. The Committee found to be unsubstantiated the claim of a district attorney that he had been forced out of office in violation of the Covenant. The High Judicial Council of Bulgaria ordered the dismissal, and the action was affirmed by the Bulgarian Supreme Court. The United Nations Human Rights Committee found that the High Judicial Council was a mere "administrative body", see Views at paragraph 2.1, footnote 1, and the author's claim that Council members were biased against him was dismissed as "not … substantiated", without any explanation as to whether an administrative body as such could be bound by the requirements of article 14(1). The basis for challenging the dismissal might have rested on a claim that the review procedure of the Supreme Court of Bulgaria was itself amenable to Committee scrutiny, since the court was indisputably a judicial body covered by article 14.

5.12 One should also note a fourth case of *Franz and Maria Deisl v. Austria*, No. 1060/2002, submitted on 17 September 2001 and decided 27 July 2004. Represented by counsel Alexander H.E. Morawa, the complainants presented an exceedingly complicated set of facts dealing with zoning law in a municipality near Salzburg, including the conversion of a granary into a weekend house, and an appeal against a demolition order concerning a granary that was to be converted into a shed. The authors complained of an administrative process that "took more than 30 years", and was met at the end by decisions of the Administrative Court and Constitutional Court delayed as long as two years and nine months. See Views of the Committee, *Deisl v. Austria*, at paragraph 3.4. Austria invoked its reservation to article 14 of the Covenant that sought to maintain "the Austrian organization of administrative authorities under the judicial control of the Administrative Court and the Constitutional Court." See Views of the Committee, *id.*, at paragraph 6.4. In regard to the delays before those two courts, Austria noted that the Constitutional Court had also been faced with some 5,000 cases in regard to alien law, stemming from the conflict in the Balkans, and 11,000 complaints about minimum corporate tax.

5.13 The authors claimed that the range of rights covered by article 14 of the International Covenant was broader than article 6 (1) of the European Convention, in particular, because the

word “civil” did not appear in the Covenant. Relying upon the “nature of the right” language adduced in the earlier *Y.L. v. Canada* case, but in this rather different context, the Committee opined that “the … request for an exemption from the zoning regulations, as well as the orders to demolish their buildings, *relate to* the determination of their rights and obligations in a suit at law”. See Views of the Committee, *Deisl v. Austria*, at paragraph 11.1 (emphasis added). This broader phrase might seem to suggest that preliminary administrative decisions are also covered by the Covenant.

5.14 In addressing admissibility and the merits, the Committee noted in the *Deisl* case that article 14 (1) “does not require … that decisions are issued by [independent and impartial] tribunals at all appellate stages”. See Views of the Committee, at paragraph 10.7. But the Committee then seemingly considered tests for unreasonable delay in relation to municipal and provincial administrative authorities that were not themselves “courts” or “tribunals” under article 14, even though there were reviewing courts in Austria that would, ultimately, review these same proceedings. The Committee also referred to “delays of the proceedings as a whole”, not restricting its gaze to the two particular judicial tribunals. See Views of the Committee, at paragraph 10.11.

5.15 Although I joined in the majority at the time, these tests widely applied would mean that the Human Rights Committee sitting in Geneva could become the arbiter of the calendar delays of all administrative agencies within 160 States parties. It is doubtful that this is what the Committee intended in *Y. L. v. Canada*, or indeed, what the drafters intended in 1949. Though no violation was sustained on the facts of *Deisl v. Austria*, the dicta of the decision potentially could open a Pandora’s Box. Though not fully comprehended at the time, similar scrutiny could bring thousands of decisions each year before the Committee. One may note, as well, that the disposition of this particular petition to the Human Rights Committee entailed a 19-page opinion and substantial deliberative time, in a matter that does not approach the moral or legal seriousness of so many other petitions presented under the Optional Protocol to the Human Rights Committee.[39]

5.16 And then, there is the case of *Perterer v. Austria*, No. 1015/2001, filed on 31 July 2001, and decided on 20 July 2004, in which the complainant was again a municipal official, robustly represented by counsel Alexander H.E. Morawa. As with *Lederbauer*, the complainant in *Perterer* was accused of using public resources for private purposes, and failing to attend scheduled job-related hearings on building projects. He was suspended by the Austrian Disciplinary Commission, and as in the *Lederbauer case*, challenged the qualifications of the chairman of the Disciplinary Commission senate, even seeking to bring criminal charges against him. The complainant engaged in another series of challenges that delayed the proceedings. He argued he was unfit to stand trial for medical reasons. When a new senate chairman was appointed, he newly challenged the two ordinary senate members nominated by the municipality, claiming they also lacked independence. After a remand of the matter affirmed his right to challenge those members, he launched another challenge to disqualify the new senate chairman. The initial chairman returned to conduct the proceeding, was again challenged by Perterer, and the second senate chairman then returned to conduct the proceeding. The Appeals Commission finally dismissed Perterer’s complaint that the second chairman’s brief prior service had prejudiced him. Perterer also had challenged, one might add, the composition of the Disciplinary Appeals Commission, seeking to disqualify its chairman and two members. The Austrian Administrative Court rejected Perterer’s challenge to the composition and decision of the

Appeals Commission. His complaint to the European Court of Human Rights was also rejected on the ground that the European Convention did not cover the matter of the discharge of civil service employees, Peterer then complained to the United Nations Human Rights Committee, arguing with no apparent irony that the Austrian proceedings had lasted too long. The State party argued that article 14 (1) of the International Covenant on Civil and Political Rights did not apply to disputes between administrative authorities and civil servants who exercise public powers. Upon the rationale of *Y.L. v. France*, the state party also noted that Disciplinary Commission decisions could be appealed to the Austrian Civil Service Appeals Commission and Administrative Court, and thus, that the undisputed independence and impartiality of the latter fully met the standards of article 14.[40]

5.17 The Human Rights Committee concluded, however, that the State party had "conceded that the trial senate of the Disciplinary Commission was a tribunal within the meaning of article 14, paragraph 1, of the Covenant", see Views of the Committee, *Perterer v. Austria*, at paragraph 9.2, though it is open to argument whether the State party merely meant that the Commission was impartial and independent even while not constituting a tribunal. The Committee also concluded that the renewed service of the second chairman of the trial senate "raises doubts about the partial character of the trial senate", even though the Administrative Court dismissed this complaint as unfounded. The Committee acknowledged that the Administrative Court had "examined this question, [but] it only did so summarily". See Views of the Committee, *Perterer v. Austria*, at paragraph 10.4. And finally, the Human Rights Committee found that the 57 months consumed in the administrative proceedings was excessive, because part of the time was taken in the appeal of decisions that were later reversed. See Views of the Committee, *Perterer v. Austria*, at paragraph 10.7. Although these Views occasioned no dissents, one may question in retrospect, with a longer view of the case law, whether this type of detailed reproval of the national administrative law of a particular state system can constitute the kind of violation that the drafters of article 14 meant to reach. Certainly, the substantial delay of 57 months seems less surprising against a background in which the complainant tried to disqualify every reviewing official involved in his case. It would also be surprising to conclude, as a general matter, that the reversal of a good faith error in a lower body necessarily means that unreasonable time has been taken. In setting standards for acceptable delay, this Committee has a responsibility to take account of the challenges faced by national reviewing bodies in light of their calendars. Standard setters may wish to recall the unavoidable and lengthy delays that even this Committee has occasionally faced in its own work.

6.1 Thus, these sorts of cases may properly demand a reflection upon the drafting history and preparatory record of the Covenant - if only to ascertain whether this extrusion of article 14 (1) and the accompanying use of scarce Committee time in order to govern the intricate detail of national administrative processes is in fact consistent with the profoundly important vocation of the Covenant.

6.2 The Human Rights Committee is properly protective of its jurisdiction. But this new example of a genre of routine and fact-specific administrative cases again warrants asking whether we have done justice to the treaty reservation taken by many European states in joining the Optional Protocol. Under Austria's reservation to the Optional Protocol, the Committee is precluded from reexamining a communication that presents the same "matter" previously examined by the European Court of Human Rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms.[41] The French language text of article

14 (1) of the International Covenant is a close replica of the French language text of article 6 (1) of the European Convention in its reference to "contestations sur ses droits et obligations de caractère civil."[42] It is certainly ambitious to say that a "matter" is not covered by the reservation simply because the Committee prefers to take a different view of the merits, in contrast to the European Court. It is also worth recalling that the deliberate usage of the phrase "droits et obligations de caractère civil" in the language of the International Covenant was noticeably narrower than the language of the Universal Declaration of Human Rights voted by the General Assembly in 1948, which referred generally to "*droits et obligation*s."[43] The accession of States parties to the optional protocol of the International Covenant on Civil and Political Rights is not irreversible, and some caution in the exercise of our jurisdiction may be more faithful to the purpose of the reservation.

6.3 This caution in interpretation is also warranted by the need to preserve the Committee's ability to provide effective and prompt adjudication of serious complaints, within a United Nations human rights system that has competing demands. In a concurring opinion in *Pellegrin v. France*, Judge Ferrari Bravo cautioned that the European Court of Human Rights faced "an avalanche of applications concerning the economic treatment of public servants." Professor Manfred Nowak has noted the "*problematique* of detailed procedural guarantees in international human rights treaties."[44] The backlog of 180,000 cases in the European Court stands as a warning to any international system that hopes to treat the serious human rights crises that arise in countries around the world.

(*Signed*): Ruth Wedgwood

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

Notes

[1] The Covenant and the Optional Protocol entered into force for Austria on 10 December 1978 and on 10 March 1988, respectively. Austria entered the following reservation upon ratification of the Optional Protocol: "On the understanding that, further to the provisions of article 5 (2) of the Protocol, the Committee provided for in article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms."

[2] Art. 126 of the Austrian Federal Constitutional Act reads: "No member of the GAO may be a participant in the management and administration of enterprises subject to control by the GAO. Just as little may a member of the GAO participate in the management and administration of any other enterprises operating for profit."

[3] Application No. 57822/00

[4] Application No. 73230/01

[5] Application No. 13874/02

[6] See European Court of Human Rights, decision on admissibility (application No. 73230/01), dated 26 February 2002; decision on admissibility (application No. 13874/02), dated 27 June 2002.

[7] European Court of Human Rights, judgement of 8 December 1999, *Pellegrin v. France* (application No. 28541/95), 1999-VIII Reports, at para. 67.

[8] The author refers to communication No. 1015/2001, *Perterer v. Austria*, at para. 9.3.

[9] The author refers to communication No. 207/1986, *Yves Morael v. France*, at para. 9.3.

[10] The author refers to communications No. 203/1986, *Muñoz Hermoza v. Peru*, at paras. 11.3 and 12; No. 238/1987, *Floresmilio Bolaños v. Ecuador*, at para. 8.4.

[11] The author refers, *mutatis mutandis*, to communication No. 1060/2002, *Franz and Maria Deisl v. Austria*, at para. 11.6 (c).

[12] Human Rights Committee, 21st session (1984), general comment No. 13: *Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)*, at para. 6.

[13] The author refers to communications No. 158/1983, *O. F. v. Norway*, decision on admissibility adopted on 26 October 1984, at para. 5.2; No. 441/1990, *Casanovas v. France*, Views adopted on 19 July 1994, at para. 5.1.

[14] Communication No. 1060/2002, *Deisl v. Austria*, Views adopted on 27 July 2004, at para. 11.1.

[15] Communications No. 203/1986, *Muñoz Hermoza v. Peru*, Views adopted on 4 November 1988, at paras. 11 *et seq.*; No. 824/1998, *Nicolov v. Bulgaria*, Views adopted on 20 March 2000, at para. 8.3; No. 454/1991, *García Pons v. Spain*, Views adopted on 30 October 1995, at paras. 9.3 *et seq.*; No. 468/1991, *Bahamonde v. Equatorial Guinea*, Views adopted on 20 October 1993.

[16] Communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, at para. 9.2

[17] The State party refers to the judgements of the European Court of Human Rights on Applications No. 29800/96, *Basic v. Austria*, and No. 30160/96, *Pallanich v. Austria*, both dated 30 April 2001.

[18] European Court of Human Rights, application No. 28541/95, *Pellegrin v. France*, judgement of 8 December 1999, at paras. 64 *et seq.*; No. 39564/98, *G. K. v. Austria*, judgement of 14 March 2000, *passim*.

[19] The State party refers to European Court of Human Rights, *Pierre-Bloch v. France*, judgement of 21 October 1997, Reports 1997-VI, at para. 51.

[20] See communication No. 441/1990, *Robert Casanovas v. France*, Views adopted on 19 July 1994, at para. 5.2.

[21] See communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, at para. 9.2.

[22] Ibid.

[23] See e.g. communication No. 998/2001, *Althammer v. Austria*, , at para. 8.4.

[24] See para. 4.3 above (with reference to European Court of Human Rights, application No. 28541/95, *Pellegrin v. France*, judgement of 8 December 1999, at paras. 64 *et seq.*).

[25] See para. 6.2 above (with reference to communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, at para. 9.2).

[26] See communication No. 441/1990, *Casanovas v. France*, Views adopted on 19 July 1994, at para. 5.1; communication No. 1115/2002, *Petersen v. Germany*, decision on admissibility adopted on 1 April 2004, at para. 6.6.

[27] Communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, at para. 7.3; No. 886/1999, *Bondarenko v. Belarus*, at para. 9.3; No. 1138/2002, *Arenz et al. v. Germany*, admissibility decision, at para. 8.6.

[28] Communication No. 1003/2001, *P.L. v. Germany*, decision on admissibility adopted on 22 October 2003, at para. 6.5; communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision on admissibility adopted on 2 November 2004, at para. 7.2.

[29] See communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, at para. 10.7.

[30] See communication No. 1060/2002, *Deisl v. Austria*, Views adopted on 27 July 2004, at paras. 11.3-11.6.

[31] *Compare Casanovas v. France*, No. 441/1990, 19 July 1994, at para. 2.2 (six requests to Administrative Tribunal for expedited proceedings).

[32] The Spanish text of the International Covenant on Civil and Political Rights speaks similarly of “la determinación de sus derechos u obligaciones de carácter civil”.

[33] See *Y.L. v. Canada*, No. 112/1981, 8 April 1986, at para. 5 ("The Working Group of the Human Rights Committee … considered that the decision [on admissibility] might require a finding as to whether the claim which the author pursued, in the last instance before the Pension Review Board was a 'suit at law' within the meaning of article 14 paragraph 1, of the Covenant. The Working Group of the Committee therefore requested the author and the State party to respond to the best of their abilities, to the following questions: (a) How does Canadian domestic law classify the relationship between a member of the Army and the Canadian State? Are the rights and obligations deriving from such a relationship considered to be civil rights and obligations *or* rights and obligations under public law? (b) Are there different categories of civil servants? Does Canada make a distinction between a statutory regime (under public law) and a contractual regime (under civil law)?" (Emphasis added).

[34] See *Y.L. v. Canada*, No. 112/1981, 8 April 1986, at para. 9.2 ("The travaux preparatoires do not resolve the apparent discrepancy in the various language texts. In the view of the Committee, the concept of a "suit at law" or its equivalent in the other language texts is based on the nature of the right in question rather than on the status of one of the parties (government, parastatal or autonomous statutory entities), or else on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon, especially in common law systems where there is no inherent difference between public law and private law, and where the courts normally exercise control over the proceedings either at first instance or on appeal specifically provided by statute or else by way of judicial review.").

[35] For an introduction to the negotiating history of the Covenant, see Marc J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers 1987). It is striking, however, that in a setting of active jurisprudence, there has been no publication of the full *travaux*.

[36] Compare Bernhard Graefrath, Menschenrechte und internationale Kooperation, *10Jahre Praxis des Internationalen Menschenrechtskomitees,* Berlin 1998, at p. 202.

[37] See Views of the Committee, paragraphs 7.4, 7.5 and 7.6.

[38] See Views of the Committee, paragraphs 5.2, 7.3, and 7.7.

[39] There are certainly cases where a substantive Covenant guarantee may have procedural implications. E.g., *Pashtukhov v. Belarus*, No. 814/1998 (arbitrary dismissal of constitutional court judge by presidential decree implicates articles 14 and 25); *Munoz v. Peru*, No. 203/1986 (articles 14 and 25 violated where police officer dismissed without required statutory hearing). *Cf.* Manfred Nowak, *United Nations Covenant on Civil and Political Rights, CCPR Commentary*, 2d rev. ed., 2005, at p. 67 (relationship between article 2 and substantive rights under the Covenant).

[40] *Accord I.P. v. Finland*, No. 450/1991, decided 26 July 1993, at para. 6.2 (inadmissibility of article 14 challenge to administrative procedure of tax authorities, noting that "whether matters relating to the imposition of taxes are or are not 'rights or obligations in a suit at law' does not have to be determined, because in any case the author was not denied the right to have his claims

concerning the decision by the Tax Office heard before an independent tribunal.".). The Human Rights Committee's reversion in this later case to the test of *Y.L. v. France* case may have important lessons for our jurisprudence, suggesting that the availability within national law of an appeal to an impartial tribunal is sufficient, in general, to satisfy the requirements of article 14 in regard to administrative proceedings.

41 The English text of the Austrian reservation to the Optional Protocol reads as follows:

> "On the understanding that, further to the provisions of article 5 (2) of the Protocol, the Committee provided for in article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms."

Since the date of the Austrian reservation, the work of the European Commission on Human Right has been taken up by the European Court of Human Rights. The reservation is appropriately read to apply to this successor body as well.

42 The first sentence of Article 6(1) of the European Convention reads, in its French text, as follows: "Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi, qui décidera, soit des *contestations sur ses droits et obligations de caractère civil*, soit du bien-fondé de toute accusation en matière pénale diregée contre elle." (emphasis added)

Compare Article 14 (1), second sentence, in the French text of le Pacte international relatif aux droits civils et politiques: "Toute personne a droit á ce que sa cause soit entendue équitablement et publiquement par un tribunal compétent, indépendant et impartial, établi par la loi, qui décidera soit du bien-fondé de toute accusation en matière pénale diregée contre elle, soit des *contestations* s*ur ses droits et obligations de caractère civil*." (emphasis added)

43 See Article 10 of la Declaration universelle des droits de l'homme, adopted by the General Assembly on 10 December 1948, which reads as follows: " Toute personne a droit, en pleine égalité, à ce que sa cause soit entendue équitablement et publiquement par un tribunal indépendant et impartial, qui décidera, *soit de ses droits et obligation*s, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle." (emphasis added)

So, too, the English text differs significantly between the two instruments. Article 10 of the Universal Declaration of Human Rights reads: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." In contrast, article 14 (1), second sentence, of the International Covenant on Civil and Political Rights reads in its English text: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

44 See Manfred Nowak, *supra* note 9, at p. 306.

Annex VIII

DECISIONS OF THE HUMAN RIGHTS COMMITTEE DECLARING COMMUNICATIONS INADMISSIBLE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. Communication No. 982/2001, *Singh Bhullar v. Canada** (Decision adopted on 31 October 2006, Eighty-eighth session)

Submitted by:	Jagjit Singh Bhullar (represented by counsel, Mr. Stewart Istvanffy)
Alleged victim:	The author
State party:	Canada
Date of communication:	3 June 2001 (initial submission)
Subject matter:	Expulsion of Sikh from Canada to India
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Issues of non-refoulement - fair trial - protection of family unit and rights of children
Articles of the Covenant:	2, 6, 7, 14, 23 and 24
Articles of the Optional Protocol:	5, paragraph 2 (a)

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

Meeting on 31 October 2006,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Decision on admissibility

1.1 The author of the communication, dated 3 June 2001, is Jagjit Singh Bhullar, an Indian national born on 10 October 1960 in India. He claims that he would be a victim of violations by Canada of articles 2; 6; 7; 14; 23 and 24 of the Covenant in the event of his return to India. He is represented by counsel, Mr. Stewart Istvanffy.

1.2 On 16 August 2001, the State party advised that it would comply with the Committee's request for interim measures, pursuant to (then) rule 86 (now rule 92) of the Committee's rules of procedure that the author not be removed from Canada while the Committee was considering the case.

Factual background

2.1 The author was a sympathiser and supporter of the main Sikh political groups in India, including the All-India Sikh Student Federation and Akali Dal (Mann), one of the main Sikh parties in the Punjab. He claims that since 1995 he was subject to of numerous beatings and torture, being suspected of assisting such groups. After the author's escape, the author's family was harassed by police, while his father, a community leader, was threatened with death by members of the Punjabi police. The author also alleges that his wife was raped in police detention while he was sought by the police.

2.2 In 1997, the author decided to leave India. In September 1997, his wife arrived in Canada, and the author followed her in January 1998. In late 1997/early 1998, a child was born to the author and his wife in Canada. On 11 August 1998, a two-member Convention Refugee Determination Panel of the Immigration and Refugee Board heard the status claim of the author and his wife for refugee. The author and his wife were represented by counsel at that hearing.

2.3 On 8 September 1998, the author's claim was rejected. The panel, on the totality of the evidence, determined that the evidence presented by the author and his wife was not credible, inter alia on the basis of significant inconsistencies in the evidence which had not been satisfactorily explained. A "serious possibility" of persecution in the event of return to India had therefore not been made out.

2.4 On 26 October 1998, the author applied to become part of the Post-Determination Refugee Claimants in Canada Class ("PDRCC Class"). Unsuccessful refugee claimants may apply for remaining in Canada under this class, which provides an opportunity for application for permanent residence for individuals who, although not determined to be refugees under the 1951 Convention, face an objectively identifiable risk to life or extreme sanction or inhumane treatment should they be returned to their country of origin. The process also allows for any possible changes to be evaluated prior to removal from Canada. The author was found to be ineligible for this class on account of late filing.

2.5 On 19 January 1999, a second child was born to the author and his wife.
On 14 November 2000, the author submitted a request for ministerial exemption on

humanitarian grounds, under section 114 of the Immigration Act. He advanced in support his wife's difficult pregnancy, the premature birth of their son in January 1999, his wife's part-time work as a seamstress and his intention of joining her in this employment, and the danger that he would face in India due to his membership in a Sikh group and his "prior political activities".

2.6 On 19 January 2001, the application for a ministerial exemption on humanitarian grounds was rejected, with written reasons. As to the risk of return, the decision noted that Mr. Singh Bhullar had advanced the same material as presented to the Immigration and Refugee Board at the initial hearing, without explaining any of the inconsistencies that had led to the Board's finding of poor credibility. On family issues, the family had been in Canada for only two years and had failed to establish themselves. If the sons were to return to India, they would benefit from the presence of both parents' extended families and adequate educational facilities, and would retain the right to return to Canada.

2.7 On 20 February 2001, the author filed two applications for judicial review. The first concerned the original adverse determination of the Immigration and Refugee Board. As it was submitted over two years past the deadline for such applications, the author requested an extension of time for filing. On 11 June 2001, the Federal Court rejected the request for an extension of the deadline for filing, as the application did not raise a serious question to be tried. The second application for judicial review concerned the decision of 19 January 2001 to decline admission on humanitarian and compassionate grounds. On 17 August 2001, the Federal Court dismissed that application, because filed out of time, since the author had failed to advance a "fairly arguable" case or a serious question to be tried.

The complaint

3.1 The author argues that he would be subject to extrajudicial execution and torture if returned to India, in breach of articles 6 and 7 of the Covenant. There is no mandatory prohibition of returning persons to a risk of death or torture abroad. The decision to expel the author also does not sufficiently consider the non-derogable nature of articles 23 and 24 concerning protection of the family and his Canadian-born children.

3.2 The author further argues that he has no effective legal remedy, in breach of articles 2 and 14 of the Covenant, as the State party's immigration agents are not sufficiently impartial, and lack the independence and competence necessary to undertake the required risk assessments. Such agents are under pressure to decide in favour of expulsion, with an attitude presuming lying or abuse of the system on the part of applicants.

The State party's submissions on admissibility

4.1 On 2 November 2001, the State party disputed the admissibility of the communication, arguing that domestic remedies had not been exhausted with respect to the claim under article 7 and that no prima facie violation of the Covenant had been disclosed with respect to any claim.

4.2 With respect to domestic remedies, the State party argues that the author failed to exercise due diligence in pursuing available and effective remedies. He has not demonstrated that the remedies which would have been available to him are not effective or available within a reasonable timeframe. The State party argues that his application under the Post Determination Refugee Claimants in Canada (PDRCC) Class was submitted after expiry of the prescribed deadline, and was accordingly dismissed. His application for judicial review of the Immigration and Refugee Board's adverse refugee determination was also submitted after expiry of the deadline and was dismissed by the Federal Court as not raising a serious question to be tried. His application for judicial review of the rejection of the application for humanitarian and compassionate consideration was also submitted after the expiry of the relevant deadlines for filing and dismissed by the Federal Court.

4.3 The State party adds that no prima facie violation of the Covenant has been disclosed, and the communication is inadmissible for insufficient substantiation. Under article 7, while acknowledging that police violence continues to be a problem in Punjab, the Akali Dal (Mann) political party the author joined in 1993 has formed a coalition government with the leading Bharatiya Janata Party in Punjab. As the author is a member of one of the governing parties of the present coalition, it is unlikely he would be at risk in India.

4.4 On 3 July 2002, the State party commented on the merits of the author's claims. It submits that after reviewing a number of credibility problems in the author's representations to Canadian immigration authorities, and even assuming the veracity of the author's personal history, he has failed to establish that he and his wife would face a foreseeable, personal and imminent risk of torture if returned to India. The State party bases this conclusion on two principal factors: (a) the author's own status as a former ordinary member of the Akali Dal (Mann) Party, who at no time engaged in high profile political activities and thus would be unlikely to be wanted by the authorities if returned to India, and (b) the improved political conditions in Punjab, as attested by the reports of several non-governmental organizations and the Research Directorate of Canada's Immigration and Refugee Board. The State party adds that the author's subsidiary claims under articles 2, 14, 23 and 24 have not been sufficiently substantiated to establish even a prima facie violation of these provisions.

Author's comments on the State party's submissions

5.1 On 10 October 2003, the author responded to the State party's submissions. As to the issue of domestic remedies, the author argued that judicial review by the Federal Court is not a full appeal on the merits, but rather is "a very narrow ground of review for gross errors of law", for which leave to appeal must be obtained. In the context of deportation, the application itself has no suspensive effect and must be accompanied by an application for a stay.

5.2 The author claims that the Canadian system for analysis of danger is "a farce" and provides neither a fair nor independent examination of the case prior to deportation. The author argues that the sufficiency of available judicial recourse in Canada has been criticised in a case before the Inter-American Commission on Human Rights. The author contends that he filed for judicial

review of the refusal of the pre-removal risk assessment (PPRA), with an application for stay of deportation, submitted under current procedures. The stay of deportation was denied and leave for judicial review was denied.

5.3 Finally, the author also claims to have fully adjudicated the refusal of refugee status at the Immigration and Refugee Board, leave to apply for judicial review having been denied by the Federal Court. As to the fact that PDRCC submissions were not made, the author states that he did not receive the decision by mail and that he was not responsible for missing the statutory deadlines. In addition, the author comments on the merits of the case.[1]

Supplementary submission of the State party

6. On 12 February 2004, the State party responded to the author's submissions on the merits of the case.

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2 As to the issue of exhaustion of domestic remedies, the Committee notes that the State party identifies three distinct avenues of domestic redress that the author was entitled to pursue. Firstly, the author's application for judicial review of the Board's denial of refugee status was filed out of time and dismissed by the Federal Court. Secondly, following the rejection of his application for refugee status, he was entitled to apply for consideration under the Post Determination Refugee Claimants in Canada (PDRCC) Class, which would have been in a position to assess the refoulement issues raised by the author. The author however did not file such a claim within the specified time limits. Thirdly, the author's application for judicial review of the rejection of the claim for humanitarian consideration was also filed out of time, and again rejected by the Federal Court.

7.3 The Committee recalls its jurisprudence that authors are bound by procedural rules such as filing deadlines applicable to the exhaustion of domestic remedies, provided that the restrictions are reasonable.[2] Leaving aside the issue of whether the author's failure to file in a timely manner an application under the Post Determination Refugee Claimants in Canada (PDRCC) (see paragraph 5.3, *supra*), the Committee notes that both applications for judicial review were filed out of time by the author and were not subsequently pursued. The author has failed to advance any reasons for these delays, nor any argument that the specified time limits in question were either unfair or unreasonable. It follows that the author has failed to pursue domestic remedies with the "requisite diligence",[3] and the communication must be declared inadmissible, for failure to exhaust domestic remedies, under article 5, paragraph 2 (b), of the Optional Protocol.

8. Accordingly, the Committee decides:

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

(b) That this decision will be transmitted to the author and, to the State party.

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

Notes

[1] See summary in paragraph 4.4.

[2] See, for example, *A.P.A. v. Spain* communication No. 433/1990.

[3] Ibid., at para. 6.3.

B. Communication No. 996/2001, *Stoljar v. Russian Federation** (Decision adopted on 31 October 2006, Eighty-eighth session)

Submitted by:	Mr. Vadim Stolyar (represented by Karina Moskalenko, Moscow International Protection Centre)
Alleged victim:	The author
State party:	The Russian Federation
Date of communication:	16 February 1999 (initial submission)
Subject matter:	Right to be represented by a lawyer at all stages of criminal proceedings
Substantive issues:	Ill-treatment, habeas corpus, unfair trial
Procedural issues:	Substantiation of claim
Articles of the Covenant:	7, 9 and 14
Article of the Optional Protocol:	2

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

Meeting on 31 October 2006,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Vadim Stolyar, a Russian national of Ukrainian origin, born in 1977. He claims to be victim of violation by the Russian Federation of his rights under articles 7; 9; and 14, paragraphs 1 and 3, (d), (e), and (g), of the Covenant.[1] He is represented by counsel, Mrs. Karina Moskalenko, Moscow International Protection Centre.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Facts as submitted by the author

2.1 During the night of 11 February 1995, the author walked with a friend, R., near a warehouse in a remote area in Mityshchy city (Russia). They met two pedestrians (Mr. and Mrs. B., both retired) and asked them for cigarettes. Mr. B. drew a knife from his bag, injured R. in the spleen area, and ripped the back of the author's jacket. R. then left the scene. In order to protect himself, the author hit Mr. B.'s hand with a metal bar he had found in the snow. The latter fell to the ground, and his wife helped him to get up and to leave the scene. The author then went home; R. was already there and his companion and the author's wife were treating his injury.

2.2 On 12 February, Mrs. B. reported the attack to the police. She explained that she had lost consciousness after being hit with a metal bar, and when she recovered, her husband was no longer near her. The author contends that Mr. B. was found early that morning next to a dormitory located near the crime scene. He was brought to a hospital where he died at around 9 a.m., allegedly, because of improper medical care.

2.3 During the night of 13 to 14 February 1995, at around 1 a.m., five civilian policemen came to the author's apartment. His spouse opened the door and they entered, woke up the author, handcuffed him and brought him to a police station, without informing him of the reasons for arrest. They charged him with an administrative offence, for resisting his arrest. On 14 February 1995, the author was brought to the Mytishchinsk City Court, which ordered seven days of administrative arrest. The author claims that he never resisted the policemen during the arrest.

2.4 During his administrative detention, the author was interrogated as a witness in relation to the murder of Mr. B., and allegedly was severely beaten on two occasions by the investigators, who applied pressure on him in order to force him to confess guilt. During this time, he also participated in a reconstitution of the crime at the crime scene. On 17 February, allegedly without reason, he was handcuffed to a radiator in a corridor of the police station. He claims that even after he confessed guilt, his procedural status was not changed until 20 February 1995.

2.5 On 6 March 1995, his wife appealed to the Mityshchinsk City Prosecutor, claiming that her husband's arrest was unlawful. On 5 April 1995, the Prosecutor's Office replied that the arrest had been lawful, as her husband was suspected of having committed a murder. On an unspecified date, the author's lawyer filed a protest motion with the Mytishchinsk District Prosecutor's Office, and this Office forwarded a protest motion to the President of the Mytishchinsk City Court. The author contends that the fact that the Prosecutor transmitted the protest motion shows that his administrative arrest was unlawful[2].

2.6 On 31 October 1996, the Mystishchinsk City Court sentenced the author to 10 years' imprisonment. He was found guilty of murder, robbery and hooliganism, under articles 108 (2), 206 (2), 146-2 (a), of the Criminal Code. On 17 December 1996, the Criminal Collegium of the Moscow Regional Court confirmed the judgment, which was also subsequently examined by the Supreme Court, under a supervisory procedure, and once again confirmed.

The complaint

3.1 The author claims that, in violation of articles 7 and 14, paragraph 3 (g), he was beaten by investigators during his administrative detention, to force him to confess his guilt.

3.2 In addition, the fact that he was unlawfully placed under administrative arrest while in fact he was detained on a murder charge and was interrogated on this count, amounts to a violation of his right to liberty and security of person, under article 9 of the Covenant.

3.3 The author claims that article 14, paragraph 1, of the Covenant, was violated, as the court was partial. He argues that the court's evaluation of evidence was in violation of the principle of equality of arms, as all testimony provided by the injured party was fully taken into account, though often contradictory and several times modified during the preliminary investigation. At the same time, according to the author, all evidence presented on his behalf was rejected by the Court.

3.4 The author claims that, in violation of article 14, paragraph 3 (d), his lawyer was allowed to meet with him only seven days after his arrest, on 20 February 1996, although the author's mother had privately retained this lawyer on 14 February. The investigating officers also used violence against his co-accused, R., who confirmed this in court. The fact that he was kept at the police premises for seven days, without being transferred to a pre-trial detention centre, in the absence of a lawyer, has to be considered as indirect evidence of the beatings he was subjected to. In substantiation, he provides a copy of the trial transcript dated 29 October 1996, where he informed the court that "when he was brought to the police office, he was beaten there". He affirms that the court ignored his statements to this effect.

3.5 According to the author, article 14, paragraph 3 (e), of the Covenant was violated, as the court refused to summon all potential witnesses, in particular S., K., and G., whose testimonies, allegedly contradicted the prosecution's version. He contends that these testimonies were on record in the criminal case file, and although "the court was obliged to summon the witnesses and to interrogate them and evaluate their depositions", it failed to do so.

State party's observations

4.1 In its comments of 11 July 2002, the State party affirmed that the Supreme Court and the General Prosecutor's Office examined the author's communication, and both concluded that his allegations of violations of the Covenant and the Criminal Procedure Code during the preliminary investigation and the trial were without foundation.

4.2 According to the State party, the trial court comprehensively and fully examined all the available evidence, evaluated it in its totality, and concluded that the author and his co-accused R. did in fact attack a family of retired persons (Mr. and Mrs. B.), robbed them and ran away. Shortly afterwards, without any reason, the author returned to the crime scene and hit Mr. B. several times with a metal bar, as result of which Mr. B. later died.

4.3 The author was arrested as a suspect on 20 February 1995, and on 22 February, in the presence of his lawyer, was charged with murder and robbery. On 23 February, he was placed in preventive detention. During the preliminary investigation and detention and the trial, he was informed about his procedural rights as a suspect, including his right to be represented by a lawyer and of the right not to testify against himself (article 51 of the Russian Constitution).

4.4 According to the State party, the court established that the author was guilty of having committed a premeditated robbery in collusion, acting in a group, hooliganism, and of intentionally having caused severe corporal injuries causing death. A forensic expert concluded that Mr. B. had suffered from ("subdural") brain haematoma, and had suffered broken ribs and pleural and pulmonary damage, also constituting serious bodily injuries. The expert concluded that death was caused by an internal cranial-brain trauma. All injuries had been caused with a blunt and solid object; it was not excluded that the trauma was caused by hits with a metallic bar, as traces of metal were discovered on the victim's skin.

4.5 The State party contends that the Court found no grounds not to believe Mrs. B., as her testimony was coherent and confirmed by experts' conclusions, and other evidence, including the testimonies of three witnesses unrelated to her.

4.6 The material in the criminal case file reveals that during the trial, witnesses were called on the author's behalf as well. According to the State party, the court evaluated all the evidence examined during the court trial, including those testimonies. The list of witnesses to be summoned, contained in the criminal case file, does not contain the names of S., K., and G., and during the trial neither the author nor his counsel have requested to call those persons.

4.7 The Mityshchinsk City Prosecutor's Office investigated the author's and his co-defendant's allegation that moral and physical pressure were used by the investigators to force them admit guilt. The Prosecutor's Office concluded that these allegations were unfounded.

4.8 The State party denies as groundless the author's assertion that the referral of the protest motion to the Mityshchinsk City Court (against the decision of 14 February 1995 to place him on administrative arrest) shows that he was subjected unlawfully to an arrest, on an "invented" administrative case. Indeed, on 24 April 1995, the Mityshchinsk City Court decided to reject this protest motion.

4.9 During the administrative arrest, the author was interrogated by an investigator, as a witness in a criminal case. According to the State party, the court did not take into account these depositions as evidence which established the author's guilt when deciding on the case. His guilt was established based on the victim's and witnesses' testimonies, and on expert conclusions. The author's allegations that the deceased first attacked him and his co-accused R. with a knife, and injured his co-accused, were examined but rejected by the court.

Author's comments

5. The author presented his comments on 16 May 2006. He reiterated, in detail, his previous allegations and dismissed the State party's observations as superficial. He contended that the State party limited itself to confirming the grounds for his conviction on a murder charge, and pointed out that no documentary evidence has been adduced by the State party in substantiation of its observations.

State party's additional observations

6.1 On 16 August 2006, the State party submitted additional observations. It recalls that the author's allegations about insufficient grounds for his conviction and the lack of objectivity of the preliminary investigation were examined by the Office of the Prosecutor General and found to be unfounded. Also, in April 2002, the Supreme Court examined the author's criminal case (under a supervisory proceeding), and confirmed the sentence.

6.2 The author's allegation that before his interrogation as a witness, he was not informed of his right not to testify against himself does not correspond to reality. The interrogation record contains a handwritten annotation made by the author, to the effect that he was informed of this right, and he was informed of his rights, in particular of his right not to testify against himself. In addition, his depositions as a witness were not taken into consideration by the court.

6.3 The State party rejects the author's allegation about a violation of his right to defence. According to the criminal case file, on 17 February 1995, he was informed of the relevant provisions of the Criminal Procedure Code, but refused the services of a lawyer.

6.4 The identification parade on which the author was recognized by Mrs. B. was held in the presence of a lawyer and witnesses, and was conducted in strict compliance with the procedural requirements, and correctly accepted as admissible evidence by the court. The court had no reason not to believe Mrs. B., as her deposition was consistent with the remainder of the evidence. The principle of equality of arms was also respected, and both defence and prosecution were afforded equal rights in court.

6.5 The State party also rejects the author's allegations on the partiality of the court as groundless, and points out that all demands formulated by the parties in the trial received adequate examination.

Author's comments

7.1 The author commented on the State party's observations on 31 August 2006. He notes that the State party still has not adduced documentary evidence in support of its arguments, but limited itself in confirming in general terms the grounds for his conviction.

7.2 The author confirms that after his arrest, he was informed of his right not to testify against himself, but claims that when he was interrogated as a witness, he was warned that his criminal liability could be engaged in case of false testimony.

7.3 Finally, he recalls his allegations under article 14, paragraph 3 (e), about the failure of the court, despite its obligation to do so, to call and interrogate three witnesses (S., K., and G.) because their depositions during the preliminary investigation contradicted the prosecution's version.

Issues and proceedings before the Committee

Admissibility considerations

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

8.2 The Committee notes that the same matter is not being examined under any other international procedure, and that the State party does not contest that domestic remedies have been exhausted. The requirements of article 5, paragraph 2 (a) and (b), of the Optional Protocol, have therefore been met.

8.3 The author has claimed that, contrary to article 7, of the Covenant, he was beaten during the initial stages of his arrest to force him to confess his guilt, and that after he complained about this in court, his claim was ignored. The State party has objected that the Mytishchinsk City Prosecutor's Office has investigated the author's pertinent allegations and concluded that they were unfounded. In the absence of any other pertinent information, in particular the absence of detailed description of the alleged acts of ill-treatment the author was allegedly subjected to, and in the absence of medical evidence or information as to whether the author or counsel complained about these allegations during the investigation, the Committee considers that the author has failed sufficiently to substantiate this claim, for purposes of admissibility. In the circumstances, this claim is inadmissible under article 2, of the Optional Protocol.

8.4 The author claims a violation of article 9, as, allegedly, he was unlawfully detained for seven days, from 14 to 20 February 1995, because the investigators falsely accused him of resisting his arrest and the court confirmed this sanction. The Committee notes that the author's counsel appealed, on an unspecified date, the administrative sanction to the Prosecutor's Office, which submitted a protest motion to the Court, but the Court rejected the motion. In the absence of other pertinent information in this connexion, the Committee considers that the author has failed sufficiently to substantiate this allegation, for purposes of admissibility. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

8.5 The author claims that contrary to article 14, paragraph 1, his trial was not fair, because the court was partial and took into consideration only the victim's description of the crime but rejected his own version. The State party argues that its Supreme Court and its General Prosecutor's Office examined the author's communication and concluded that his allegations of Covenant violations during the preliminary investigation and the court trial are unfounded. It added that the trial court established the author's guilt after having fully evaluated all the available evidence during the trial. In substance, theses allegations relate to the evaluation of facts and evidence, and the Committee recalls that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that it was clearly arbitrary or amounted to a denial of justice.[3] In the absence of other pertinent

information that would show that this is the situation in the present case, the Committee considers that this part of the communication is also inadmissible under article 2 of the Optional Protocol.

8.6 The author has claimed a violation of his right to defence as protected by article 14, paragraph 3 (d), since after being placed under administrative arrest by a court order, from 14 February to 20 February 1995, his privately retained lawyer was not allowed to see him until 20 February. The State party argues that the author was arrested as a suspect on 20 February 1995, and charged with murder on 22 February, and that, in any event, on 17 February, he had refused, in writing, to be legally represented. This was not refuted by the author. In the circumstances of the present case, and in absence of any further relevant information in this relation, the Committee considers that the author has failed to sufficiently substantiate his allegations, for purposes of admissibility. This part of the communication is therefore inadmissible under article 2, of the Optional Protocol.

8.7 The author claims a violation of article 14, paragraph 3 (e), as three witnesses called on his behalf - S., K., and G., - whose testimonies allegedly would have contradicted the prosecution's version, were not summoned by the court. The State party objects that the list of witnesses to summon in the case file does not mention the names of S., K., and G., and that, in court, neither the author nor counsel requested to call these individuals as witnesses; this was uncontested by the author. In the circumstances, the Committee considers that the author has failed sufficiently to substantiate this allegation, for purposes of admissibility, and it is accordingly inadmissible under article 2 of the Optional Protocol.

8.8 The author has also claimed that contrary to article 14, paragraph 3 (g), he was forced by the investigators to confess his guilt. The State party has replied that both during the preliminary investigation and in court, he was informed about his procedural rights as a suspect, and in particular his right not to testify against himself. The Mityshchinsk City Prosecutor's Office investigated the author's and his co-defendant's allegations that moral and physical pressure were used by the investigators to force them admit guilt, and concluded that these allegations were unfounded. The Committee notes that the author did not refute the State party's affirmations: he acknowledges that he was informed of his right not to testify against himself, but claims that at the same time he was informed of his criminal liability if he gave false testimony. In the circumstances, and in the absence of any other pertinent information in this connection, the Committee considers that the author has failed to sufficiently substantiate his allegations, for purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

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

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

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

Notes

[1] The Optional Protocol entered into force for the State party on 1 January 1992.

[2] The author does not give any information on the outcome of this appeal. From the subsequent State party's submission, however, it transpires that on 24 April 1995, the Mityshchinsk City Court has ruled not to give suit to this protest motion, finding that the author's administrative case for hooliganism was lawful and grounded (see 4.8 *infra*).

[3] See communication No. 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision adopted on 3 April 1995, para. 6.2.

C. Communication No. 1098/2002, *Guardiola Martinez v. Spain** (Decision adopted on 31 October 2006, Eighty-eighth session)

Submitted by:	Fernando Guardiola Martínez (not represented by counsel)
Alleged victim:	The author
State party:	Spain
Date of communication:	8 March 2001 (initial submission)
Subject matter:	Trial with proper judicial safeguards
Procedural issues:	Exhaustion of domestic remedies, insufficient substantiation of the alleged violations
Substantive issues:	Right to a fair trial and to be tried by an impartial court. Right to have sentence and conviction reviewed by a higher court in accordance with the law
Articles of the Covenant:	14 (1) (2) (3) (5)
Articles of the Optional Protocol:	2; 5 (2) (b)

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

Meeting on 31 October 2006,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 8 March 2001, is Mr. Fernando Guardiola Martínez, a lawyer and a Spanish citizen, born on 1 December 1960. The author claims to be a victim of a violation by Spain of article 14, paragraphs 1, 2, 3 and 5, of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is not represented by counsel.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

Factual background

2.1 On 12 April 1994, the author and his brother, Juan Guardiola Martínez, both lawyers, accompanied a client to a notary's office where an acquittance relating to a sale was drawn up in favour of a private company. The sum received by the client was placed in a briefcase owned by the brothers. Later the same day, the brothers went to the police and reported the theft by the client of the briefcase and its contents. The briefcase and its contents were recovered forthwith and, on 13 April 1996, Liria Examining Court No. 2 entrusted the contents of the briefcase, which included bearer cheques and bills of exchange, among other things, to the author and his brother for safekeeping.

2.2 On 21 May 1998, Division IV of the Valencia Provincial Court convicted the author and his brother of misappropriation for not having returned the money and commercial papers that they had received for safekeeping from the Examining Court. The sentence they received was a three-year term of imprisonment and general disqualification for six years.

2.3 During the proceedings, the author lodged a number of appeals against various procedural measures with Division IV of the Valencia Provincial Court. According to the author, the Valencia Provincial Court had failed to act impartially and objectively in dealing with the successive appeals referred to it from the Examining Court.

2.4 According to the author, the Provincial Court had denied his right to submit key evidence, namely the judicial decision on entrustment for safekeeping. He further alleges that he was convicted of misappropriation by analogy, since he was not a public servant and the money in question was not from public funds.

2.5 On 9 March 1999, the author lodged an application for review on points of law with the Supreme Court, but this application was rejected in a ruling of 24 January 2000. The application for *amparo* to the Constitutional Court was declared inadmissible on 2 June 2000 on the ground that it had been lodged out of time. The author considers that domestic remedies have been exhausted.

2.6 On 10 March 2001, following the submission of the communication to the Human Rights Committee, the author lodged another appeal to the Supreme Court on the grounds of miscarriage of justice, requesting that the prison sentence be suspended.

The complaint

3.1 The author claims a violation of article 14, paragraph 1, of the Covenant, as the Valencia Provincial Court allegedly failed to act impartially and objectively in dealing with the successive and repeated appeals referred to it from the Examining Court.

3.2 The author also alleges violations of article 14, paragraph 2, of the Covenant, on presumption of innocence, and article 14, paragraph 3, by having been precluded from presenting evidence in the form of the judicial decision on entrustment for safekeeping.

3.3 The author also maintains that he was tried in sole instance, as the application to the Supreme Court for review on points of law does not involve a second instance, and this raises questions in relation to article 14, paragraph 5, of the Covenant.

State party's observations on admissibility and merits

4.1 On 13 and 31 May 2003, the State party contended that the communication was inadmissible since it constituted an abuse of the right of appeal and was manifestly groundless. The State party also contends that the author failed to exhaust domestic remedies.

4.2 According to the State party, the author is being deliberately vague in referring in a general way to the rights which have allegedly been violated. The State party argues that the communication also contains many deliberate omissions and wilfully misleading suggestions contradicted by the examination of the facts and the court documents in this case.

4.3 The State party argues that the author makes a series of sweeping claims, without specifically indicating what facts are disputed. When he claims that he was denied the right to submit key evidence, he does not specify what evidence was refused or how this prejudiced his defence. The State party refers to the ruling of the Supreme Court which states that a great deal of evidence was admitted and examined in the case under consideration. With regard to the evidence, the Supreme Court observed that the need for the judicial decision on the entrustment for safekeeping to be submitted in evidence is obviated by the documentary evidence relating to the entrustment arrangements.

4.4 The State party indicates that, contrary to what is alleged by the author, article 435.3 of the Criminal Code, which defines the crime of misappropriation, provides that, in addition to public servants, the crime can be committed by "the administrators or depositaries of money or goods embargoed, seized or deposited by public authority, even if they belong to private individuals".

4.5 According to the State party, the sweeping allegation that his case was tried in sole instance is contradicted by the many questions considered and resolved by the Supreme Court in the review procedure on points of law, including alleged errors of fact and in the evaluation of evidence, or procedural irregularities in the trial at first instance. The State party considers that the author has had repeated access to justice and obtained fully reasoned judicial decisions in which the competent legal authorities replied in detail to his allegations. It concludes that, taking into account the lack of substantiation of the claims, the communication is a pretext to request non-enforcement of the author's sentence and constitutes an abuse of rights.

4.6 With regard to the exhaustion of domestic remedies, the State party contends that the author failed to raise the questions now before the Committee at the domestic level, despite having alleged various grounds in his numerous appeals. In particular, the author did not raise the lack of impartiality of the Valencia Provincial Court in any of the numerous appeals lodged.

4.7 On the merits of the communication, the State party indicates that the ruling by the Supreme Court also has the effect of reviewing evidentiary matters, in terms of both the formal aspects and the facts on which the conviction is based, mentioning specifically the elements that determined the author's conviction. In addition, in a ruling of the same date, which clarifies the previous ruling and which the author himself invokes, the Supreme Court corrected the factual error which had occurred by modifying the evidentiary facts through the judgement on points of law in relation to the co-accused, which constitutes concrete evidence that the facts were reviewed.

Additional observations by the author

5. Despite receiving three reminders, the author failed to submit any comments on the State party's observations.

Issues and proceedings before the Committee

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

6.2 In accordance with article 5, paragraph 2 (a), the Committee has established that the same matter has not been submitted for examination under another procedure of international investigation or settlement.

6.3 With regard to the allegations that the Valencia Provincial Court acted arbitrarily and was not impartial or independent, in violation of article 14, paragraph 1, the Committee notes that the author made no appeal on those grounds to the Supreme Court, so that this part of the communication should be declared inadmissible for failure to exhaust domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

6.4 Furthermore, the Committee takes note of the allegations relating to a lack of objectivity and impartiality in the evaluation of the facts and evidence carried out by the Valencia Provincial Court. In that regard, the Committee recalls that it has repeatedly held that, in principle, it is for the courts of States parties to evaluate the facts and evidence, unless such evaluation is manifestly arbitrary or constitutes a denial of justice.[1] The Committee considers that the author has not demonstrated, for purposes of admissibility, that the procedures conducted by the courts of the State party in the author's case were arbitrary or constituted a denial of justice, and this part of the communication should therefore also be declared inadmissible under article 2 of the Optional Protocol.

6.5 On the alleged violation of article 14, paragraph 2, of the Covenant, the Committee notes that, in its ruling, the Supreme Court carefully examined the author's claims concerning alleged errors in the evaluation of the evidence. The Committee considers that the author has not sufficiently substantiated his claim in respect of article 14, paragraph 2, of the Covenant, for purposes of admissibility, and concludes that this part of the communication is inadmissible in accordance with article 2 of the Optional Protocol.

6.6 With regard to the alleged violation of article 14, paragraph 3, of the Covenant, the Committee notes that the author did not indicate the reasons for his view that this provision has been violated and that the facts described do not appear to reveal violations of the provision in question. Consequently, the Committee considers that the allegations have not been sufficiently substantiated for purposes of admissibility, and therefore finds this part of the communication to be inadmissible in accordance with article 2 of the Optional Protocol.

6.7 The author also alleges that the facts on which he was convicted at first instance were not reviewed by a higher court, since he considers that the Spanish review procedure on points of

law is not an appeal procedure and is admissible only on specific grounds, which expressly exclude review of the facts. According to the author, this constitutes a violation of article 14, paragraph 5.

6.8 It is clear, however, from the ruling of the Supreme Court that it carefully examined the evaluation of evidence carried out by the court of first instance, concluding that much documentary evidence, inter alia, had been admitted and examined. The Committee notes the observations by the State party to the effect that the author fails to specify exactly what evidence was refused or how this prejudiced his defence. In the Committee's view, the complaint concerning article 14, paragraph 5, has not been sufficiently substantiated for purposes of admissibility, and the Committee finds that it is inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

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

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

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

Note

[1] See, among others, communications No. 541/1992, *Errol Simms v. Jamaica*, decision of 3 April 1995, para. 6.2; No. 842/1998, *Serguey Romanov v. Ukraine*, decision of 30 October 2003, para. 6.4; No. 1399/2005, *Cuartero Casado v. Spain*, decision of 25 July 2005, para. 4.3; No. 1102/2002, *Semey Joe Johnson v. Spain*, decision of 27 March 2006, para. 6.4.

D. Communication No. 1151/2003, *Gonzalez v. Spain**
(Decision adopted on 1 November 2006, Eighty-eighth session)

Submitted by:	Estela Josefina González Cruz (represented by Jose Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	25 May 2001 (initial submission)
Subject matter:	Recognition of a foreign university qualification under international treaty
Procedural issues:	Insufficiently substantiated claims
Substantive issues:	None
Articles of the Covenant:	14, paragraph 1; 26
Article of the Optional Protocol:	2

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

Meeting on 1 November 2006,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 25 May 2001, is Estela Josefina González Cruz, a Dominican national born in 1966. She claims to be the victim of a violation by Spain of articles 14, paragraph 1, and 26 of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by Jose Luis Mazón Costa.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

The text of an individual opinion signed by Committee member Mr. Hipólito Solari-Yrigoyen is appended to the present document.

Factual background

2.1 The author moved to Spain on completion of her dentistry studies in the Dominican Republic. Once in Spain, she applied on 15 January 1991 for automatic recognition of her degree in dentistry of *Doctora en Odontología*, awarded by the University of the Dominican Republic, as equivalent to the Spanish degree of *Licenciada en Odontología*, invoking the Cultural Cooperation Agreement of 27 January 1953 between Spain and the Dominican Republic. According to article 3 of the agreement, "Nationals of both countries who have received degrees or diplomas awarded by the competent national authorities for the practice of a profession in either of the States parties shall be deemed competent to practise such professions in the territory of the other State, subject to the rules and regulations of that State."

2.2 On 23 March 1995, the Technical General Secretary of the Ministry of Education and Science issued a decision to the effect that the recognition sought would be conditional upon the successful completion of "a supplementary examination on the basic Spanish training requirements for the degree of *Licenciada en Odontología*".

2.3 Again invoking the 1953 cooperation agreement, the author challenged the Technical General Secretary's decision in the Administrative Division of the High Court, seeking unconditional automatic recognition of her qualification as equivalent to the Spanish degree.

2.4 In a ruling dated 11 November 1996, the Administrative Division noted that the recognition of foreign higher education qualifications was governed by Royal Decree No. 86/1987 of 16 January, which gives as "the primary sources in this regard the international treaties ... signed by Spain and, where appropriate, the recommendations or resolutions adopted by the intergovernmental bodies of which Spain is a member, as well as the equivalence tables for courses of study and qualifications approved by the Ministry of Education and Science on the basis of the report of the Academic Committee of the Board of Universities". The Division noted that Spain and the Dominican Republic had signed the 1953 agreement cited by the author, and that this had been superseded by the Cultural Cooperation Agreement of 27 January 1988. However, under the transitional provision of the 1988 agreement, "in accordance with the principle of non-retroactivity of laws, applications for recognition of qualifications or diplomas held by nationals of either country and obtained following university courses of study commenced in the other country before the signing of this agreement [shall continue] in each case to be considered in the light of the specific regulations of each country, within the framework established by the 1953 agreement". Inasmuch as the author, according to the certificate issued by the Dominican University, had commenced her course of study in 1987, the Division concluded that the 1953 agreement applied.

2.5 In the Division's view, and in accordance with the Supreme Court's consistent case law, while article 3 of the 1953 agreement should be interpreted as containing a principle of "automatic" recognition of qualifications, nevertheless, as the Supreme Court itself had stated, the equivalent qualification should be the old Spanish degree in dentistry, which has been obsolete since 1948. The old degree had remained valid as there were still in fact practising dentists in Spain who held that qualification, and it did permit a restricted practice, confined to certain types of activity consistent with a course of studies that did not include a degree in medicine or surgery. The Division stated that "there can be no equivalence with the present degree of *Licenciada en Odontología* established in Act No. 10/1986 of 17 March, which demands a longer course of studies, at a higher level, than that followed by the [author]".

2.6 In light of the foregoing, the High Court upheld the appeal, providing that the Spanish equivalent qualification should be the one that became obsolete in 1948, with the option of equivalence with the new dentistry qualification upon successful completion of a supplementary examination.

2.7 On 13 May 1997, the Government Attorney submitted an appeal in cassation against the High Court judgement, claiming a violation of article 3 of the 1953 agreement in conjunction with regulation No. 86/1987, with Community Directives Nos. 78/686/EEC, 78/687/EEC, 78/688/EEC and 81/1057/EEC, in respect of dental practice, and with Act No. 10/86. The appeal was based on the Supreme Court's recent jurisprudence on the issue of equivalence between the Dominican degree of *Doctor en Odontología* and the Spanish degree of *Licenciado en Odontología*, according to which:

(a) In order to practise as a dental surgeon in Spain, it was now necessary to hold the new university degree of *Licenciado en Odontología* governed by Act No. 10/86;

(b) The profession of dental practitioner covered by the old qualification which became obsolete in 1948 was substantially different from the new qualification in terms of knowledge acquired, as repeatedly established in case law;

(c) The purpose of the Community Directives relating to dental practice was to ensure that the dental profession in all member States met the required standard of specialist training, as moderated by the competent academic authority in each member State; to that end, Act No. 10/1986 established the degree of *Licenciado en Odontología*, which is different from and of a higher level than the formal qualification obtained by the author;

(d) The transitional provision of the 1988 agreement governed any legal relationships and rights established at the time the law changed and was intended to bridge the gap created by the abolition of the old qualification;

(e) There were no grounds for recognizing an equivalence between the Dominican qualification and the Spanish qualification applicable up to 1948, since the latter no longer existed at the time the application for recognition was made;

(f) The only admissible equivalence was between the Dominican qualification and the new Spanish qualification following successful completion of a supplementary examination in accordance with the provisions of Royal Decree No. 86/1987.

2.8 In a judgement of 25 May 1998, the Supreme Court upheld the appeal, on the following grounds:

(a) The courses of study leading to the old qualification in dentistry had ceased to be offered in 1948, as a result of which that qualification no longer existed in Spain;

(b) The 1988 agreement could not be properly applied without reference to domestic legislation, in accordance with the Community Directives cited, since the recognition requested required the authorities to verify the equivalence of the foreign and Spanish qualifications;

(c) Consequently, the qualification of dental practitioner obtained by the author was not equivalent to the new dental qualification, since the course of study leading to the latter and conferring the right to practise as a dentist was of a higher level than that required to obtain the qualification awarded in the Dominican Republic.

2.9 On 9 July 1998 the author applied for *amparo*, claiming a violation of her right to equal treatment and to effective legal remedy. In a ruling dated 28 September 1998, the Constitutional Court rejected the appeal on the grounds that "the contested judgement [was] one in a series of judgements, some pre-dating it, some post-dating it, which [had] effectively changed case law on the interpretation and application of the relevant legislation on recognition in Spain of dental qualifications from Latin American and, specifically, Dominican, universities, which [meant it could not] be viewed as an isolated or *ad casum* decision".

The complaint

3.1 The author argues that the denial of automatic equivalence of her degree as provided by the 1953 agreement and recognized by the High Court judgement amounts to a denial of justice, which is prohibited under article 14, paragraph 1. She claims that the arguments adduced in the Supreme Court judgement altering existing case law on the direct equivalence of qualifications are false and contrived. Further, the Supreme Court's argument based on Community law is arbitrary and fabricated, and contradicts the Court's own case law by maintaining that the qualification with which the foreign qualification should be compared is the dentistry degree established in Act No. 10/1986 when in previous rulings it had found that the benchmark should be the old 1948 degree.

3.2 The author also alleges a violation of the right to equality before the law and the courts under articles 26 and 14, paragraph 1, inasmuch as the Supreme Court, applying what she claims were contrived arguments that contradicted its own case law, treated her case differently from numerous previous cases in which, she asserts, the Court had upheld automatic recognition. Citing the International Convention on the Elimination of All Forms of Racial Discrimination, she further argues that a change in case law which invalidates university degrees obtained abroad by nationals of other States must be transparent if it is to reflect the principles of that Convention.

State party's observations on admissibility and the merits

4.1 The State party argues (2 February 2006) that the Committee should declare the communication inadmissible or, failing that, should find that no violation has occurred. It points out that the issue raised is one of interpretation of domestic law, which is the prerogative, in principle, of the domestic courts, as the Committee has said many times. The State party argues that there has been a change in the interpretation applied in the Supreme Court's case law, insofar as the recognition of equivalence that had for some time been automatic has now been made subject to the successful completion of a general examination. That change meant that all subsequent judgements must rule similarly.

4.2 The State party recalls that Supreme Court jurisprudence holds only that changes in interpretation should be made on adequate and specific grounds. In its most recent judgements (17 and 23 November 2005, copies annexed to the State party's observations), the Court refers

to the change in interpretation in respect of the equivalence of Dominican and Spanish dentistry qualifications, giving explicit, extensive and reasoned arguments therefore and citing "oft-repeated legal jurisprudence, as reflected in such judgements as those of 4 July 2001, 4 October 2000, 16 October and 20 November 2001 and 4 June 2002, which in turn refer back to earlier rulings".[1] In these judgements, the Supreme Court similarly finds that the degree in dentistry awarded by the Dominican Republic cannot be deemed equivalent to the current Spanish degree, and moreover that, since the training leading to the old degree in dentistry ceased to be offered in 1948, there can be no equivalence with the old qualification either.

Author's comments

5.1 The author reiterates that the 1953 agreement clearly allows for automatic recognition of qualifications and that every judgement handed down by the Supreme Court between 1953 and 1995 upheld that interpretation. She argues that the change in interpretation constitutes arbitrary disregard for a bilateral treaty signed by Spain and is not based on reasonable and objective grounds.

5.2 The author further argues that the change came about because the Supreme Court yielded under pressure exerted by the General Board of Colleges of Dentistry and Stomatology in what she calls "dental xenophobia", and amounts, she asserts, to arbitrary discrimination against immigrant Hispanic dental practitioners, whose right to recognition of their qualifications is denied with a view to stopping them living and working in Spain.

Issues and proceedings before the Committee

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

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other procedure of international investigation or settlement.

6.3 The author argues that the change in the Supreme Court's case law on recognition of foreign degrees in dentistry constitutes a denial of justice, in violation of article 14, paragraph 1, claiming it is not based on objective or reasonable grounds. The Committee notes the State party's argument to the effect that the issue is one of interpretation of domestic law, which, as repeatedly stated in the Committee's case law, is the prerogative of the domestic authorities and courts unless such interpretation is manifestly arbitrary or amounts to a denial of justice.[2] The Committee considers that the information before it and the arguments adduced by the author fail to show that the interpretation of applicable law by the Supreme Court in cassation was arbitrary or amounted to a denial of justice. Rather, they reveal a decision that follows the case law consistently applied by the Court in recent years and which reflects a change in jurisprudence warranted by the abolition of the old Spanish degree - which nevertheless remained temporarily valid so as to accommodate holders of the old qualification who were still practising in Spain. Moreover, the fact that, as from 1995-1996, the Court ceased to recognize the equivalence of foreign qualifications and a qualification that had been obsolete for more than 40 years, in view

of the introduction of a new, more advanced degree in 1986, cannot, prima facie, be challenged as arbitrary. In light of the foregoing, the Committee finds that the author has not substantiated this part of her claim sufficiently for purposes of admissibility and accordingly declares it inadmissible under article 2 of the Optional Protocol.

6.4 As to the claims under articles 26 and 14, paragraph 1, the Committee considers that the author has failed to show that she was a victim of differentiated treatment on any of the grounds established in article 26. In that regard, she has not provided a single example of a similar application made around the same time that might have been dealt with differently by the Spanish authorities; she cites only cases prior to 1995, i.e., cases that pre-date the change of interpretation in the Supreme Court's jurisprudence on the matter. The Committee recalls in any event that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[3] The Committee concludes that this part of the communication is insufficiently substantiated for purposes of admissibility and declares it inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

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

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

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

Notes

[1] Extract from judgement of 23 November 2005 of the Administrative Division of the Supreme Court, 7th Section, application No. 6863/1999.

[2] See, inter alia, communications Nos. 811/1998, *Mulai v. Republic of Guyana*, decision of 18 August 2004, para. 5.3; and 1399/2005, *Cuartero Casado v. Spain*, decision on admissibility, 16 August 2005, para. 4.3.

[3] General comment No. 18 (HRI/GEN/1/Rev.7), adopted by the Committee at its thirty-seventh session. In the same vein, see, inter alia, communications Nos. 182/1984, *Zwaan de Vries v. The Netherlands*, decision of 9 April 1987, para. 13; 861/1999, *Alain Lestourneaud v. France*, decision on admissibility, 3 November 1999, para. 4.2; and 945/2000, *Bohumir Marik v. Czech Republic*, decision of 26 July 2005, para. 6.3.

Appendix

Dissenting opinion by Committee member Mr. Hipolito Solari-Yrigoyen

I disagree with the majority view on the following points:

Consideration of admissibility

The author argues that the change in the Supreme Court's case law on recognition of foreign degrees in dentistry constitutes a denial of justice, in violation of article 14, paragraph 1, and that, in violation of article 26, she has been discriminated against in relation to other similar cases by the application of this change in case law, which is based on criteria that are neither reasonable nor objective. The State party maintains that the communication is inadmissible in that the issue it raises is in principle a matter for the interpretation of domestic law by the domestic courts. Nevertheless, the Committee should point out that the possible conflict between the application of an international treaty and domestic law raises issues concerning the two above-mentioned articles of the Covenant that require the communication to be ruled admissible in relation to them.

Consideration of the merits

When the 1953 Cultural Cooperation Agreement was superseded by a new one on 27 January 1988, the State party and the Dominican Republic decided by common accord that recognition of degrees from both countries obtained as a result of studies commenced before the new agreement came into force would be governed by the old 1953 agreement. This was the case of the degree of *Doctora en Odontología*, which the author wishes to have recognized and which she had obtained from the University of the Dominican Republic, having commenced her course of study in 1987.

The author notes that, under the above-mentioned agreement, the granting of automatic recognition in similar cases was upheld in rulings of the Supreme Court between 1953 and 1995, i.e. for 42 years. There is no doubt, therefore, that both States understood during this time that recognition would be automatic.

As from 1995-1996, the Supreme Court's case law changed. According to the State party, this was because a higher degree of *Licenciado en Odontología*, governed by Act No. 10/1986, had been introduced in 1986 in Spain. Nevertheless, the State party does not explain why, between the introduction of this higher degree in 1986 and 1995, i.e. for nine years, the degree of *Doctor en Odontología* obtained by the author in the Dominican Republic continued to be recognized automatically.

Nor does the State party explain why, when it signed the new Cultural Cooperation Agreement in 1988, two years after the introduction of the higher degree in 1986, it was expressly stipulated that cases like the author's would continue to be governed by the 1953 agreement. Neither a domestic law nor its regulations or changes in case law can be used by a State party to amend an international treaty that remains in force, if the signatories have not denounced the treaty.

In accordance with the principle of *pacta sunt servanda*, any treaty in force binds the parties and must be complied with by them in good faith. The Vienna Convention on the Law of Treaties, which has been in force since 27 January 1980, establishes that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty (art. 27).

The information supplied to the Committee by the parties makes it clear that the Supreme Court's application of national law that involves departing from the provisions of an international agreement constitutes a violation of article 14, paragraph 1, of the Covenant.

The change in case law has led the State party to treat the author differently to those who received automatic recognition of the same degree of *Doctorado en Odontología* that the author possesses, and there is no need to ask her to provide examples from around the same time, as the majority of Committee members would have done, since it is obvious that case law has been changed to avoid compliance with the international agreement governing recognition of degrees between the Dominican Republic and the State party.

I consider, therefore, that the author's rights under article 26 of the Covenant have been violated.

The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation by the State party of articles 14, paragraph 1, and 26 of the Covenant.

(*Signed*): Hipólito Solari-Yrigoyen

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

E. Communication No. 1154/2003, *Katsuno et al. v. Australia** (Decision adopted on 31 October 2006, Eighty-eighth session)

Submitted by:	Katsuno, Masaharu et al. (represented by counsel, Mr. Tobin)
Alleged victims:	The authors
State party:	Australia
Date of communication:	21 January 2002 (initial submission)
Subject matter:	Alleged unfair trial due to inadequate translation
Procedural issues:	None
Substantive issues:	Unfair trial, failure to be informed of arrest and the reasons for arrest, inadequate facilities to communicate with counsel, failure to be tried in their presence, compelled to testify against themselves, failure to obtain the attendance of witnesses under the same conditions as witnesses against them, inadequate assistance of interpreter
Articles of the Covenant:	2; 9, paragraph 2; 14, paragraphs 1, 2 and 3 (a), (b), (d), (e), (f) and (g); and 26.
Articles of the Optional Protocol:	2, and 5, paragraph 2 (b)

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

Meeting on 31 October 2006

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in adoption of the Committee's decision.

Decision on admissibility

1. The authors of the communication are Masaharu Katsuno, Mitsuo Katsuno, Yoshio Katsuno, Chika Honda and Kiichiro Asami, all Japanese nationals, who, at the time of submission of the communication, were detained at various correctional centres in Australia. They have all since been released. They all claim to be victims of violations of article 2; article 9, paragraph 2; article 14, paragraphs 1, 2 and 3 (a), (b), (d), (e), (f) and (g); and article 26, of the International Covenant on Civil and Political Rights. They are represented by counsel, Mr. James Tobin.

Facts as presented by the authors

2.1 On 17 June 1992, the authors were arrested at Melbourne airport on arrival from Kuala Lumpar, and were charged with the importation of heroin for commercial purposes. During their interrogation by a customs officer at the airport and subsequent interrogation by a federal police officer, the interpretation provided was allegedly inadequate. For this reason, they did not realize that they were under arrest and that their statements could be used against them later. Chika Honda and Mitsuo Katsuno, allege that they did not have counsel present during their interrogation, as the way in which the interpreter translated this right was incomprehensible.

2.2 Between 9 November and 7 December 1992, the authors were committed for trial at the Melbourne Magistrates' Court. Between March and May 1994, they were tried together by a jury at the County Court in Melbourne. On 28 May 1994, they were found guilty as charged. Yoshio Katsuno was sentenced to 25 years imprisonment and the others were each sentenced to 15 years imprisonment.

2.3 At trial the prosecution alone could examine a list of "unsuitable jurors". That is, jurors who are not disqualified from jury service but who have criminal records or are known to be "antagonistic towards police". The trial was conducted with nationwide media coverage, which described each of the authors derogatively as a "yakuza"; a word normally used to describe those belonging to Japanese organized crime groups.

2.4 Two other Japanese women, who were arrested with the authors at the airport, were allowed to return to Japan. It is alleged that they were threatened by the police that if they returned to Australia they would be arrested and prosecuted, with the result that their evidence was not available to the authors at trial.

2.5 The authors appealed to the Court of Appeal of the Supreme Court of Victoria. On 15 December 1995, only Yoshio Katsuno's appeal was allowed. His conviction was set aside and a new trial ordered. On 12 November 1996, his new trial took place at the Melbourne County Court and a guilty verdict was returned against him. On 23 December 1997, an application for leave to appeal to the Court of Appeal of the Supreme Court of Victoria was dismissed. In September 1999, an application for leave to appeal to the High Court of Australia was denied.

2.6 The authors allege that, throughout the legal process, they were provided with inappropriate and unqualified interpreters. They submit information on the alleged deficiencies in interpretation throughout the proceedings, including a report, prepared by interpretation experts, which identifies the following deficiencies: wrongly or very inaccurately interpreting the investigator's questions and/or the author's answers; failing to interpret questions asked by the

investigator; arbitrarily asking his or her own questions to the authors; providing answers that the authors simply did not give; providing erroneous explanations to the investigator about the social meaning of Japanese terms; providing answers in English whose grammar and syntax was highly deficient, and in some cases unintelligible; engaging in long exchanges in Japanese with the authors, in which the investigator did not participate, and then simply summarizing, often inaccurately, what had transpired; inability to translate essential legal terms. According to the authors, all these deficiencies constitute breaches of widely accepted principles of professional ethics of interpreters.

2.7 The authors were only provided with one interpreter between them during the trial and they allege that there was no coordination between the main interpreter and the other two interpreters who relieved her. Thus, there was no consistency in the translation of difficult terms. Consultations between the authors and their lawyers before and after the trial were difficult because the interpreters left the courtroom immediately after each day of hearings, and there was insufficient legal aid to cover such meetings.

2.8 The authors allege that there was no possibility to resolve problems of cultural difference. Such cultural differences made it difficult for them to protest against unfairness during the pre-trial and trial proceedings, and may have played a role in their failure to protest aggressively their innocence, something considered inappropriate in Japan, but considered a sign of guilt in the State party.

The complaint

3.1 The authors claim that they have exhausted domestic remedies. On the inadequacy of interpretation, they concede that counsel wrongly agreed at trial that the interpretation was accurate and did not raise the issue on appeal but claim that "this is due to the Australian government's failure to have in place an adequate system to assure proper interpretation". They did not become aware of the deficiencies in interpretation until 2001, when experts examined the transcripts. In their view, problems of interpretation are not matters discernible by lawyers, as their detection and assessment requires specialized knowledge of the languages in questions. Even if counsel had been able to perceive the seriousness of the problem, they would not have had the means to hire the appropriate specialists.

3.2 The authors claim that inadequate interpretation services provided during the investigation interviews, and the evidentiary use of the transcripts of these interviews at trial, unfairly damaged their credibility, amounting to a failure to ensure equality before the courts and a fair and public hearing, under article 14, paragraph 1.

3.3 They claim that as they did not know that they were under arrest and that their statements might subsequently be used against them, they were denied the right to be informed of the nature and cause of the charge against them, under articles 9, paragraph 2 and 14, paragraph 3 (a).

3.4 Chika Honda and Mitsuo Katsuno claim that, as they were not provided with counsel during their police interrogation, their rights under article 14, paragraph 3 (d), and paragraph 1 were violated. They add that, as the absence of counsel is likely to result in a suspect testifying against himself/herself, the failure to inform them of their right to counsel during the interrogation also amounts to a violation of their right against self-incrimination, under article 14, paragraph 3 (g).

3.5 They claim that inadequate interpretation services provided for the trial, due to poor staffing, mismanagement and lack of professional conduct, amounted to a denial of their right to the free assistance of an interpreter, under article 14, paragraph 3(f). They claim that as they were only allocated one interpreter between them for their trial they could not communicate with counsel, in violation of article 14, paragraph 3 (b).

3.6 They claim that their rights under article 14, paragraph 3(d) were violated, as mere physical presence in the court room cannot be equated with "linguistic presence". The latter, they argue, entails the ability to confront witnesses, communicate with counsel and assist him/her in their defence.

3.7 They claim that the two potential Japanese witnesses would have been too afraid to return to the State party given the threats made against them. This situation allegedly amounted to a violation of the authors' rights under article 14, paragraph 3(e), to obtain witnesses under the same conditions as witnesses against them.

3.8 They claim that, as there was no system in place to resolve problems of cultural difference, they were discriminated against, in contravention of their rights under articles 2 and 26, on grounds of language.

3.9 They claim that insufficient financial assistance provided by the State party prevented them from having access to proper interpretation services and to communicate with their counsel, in violation of their rights to equality before the court and a fair hearing, under article 14, paragraph 1, and to equality before the law and equal protection of the law, under article 26.

3.10 As the authors were tried together, they could not fully defend their own interests at trial, in violation of article 14, paragraph 1. They claim that where the problems of interpretation were pervasive but poorly understood, a single trial for all authors made it more difficult for each to communicate with counsel and to understand what was happening in court.

3.11 They claim that the process of selecting the jury contributed to an unfair trial as the prosecution alone had had an opportunity to examine the list of "unsuitable jurors", thus violating the principle of equality of arms, pursuant to article 14, paragraph 1.

3.12 Finally, the authors claim that high media coverage of their case contributed to the unfairness of the trial, thereby violating article 14, paragraph 1.

State party's submission on admissibility and the merits

4.1 On 15 April 2003, the State party informed the Committee that Masaharu Katsuno, Mitsuo Katsuno and Kiichiro Asami had been released on parole on 6 November 2002 and Chika Honda was released on parole on 17 November 2002. Yoshio Katsuno was also released. Their releases were authorized by the Attorney General, and they were immediately returned to Japan.

4.2 On 28 July 2004, the State party contested the admissibility and merits of the communication. It submits that the communication is inadmissible for failure to exhaust domestic remedies and refers to the authors' failure to raise the issues of the alleged inaccuracy of transcripts of interviews and poor interpretation services at trial or on appeal. It contests the

contention that it does not have an effective system to ensure the provision of adequate interpretation services, and submits that a regulatory body to ensure the availability and competence of interpreters was established in the form of the National Accreditation Authority for Translators and Interpreters Ltd (NAATI). This authority requires a minimum standard of professional practice to be accredited at the translator and/or interpreter level. The interpreters provided for the authors' trials were at the appropriate translator and interpreter, or "Level 3", standard.

4.3 According to the State party, the right of an accused in a criminal trial to the services of an interpreter is a well-entrenched principle within its legal system. The courts may stay proceedings where it appears that an abuse of process will result in an unfair trial. Similarly, where a person believes that they were denied these rights, they may appeal their conviction on these grounds. This remedy was available to the authors. Despite appealing their convictions on a number of other grounds, with the exception of Yoshio Katsuno, none of them raised the issue of inaccurate interview transcripts or of inadequate interpretation services at the 1995 appeal. The authors' counsel would have been alerted to the possibility of raising the issues on appeal as they were brought up by Yoshio Katsuno.

4.4 The State party submits that the authors and their counsel appear to have been alerted to the issues raised in this communication during the authors' trial, as the accuracy of the original interview transcripts was questioned at the committal hearing at the Melbourne Magistrate's Court. Thus, many of the transcripts that were introduced as evidence at trial had been corrected by independent and competent interpreters. Interpretation services were provided to assist the authors for the duration of the trial. Concerns regarding whether Mitsuo Katsuno and Kiichiro Asami were adequately informed of their rights under Part 1C of the Crimes Act 1914 (Cth), similar to the allegation under article 14, paragraph 3(d), were also raised at the committal hearing.

4.5 It was open to authors' counsel to challenge the admissibility of the Australian Federal Police (AFP) records of interview at the authors' trial. As this did not occur, the videotapes of each of the interviews were played in full to the jury at trial and the jurors were provided with interview transcripts to assist them. The failure to question the admissibility of the interview transcripts suggests that authors' counsel wanted these transcripts to be admitted as evidence. Given that the authors did not testify at trial, the interview transcripts were the only means by which their own version of events was put before the jury.

4.6 With regard to the alleged inadequacy of interpretation services, the State party submits that the authors were at all times at liberty to express to the court or to their counsel their inability to understand what was happening during the trial. At no time were such concerns raised. An alternative remedy the authors could have pursued was to complain to the Commonwealth Ombudsman about the conduct of the investigating officers from the AFP. Under section 31 of the Complaints (AFP) Act 1981 (Cth), the Ombudsman may investigate a complaint made by any person concerning the actions of an AFP member. The Ombudsman could have ordered that some remedial action be taken in the case of the authors if it was found that an AFP's conduct was "unreasonable, unjust, oppressive or improperly discriminatory".

4.7 If the Committee considers that the communication is not inadmissible as a whole, the State party requests that the Committee dismiss the claims with regard to an impartial tribunal and inadequate legal aid funding, under article 14, paragraph 1, and the claims under article 2,

article 9, paragraph 2, article 14, paragraph 3 (a), (b), (e), and (g) and article 26, as inadmissible, on the ground that the authors have failed to substantiate these allegations. It adds that the allegations under articles 14, paragraph 3 (a), (b), (e) and (g) fall outside the scope of the Covenant and are thus inadmissible *ratione materiae*.

4.8 On the merits, as to the claim that interpretation services during the pre-trial investigation were inadequate, the State party affirms that competent interpreters were present at all interviews with the authors. When the translation of these interviews was questioned during the committal hearing errors were corrected, and the amended interview transcripts were accepted as accurate by authors' counsel. In the State party's view, the standard of interpretation expected by the authors is unattainably high, given the nuances in translation that will inevitably occur in the translation from one language to another. It argues that the standard provided to the authors was in conformity with the standard set out by the ECHR in *Kamasinski v. Austria*[1] The AFP officers, the DPP and the judge and jury would have been aware that the English text of the transcripts was not the exact dialogue of the authors. It is submitted, therefore, that grammatical errors in the English text would not have influenced the jury in the manner that the authors claim.

4.9 The State party submits that the system used in the authors' trial was for a single interpreter to simultaneously translate the proceedings into a microphone. Each of the accused was provided with a headset through which he or she could hear the interpreter's translation of the proceedings. Thus, while only a single interpreter was used at the trial, each accused could hear everything in the court room as it was being said. This system was used following the direction of one of the authors' counsel to the DPP, who indicated a preference for the system of a single interpreter and in particular for the same interpreter that was used during the committal hearing and the trial. The DPP also complied with the authors' request to engage the services of a particular interpreter for Yoshio Katsuno's retrial. During the trial, the authors and their counsel indicated that they were happy with the system of interpretation and that the performance of the court interpreter was acceptable. The interpreter remained after the day's hearing and no concerns were raised by the author or counsel. Indeed, the authors and their counsel actually complemented the interpreter on her performance.

4.10 The State party contests the claim that the media publicity surrounding the trial, and the domestic law regarding jury empanelment, resulted in a violation of the obligation to be impartial. No evidence regarding the nature of this publicity was raised at trial.

4.11 According to the State party, the jury empanelment process is a fair system designed to create an impartial tribunal in the case of a criminal trial. Australia recalls the Committee's jurisprudence that it is for the State party to review the application of domestic law, unless it is evident that the application was manifestly arbitrary or amounted to a denial of justice.[2] The Committee similarly holds that the appellate courts of States parties to the Covenant are responsible for the evaluation of facts and evidence in a particular case, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge clearly violated his obligation of impartiality.[3] In any event, the practice that the authors complain of did not affect their trial as the list of disqualifying jurors provided to the prosecution was not actually used by the DPP in the authors' trial.[4] The State party notes that in accordance with section 39 of the Juries Act 1967 (Vic), the authors each had the right to challenge peremptorily four potential jurors.

4.12 As to the allegation under articles 26 and 2, since cultural differences were not taken into account during the trial, and as insufficient financial legal aid was provided, the State party submits that the authors were subject to the same laws and treated in the same manner as any other accused in similar circumstances. It provided interpreters at all stages of the proceedings and individual representation during the trial in order to correct the cultural and linguistic differences of the accused and to allow them equal opportunity to defend themselves. They have not provided any evidence to demonstrate in what way inadequate legal aid funding to assist with interpretation contributed to discrimination in this regard.

4.13 The State party submits that Kiichiro Asami was sufficiently informed of the reasons for his arrest in compliance with article 9, paragraph 2. This allegation is inconsistent with article 14, paragraph 3 (a), and no evidence was provided to support an allegation under this provision. It denies the allegation that neither Chika Honda nor Mitsuo Katsuno were informed of their right to counsel. The translation of this right by the interpreter was sufficient to convey the meaning of this right to them. Both authors were legally represented at trial and on appeal, suggesting that they were aware and ultimately informed of their right to legal representation. The State party denies that the same authors were denied their rights under article 14, paragraph 3(g). Not only is the allegation purely hypothetical, as the authors never actually did confess, but jurisprudence on this article suggests that some positive form of compulsion would be required for a finding of a violation.

4.14 As to the allegation that they were denied their right to obtain testimony of witnesses under the same condition as those against them, the State party rejects the allegation as inadmissible, since it refers only to the possibility of the authors' rights being violated and not of any actual violation. In any case, there was no violation of article 14, paragraph 3(e), as the authors had the same opportunity as the defence to call the witnesses in question but chose not to do so. The appellate court considered this issue and found no miscarriage of justice.

The authors' comments on the State party's submission

5.1 On 24 December 2005, the authors reiterated their previous claims and added the following elements on admissibility. They submit that the central issue is that inaccurate interpretation fundamentally tainted the pre-trial questioning by the police, unfairly undermining their credibility. They submit that counsel did not oppose the admission of the records of interviews because they did not know the extent of the interpretation problems at that time. While counsel was aware that smooth communication between the authors and the police was not taking place, it was not possible for them to know that the problem was due to the inadequacy of the interpreters.

5.2 The authors deny that Yoshio Katsuno formally raised the issue of poor interpretation as a ground of appeal but claim that it arose during his appeal in the context of a claim on the voluntariness of his admissions made during an interview with the AFP. As to the possibility of complaining to the Ombudsman, it is argued that such a remedy cannot be considered effective. The authors were prevented from expressing to the court or to their counsel that they were unable to understand what was happening at trial, due to cultural and linguistic obstacles, poor interpretation, and an unfamiliar legal system.

5.3 With respect to the State party's arguments on the merits, they provide detailed reasons on why the current case differs from that of *Kamasinski v. Austria,* (para. 4.8), including the fact that in the current case there were indications that the accused was unable to understand the questions put to him. During the committal hearing, one of the officers admitted that there were times when it appeared that Mr. Asami did not understand what was being put to him.

5.4 According to the authors, during the trial, they asked one of the substitute interpreters to request that the main interpreter be replaced, on account of her habit of summarizing rather than translating everything said, her refusal to stay back at the end of the day's hearing and an alleged conflict of interest that arose as a result of her friendship with the prosecutor. The authors deny the State party's claim that any errors in interpretation were only minor and refer to the detailed analysis provided by the authors in three reports. They deny that such errors could have been "corrected" after the committal hearing. While admitting that counsel had in fact indicated a preference for a single interpreter for the trial, according to the authors, international best practice is to provide multiple-defendants trials with more than one interpreter. As to the failure to call the two witnesses from Japan, the authors reiterate that during the preliminary hearing, the prosecutor indicated that if they returned to the State party, he would have them arrested, which, would have made it impossible to call them to testify.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the claim is admissible under the Optional Protocol to the Covenant.

6.2 As to the requirement to exhaust domestic remedies, the Committee notes that the majority of the claims are based on the allegation that from the time of the authors' arrest until their conviction, the interpretation provided by the State party was so inadequate as to result in numerous violations of their rights under article 9 and article 14. The Committee observes that, except for claims relating to the calling of witnesses (14, paragraph 3(e)) and the empanelment of the jury (14, paragraph 1)**,** none of these claims were raised on appeal. It notes the argument that neither the authors nor their counsel could have been aware of the extent of the interpretation deficiencies at the time, and that it was only in 2001 (seven years after conviction), that they realized the extent of the problem. The Committee observes, however, and it remains uncontested, that the authors were concerned about the quality of the interpretation already during the committal hearing (para. 5.3) as well as during the trial (para. 5.4). Thus, their argument that they were unaware of the problem until 2001 is not corroborated. In any event, for the purpose of exhaustion, the Committee considers that it was the authors' and their representatives' responsibility to ensure that they had the relevant facts and arguments at their disposal for the purposes of their appeal. Their failure to procure expert information prior to their appeal, but only seven years after their trial, does not absolve the authors from the requirement to exhaust available domestic remedies. Accordingly, the Committee finds this claim inadmissible, under article 5, paragraph 2 (b), of the Optional Protocol.

6.3 As to the claim relating to the empanelment of the jury, in alleged violation of article 14, paragraph 1, the Committee notes that this issue was raised on appeal and that the Court of Appeal considered it in detail. It also notes that, as argued by the State party and as evidenced in the appeal proceedings, the list of disqualified jurors provided to the prosecution was not actually used by the Director of Public Prosecution in the authors' trial. The Committee finds, therefore, that the authors have failed to substantiate this claim, for purposes of admissibility, under article 2, of the Optional Protocol.

6.4 The Committee finally notes the authors' claim, under article 14, paragraph 3 (e), that if certain witnesses had been requested to return to Australia to testify at their trial, they would have refused for fear of being arrested following such threats made by Australian police before their return to Japan. However, having examined the proceedings, the Committee notes that the issue of these witnesses was considered in depth by the Court of Appeal, which had been requested, on behalf of the respondents and the applicants, to proceed on the hypothesis that the witnesses were willing to attend. It also notes that the argument on appeal related to an alleged miscarriage of justice due to the prosecution's failure to call these witnesses and not to an argument that their failure to return for the hearing was the result of police threats. The Court found that, as the prosecution had reasonably concluded that the witnesses concerned were co-conspirators with the accused, it did not think that a miscarriage of justice resulted from the prosecution's decision to make the witnesses available to be called by the defence (by providing money for their return) but not itself call them. Indeed, the authors have not disputed that they could have called the witnesses in question themselves. For these reasons, the Committee considers that the authors have failed to substantiate their claim, for purposes of admissibility. Accordingly, it finds this claim inadmissible under article 2 of the Optional Protocol.

6.5 As to the claims under article 26, that the authors were discriminated against as there was no system in place to resolve problems of cultural difference, and that they were denied equality before the law and equal protection of the law as they were provided with insufficient legal aid, the Committee considers that the authors have failed to substantiate these claims for purposes of admissibility. Accordingly, these claims are inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

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

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

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

Notes

[1] Application No. 1783/82, [76], [11]-[12].

[2] *Dole Chadee et al. v. Trinidad and Tobago,* communication No. 813/1998, adopted on 29 July 1998.

[3] *Kelly v. Jamaica*, communication No. 253/1987, adopted on 8 April 1991.

[4] The State party refers to the discussion of this matter by His Honour Judge Byrne, where he noted that the practice of providing a list of disqualifying jurors was established in Australia to enable the Crown to empanel a jury that is impartial and indifferent to the cause to be tried. His Honour considered that: [T]he Crown cannot be expected to exercise its right to achieve that object [of securing an impartial and indifferent jury] without knowledge which informs the exercise of the right. It is to that end that the practice of providing information of "non-disqualifying convictions" to the prosecution has developed *R v Su & Ors,* above n 53, 32.

F. Communication No. 1187/2002, *Verlinden v. Netherlands** (Decision adopted on 31 October 2006, Eighty-eighth session)

Submitted by:	Frans Verlinden (represented by counsel, B.W.M. Zegers)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	12 June 2002 (initial submission)
Subject matter:	Alleged bias of judges because of their professional link to colleagues of the lawyer of one of the parties to the proceedings - Right to a reasoned judgment
Substantive issues:	Right to a fair trial before an independent and impartial tribunal
Procedural issues:	Admissibility *ratione personae* - Level of substantiation of claim - Exhaustion of domestic remedies
Article of the Covenant:	14 (1)
Articles of the Optional Protocol:	1, 2 and 5 (2) (b)

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

Meeting on 31 October 2006

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Frans Verlinden, a Dutch national. He claims to be a victim of a violation by the Netherlands[1] of his rights under article 14 of the International Covenant on Civil and Political Rights. He is represented by counsel, Mr. B.W.M. Zegers.

1.2 Pursuant to a request submitted by the State party in its observations on admissibility, the Special Rapporteur on New Communications, acting on behalf of the Committee, decided that the admissibility of the communication should be considered separately from the merits.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Factual background

2.1 The author is the owner of a real estate company. In June 1990, he filed a claim in the Hague Regional Court against a construction company, NBM Amsteland N.V. (NBM), and against the Chairman of its Board of Directors, V.d.B., regarding a property sales contract. On 1 July 1992, the Hague Regional Court issued an interlocutory decision on a procedural question in favour of the author.

2.2 The other party appealed the decision to the Hague Court of Appeal which, on 9 September 1993, quashed the decision and referred the matter back to the Hague Regional Court. The author appealed the decision of the Court of Appeal to the Supreme Court. On 6 January 1995, the Supreme Court dismissed the appeal, referring to Section 101a of the Judicial Organisation Act.[2]

2.3 In renewed proceedings, the Hague Regional Court rejected the author's claim on 29 November 1995. On 4 December 1997, the Hague Court of Appeal dismissed his appeal and, on 5 November 1999, the Supreme Court dismissed the further appeal.

2.4 Throughout the proceedings, NBM and V.d.B. were represented by R.M.S., a lawyer of the law firm De Brauw Blackstone Westbroek Linklaters & Alliance (DBB) in The Hague. Several DBB law firm colleagues of R.M.S. also work as substitute judges at the Hague Regional Court or at the Hague Court of Appeal. Another DBB lawyer is a professor at the Free University in Amsterdam; three other professors at the University are also substitute judges at the Hague Regional Court. One former DBB lawyer became a tenured professional judge at the Hague Court of Appeal; another former DBB lawyer now works as a judge on the Supreme Court and is a relative of the Coordinating President of the Hague Court of Appeal.

2.5 The relevant Hague Courts were composed of full-time judges. No substitute judge heard the author's case.

The complaint

3.1 The author claims that the Dutch system of substitute judges is incompatible with article 14 of the Covenant, since it fails to ensure impartiality of judges. The close link between DBB, in particular the law firm colleagues of R.M.S. who work as substitute judges in the Regional and Appeal Courts of The Hague, and the tenured professional judges in these Courts impairs the independence and impartiality of these tribunals, thereby violating his right to a fair trial under article 14.

3.2 The author submits that articles 3 and 4 of the Civil Courts Composition Act allow judges who regularly sit on a Regional Court to also sit as substitute judges on another Regional Court. The failure of the Hague Court of Appeal to refer his case to another Regional Court, or to appoint judges of another court as substitute judges in the Hague Courts showed, or at least conveyed the impression, that the Court had an "interest" in passing judgement on his case.

3.3 The author contends that, unlike full-time professional judges who are precluded from acting as a lawyer or notary and from giving professional legal advice, and who are required to include any additional functions in a public register, under article 44 of the Judicial Officers (Legal Status) Act, substitute judges are exempted from the application of this provision. In

addition, a report published in 2000 by the Scientific Research and Documentation Centre of the Ministry of Justice concluded that a large number of full-time judges refused to register their additional functions. This lack of transparency made it impossible for a complainant to determine if judges are associated with the other party and undermined the confidence in the integrity of the judiciary.

3.4 Although article 34 of the Code of Conduct for the Legal Profession (1992) prohibits lawyers to act as counsel in proceedings before a judicial body on which one or more of their law firm colleagues sit as judges, it cannot, in the author's view, be excluded that cases where one of the parties is represented by a law firm colleague of a substitute judge are generally being discussed among the judges of a court.

3.5 By reference to article 12 of the Judicial Organisation Act which prohibits contact between a judge and the parties or their lawyers outside court proceedings in respect of pending or future cases, the author claims that the judges of the Hague Courts cannot be considered impartial in his case, given their association with law firm colleagues of the lawyer of the opposite party.

3.6 The author submits that Judge H. of the Hague Court of Appeal is also a legal advisor for the Ministry of Justice, which he considers to be incompatible with the separation of powers principle. He concludes that there are legitimate grounds for fearing that the judges of the Hague Regional and Appeal Courts were not impartial in his case, which was in itself sufficient to vitiate the appearance of independence and impartiality of these tribunals.

3.7 Furthermore, the author claims that his right to a reasoned judgement under article 14 was violated, because the Supreme Court rejected his appeal in 1995 on the basis of Section 101a (now article 81) of the Judicial Organisation Act, by stating only that it would not lead to cassation of the original judgment, nor answer any questions of law in the interest of the uniformity or development of the law.

3.8 The author submits that he exhausted available domestic remedies. He contends that he was unaware of the links between the judges of the Hague Courts and the DBB law firm colleagues of R.M.S., the lawyer of NBM and V.d.B., during the proceedings. Even if he had challenged the judges assigned to his case, they would merely have been replaced by other judges of the same Court, who would have had similar links to the DBB substitute judges.

State party's observations on admissibility

4.1 On 18 August 2003, the State party challenged the admissibility of the communication, arguing that the author does not meet the victim requirement under article 1 of the Optional Protocol; that the same matter is pending before the European Court of Human Rights (article 5, paragraph 2 (a), of the Optional Protocol); and that the author did not exhaust available domestic remedies (article 5, paragraph 2 (b), of the Optional Protocol).

4.2 The State party points out that none of the judges who heard the author's case was attached to the DBB law firm in The Hague. Judge H., who heard the author's case in 1993 and again in 1997 in the Hague Court of Appeal, was a full-time judge at the Court of Appeal since 1984 when he left the Ministry of Justice. The State party recalls the Committee's jurisprudence[3] that

the Optional Protocol does not allow individuals to challenge a State party's law or legal practice in the abstract, by way of *actio popularis*, and concludes that the author has no *locus standi* under article 1 of the Optional Protocol.

4.3 The State party submits that the Registry of the European Court of Human Rights informed it that the author had also brought the same matter before the European Court of Human Rights and that his application (No. 66496/01) was still pending before that Court. Therefore, the Committee should declare the present communication inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

4.4 The State party argues that the author could have challenged the alleged impartiality of any of the judges involved in his case in civil proceedings under article 29 (now article 36) of the Code of Civil Procedure, as soon as the facts or circumstances which could have prejudiced their impartiality had come to his attention, article 30, paragraph 1 (now article 37, paragraph 1), of the Code of Civil Procedure. The challenge would subsequently have been heard by the full bench of the Court, excluding the challenged judge (article 32, paragraph 1 (now article 39, paragraph 1) of the Code of Criminal Procedure). If granted, the case would have been heard by a court in which the challenged judge took no part.

4.5 For the State party, the author's contention that he was unaware at the time of the "close ties" between the legal profession and the judiciary is unconvincing. Given that additional functions of judges were frequently registered since 1989, following a recommendation of the Netherlands Association for the Administration of Justice, and since 1997 under article 44 of the Judicial Officers (Legal Status) Act, and that the issue of substitute judges had received considerable attention in professional legal literature, it was "extremely improbable" that the author did not learn before the end of the proceedings in his case that the Dutch judiciary sometimes employs persons from the legal profession as substitute judges.

4.6 Any challenge to a judge must be based on specific objections which call into question the judge's impartiality, or the appearance thereof. The State party contests that challenging the impartiality of the judges would not have been an effective remedy. By reference to the Committee's jurisprudence in *Perera v. Australia*,[4] the State party concludes that, in order to exhaust all available domestic remedies, the author would have been required to challenge the judges whom he believed to lack impartiality, and that without such a challenge, his communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

Author's comments on State party's submission

5.1 On 5 December 2003, the author submitted comments, arguing that the link between the Hague Regional and Appeal Courts and DBB is serious enough to question the independence and impartiality of these tribunals, that his case was no longer pending before the European Court of Human Rights which had declared his application inadmissible on 7 November 2003, and that even if he had known about the link between the Hague Courts and DBB during the proceedings, it would have been futile to challenge the judges.

5.2 The author alleges that there is confusion between the judicial and executive powers since the State party's observations on the admissibility of his communication were signed by H.L.J.

for the agent of the Government of the Netherlands, R.B., a civil servant in the Dutch Foreign Ministry and at the same time a substitute judge on the Hague Regional Court. He reiterates that he was personally affected by the lack of independence and impartiality of the Hague courts and therefore a "victim" of a violation of article 14.

5.3 The author submits a letter from the Registry of the European Court of Human Rights informing him that on 7 November 2003, his application (No. 66496/01) was declared inadmissible under articles 34 and 35 of the European Convention as "essentially the same as one already submitted by the same applicant to another procedure of international investigation or settlement and contained no relevant new information". He argues that the State party's inadmissibility argument based on article 5, paragraph 2 (a), of the Optional Protocol has become moot.

5.4 On exhaustion of domestic remedies, the author reiterates that during the domestic proceedings from 1990 to 1999, he was unaware of the close link between the Hague Courts and DBB; it was only after the end of the domestic proceedings that this claim was brought before the Committee by his new lawyer, Mr. Zegers. The institution of substitute judges was still largely unknown to the public. It was therefore not "extremely improbable" that he learned only recently about the fact that the Dutch judiciary sometimes employs persons from the legal profession as substitute judges. Even if a complainant was aware of such alternative employment, it was difficult to ascertain if lawyers or civil servants were at the same time substitute judges, in the absence of any requirement for substitute judges to register their additional functions.

5.5 The author reiterates that to challenge the judges of the Hague Courts would have been futile, as the decision to appoint judges of another Regional Court to hear a case can only be taken by the Courts *proprio motu*. The dilemma faced by complainants whose case has been re-assigned to different judges of the same court, and to whom the same challenges apply as to the replaced judges, was acknowledged by the Attorney-General in an advisory opinion dated 22 April 2000 in a similar case, *Verlinden v. Pension Fund*. The Attorney-General had concluded that where national law does not provide for a possibility to have one's case heard by another court, such a request could be based on article 6 of the European Convention on Human Rights. Similarly, in *Solleveld v. The Dutch State*, the Hague Regional Court referred the case to the Utrecht Regional Court, after the judges had been challenged because of the alleged link between the Court and the DBB law firm. The request for transfer to another court was granted on the basis of article 6 of the European Convention.

5.6 Furthermore, the author submits that in *Verlinden v. Pension Fund*, Mr. Zegers, who became his lawyer at a late stage of the proceedings, challenged the connection between DBB and the Hague Court of Appeal before that Court and before the Supreme Court. On 30 June 2000, the Supreme Court rejected his complaint and found that there were sufficient guarantees to ensure the independence and impartiality of lawyers working as substitute judges; the connection between the Hague Courts and DBB did not constitute sufficient grounds to justify objective doubts about the Courts' independence and impartiality. On the same day, the Supreme Court made a similar ruling in *Sanders v. ANWB*. The author concludes that in the absence of reasonable prospect of success, he was not required to exhaust domestic remedies by challenging the judges of the Hague Regional Court and the Hague Court of Appeal who heard his case.

Additional observations by the author

6.1 On 28 May 2004, the author submitted a letter dated 8 October 1990 from his former lawyer to the Dean of the Haarlem Bar Association, in which his former lawyer complained about the conduct of R.M.S., who had allegedly boasted about DBB's good contacts with the President of the Almelo Regional Court a few days prior to a hearing before that Court, where each of the lawyers represented one of the parties. At that hearing, the President immediately ruled himself incompetent to hear the case which, in the author's view, was indicative of the contacts used by DBB to obtain "a positive judicial outcome".

6.2 The author contends that Judge H., who heard his case as a judge in the Hague Court of Appeal, used to be a colleague of R.M.S. at the DBB law firm and a colleague of R.M.S.' wife at the Ministry of Justice. In all his court cases, in which R.M.S. acted as counsel of the adversary party, H. was involved as a judge. The fact that Judge T.K. of the Amsterdam Court of Appeal is a member of the Board of Commissioners of NBM also created a conflict of interests.

Issues and proceedings before the Committee

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

7.2 The Committee notes that the same matter has already been considered by the European Court of Human Rights and concluded by the inadmissibility decision of 7 November 2003. However, it recalls its jurisprudence[5] that it is only where the same matter is being examined under another procedure of international investigation or settlement that the Committee has no competence to deal with a communication under article 5, paragraph 2 (a), of the Optional Protocol. In addition, the State party has not filed a reservation to article 5, paragraph 2 (a), of the Optional Protocol. Thus, article 5, paragraph 2 (a), does not bar the Committee from considering the present communication.

7.3 While taking note of the State party's argument that the author could have challenged the alleged impartiality of the judges involved in his case in civil proceedings, the Committee also notes the author's uncontested claim that the Supreme Court had rejected a similar challenge made by him in another case, finding that the connection between the Hague Courts and DBB did not give rise to objective doubts about the Courts' independence and impartiality. It recalls that article 5, paragraph 2 (b), of the Optional Protocol does not require authors to exhaust remedies that objectively have no prospect of success,[6] and considers that the author has sufficiently substantiated that it would have been futile for him to challenge the judges involved in his case.

7.4 With regard to the author's claim that the Dutch system of substitute judges is generally incompatible with article 14 of the Covenant, since it fails to ensure impartiality of judges, the Committee observes that this claim amounts to an *actio popularis* and is, therefore, inadmissible under article 1 of the Optional Protocol.

7.5 The Committee has noted the author's claim that he did not have a fair trial because of the close association between the Hague Regional Court and the Hague Court of Appeal on the one hand and the DBB law firm on the other hand, and that therefore article 14 was violated. The

Committee observes that the relevant Hague Courts which heard the author's case were composed of full-time professional judges who had no ties with DBB and that the author has not put forward any specific circumstances which would call into question these judges' impartiality and independence. The Committee therefore finds this claim unsubstantiated. As to the claim that the failure of the Hague Court of Appeal to refer the author's case to another Regional Court or to appoint judges from another court would indicate that the Court had a special interest in his case, the Committee considers that the author has not provided the Committee with any additional information which would substantiate his claim. Lastly, the Committee notes the author's claim that there are several special links between the Hague Courts and DBB (see paragraphs 2.4, 3.6, 5.7 and 5.8 above) which give rise to conflicts of interest. However, the Committee considers that the author has failed to substantiate, for purposes of admissibility, that these links are sufficiently close in time or in nature to the adjudication of his case, as to raise issues under article 14.

7.6 The Committee therefore concludes that the author's claim of lack of independence and impartiality on the part of the judges who heard his case in the Hague Regional Court and the Hague Court of Appeal is inadmissible under article 2 of the Optional Protocol.

7.7 As regards the author's claim that the mere reference to Section 101a of the Judicial Organisation Act, in the Supreme Court's decision of 6 January 1995 rejecting his appeal, violated his right to a reasoned judgment, the Committee observes that, while article 14, paragraph 1, may be interpreted as obliging courts to give reasons for their decisions,[7] it cannot be interpreted as requiring a detailed answer to every argument advanced by a complainant.[8] Thus, the need to ensure the effective operation of the judiciary may require courts, especially the highest courts of States parties, merely to endorse the reasons for the lower court's decision in dismissing an appeal, so as to handle their caseload.[9] The Committee recalls that the Supreme Court dismissed the author's appeal, finding that he had failed to adduce any reasons which would lead to cassation of the decision of the Hague Court of Appeal of 9 September 1993. It thereby endorsed, at least implicitly, the reasoning of the Court of Appeal. In addition, the Supreme Court found that the author's appeal did not give rise to any fundamental questions of law, as required by Section 101a of the Judicial Organisation Act. Against this background, the Committee considers that the author has failed to substantiate, for purposes of admissibility, that the Supreme Court's decision was not sufficiently reasoned. This part of the communication is accordingly also inadmissible under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

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

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

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

Notes

[1] The Covenant and the Optional Protocol both entered into force for the Netherlands on 11 March 1979.

[2] Section 101a (old; currently Section 81) of the Judicial Organisation Act reads: "If the Supreme Court considers that a petition may not lead to cassation of the original judgement or that it does not require that questions of law be answered in the interests of the uniformity or development of the law, it may confine itself to stating this opinion in that part of the judgement containing the grounds on which it is based."

[3] Communication No. 35/1978, *Mauritian Women's Case*, Views adopted on 9 April 1981, at para. 9.2.

[4] Communication No. 536/1993, *Perera v. Australia*, decision on admissibility adopted on 28 March 1995, at para. 6.5.

[5] Communication No. 824/1998, *Nicolov v. Bulgaria*, decision on admissibility adopted on 24 March 2000, at para. 8.2; communication No. 1185/2003, *Van den Hemel v. The Netherlands*, decision on admissibility adopted on 25 July 2005, at para. 6.2; communication No. 1193/2003, *Sanders v. The Netherlands*, decision on admissibility adopted on 25 July 2005, at para. 6.2.

[6] See, e.g., communication No. 1095/2002, *Gomaríz Valera v. Spain*, Views adopted on 22 July 2005, at para. 6.4.

[7] The right to a duly reasoned, written judgement in the trial court and at least in the court of first appeal has been recognized by the Committee with regard to article 14, paragraph 5, of the Covenant. See *Van Hulst v. The Netherlands*, communication No. 903/1999, decision on admissibility adopted on 1 November 2004, at para. 6.4.

[8] With regard to article 6 (1) of the European Convention on Human Rights, see European Court of Human Rights, *Van de Hurk v. The Netherlands*, Judgement of 19 April 1994, Series A-288, at para. 61; *García Ruiz v. Spain* (application No. 30544/96), Judgement of 21 January 1999, at para. 26.

[9] *Cf.* European Court of Human Rights, *García Ruiz v. Spain* (application No. 30544/96), Judgement of 21 January 1999, at para. 26.

G. Communication No. 1201/2003, *Ekanayake v. Sri Lanka**
(Decision adopted on 31 October 2006, Eighty-eighth session)

Submitted by:	Mr. Hiran Ekanayake (not represented by counsel)
Alleged victim:	The author
State party:	Sri Lanka
Date of communication:	10 April 2003 (initial submission)
Subject matter:	Unfair dismissal from judicial service
Procedural issue:	None
Substantive issues:	Inequality
Articles of the Covenant:	26
Articles of the Optional Protocol:	2, 5, paragraph 2 (b)

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

Meeting on 31 October 2006,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Hiran Ekanayake, a Sri Lankan citizen, born on 24 July 1965. He claims to be a victim of violations by the State party of article 26 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

The facts as presented by the author

2.1 On 1 July 1998, the author joined the judicial service. On 1 January 1999, he was appointed as a permanent magistrate and an additional district judge in Thambuttegama. One year after this appointment, he was transferred to Colombo as an additional Magistrate. He believes that he was transferred for not having complied with an order of the Judicial Services

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Commission (JSC) to have a loud speaker system removed by police from a meeting attended by the then opposition leader. He alleges that the members of the JSC were members of the same political party as the President.

2.2 In April 2000, the author was requested by the Chief Justice to close a particular criminal case without further proceedings, when, in the author's view, there was sufficient evidence to let the case go to trial. The author alleges that the accused was a friend of the Chief Justice; the author refused to comply with the order.

2.3 Upon moving to Colombo, the author did not receive official accommodation nor did he receive any rent allowance. Other judicial officers had such privileges. He alleges that the failure of the JSC to provide him with these privileges was designed to harass him. The absence of official accommodation resulted in the author having to rent cheap accommodation in Ratmalana, a town 12 miles from Colombo. Due to the distance, security checks, and traffic congestion, the author had to leave his house at 5.30 a.m. to go to work, as it could take three and half hours to reach the courthouse in Colombo.

2.4 On 11 May 2000, due to the length of time it took travelling to work, which was affecting his physical and mental well being, the author asked for a transfer from Colombo. On Friday 2 June 2000, he appeared before the JSC and was questioned by the Chief Justice about his request. He was referred to as a "mental wreck" and declared incapable of continuing in judicial service. He was requested to tender his resignation on the same day but he refused.

2.5 On Monday 5 June 2000, the author felt unwell, which he attributes to his meeting with the JSC, and did not go to work. He made arrangements with the supernumerary magistrate to substitute for him. On the same day, he saw a doctor who indicated that he was suffering from a "nervous illness" and gave him two weeks medical leave from 5 to 19 June 2000. The author returned to work on 17 June 2000.

2.6 On 28 June 2000, the author's service was terminated by the JSC for the following reasons: he had not reported for work from 5 June 2000 without obtaining prior leave; he was suffering from a "supervening nervous illness"; he had been the target of previous complaints; and was unfit to hold judicial office. After the termination of his service, which received media coverage, the author received death threats, and a group of unidentified people twice "searched for him" at night in his residence. He went into hiding for nearly one and a half years out of fear. He did not file complaints with the police, as he believed "it could make the situation worse": the then administration "would not have hesitated to design a method of suppression".

2.7 On 10 July 2000, the author appealed to the JSC, to which no response was received. He also complained to the Human Rights Commission of Sri Lanka[1] and the President of Sri Lanka. There was no response from the President's office.

The complaint

3.1 The author claims that he did not receive equal protection of the law and that he was discriminated against, contrary to article 26.

3.2. He claims that all available effective domestic remedies have been exhausted. He alleges that the Sri Lankan judiciary is not independent, and that its ineffectiveness as well as that of the other law enforcement authorities, due to political influence and fear, prevents him from filing a claim in a first instance Sri Lankan court.

3.3 The author claims that the JSC is highly politicized. The Chief Justice is its Chair and it is also presided over by two Supreme Court judges. He claims that the Chairman of the Human Rights Commission is a strong supporter of the Chief Justice and the President of Sri Lanka. The Chief Justice has absolute control over the Court of Appeal, because the President of Sri Lanka appoints and promotes judges to the Court of Appeal on the recommendation of the Chief Justice. According to the author, no Court of Appeal judge would risk his or her future by acting against the expectation of the Chief Justice. In the event of the author filing a case in the Court of Appeal, he would have to include the Chief Justice and the JSC as defendants, and any order issued in his favour would have an adverse impact on their careers. Even if the Court of Appeal rendered an order in the author's favour, the Chief Justice could influence the Attorney-General's department to appeal against the order before the Supreme Court. As the Supreme Court judges are also appointed by the Chief Justice, such remedy cannot be considered effective.

3.4 The author claims that the JSC's view of his medical condition is unacceptable because his case was not considered by a medical board consisting of three specialists, as required by domestic law. He claims that the reasons given by the JSC for his dismissal are unsustainable and were maliciously fabricated for the purpose of depriving him of judicial office. The real reason why he was dismissed is on account of his failure to cooperate with the directions of the JSC, referred to in paragraphs 2.1 and 2.2 above.

The State party's submission on admissibility and merits

4.1 In its submission of 15 March 2004, the State party contests the admissibility of the communication on grounds of non-exhaustion of domestic remedies. It highlights the author's failure to submit any claim before the Sri Lankan courts. It cites Articles 107 to 117 of the Sri Lankan Constitution, which ensure the independence of the judiciary, and denies that the executive has any role to play in the discipline of judicial officers or within the JSC. Such a role could be construed as interference within the terms of Article 115 of the Constitution and could result in a jail term and a fine if established.

4.2 On the merits, the State party contests the author's allegations that the Chairman of the Human Rights Commission was a political supporter of the President, and that the Chief Justice has control over all judges on the Court of Appeal. The author has made such allegations merely as a pretext for not exhausting domestic remedies. Moreover, it may be noted that all decisions complained of in the communication were decisions of the JSC and not the sole decision of the Chief Justice.

4.3 The State party explains that the author joined the judiciary on 1 July 1998 and was on probation when dismissed. Up to the time of his dismissal, many complaints were filed against him of which the State party refers to the following: abuse of power to build on land belonging to him, contrary to regulations; institution of criminal proceedings before his own court against an individual with whom the author had personal differences and which the author subsequently

admitted; and delay of one year in the hearing of a case involving maintenance of a child. The State party submits that two of these incidents occurred prior to the appointment of the current Chief Justice.

4.4 The State party submits that the author requested a transfer only four months after he took up his position in Colombo, on account of alleged difficulties in travelling into Colombo every day, which he alleged was aggravating his nervous condition. It denies that it would take three and half hours to travel from Ratmalana to Colombo. Even during peak hours, the journey would not take more than one hour. The author also stated that he had to rent another house in Kandy to keep his excess furniture whilst taking on his residence outside Colombo. In the State party's view, this request for a transfer so soon after he took up his new position was intended to negate the object of the transfer, namely, immediate supervision intended by the JSC over his conduct and work, and was inconsistent with the declaration made by him on appointment that he would accept a posting in any part of Sri Lanka.

4.5 The State party considers that the JSC's decision to terminate the author's employment was fair, reasonable and justified. Upon questioning by the JSC, it was noticed that the author was suffering from a state of instability, on the basis of which they believed that he was incapable of discharging his duties. On 5 June 2000, he failed to report to work and only faxed a medical report, which stated that he was suffering from a "nervous illness", to the JSC on 6 June 2000. As a result of these facts, as well as the author's past conduct, including the fact that he stayed away from work without prior leave and also the fact that he was on probation, the JSC terminated his judicial appointment. In this regard, it referred to rule 13 of the Rules of the JSC, which states that, "The Commission may at any time terminate the appointment of an officer who is on probation without assigning any reason."

4.6 The State party confirms that the author was denied rent allowance pursuant to circulars issued by the JSC, in accordance with which a judicial officer must live either within the city limits of Colombo or within the jurisdiction of the Colombo Magistrates Court. As this condition was not satisfied in the case of the author, he was not entitled to any rental subsidy.

The author's comments on the State party's submission

5.1 On 21 May 2004, the author reiterated his previous claims. He submits that the existence of Constitutional provisions on the independence of the judiciary does not necessarily mean that there is such independence in fact. He submits that in practice the judiciary is not independent and the constitutional articles are not applied. As to the previous alleged complaint against the author in relation to the abuse of power with respect to land, the author dismisses this allegation.

5.2 The author denies that the transfer to Colombo was made for any supervisory purpose and also denies that it matters where a judge is working for such purposes. As to the rent allowance issue, he submits that the JSC may grant it to individuals, depending on the circumstances of their case. He claims to know of judicial officers living outside the abovementioned limits (para. 4.6) who receive such an allowance. The author provides information on the unlawfulness of his dismissal, and the procedure that should have been followed in this case, particularly in light of his mental health. He complains that he fears for his life, that he has been living for the last four years in a remote village, out of the public eye, and that he receives telephone threats

that he will be murdered if he does not withdraw his case before the Committee. He wrote to the Minister of Interior, the Prime Minister and the Inspector General of Police, asking for security, but never received a response.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 As to the requirement to exhaust domestic remedies, the Committee notes that the author did not raise any claim before the State parties' courts with respect to his dismissal from judicial service, which he claims violates article 26 of the Covenant. He confirms that he could have appealed his dismissal to the Court of Appeal but chose not to do so, as according to him, the judiciary is not independent. The Committee considers that the generalized claim made by the author that none of the judges of the Court of Appeal or the Supreme Court could deal with his case impartially, since all are influenced by the Chief Justice, has not been substantiated by him. It concludes that the author has failed to exhaust domestic remedies or to show that they would be ineffective in the circumstances of this case. Accordingly, this part of the communication is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

6.3 As to the claim under article 26, that the author was unequally treated with respect to the provision of rent allowance, the Committee finds this claim insufficiently substantiated, for purposes of admissibility, under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

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

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

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

Note

[1] He does not provide the outcome of this complaint.

H. Communication No. 1213/2003, *Sastre v. Spain**
(Decision adopted on 28 March 2007, Eighty-ninth session)

Submitted by:	Diego Sastre Rodríguez and Juan Diego Sastre Sánchez (represented by counsel, Mr. Miguel Angel Pouget Bastida)
Alleged victims:	The authors and Ms. Encarnación Sánchez Linares
State party:	Spain
Date of communication:	15 May 2002 (initial submission)
Subject matter:	Administrative procedures for eviction from a previously expropriated home
Procedural issues:	Exhaustion of domestic remedies
Substantive issues:	Right to an effective remedy; right to a public hearing by a competent court; arbitrary and unlawful interference with the home
Articles of the Covenant:	2, paragraph 3; 14, paragraph 1; and 17
Articles of the Optional Protocol:	2 and 5, paragraph 2 (b)

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

Meeting on 28 March 2007,

Adopts the following:

Decision on admissibility

1. The authors of the communication, dated 15 May 2002, are Diego Sastre Rodríguez, a Spanish national born on 21 July 1931, and Juan Diego Sastre Sánchez, a Spanish national born on 3 January 1972. They claim to be the victims of a violation by Spain of articles 2, paragraph 3, 14, paragraph 1, and 17 of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The authors are represented by counsel, Mr. Miguel Angel Pouget Bastida.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada and Sir Nigel Rodley, Mr. Ivan Shearer.

The facts as submitted by the authors

2.1 On 13 April 1989, the Cartagena City Council approved an urbanization plan that required the demolition of various houses located in the area where Encarnación Sánchez Linares, who died on 17 November 2001, lived with her husband, Diego Sastre Rodríguez, and their son, Juan Diego Sastre Sánchez. The aim of the plan was to build 1,692 homes. On 27 May 1991, Encarnación Sánchez Linares, as the owner of the property, received compensation and agreed to leave her home within four months of the City Council's giving notice to vacate it.

2.2 However, on 19 November 1991, the Administrative Chamber of the Murcia Superior Court of Justice ruled that the urbanization plan was invalid, and its implementation was abandoned in 1992. As a consequence, the authors did not vacate their house.

2.3 On 20 September 1993, Encarnación Sánchez Linares requested the City Council to declare null and void the measures taken in implementation of the urbanization plan. However, the authorities maintained that the ruling of the Administrative Chamber of the Murcia Superior Court of Justice invalidating the plan was not yet enforceable. On 27 December 1993, the Cartagena City Council adopted a modified plan correcting the faults that had led to its being declared invalid.

2.4 On 18 May 2000, Encarnación Sánchez Linares was given notice to leave her home within four months. Ms. Sánchez appealed to the City Council on 19 June 2000, asking for these decisions to be annulled to enable her to keep her home.

2.5 On 4 October 2000, the councillor responsible for town planning issued an order to vacate the premises within 10 days, invoking the urgent need for the land to be made available in order to build a sports centre. The authors were notified of the adoption of the order on 5 October. On 17 October 2000, Encarnación Sánchez Linares challenged the order, as well as various decisions and the planning regulations purportedly being implemented, before the Administrative Chamber of the Murcia Superior Court of Justice. She also requested an interim measure of protection suspending the eviction until a ruling was handed down. The same day, she submitted a written petition to the Administrative Courts and the Cartagena City Council, informing them of the lodging of an appeal and calling on the Administrative Courts to refrain from permitting the authorities to enter the property and carry out the eviction order.

2.6 On 18 October 2000, Administrative Court No. 1 of Murcia ruled that the petition should be returned to Encarnación Sánchez.

2.7 On 2 November 2000, following an application from the Cartagena City Council, Administrative Court No. 1 of Murcia ruled, without notifying or hearing the authors, that the property could be entered within 10 days to carry out the eviction, provided that no legal order to suspend these decisions had been made. The family were not informed of this decision either by the Court or by the City Council, and learned of its existence only from the radio.

2.8 On 10 November 2000, police officers arrived at the family's home and informed the authors that eviction would take place on 16 November. As a consequence, Encarnación Sánchez Linares requested the Administrative Court and the Administrative

Chamber of the Murcia Superior Court of Justice to adopt interim measures of protection. The latter ordered on 16 November 2000 that the eviction should be suspended, when it was just about to begin.

2.9 Three days earlier, on 13 November, Encarnación Sánchez Linares had challenged before the Administrative Court the decision of 2 November that permitted eviction to begin, on the grounds that it had been made without hearing the persons affected; the Administrative Court dismissed this appeal on 14 November 2000. On 23 November 2000, she lodged an appeal with the Administrative Chamber of the Murcia Superior Court of Justice against the same decision of 2 November 2000 authorizing entry to her property. This appeal cited the lack of a hearing, the lack of effective exercise of the remedy and the lack of enforceability of the administrative act. The court dismissed the appeal on 31 January 2001. An *amparo* application was then made to the Constitutional Court, but was declared inadmissible in a ruling on 26 November 2001.

2.10 On 17 November 2000, Encarnación Sánchez Linares appealed to the Administrative Court against the decision of 18 October 2000 that ordered the return of her petition to withhold authorization to evict. The court dismissed this appeal on 21 December 2000. The author then submitted an *amparo* application to the Constitutional Court, which was declared inadmissible on 16 July 2001, on the grounds that the lower court had not infringed any procedural rules.

2.11 On 23 November 2000, the Administrative Chamber of the Murcia Superior Court of Justice lifted the stay of eviction granted on 16 November and denied the petition to suspend the eviction order. On 13 December 2000, Ms. Sánchez appealed to the Administrative Chamber of the Supreme Court for judicial review of the decision to lift the interim measure of protection, requesting a decision on whether the order of 4 October 2000 could be carried out.
On 15 January 2003, the Administrative Chamber of the Supreme Court dismissed the application for judicial review.

2.12 On 14 December 2000, the Cartagena City Council applied to the Administrative Court for renewed authorization to enter the property, which was granted on 26 December 2000. An appeal was lodged before the same Administrative Court, referring to the appeal against the 2 November 2000 decision to authorize entry, which was at the time still pending before the Administrative Chamber of the Murcia Superior Court of Justice, and again invoking, among other grounds, the lack of a hearing. On 22 January 2001, the Administrative Court dismissed the appeal, ruling that "… in issuing the order being challenged, it was unnecessary to notify the interested party, since even if the appellant had entered an appearance in the proceedings, the Jurisdiction Act does not provide for such notification, as the order authorizing entry did not involve an adversary procedure …", and that "the appeal lodged against the decision authorizing entry (2 November 2000) in no way affects the execution of this ruling, insofar as the leave to appeal is granted with devolutive effect, in accordance with article 80.1 (d) of the Jurisdiction Act".

2.13 Eviction took place on 29 January 2001, with the dwelling being sealed off before being demolished the following day. Encarnación Sánchez Linares, who was suffering from terminal cancer, died on 17 November 2001.

2.14 On 26 November 2001, the Constitutional Court ruled that the last two *amparo* applications submitted were inadmissible.

2.15 Given that the order of 4 October 2000 was carried out by the Cartagena City Council as a matter of urgency, the specific manner of its implementation was also challenged before the Administrative Chamber of the Murcia Superior Court of Justice on 20 February 2001 under appeal No. 398/2001, which also remains pending.

2.16 On 16 March 2006, the date of the last communication by the authors to the Committee, the urbanization plan had still not been put into effect.

The complaint

3.1 The authors' complaint relates exclusively to the ruling of Administrative Court No. 1 of Murcia on the Cartagena City Council's authorization to enter the property. They claim that these proceedings were challenged before the Spanish courts and that all domestic remedies in respect of them have been exhausted, including the *amparo* application to the Constitutional Court.

3.2 According to the authors, the decisions of Administrative Court No. 1 of Murcia have resulted in violations of the Covenant, as follows:

- Article 2, paragraph 3, given that the appeal against the decisions of the Administrative Courts did not suspend enforcement of the decision being challenged;

- Article 14, paragraph 1, because the administrative acts ordering eviction from a family home do not respect the affected parties' right to a hearing and defence. According to the authors, the court should have undertaken a balanced assessment of interests before authorizing entry;

- Article 17, given that, without prior hearing or possibility of effective remedy, they were subjected to forcible and summary eviction and immediate demolition of the dwelling that constituted the family home in pursuit of an urbanization plan that had been abandoned and invalidated. They maintain that, although they received compensation for the dwelling, such compensation corresponded to the need to occupy the land for the urbanization plan. They therefore contend that the court's decision permitted arbitrary and unlawful interference with their home.

State party's observations on the admissibility and merits of the communication

4.1 The State party submitted its observations on the admissibility and merits of the communication on 15 February 2006. Concerning admissibility, it claims that the authors have not exhausted domestic remedies in accordance with article 5, paragraph 2 (b), of the Optional Protocol. Furthermore, the State party considers that the communication constitutes an abuse of the right to bring complaints before the Committee, under the terms of article 3 of the Protocol. With reference to the merits, the State party maintains that the facts as submitted do not reveal violations of the Covenant.

4.2 According to the State party, the communication is based on a challenge to the executive nature of administrative acts, i.e., the authors consider that giving the City Council the power to execute its decisions of its own volition, without the need to seek prior legal confirmation,

constitutes a violation of the Covenant. In this context, it is the authors' view that appeals to administrative courts must, as a matter of principle, have a suspensive effect on administrative acts.

4.3 The State party indicates that the situation under the Spanish system is common to the vast majority of legal systems. It maintains that, moreover, the Spanish legal system grants special protection, since in addition to the provision that enables courts to suspend acts as a precautionary measure when a legal challenge is in progress, in cases where administrative acts require entrance into a home, it also calls for authorization from a judge. This authorization is independent of the process of reviewing the decision or of any interim measures of protection that may be adopted. The judge's authorization simply ensures that entrance to the home does not stem from actions that involve taking the law into one's own hands without a well-founded administrative decision, and that it is carried out by way of a procedure that prima facie appears correct. The State party refers to the ruling of the Administrative Chamber of the Murcia Superior Court of Justice, as well as the subsequent Supreme Court ruling in this case.

4.4 The State party notes that the authors received appropriate compensation for their home and had undertaken to leave it since before 1991, that is to say, 10 years prior to eviction. It also indicates that the authors unsuccessfully challenged the urbanization plan that gave rise to the eviction, as well as the Cartagena City Council order of 4 October 2000, under which the eviction order was placed before three separate courts, the Administrative Court of Murcia, the Administrative Chamber of the Murcia Superior Court of Justice and the Supreme Court, none of which found grounds to suspend the enforceability of the corresponding administrative act. The case then went before the Constitutional Court, which upheld the measure on three occasions following appeals that failed to invoke the inviolability of the home, referring only to infringement of the right to "effective legal protection" for lack of a hearing and due cause, among other things.

4.5 Moreover, the specific manner of the eviction was also challenged before the Administrative Chamber of the Murcia Superior Court of Justice, a step that can only be considered as a judicial review of the lawfulness and validity of the eviction. As a consequence, this step taken by the authors must be viewed as intended to redress the violation that they report to the Committee before the domestic courts have concluded their examination and issued a ruling on the matter.

4.6 The State party considers, therefore, that the requirements of article 5, paragraph 2 (b), have not been met, since the authors have not exhausted all domestic remedies to redress the alleged violation.

4.7 With reference to the merits, the State party maintains that in the case in question, the authors have had access to all forms of reasonably available legal recourse. They have challenged each act of the proceedings, the action of implementation and even what they call the "specific manner of its implementation". Likewise, the proceedings relating to the contested acts have been carried out at their instigation and with their constant involvement. In these circumstances, it appears difficult to maintain that there has been a violation of the Covenant, since it is not laid down that the protective intervention of the Administrative Court judge, which the Covenant does not require and which is not a review mechanism but a simple precaution that in no way limits judicial review of the administrative act through its own channels, calls for the involvement of the interested party, as though it were a genuine trial.

4.8 According to the State party, the Covenant does not require that administrative acts should be preceded by court proceedings in order to be executed. This is without prejudice to judicial review of such acts and, if necessary, reparation of any harm that their implementation may have caused. Nor does the Covenant require every remedy against a legal ruling to have a suspensive effect. In this particular case, the judicial authorization did not breach the right of defence or cause any harm since it is an additional safeguard and not a substitute for judicial review of the acts. Thorough judicial review has taken place and is continuing, since the decision not to suspend the authorized measures as a precaution, which also pre-dated implementation and was independent of the authorization, contained a full statement of the grounds for non-suspension. The State party pointed out, moreover, the reparable nature of the alleged harm suffered in the event that the pending appeals are upheld.

Authors' comments

5.1 In their comments dated 16 March 2006, the authors point out that more than five years have elapsed since their home was demolished, following the forcible and summary eviction of a family with serious health problems before the courts had ruled on the appeal against the eviction authorization. They add that, five years later, the plot on which the house had stood remains empty.

5.2 They reject the State party's assertion that the Spanish legal system affords special protection by virtue of the fact that, in addition to the protective measures involving a stay of execution that a court may order when hearing an appeal against an administrative act, it also requires authorization by an Administrative Court judge for entry into a home. According to the authors, authorization to enter a home was designed for cases in which no administrative appeal against the act to be implemented is available and which call for waiver of the inviolability of the home.

5.3 The authors reaffirm that Administrative Court No. 1 of Murcia improperly intruded on the jurisdiction of the Administrative Chamber of the Murcia Superior Court of Justice by authorizing entry into a home with a view to its demolition without hearing them. Similarly, they repeat that they were not informed of the existence of the City Council's application or given the opportunity to submit arguments. Nor were they notified of the authorization granted.

5.4 The authors likewise point out that the compensation received in 1991 was for the vegetation and structures hindering the implementation of a plan that was never carried out. There was therefore no reason to possess the plot urgently. According to the authors, they have for five years been deprived of the land upon which their demolished house was built, and the money that they received as compensation was insufficient.

5.5 Lastly, they state that on 21 October 2005, the Administrative Chamber of the Murcia Superior Court of Justice ruled that the appeal against the order of 4 October 2000 was inadmissible (see paragraph 2.5). On 9 January 2006, one of Encarnación Sánchez Linares' daughters applied to the Supreme Court for judicial review, and this appeal remains pending.

Issues and proceedings before the Committee

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

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement, so that the provisions of article 5, paragraph 2 (a), of the Optional Protocol do not preclude its consideration of the complaint.

6.3 The Committee takes note of the general argument of the State party that in this case domestic remedies have not been exhausted, given that a series of appeals remain pending before the domestic courts, which would provide an appropriate means of redress against the alleged violations. Concerning the authors' claims in relation to article 17 of the Covenant, the Committee, noting that neither the alleged violation of this article, nor the existence of arbitrary and unlawful interference with their home, were drawn to the attention of the domestic courts, declares this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.4 Concerning the authors' claims in relation to article 14, paragraph 1, the Committee notes that the appeals relating to the alleged lack of a hearing and the lack of suspensive effect of the appeals lodged with the Administrative Court were dismissed on three different occasions by the Constitutional Court. In those circumstances, the Committee considers that the authors have done all that can be reasonably required of them to exhaust domestic remedies in respect of their complaint in relation to article 14, paragraph 1.

6.5 The Committee notes that article 14, paragraph 1, of the Covenant does not oblige States parties to provide avenues for redress in respect of judgements relating to the determination of civil rights and obligations. However, it considers that if a State party provides for such redress, the guarantees of a fair trial implicit in the article must be respected in that process.[1] The Committee considers that the question of whether these procedures comply with the requirements of the Covenant must be looked at globally, in the light of the particular aspects of the case.[2] The Committee notes the authors' complaint that administrative acts ordering eviction from a home do not respect the right of the persons concerned to a hearing, and that appeals against the rulings of the Administrative Courts do not have a suspensive effect. The Committee also notes the State party's argument that the Administrative Court judge's authorization in cases of implementation of administrative acts requiring entry into a home is a limited procedure that does not affect judicial review of those acts. The authors do not dissent from this view, but consider that such a situation violates the rights and guarantees established by the Covenant. The Committee likewise observes that, as the Constitutional Court noted,[3] in this specific case the authors had the opportunity to participate actively in the various proceedings they initiated relating to the eviction, and that they even obtained interim measures of protection that suspended eviction for some time. As a consequence, the Committee considers that the authors have not sufficiently substantiated their allegations for the purposes of admissibility, and conclude that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.6 As regards the alleged violation of article 2, paragraph 3, the Committee notes that article 2 can be invoked only in conjunction with other articles of the Covenant. It observes that article 2, paragraph 3 (a), stipulates that each State party undertakes to ensure that "any person whose rights or freedoms […] are violated shall have an effective remedy".[4] However, article 2, paragraph 3 (b), obliges States parties to ensure determination of the right to such remedy by a competent judicial, administrative or legislative authority, a guarantee which would be void if it were not available where a violation had not yet been established. While a State party cannot reasonably be required, on the basis of article 2, paragraph 3 (b), to make such procedures available no matter how unmeritorious such claims may be, article 2, paragraph 3, provides protection to alleged victims if their claims are sufficiently well founded to be arguable under the Covenant.[5] Considering that the authors of the present communication have failed to substantiate, for purposes of admissibility, their claims under article 14, paragraph 1, their allegation of a violation of article 2 of the Covenant is also inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

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

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

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

Notes

[1] See communication No. 1183/2003, *Martínez Puertas v. Spain*, decision of 27 March 2006, para. 6.4.

[2] See communication No. 112/1981, *Y.L. v. Canada*, decision of 8 April 1986, para. 9.3, and the Committee's analysis in communication No. 1060/2002, *Deisl v. Austria*, decision of 27 July 2004, para. 10.7.

[3] See Constitutional Court Supplement 3237/2001, 26 November 2001.

[4] See communications Nos. 275/1988, *S.E. v. Argentina*, decision of 26 March 1990, para. 5.3, and 1192/2003, *M. de Vos v. The Netherlands*, decision of 25 July 2005, para. 6.3.

[5] See communication No. 972/2001, *Kazantzis v. Cyprus*, decision of 7 August 2003, para. 6.6.

I. Communication No. 1219/2003, *Raosavljevic v. Bosnia and Herzegovina** (Decision adopted on 30 March 2007, Eighty-ninth session)

Submitted by:	Vladimir Raosavljevic (not represented)
Alleged victim:	The author
State party:	Bosnia and Herzegovina
Date of communication:	3 July 2003 (initial submission)
Subject matter:	Non-renewal of appointment of Supreme Court judge for participation in controversial judgements - Alleged lack of an effective remedy to challenge decision of High Judicial and Prosecutorial Council
Substantive issues:	Right of equal access to public service - Right to an effective remedy
Procedural issues:	Admissibility *ratione materiae* - Level of substantiation of claim - Exhaustion of domestic remedies
Articles of the Covenant:	2 (1) and (3), 17, 25 (c)
Articles of the Optional Protocol:	2, 3 and 5, paragraph 2 (a) and (b)

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

Meeting on 28 March 2007

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Vladimir Raosavljevic, a national of Bosnia and Herzegovina, born on 28 July 1939. He claims to be a victim of violations by Bosnia and Herzegovina[1] of article 25, read alone and in conjunction with article 2, paragraphs 1 and 3, and, indirectly, article 17 of the International Covenant on Civil and Political Rights (the Covenant). He is not represented.

* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

1.2 On 19 January 2004, the State party requested the Committee to examine the admissibility of the communication separately from its merits, in accordance with rule 97, paragraph 3, of the Committee's rules of procedure. On 11 February 2004, the Committee, through its Special Rapporteur on new communications, decided to examine the admissibility of the communication together with the merits.

Factual background

2.1 From 1965 to 2003, the author served as a judge on the Municipal Court of Prnjavor (5 years), the District Court (23 years) and, from 1993 to 2003, on the Supreme Court of the Republika Srpska, where he presided over the criminal department.

2.2 In 2002, the High Representative for Bosnia and Herzegovina established High Judicial and Prosecutorial Councils at State level and in both of the Bosnian Entities. All existing judicial posts in the State party were declared vacant and incumbents were required to reapply for appointment. The High Judicial and Prosecutorial Council of the Republika Srpska (HJPC) conducted the process of selection and appointment in Republika Srpska (RS), in accordance with the criteria set out in Article 41^{2} of the Law on the High Judicial and Prosecutorial Council of the Republika Srpska (RS Law on HJPC).

2.3 On 4 November 2002, in extraordinary review proceedings, a chamber of the Supreme Court of RS chaired by the author vacated a final judgment of the Bijeljina Basic and District Courts, which found several defendants guilty of kidnapping and forcible abortion and sentenced them to prison terms of between 4 years and 6 months and 6 years and 6 months. It referred the matter back to the first instance court. In another case, a chamber also chaired by the author, acting as second instance court, upheld a conviction of murder, allegedly despite insufficient evidence and without properly reviewing the verdict. In both cases, complaints were brought against the author by the Office of the United Nations High Commissioner for Human Rights in Bosnia and Herzegovina and by the father of the murder convict, respectively.

2.4 According to the author, in early 2003, the HJPC Field Office in Banja Luka evaluated his application for reappointment to the Supreme Court of RS. Based on an investigation of the two complaints, the investigator found that the above verdicts were unlawful and that they called into question the author's suitability. On 12 March 2003, the HJPC decided not to reappoint the author as a Supreme Court judge. The fact he had not been selected would not prevent his future appointment to the position of judge or prosecutor. The decision was taken on the basis of a complex rating system (see also paragraph 5.2 below).

2.5 By letter dated 17 March 2003, the author and another Supreme Court judge, whose reappointment was denied because of his participation in the above verdicts, objected to the decision of the HJPC, arguing that in the kidnapping and forcible abortion trial, the lower courts should have ordered an expertise to assess the mental capacity of the main accused at the time of commission of the crime; their evaluation of the medical evidence had been one-sided.

2.6 On 20 March 2003, the author requested the HJPC to reconsider its decision to terminate his appointment, emphasizing his professionalism, the efficiency of the criminal department at the Supreme Court of RS that he presided and the high respect that he enjoyed among his colleagues. On 2 April 2003, the HJPC rejected the request, stating that this decision was not subject to appeal.

The complaint

3.1 The author claims that the non-renewal of his appointment based on his legal assessment in the two above cases was discriminatory, amounted to a denial of his right to equal access to public service, interfered with his independence as a judge and damaged his honour and reputation, in violation of articles 2, paragraph 1, 17 and 25 (c), read in conjunction with article 2, paragraph 3, of the Covenant (in the absence of an effective remedy to challenge the decision of the HJPC).

3.2 The author reiterates that the criminal department of the Supreme Court of RS which he presided over was the most efficient in Bosnia and Herzegovina, with only three unresolved cases as of 12 February 2003. He had participated in several expert teams reviewing and drafting legislation in the RS and Brcko District. Although he had received higher scores in the evaluation process than all the candidates who were appointed to the Supreme Court, the decision to terminate his appointment prior to reaching the retirement age of 70 was based on two controversial judgments only. None of the following criteria were taken into consideration by the HJPC: the efficiency of his department, his professionalism and work experience, the absence of any irregularities in his previous cases and absence of any disciplinary action against him.

3.3 By reference to Section 258 of the Code of Criminal Procedure, the author argues that the decision of 4 November 2002 to revoke the convictions in the kidnapping and forcible abortion case was lawful, as it was based on the opinion of several forensic psychiatrists that the accused suffered from mental illness when he committed the crime.

3.4 The author claims that, apart from interfering with his independence as a judge, the HJPC was not composed as it should have been when deciding on his application, since one of the members was appointed from among the lowest professional category of attorneys, although he/she should have been appointed by the Attorney-General's Office.

3.5 The author submits that he could not appeal the decision of the HJPC to any other instance and that he was denied access to the files after completion of the evaluation process.

State party's observations on admissibility and merits

4. On 19 January 2004, the State party challenged the admissibility of the communication, arguing that the author did not exhaust domestic remedies, as he did not file an application for review of the decision of the HJPC in the Supreme Court of RS, nor any further appeal with the Constitutional Court or the Human Rights Chamber of Bosnia and Herzegovina set up under Annex V of the Dayton Agreement.. It requests the Committee to ascertain that the same matter is not being examined by the European Court of Human Rights.

5.1 On 30 April 2004, the State party reiterated its arguments for challenging the admissibility of the communication and commented on its merits, arguing that the facts as presented raise no issues under articles 17 and 25 (a) and (b) of the Covenant.

5.2 On the claim under article 25 (c), the State party submits that the author's application was part of a process for the appointment of 16 judges to the Supreme Court of the RS.
Of 98 candidates who applied for the 16 posts, 91 were interviewed. All of them met the legal

requirements for appointment to the Supreme Court. The HJPC was competent to select the candidates it considered best suited, on the basis of the criteria prescribed by Article 41 of the RS Law on HJPC. Under the State and RS Constitutions, the ethnic composition of the Supreme Court was to reflect the ethnic composition of the RS population, in accordance with the 1991 census conducted in the Former Socialist Republic of Yugoslavia. Thus, the 13 judges proposed by the nomination panel included eight Serbs, two Bosniaks, two Croats and one "Other". The author received high evaluation marks by the panel but was ranked below the threshold set for the eight judges of Serb ethnicity. The selection process was based on objective criteria rather than political opinion and affiliation and provided the author with "a fair opportunity" to run for the post of judge, in accordance with domestic law and article 25 (c) of the Covenant.

5.3 The State party submits that during the selection process, the HJPC was composed in accordance with Articles 5[3] and 76[4] of the RS Law on HJPC. While Article 5 defined the composition of the Council in principle, Article 76 gave the High Representative a certain margin of discretion to depart from this provision when appointing HJPC members during the transitional period.

Author's comments

6.1 On 22 May 2004, the author commented, arguing that he never contacted the European Court of Human Rights and that the State party had failed to cite a single provision under domestic law which would have enabled him to challenge the decision of the HJPC in another instance. He exhausted the only remedy available to him by filing a request for reconsideration under Article 79 (3)[5] of the RS Law on HJPC. The decision of the HJPC rejecting his request clearly stated that it was not subject to appeal. Furthermore, Article 86[6] of the RS Law on HJPC defined this Law as "lex specialis," precluding the application of any remedies foreseen in other laws. The recent inclusion of a provision on court protection in the new draft State Law on HJPC only concerned disciplinary proceedings and was without retroactive effect. The Human Rights Chamber had ceased to receive cases at the time he sought to appeal the decision of the HJPC. It was not a domestic remedy. He therefore exhausted all available domestic remedies.

6.2 By reference to statistical reports which show that he exceeded the workload quota by 217.4 percent in 2000 and by 161.5 percent in 2001, the author reiterates that his appointment was terminated despite the fact that he obtained the highest evaluation scores of all candidates, based on criteria set out in Article 41 of the RS Law on HJPC. In accordance with Article 17 of the rules of procedure of the HJPC, the evaluation records are confidential and not to be disclosed to the candidates. The State party failed to present these records to the Committee in order to conceal his and other candidates' evaluation scores.

6.3 Without challenging the selection of judges on the basis of ethnic quota, the author submits that ethnicity was not an issue in his case, given that the eight judges appointed to the RS Supreme Court's criminal department were all Serbs. Four of them came from lower instance courts; one had never decided on appeal in his career.

6.4 The author emphasizes that the only reason for not reappointing him to the Supreme Court of RS was his legal assessment in the two verdicts, based on which the HJPC marked him as unsuitable, unlike other candidates who were appointed to the RS Supreme Court or to the Constitutional Court of Bosnia and Herzegovina although they had participated in the same

judgments. The HJPC deprived him not only of his right to equal access to the RS Supreme Court, but also recommended that his application for any other judicial post be rejected.

6.5 For the author, the fact that the judgments were declared unlawful by the HJPC after it received complaints from dissatisfied parties amounts to a severe interference with his independence as a judge as well as usurpation, by an executive organ, of judicial power that can only be exercised by a higher court. When working on the cases, he faced considerable pressure from HJPC investigators showing a strong interest in both cases. Although the investigators were not qualified to exercise judicial power, they scrutinized the verdicts, which were the result of years of work, in a few days and summarized their analysis of these complex cases in a few sentences. Their findings on both verdicts were arbitrary, incomplete and inaccurate.

6.6 The author argues that the membership of the HJPC is regulated in detail in the RS Law on HJPC to ensure an impartial and transparent appointment procedure. This process was flawed in his case, since one of the members of the HJPC, S. M., a deputy public prosecutor from the basic public prosecutor's office, had not been elected by the Association of Judges and Prosecutors of RS, as required by Article 5 of the RS Law on HJPC. The list of elected candidates forwarded to the High Representative for approval did not include S. M. It would, moreover, have been possible to appoint a public prosecutor of the Public Prosecutor's Office of RS, in accordance with Article 5. The flexibility clause in Article 76, which required the High Representative to appoint members specified in Article 5 only "to the extent possible" during a transitional period, was no justification for the unlawful composition of the HJPC at the time when his appointment was terminated. The State party should have disclosed the relevant evidence if it wanted to show that the Council was properly composed.

6.7 The author submits that the State party has not established an effective remedy to review decisions on the appointment of judges, in violation of article 2, paragraph 3, of the Covenant. The rejection by the HJPC of his request for reconsideration was a stereotyped decision designed for mass communication, which did not address a single issue raised by him. The possibility to file such a request was not an effective remedy, as it did not involve review by another instance. The discretion vested in the HJPC to appoint judges cannot be unlimited but must respect applicable domestic and international standards.

6.8 The author claims that he was deprived of an opportunity to present his arguments and to defend his rights. Any allegations against him should have been dealt with in disciplinary proceedings under Article 49 of the RS Law on HJPC. It was only after the State party had received his communication that he was granted access to the files of the HJPC. He claims compensation for the moral and material damage suffered, including damage to his honour and reputation after 38 years of judicial service.

Issues and proceedings before the Committee

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

7.2 As required by article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 With regard to the question of exhaustion of domestic remedies, the Committee takes note of the State party's argument that the author did not file either an application for review of the decision of 12 March 2003 the HJPC in the Supreme Court of RS, nor further appealed to the Constitutional Court or the Human Rights Chamber of Bosnia and Herzegovina. It also notes the author's objection that his request for reconsideration under Article 79 (3) of the RS Law on HJPC was the only remedy available to him under domestic law.

7.4 The Committee recalls that it is implicit in rule 97 of its rules of procedure and article 4, paragraph 2, of the Optional Protocol that a State party to the Covenant should make available to the Committee all the information at its disposal, including, at the stage of admissibility of a communication, detailed information about remedies available to the victims of the alleged violation in the circumstances of their case. It considers that, while generally referring to remedies before the Supreme Court, the Constitutional Court and the Human Rights Chamber of Bosnia and Herzegovina, the State party has not provided any detailed information on the availability and effectiveness of these remedies in the circumstances of the author's case. The Committee is therefore satisfied that the author exhausted domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol, by filing a request for reconsideration with the HJPC.

7.5 Insofar as the author alleges violations of his rights under article 25 (a) and (b) of the Covenant, the Committee observes that his claims are inadmissible *ratione materiae* under article 3 of the Optional Protocol.

7.6 With regard to the author's claim under article 25 (c) that the decision of the HJPC not to reappoint him as a Supreme Court judge violated his right to equal access to public service, the Committee notes that article 25 (c) guarantees not only access to public service, but also a right of retention in the public service on general terms of equality. In principle, therefore, the claim falls within the scope of the provision. The principle of access to public service on general terms of equality implies that the State party must not discriminate against anyone, on any of the grounds set out in article 2, paragraph 1, of the Covenant. The author claims that the only reason not to re-appoint him was his legal determination of two controversial judgments, and that other judges who participated in the same judgments were appointed to the Supreme Court of RS or the Constitutional Court of Bosnia and Herzegovina. The Committee notes, however, that the rating system used to determine the eligibility and suitability of judges was complex and based on objective criteria (see paragraph 5.2), and that while the author was given high evaluation marks by the panel, he was ranked below the threshold set for judges of Serb ethnicity. On the basis of the material before it, the Committee considers that the author has failed to substantiate sufficiently, for purposes of admissibility, that his non-inclusion in the appointment list of judges was exclusively based on the two controversial judgments he had delivered, and not on other objective criteria underlying the ranking system. Accordingly, this claim is inadmissible under article 2 of the Optional Protocol.

7.7 As regards the allegation that the HJPC was improperly constituted, interfered with his independence as a judge and violated his honour and reputation, the Committee notes that the author does not explicitly invoke a specific provision of the Covenant in relation to this claim. It considers that he failed to substantiate, for purposes of admissibility, that the appointment of a deputy public prosecutor from the basic public prosecutor's office, who had not been elected by the Association of Judges and Prosecutors of RS, was not covered by the flexibility clause in Article 76 and therefore in breach of Article 5 of the RS Law on HJPC. Similarly, the author did

not substantiate, for purposes of admissibility, that the evaluation of his suitability by the HJPC based on, inter alia, two judgments, which gave rise to complaints calling into question his integrity and impartiality, interfered with his judicial independence or violated his honour and reputation. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.8 The author has invoked article 2 of the Covenant read together with articles 17 and 25 (c). This raises the question as to whether the fact that he had no possibility to appeal the decision of the HJPC to another instance amounted to a violation of his right to an effective remedy as provided for by article 2, paragraphs 3 (a) and (b), of the Covenant. The Committee recalls that article 2 can only be invoked in conjunction with a substantive right protected by the Covenant,[7] and only if a violation of that right has been sufficiently well-founded to be arguable under the Covenant.[8] As the author has failed to substantiate, for purposes of admissibility, his claims under articles 17 and 25 (c), his claim of a violation of article 2 of the Covenant accordingly is also inadmissible under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

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

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

Notes

[1] The Covenant and the Optional Protocol entered into force for the State party on 6 March 1992 and 1 June 1995, respectively.

[2] Article 41 ("Criteria for Appointment") of the RS Law on HJPC (23 May 2002) reads:

> "The Council shall assess whether the applicant is able to perform judicial or prosecutorial functions, taking into account the following criteria:
>
> (1) Professional knowledge and performance;
>
> (2) Proven capacity through academic written works and activities within professional associations;
>
> (3) Proven professional ability based on previous career results, including participation in organized forms of continuing training;
>
> (4) Work capability and capacity for analysing legal problems;

(5) Ability to perform impartially, conscientiously, diligently, decisively, and responsibly the duties of the office for which he/she is being considered;

(6) Communication abilities;

(7) Relations with colleagues, conduct out of office, integrity and reputation; and

(8) Managerial experience and qualifications (for the positions of president of court and public prosecutor).

The Council shall implement relevant Constitutional provisions regulating the equal rights and representation of constituent peoples and others. Appointments to all levels of the judiciary should also have, as an objective, the achievement of equality between women and men."

[3] Article 5 ("Members of the Council") of the RS Law on the HJPC reads: "The Council shall have members, as follows:

- A judge of the Supreme Court of Republika Srpska, elected by all the judges of the Court;
- A public prosecutor of the Public Prosecutor's Office of Republika Srpska elected by the Public Prosecutor of the Republic and deputy public prosecutors in the Office;
- One judge, either from a district court or a basic court, elected by the Association of Judges and Prosecutors of Republika Srpska;
- One public prosecutor or deputy public prosecutor, either from a district public prosecutor's office or from a basic public prosecutor's office, elected by the Association of Judges and Prosecutors of Republika Srpska;
- A minor offence court judge elected by the Association of Minor Offence Court Judges of Republika Srpska;
- An attorney elected by the Bar Association of Republika Srpska;
- A person of high moral character and integrity appointed by the President of Republika Srpska; and
- The members of the High Judicial and Prosecutorial Council established under the Constitution and laws of the Federation of Bosnia and Herzegovina.

Members of the Council shall be independent and impartial in the exercise of their functions, shall be persons of high moral standing and integrity, and shall have a reputation for efficiency, competence, and integrity."

[4] Article 76 ("Composition, Appointment, and Terms of Office") of the RS Law on the HJPC reads:

"During the transitional period, the High Representative shall appoint to the Council the members specified in Article 5, to the extent possible. During this period the Council shall not include a minor offence court judge. The mandates of the national members shall be for a term of four years as set forth in by Article 6 of this law.

The High Representative shall also appoint up to eight (8) international members to the Council. The mandates of the international members shall be confined to the transitional period."

[5] Article 79 (3) of the RS Law on HJPC reads:

"An incumbent judge, public prosecutor, or deputy public prosecutor who is not selected for judicial or public prosecutorial office under this Article may file a request for reconsideration:

(1) If the Council failed to consider material facts favourable to the applicant provided that information was submitted to the Council at the time of application, or

(2) If the applicant exercised his right to review application material under Article 40 prior to the Council's decision and the Council took adverse decision based upon information not made available to the applicant."

[6] Article 86 of the RS Law on HJPC reads:

"[…] Statutory provisions contained in the laws of Republika Srpska shall be brought into harmony with this law and any provisions that are inconsistent with this law are hereby repealed."

[7] Communication No. 275/1988, *S.E. v. Argentina*, decision on admissibility adopted on 26 March 1990, at para. 5.3.

[8] Communication No. 972/2001, *Kazantzis v. Cyprus*, decision on admissibility adopted on 7 August 2003, at para. 6.6.

J. Communication No. 1224/2003, *Litvina v. Latvia**
(Decision adopted on 26 March 2007, Eighty-ninth session)

Submitted by:	Lyudmila Litvina (not represented by counsel)
Alleged victims:	The author
State party:	Latvia
Date of communication:	4 October 2003 (initial submission)
Subject matter:	Denial of protection of the law for judicial challenges to actions and decisions of administrative bodies.
Substantive issue:	Right to have access to court.
Procedural issue:	Non-exhaustion of domestic remedies
Article of the Covenant:	14, paragraph 1
Article of the Optional Protocol:	5, paragraph 2 (b)

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

Meeting on 26 March 2007,

Adopts the following:

Decision on admissibility

1. The author of the communication is Lyudmila Litvina, who claims to be stateless, born in Latvia on 9 June 1953 and currently residing in Latvia. She claims to be a victim of violations by Latvia[1] of her rights under article 14, paragraph 1, of the International Covenant on Civil and Political Rights.[2] She is unrepresented.

Factual background

2.1 On 14 September 1999, the author obtained a certificate of proficiency in the Latvian language issued by the State Examination Commission of Latgales, a suburb of Riga, with the State seal. On 4 June 2001, the author took a written Latvian language proficiency examination

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

in the Liepâja Branch of the Naturalization Board with a view to obtain Latvian citizenship by naturalization. On the same day, the Examination Commission of the regional branch of the Naturalization Board (hereinafter, Examination Commission) competent to evaluate these examinations, decided that the author had failed the test.

2.2 On 5 June 2001, the author appealed this decision to the head of the Naturalization Board. The appeal was received on 13 June 2001; two days later, the head of the Naturalization Board asked the Appeal Commission to consider it. On 26 June 2001, the Board informed the author that her appeal was examined during the Appeal Commission's sitting of 21 June 2001. The Board rejected the author's application and considered that the Commission had assessed the quality of the author's written exam and concluded that the evaluation of the Examination Commission was objective. Thus, there were no reasons to repeal it. By the same letter, the author was informed that she could appeal this decision either to the Ministry of Justice or within a month to a court.

2.3 On 4 July 2001, the author requested the Examination Commission to provide her with certified copies of all materials related to her naturalization examination under the Law "On the Openness of Information" (hereinafter, the Law). According to the State party, the Naturalization Board replied to her request on 16 July 2001, explaining that the Naturalization Board could not satisfy her request, since she had not substantiated her request and had not indicated for what she intended to use the information requested. The Board referred to article 5, paragraph 2, subparagraph 5 and article 10, paragraph 2 of the Law; articles 17, 20 and 21.4 of the Regulation of the Cabinet of Ministers No. 275 on procedures governing the disclosure of information, which is at the disposal of the state authorities and local government of 3 August 1999 (hereinafter, Regulation No. 275). The Board added that such request should be addressed to the head of the Board, describing the necessary information and indicating for what she intended to use the information requested. A copy of a form for filing such a request was attached to the Board's letter. The author claims that she never received a reply to her request of 4 July 2001.

2.4 On 23 July 2001, the author complained to the Liepâja court and requested, inter alia, to declare that the refusal of the Naturalization Board to provide her with a copy of her written examination was illegal and to order the Board to provide the author with a copy. On 11 September 2001, the court examined the complaint. During the hearing the judge asked the author whether she could submit to the head of the Board the request with an indication of how she intended to use the materials related to her naturalization examination. The author promised to send such a request. As a result, the court adjourned the hearing to 27 September 2001, thus giving the author time to reach a friendly settlement.

2.5 On 17 September 2001, the head of the Liepâja regional branch of the Naturalization Board wrote to the author, informing her that under paragraph 1 and 3 of the Cabinet of Ministers Regulation No. 351 on "Statutes of the Naturalization Department" of 21 November 1995 (hereinafter, Regulation No. 351), the Naturalization Board was a legal person, while its branches did not have such status. Therefore, they could not provide the copies of the materials related to her naturalization examination. Under article 5, paragraph 2, subparagraph 5, article 10, paragraph 2 of the Law, and article 16 of the Regulation No. 275, materials related to the naturalization examination are restricted information. The author did not send a request to the head of the Naturalization Board to substantiate her request and indicate for what she intended to use the information requested. As a result, the author was re-invited to submit such a request.

2.6 On 21 September 2001, the author sent a letter to the Liepâja court, requesting it to order the Naturalization Board to provide her with a copy of her written examination, so that she could "challenge the results". On 27 September 2001, the Liepâja court rejected the author's complaint. During the hearing, a representative of the Liepâja regional branch of the Naturalization Board explained that materials related to the naturalization examination is restricted information, because disclosure would make it possible for candidates with insufficient knowledge to pass the examination. Disclosure of the examination papers may lower existing standards of the required proficiency in Latvian for candidates for Latvian citizenship. It would make it more difficult for the naturalization bodies to fulfil their responsibilities. The court concluded that article 16 of the Regulation No. 275 and order No. 369 of the Naturalization Board of 22 October 1999 (hereinafter, order No. 369) fully applied to the materials related to the Latvian language examination for applicants for Latvian citizenship. Anyone requesting such information must indicate in writing the purposes for what the information is intended to be used. The court ascertained, through witness testimonies and materials in the file, that the author had been told many times, orally and in writing, that materials related to the language examination had to be requested through the head of the Naturalization Board, by submitting a formal request. The author had not submitted such a request.

2.7 On 26 October 2001, the author appealed the decision to the Civil Camber of the Kurzemes Regional Court, which, on 5 December 2001, found the author's complaint well-founded and directed the Naturalization Board to provide the author with copies of her written examination. The Regional Court pointed out that:

> "[…] one cannot assume that the materials of the author's written language proficiency examination should be considered as restricted information. Article 2 of Order No. 369 stipulates that except for cases where the information concerns a person requesting it, the restricted information may be provided to natural and legal persons only with the written consent of the head or deputy head of the Naturalization Board. The author requested the information concerning her; thus, under the above Order, there are no reasons to consider this information as restricted information. […]"

2.8 The decision of the Kurzemes Regional Court was appealed by the Naturalization Board and the prosecutor on 11 January 2002 and 20 December 2001, respectively. Both pointed out that the Regional Court had not applied the provision governing the case, i.e., article 5, paragraph 2, subparagraph 5 of the Law, according to which the information related to the evaluation of examination should be deemed restricted information.

2.9 On 27 February 2002, the Senate of the Supreme Court repealed the decision of the Regional Court and remitted the case back to the Regional Court for reconsideration.

2.10 After reconsidering the case, the Kurzemes Regional Court, by decision of 23 April 2002, refused to satisfy the author's complaint, invoking the arguments mentioned in the decision of the Supreme Court Senate. On 3 May 2002, the author's representative, one Zaytsev, requested the Naturalization Board to show to him the materials of the author's language examination. On 17 May 2002, the head of the Naturalization Board refused to comply with the request, arguing that demonstration and provision of this type of information was subject to the same legal

requirement that the purpose for which the information was intended had to be stated. On 11 September 2002, the Senate of the Supreme Court rejected the author's appeal on cassation of 30 May 2002.

2.11 By Order of the Naturalization Board dated 30 December 2003, consideration of the author's application for naturalization was terminated pursuant to article 31.5 of the Regulation of the Cabinet of Ministers No. 34 on procedure governing the receipt and examination of applications for naturalization of 2 February 1999. The author did not appeal this decision of the Naturalization Board.

2.12 On 22 January 2004, the author proposed to the Naturalization Board that it consider her language proficiency examination as having been passed, stating that the Order of the Naturalization Board was issued shortly after she submitted her case to the Committee. On 6 February 2004, the Naturalization Board rejected her proposal. Since then, the author has not re-taken the language proficiency examination.

The complaint

3. The author argues that the Latvian courts denied her the protection of law in her efforts to challenge the actions and decisions of the Naturalization Board, inter alia, to provide her with copies of her written language proficiency examination, contrary to article 14, paragraph 1, of the Covenant. The Supreme Court Senate, in particular, by not directing the Naturalization Board to provide her with these materials, deprived her of the possibility to bring a lawsuit against the Naturalization Board, with a view to challenging the results of her language proficiency examination in court.

The State party's observations on admissibility and the merits

4.1 On 26 May 2004, the State party contested both admissibility and merits of the communication. On admissibility, it argues that the communication is inadmissible under article 2 of the Optional Protocol for failure to exhaust available domestic remedies. On the merits, it argues that Latvian law provides for effective access to the courts with a view to appealing any decision of the Naturalization Board, including in the present case.

4.2 The State party notes that the author did not exhaust procedures governing the disclosure of restricted information in cases like author's. This procedure is set out in Regulation No. 275. In order to ensure implementation of the Law and the above Regulation, the head of the Naturalization Board adopted order No. 369. Annex 1 of the Order sets out a list of restricted information, which includes documents relating to the examination of the Latvian language proficiency. In addition, the Order spelled out what is set out in Regulation No. 275, under which restricted information may be disclosed only with the written consent of the head or deputy head of the Naturalization Board. Annex 2 of the Order is a form to be used for submitting a request.

4.3 The State party recalls that despite having been informed about the procedure many times,[3] the author never submitted a written request to the head of the Naturalization Board in accordance with the procedure. By rejecting her complaint, the local courts referred to the above procedure. Had the author submitted her written request to the Naturalization Board by filling in the form to be used, the Board would have examined her request and would have replied to her whether her interest to receive the information overweighed the public interest for

non-disclosure. Thus, the author's allegation that non-disclosure by the Naturalization Board of a copy of her language proficiency examination deprived her of access to the courts is inadmissible.

4.4 Alternatively, the State party submits that when the author's case was considered, Latvian law afforded the author with an effective remedy to appeal the decision of the Naturalization Board of 26 June 2001 to a court. Under article 239 (2) of the Civil Procedure Code (hereinafter, CPC), she could submit to a court a complaint against any action (decision) of a government authority. Under article 239 (3) of the same Code, a complaint to a court should be submitted within one month from the date of the notification of the prior complaint to the competent administrative authority, or within one month starting from the date of the contested act. If the court considers that the challenged act violates the individual's rights, it would adopt a decision directing competent authority to remedy the violation.[4]

4.5 The State party does not see any obstacle which precluded the author from availing herself of the above procedure. As to her claim that non-disclosure of the materials relating to the language proficiency examination denied her the possibility to bring a law suit against the Naturalization Board and thus effective access to court, the State party notes that it is not necessary for a person appealing the evaluation of his/her proficiency examination either in an administrative authority or in a court to receive a copy of the examination. Under article 239 (5) of the CPC, a court shall examine the materials of the authorities or officials who took the contested action. Had the author appealed the decision of the Naturalization Board to a court, that court would have requested the evaluation of the written examination by the Examination Commission, as well as by the Appeal Commission of the Naturalization Board. On the basis of such evidence, the court would have effectively examined the author's allegation.

Author's comments on the State party's observations

5.1 On 20 July 2004, the author commented on the State party's observations. She reiterates her claims and refutes the State party's argument that she could have challenged the decision of the Naturalization Board of 26 June 2001 in court, since she was unable to provide the court with a copy of the contested materials related to her language proficiency examination.

5.2 The author challenges the State party's assertion that she failed to exhaust all available domestic remedies, because she appealed to all levels of judicial and prosecutorial authorities in Latvia. She submits that the judges and prosecutors, by taking actions and decisions on her case violated various provisions of the Latvian CPC, the Law on judicial authority and the Law on the Prosecutor's Office.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

6.3 The Committee has noted the State party's objections to the admissibility of the communication for failure to exhaust domestic remedies and the author's comments thereon. It notes the author's claim that by not obliging the Naturalization Board to provide her with materials relating to her language proficiency examination, the courts deprived her of the possibility to bring a lawsuit against the Naturalization Board, to challenge the results. The Committee observes that according to the documents before it, neither the author, nor her representative ever submitted a request to the head of the Naturalization Board in accordance with the procedure set out by Latvian law, indicating for what she intended to use the materials related to her naturalization examination.

6.4 Even if the author, as she claims, did not receive a reply from the Naturalization Board of 16 July 2001 which explained the procedure, she was present during the court hearing of 11 September 2001, where the procedure to be followed was explained to her by the judge. This court adjourned the proceedings to allow her to avail herself of this procedure. In the absence of any proper request from the author to the head of the Naturalization Board, the Committee considers that her claim that the State party's courts denied her the possibility to act judicially against the Naturalization Board and to challenge the results of her language proficiency examination, is premature and hypothetical. As the author has not, in any meaningful detail, refuted the State party's argument that it would have been possible for the author to challenge the evaluation of the language proficiency examination in court, without having to produce in court a copy of the contested results of the examination, the Committee concludes that the author has failed to exhaust available domestic remedies and that the communication is inadmissible under 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 this decision shall be communicated to the State party and to the author.

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

Notes

[1] Although the author did not invoke any specific Covenant's provisions in her initial communication of 4 October 2003, the State party chose to submit its observations on the alleged violation of article 14, paragraph 1, and, in the submissions received on 26 July 2004, the author herself was commenting on the violation of article 14.

[2] The Optional Protocol entered into force for the State party on 22 September 1994.

[3] Reference is made to the letters of the Naturalization Board of 16 July 2001 and 17 September 2001 addressed to the author; transcript of the hearing in the Liepâja first instance court of 11 September 2001.

[4] Reference is made to article 239 (7) of the CPC.

K. Communication No. 1234/2003, *Kazmi v. Canada**
(Decision adopted on 20 March 2007, Eighty-ninth session)

Submitted by:	Ms. P.K. (represented by counsel, Stewart Istvanffy)
Alleged victim:	The author
State party:	Canada
Date of communication:	5 December 2003 (initial submission)
Subject matter:	Deportation of complainant to Pakistan
Procedural issues:	Inadmissibility ratione materiae, non re-evaluation of facts and evidence, accessory character of article 2
Substantive issues:	Notion of "suit at law"
Articles of the Covenant:	2; 6; 7; and 14
Articles of the Optional Protocol:	2 and 3

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

Meeting on 20 March 2007,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Ms. P.K., a Pakistani citizen born in 1953 in Karachi, currently in hiding in Pakistan, after her deportation from Canada. She claims to be a victim of violations by Canada[1] of article 2; article 6; article 7 and article 14 of the International Covenant on Civil and Political Rights. She is represented by counsel, Stewart Istvanffy.

1.2 On 5 December 2003, in the light of the allegation by counsel that the alleged victim was subject to an imminent risk of deportation, the State party was requested, at its earliest convenience, to inform the Committee whether there was a risk that the alleged victim would be forcibly removed from Canada prior to the submission of the State party's observations on the admissibility and merits of the communication.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada and Sir Nigel Rodley.

1.3 On 9 January 2004, in view of the State party's reply dated 8 January 2004, and taking into account the fact that the author had gone into hiding, the Special Rapporteur on New Communications and Interim Measures denied the author's request for interim measures to prevent her deportation from Canada to Pakistan. This was without prejudice to any future request for interim measures if the author was likely to be apprehended by the authorities.

Factual background

2.1 Until November 1998, the author lived in Karachi with her husband and six children. She is a former member of the Mohajir Quami Movement (MQM) in Karachi, Pakistan, where she took part in its women related activities. In 1998, after the rape of one of her relatives by Mr. S., a top leader of MQM, she quit the party, became a member of the Pakistan Peoples Party (PPP) and publicly criticized the abusive behaviour of Mr. S., who was backed by MQM armed gangs. She was allegedly a victim of an attempted sexual assault and murder by Mr. S. in August 1998, who thereafter constantly threatened her and her relatives, and persecuted her with the help of MQM members and police officers. The police did not act on her complaints against Mr. S. Because of threats to her life, she fled to Canada where she arrived on 3 November 1998.

2.2 On 6 January 1999, she applied for asylum, which was denied on 25 November 1999 by the Refugee Division of the Immigration and Refugee Board (the Board), on the grounds that she was not credible, as her testimony about the events in her country was "often evasive, hesitant, confused and full of contradictions, inconsistencies and improbabilities". Her application for leave to apply for judicial review of the Board's decision was denied by the Federal Court on 15 May 2000. In 2001, the author tried to commit suicide on three occasions.

2.3 On 24 April 2003, the author applied for a Pre-Removal Risk Assessment (PRRA), which was found to be negative on 9 October 2003. The PRRA Officer considered that the author would not be subject to risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment if returned to Pakistan. The officer noted that the author's reasons for leaving Pakistan were not political but rather the result of a common crime perpetuated by an individual. Furthermore, the author had not made a link between her situation and the reported general situation of women in Pakistan, on which she had relied. Finally there were inconsistencies in some of the author's supporting documentation, none of which supported a finding that she would be at risk in Pakistan.

2.4 The author applied for permanent residence in Canada on humanitarian and compassionate grounds (H&C), based on allegations of personal risk in Pakistan. Her application was denied on 9 October 2003, on the grounds that it could not be concluded that the State protection for the author was inadequate in Pakistan, and that even if she was victimized by the individual who had allegedly threatened her, that would be a common crime motivated by a personal grudge against her as an individual.

2.5 On 15 November 2003, the author requested judicial review of this decision and requested a stay of deportation in the Federal Court, a remedy without suspensive effect. On 2 December 2003, the request for stay of deportation was denied. On 6 December, the author failed to appear for her scheduled removal, and an arrest warrant was issued.

2.6 On 1 March 2004, the author turned herself in to the Canadian immigration authorities. She was released on condition that she present herself for deportation on 5 March 2004, and was deported without escort on this date.

The complaint

3.1 The author initially claimed that her deportation to Pakistan would constitute, and later did constitute, a violation of article 6 and article 7 of the Covenant, since she has been placed at severe risk of mistreatment and torture in her country, where the military and the police are routinely persecuting political activists. Moreover she would be subjected to arrest, detention, beatings, torture or even execution at the hands of the Pakistani police, because of her religious origin and her real or assumed political beliefs.

3.2 The author requests the Committee to examine the quantity and quality of the evidence in support of her case. She claims that domestic proceedings leading to the removal order against her violated article 2 and article 14 of the Covenant, as there was no fair and independent examination of the case before ordering deportation and the order of deportation is based on a presumption that all refugee claimants are lying or abusing the system. She claims that the current PRRA procedure and humanitarian review procedures do not respect the right to a remedy.[2]

The State party's observations

4.1 On 27 May 2004, the State party commented on the admissibility and merits of the communication. On admissibility, it recalls that while a complainant need not prove his or her case, he or she must submit sufficient evidence in substantiation of his or her allegations to constitute a prima facie case. It submits that the author has failed to make at a prima facie with respect to her allegations under articles 6 and 7. With reference to the author's claim under these articles the State party contends that in fact the actual basis of her communication is her fear of Mr. S. Because of his actions, she allegedly quit the MQM party and joined the PPP.

4.2 The State party submits that the author's allegations are not credible and refers to the Immigration and Refugee Board's determination to that effect. The Board had doubts with regard to the facts relating to Mr. S. and to the fact that she was a PPP activist. It is not within the scope of review by the Committee to re-evaluate findings of credibility made by competent domestic tribunals. The state party invokes the Committee's settled jurisprudence that it cannot re-evaluate facts and evidence unless it is manifest that the evaluation was arbitrary or amounted to a denial of justice. The author has made no such allegations and the material submitted does not support a finding that the Board's decision suffered from such defects. Furthermore, both the Immigration and Refugee Board and a specially trained PRRA Officer determined that there was no serious possibility that the author would be at risk of persecution if sent back to Pakistan.

4.3 With respect to the documents submitted by the author which describe the human rights situation in Pakistan, the State party submits that the author has not demonstrated that she would be at "personal risk" in Pakistan. She has alleged not that she fears rape by Mr. S. but that she has been "targeted for detention or death by this man and his political party". So far as the State

party is concerned she has not established that Pakistan does not protect its citizens against such acts by non-state agents. With regards to her fear of reprisals from MQM members because of her alleged membership in a rival party, it is submitted that she has not established that the State would not or could not protect her against MQM.

4.4 With respect to the claim under article 6 of a violation of her right to life, the State party submits that the author has not substantiated her allegation, even on a prima facie basis, that "the necessary and foreseeable consequence of the deportation" [3] would be that she would be killed if returned to Pakistan or that the State could not protect her. It concludes that the claim under article 6 should be declared inadmissible.

4.5 With respect to the allegations under article 7, the State party asserts that the author's allegations do not establish a risk to a level beyond mere theory or suspicion, and do not substantiate a real personal risk of torture. It is not sufficient to show that women in Pakistan suffer from discrimination and abuses without providing a prima facie basis for believing that the author herself is at substantial risk of acts which meet the definition of torture or which amount to cruel, inhuman or degrading treatment or punishment.

4.6 The State party refers to the definition of "torture" in Article 1 of the Convention against Torture, which requires severe pain or suffering and also state involvement or acquiescence. It submits that in applying article 7 of the Covenant in situations such as the author's, where the alleged agent of persecution is a non-state actor, a higher threshold of evidence is required, and refers to the jurisprudence of the European Court of Human Rights to this effect[4].

4.7 The State party emphasizes that the author has not established that state protection would be unavailable or ineffective. Her evidence that she complained to the police about Mr. S. was considered "very vague" by the Board. The Board considered it implausible that the police would not protect her against a member of an opposition party. The State party concludes that the author has not substantiated, even on a prima facie basis, that there is a real risk that her rights as guaranteed by Article 7 would be violated by her removal to Pakistan. Even if the allegation that she fears mistreatment by an individual were true, she has failed to establish that Pakistan is unwilling or unable to protect her.

4.8 With respect to the claims under article 2, the State party submits that her claims are incompatible with the provisions of the Covenant, because article 2 does not recognize an independently available right to a remedy. It refers to the Committee's jurisprudence[5] that under article 2, the right to a remedy arises only after a violation of a Covenant right has been established and argues that consequently this claim is inadmissible.

4.9 With reference to article 14, the State party argues that refugee and protection determination proceedings do not fall into the category of either criminal charge or suit at law covered by article 14. Rather, they are in the nature of public law, and the fairness of these proceedings is guaranteed by article 13. The State party submits that, given the equivalence of article 6 of the European Convention on Human Rights and article 14 of the Covenant, the European Court's case law is persuasive. The European Court considered that the decision whether or not to authorize an alien to stay in a country of which he is not a national does not entail any determination of his civil rights or obligations or of any criminal charge against him within the meaning of article 6, paragraph 1, of the European Convention.[6] The State party accordingly concludes that this claim is inadmissible *ratione materiae* under the Covenant.

4.10 In the alternative, the State party contends that the immigration proceedings satisfy the guarantees of article 14. The author had her case heard by an independent tribunal, was represented by counsel, had access to judicial review of the negative refugee determination and had access to both the PRRA and H&C processes, including judicial review of those decisions.

4.11 On the author's general criticism of the refugee determination process and the scope of judicial review, the State party argues that it is not within the scope of review of the Committee to consider the Canadian refugee determination system in general, but only to examine whether in the present case it complied with its obligations under the Covenant.

4.12 Finally the State party submits that the Committee should not substitute its own finding on whether the author would reasonably be at risk of treatment in violation of the Covenant upon return to Pakistan, since the national proceedings disclose no manifest error or unreasonableness and are tainted by abuse of process, bias or serious irregularities. It is for the national courts of the States parties to evaluate the facts and evidence in a particular case. The Committee should refrain from becoming a "fourth instance" tribunal competent to re-evaluate findings of fact or review the application of domestic legislation.

Authors' comments

5.1 On 12 November 2004, counsel indicated that further to her state of post-traumatic stress and deep depression and as a result of her illegal situation, the author asked to be deported and returned to Pakistan in early March 2004, to see her family. Through her husband, counsel learned that upon her return to Pakistan, she received death threats and went into hiding. Her family expressed the wish to continue proceedings before the Committee.

5.2 On 23 March 2006, counsel commented on the State party's submission. He indicates that he has received e-mails from the immediate family of the author, and argues that her life is still seriously threatened. He claims that the agent of persecution is a high-ranking member of the governing party in Karachi, and not simply a private individual. This has consistently been interpreted as being state persecution in refugee rights jurisprudence.

5.3 Counsel affirms that the author is threatened by powerful politicians in Karachi, in a country where women receive no protection from the authorities in this type of situation. He refers to reports of international human rights organizations which underline the failure of Pakistan to prevent, investigate and punish abuses of women's rights by state agents and private actors.

5.4 On the personal risk faced by the author, counsel refers to evidence submitted during the PRRA proceedings, which included a letter from a lawyer in Karachi confirming the main facts, and an affidavit of her cousin who was raped by Mr. S., a letter from the women's wing of the PPP and two letters from her husband. Counsel also submitted evidence concerning the danger for women in situations such as the author's, as well as extracts from the author's medical and psychological files following her suicide attempts. Counsel claims that sending the author back to Pakistan, where the abuse of women's rights is met with impunity, is like a death sentence.

5.5 Counsel argues that the PRRA process does not respect the guarantees of the Canadian Charter of Rights and Freedoms and international obligations. He reiterates his claim that there is no effective remedy before the Federal Court or within the PRRA procedure, to ensure the enforcement of the international prohibition against return to torture.

5.6 With regards to judicial review by the Federal Court, counsel argues that this court has generally restricted itself to a role of control of the procedures rather than a control of the substance of Canada's international human rights obligations.

State party's supplementary submissions

6.1 On 31 August 2006, the State party commented on counsel's submissions. It argues that the author's voluntary return to Pakistan is indicative of a lack of subjective fear of persecution or death in Pakistan. It invokes the definition of "refugee" within the meaning of the 1951 Convention Relating to the Status of Refugees, which requires, inter alia, that a refugee be unwilling to avail herself, due to a well-founded fear of persecution, of the protection of her country of nationality. According to article 1C of the Convention, refugee protection ceases when a refugee voluntarily re-avails herself of the protection of her country or has voluntarily re-established herself in her country.

6.2 The State party argues that this principle of voluntary return applies equally to the author's allegations under articles 6 and 7 of the Covenant that her removal to Pakistan put her at risk of death or torture, cruel, inhuman or degrading treatment or punishment. If her fear of return had been genuine, even if she did not wish to remain in hiding, she could have turned herself in while at the same time renewing her request for interim measures to the Committee.

6.3 The State party endorses the authorities' findings that the author is not at risk in Pakistan. In the alternative, it submits that the fact that she has been able to avoid harm is conclusive evidence of the existence of an "internal flight alternative" within Pakistan. The fact that she may not be able to return to the family home does not amount to a violation of article 7 of the Covenant.

6.4 With respect to the e-mails from the author's family, the State party argues that e-mail evidence does not establish that the author is at real risk in Pakistan. In particular, the e-mails suggest that the author may be living apart from her family as a result of marital problems, and not due to an alleged fear of a third party. The author's daughters wrote to counsel that their father is angry with their mother.

6.5 The State party points out that there is no indication from counsel what happened after the daughters urged him to give them his phone number so that the author could call him from her mobile, in March 2005. It questions the fact that despite the author's access to a mobile phone and widespread internet access in Karachi, counsel has been unable to have any contact with her. Counsel's selective presentation of evidence, and in particular the absence of any information about the author since March 2005, indicates that there is in fact no evidence which would support a finding that the author's removal to Pakistan was in violation of any of her rights under the Covenant.

6.6 On counsel's criticisms of various aspects of the Canadian refugee determination system, the State party reiterates that it is not within the scope of review of the Committee to consider the Canadian system in general.

Issues and proceedings before the Committee

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

7.2 The Committee notes that the State party challenges the admissibility of the entire communication. In respect of the author's claims under articles 6 and 7, the Committee recalls that States parties are under an obligation not to expose individuals to a real risk of being killed or subjected to torture or cruel, inhuman or degrading treatment or punishment upon entering in another country by way of their extradition, expulsion or refoulement.[7] It also notes that the Refugee Division of the Immigration and Refugee Board, after a through examination, rejected the asylum application of the author on the basis of lack of credibility of the author. The author's application for leave for appeal was rejected by the Federal Court. The Pre-Removal Risk Assessment Officer (A) found that there was no serious reason to believe that her life would be at risk or that she would be the victim of cruel and unusual punishment or treatment. Finally, the author's application for permanent residence in the State party on humanitarian and compassionate grounds (H&C) was rejected as it could not be said that State protection for the author was inadequate in Pakistan.

7.3 The Committee recalls its jurisprudence that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice[8]. The material before the Committee does not show that the proceedings before the authorities in the State party suffered from any such defects. The Committee accordingly considers that the author has failed to substantiate her claims under articles 6 and 7, for purposes of admissibility, and it concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.4 As to the author's allegation under article 14 that she was not afforded an effective remedy, the Committee has noted the State party's argument that deportation proceedings do not involve either "the determination of any criminal charge" or "rights and obligations in a suit at law". The Committee observes that the author has not been charged or convicted for any crime in the State party and that her deportation is not by way of sanction imposed as a result of a criminal proceeding. The Committee accordingly concludes that the author's refugee determination proceedings do not constitute determination of a "criminal charge" within the meaning of article 14.

7.5 The Committee recalls that the concept of a "suit at law" under article 14, paragraph 1, of the Covenant is based on the nature of the right in question rather than on the status of one of the parties.[9] In the present case, the proceedings relate to the author's right to receive protection in the State party's territory. The Committee considers that proceedings relating to an alien's expulsion, the guarantees in regard to which are governed by article 13 of the Covenant, do not also fall within the ambit of a determination of "rights and obligations in a suit at law", within

the meaning of article 14, paragraph 1. It concludes that the deportation proceedings of the author do not fall within the scope of article 14, paragraph 1, and are inadmissible ratione materiae pursuant to article 3 of the Optional Protocol.

7.6 With regard to the author's claims under article 2 of the Covenant, the Committee recalls that the provisions of article 2 of the Covenant, which lay down general obligations for State parties, cannot, by themselves and standing alone give rise to a claim in a communication under the Optional Protocol. The Committee considers that the author's claim to this effect cannot be sustained, and that accordingly it is inadmissible under article 2 of the Optional Protocol.

8. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

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

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

Notes

[1] The Covenant and the Optional Protocol entered into force for Canada on 19 August 1976.

[2] Counsel refers to the case of *Chahal v. United Kingdom*, European Court of Human Rights, Judgement of 15 November 1996, paragraphs 151 and 152, and invites the Committee to adopt the ECHR's interpretation:

> "151. In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant the expulsion or to any perceived threat to the national security of the expelling State.
>
> 152. Such scrutiny need not be provided by a judicial authority but, if it is not, the powers and guarantees which it affords are relevant to determining whether the remedy before it is effective."

[3] See communication No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997, paras. 6.11 to 6.13, and communication No. 706/1996, *G.T. v. Australia,* Views adopted on 4 November 1997, paras. 8.1 and 8.2.

[4] *Bensaid v. The United Kingdom,* application No. 44599/98 (6 February 2001), para. 40.

[5] See communication No. 275/1988, *S.E. v. Argentina*, inadmissibility decision of 26 March 1990, para. 5.3.

[6] *Maaouia v. France,* application No. 39652/98 (5 October 2000).

[7] See communication No. 1302/2004, *Khan v. Canada*, inadmissibility decision of 25 July 2006, para. 5.4.

[8] See for example communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, para. 6.2.

[9] Communication No. 112/1981, *Y.L. v. Canada*, inadmissibility decision adopted on 8 April 1986, para. 9.1 and 9.2; communication No. 441/1990, *Casanovas v. France*, Views adopted on 19 July 1994, para. 5.2; communication No. 1030/2001, *Dimitrov v. Bulgaria*, decision on admissibility adopted on 28 October 2005, para. 8.3.

L. Communication No. 1285/2004, *Klečkovski v. Lithuania** (Decision adopted on 24 July 2007, Ninetieth session)

Submitted by:	Michal Klečkovski (represented by counsel, Henrikas Mickevičius)
Alleged victim:	The author
State party:	Lithuania
Date of communication:	4 May 2004 (initial submission)
Subject matter:	Spelling of author's name according to Polish orthography in identity documents
Procedural issue:	Non-exhaustion of domestic remedies
Substantive issues:	Arbitrary and unlawful interference with private life; prohibition of discrimination; protection of minorities
Articles of the Covenant:	17, alone and read with 2; 26 and 27
Articles of the Optional Protocol:	2; 3; 5, paragraph 2 (b)

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

Meeting on 24 July 2007,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 4 May 2004, is Michal Klečkovski, a Lithuanian citizen of Polish origin, currently residing in Lithuania. He claims to be a victim of violations of article 17, read alone and in conjunction with article 2, article 26 and article 27 of the Covenant the International Covenant on Civil and Political Rights by Lithuania. He is represented by counsel, Henrikas Mickevičius. The Covenant and its Optional Protocol entered into force for Lithuania on 20 February 1992.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

Facts as presented by the author

2.1 The author is an ethnic Pole who was born on 7 December 1969 in Lithuania. At his birth, he was given the first name *Michał* and acquired the family name *Kleczkowski.* Both names could be spelt in Russian in official documents. Indeed, until the end of the Soviet rule in 1991, the author's name was recorded officially in Lithuanian ("Michal Klečkovski") and in Russian. Since 1991, the author has only been able to use his name as spelt in Lithuanian. The pronunciation remains the same as for the Polish spelling.

2.2 The author has sought unsuccessfully to have his name officially recorded in his Lithuanian passport in accordance with the Polish spelling, namely "Michał Kleczkowski", instead of the Lithuanian orthography. On 18 December 2003, the author applied to the relevant administrative agency, i.e. the police, to have the name in his passport changed to the Polish spelling. This application was rejected on 24 December 2003 on the ground that the Resolution of the Supreme Council of 31 January 1991 on the writing of names and family names in passports of citizens of the Republic of Lithuania stipulates that for individuals born in Lithuania, names must be spelt according to Lithuanian orthography. In contrast, naturalized Lithuanians may continue to use the spelling of their mother language.

The complaint

3.1 The author claims that the legal requirement of the Lithuanian spelling of his name in official documents disregards an essential element of his identity and constitutes a breach of his rights under article 17, read alone and together with article 2, article 26 and article 27 of the Covenant.

3.2 With regard to article 17, the author argues that his right to have his name spelt according to the correct Polish spelling is an integral part of his right not to be subjected to arbitrary or unlawful interference with his privacy. He recalls that the Committee has held that a person's name constitutes an important component of one's identity and that the protection against arbitrary or unlawful interference with one's privacy includes the protection against arbitrary or unlawful interference with the right to choose and to change one's own name.[1] In the present case, the author considers that he was forced to change his name to comply with Lithuanian spelling.

3.3 The author considers that such interference with his privacy is arbitrary, and explains that the Lithuanian spelling of his name "looks and sounds odd" as it does not reflect a Lithuanian name or a Polish name. It gives rise to delays in the author's mail, ridicule, and difficulties in proving his relationship with other family members abroad. He submits that in several European countries, it is possible to recognize the names of people belonging to minorities without placing an undue burden on the State. In fact, the spelling *Kleczkowski* is recognized in several countries such as Austria, France and the United States of America.

3.4 The author argues that the requirement to use Lithuanian orthography in the official spelling of his name is unreasonable and that other less restrictive alternatives are available. For instance, he could be offered the opportunity to spell his name in accordance with both the official language and his native language. Alternatively, since the only letters in the Polish

spelling in the author's name which are not part of the Lithuanian alphabet are 'ł' and 'w' (even though these letters are widely used in daily language), a less restrictive spelling, e.g. *Michal Kleczkovski*, could be a compromise solution.

3.5 With regard to article 17, read in conjunction with article 2, paragraph 1, the author claims that he is discriminated against because Lithuanian citizens of Lithuanian ethnic origin can use the native spelling of their names. Moreover, naturalized Lithuanians can retain the spelling used in their previous State of nationality. With regard to article 26, the author adds that he is discriminated against in comparison to naturalized Lithuanians.

3.6 With regard to article 27, the author argues that a personal name, including the way it is spelt, constitutes an essential element in the culture of any ethnic, religious or linguistic community. According to the Committee, any restrictions imposed upon the enjoyment of one's own culture and use of one's own language have to be consistent with the other provisions of the Covenant, read as a whole, reasonable and objective.[2] The author considers that the restrictions imposed on the spelling of his name do not fulfil these criteria. Moreover, he considers this attitude as a form of forced assimilation of the Polish minority.

3.7 The author considers that there are no available and effective domestic remedies since on 21 October 1999, the Constitutional Court upheld the constitutionality of the Resolution of the Supreme Council of 31 January 1991 on the writing of names and family names in passports of citizens of the Republic of Lithuania. The applicant in that case was the author's uncle, Tadeuš Klečkovski.

State party's submissions on admissibility

4.1 On 9 July 2004, the State party challenged the admissibility of the communication. Firstly, it argues that the complaint under article 17 should be held inadmissible under article 3 of the Optional Protocol as incompatible *ratione materiae*. Article 17 does not cover or establish any specific rules or principles for writing names in identity documents. The regulation of surnames is a matter of public order and restrictions are therefore permissible.[3]

4.2 With regard to article 17, read in conjunction with article 2, the State party recalls that article 2 does not have an autonomous character and submits that this part of the communication is also inadmissible under article 3 of the Optional Protocol.

4.3 With regard to article 26, the State party considers that this claim is not substantiated since the Resolution of the Supreme Council of 31 January 1991 on the writing of names and family names in passports of citizens of Lithuania clearly imposes that the name and family name of an individual shall be written in Lithuanian letters in passports of all Lithuanian citizens without exception.

4.4 With regard to the alleged violation of article 27, the State party argues that this claim is manifestly ill-founded within the meaning of article 2 of the Optional Protocol. It believes that the writing of entries in identity documents in the state language does not deny in any way the right of members of national minorities the right to enjoy their own culture or to use their own language, including writing their names and family names in any language as long as it is not linked with the sphere of the use of the state language as an official language, which is clearly regulated by the 1995 Law on the State language.

4.5 The State party argues that the communication is manifestly ill-founded because the author's uncle, Tadeuš Klečkovski, previously submitted the same matter to the European Court of Human Rights which declared it inadmissible on 31 May 2001 as manifestly ill-founded and not disclosing any appearance of a violation of article 8 of the European Convention on Human Rights (right to privacy), taken alone or in conjunction with article 14 (principle of non-discrimination in the enjoyment of the Convention rights). While previous examination of the same matter under another international procedure does not automatically preclude that matter from being examined by the Committee, the State party considers that to the extent that the European Convention on Human Rights and the Covenant are commensurate in terms of the wording and meaning of their provisions, and the approaches of the respective supervisory organs in the application thereof, the communication does not disclose any appearance of a violation of the Covenant.

4.6 For the State party, the author has not exhausted domestic remedies since he has not brought his complaint before the national administrative courts. He could have applied to a Regional Administrative Court with a complaint relating to the lawfulness of the decision taken by the Migration Unit of the Territorial Police Commissariat on 24 December 2003. While the Constitutional Court upheld on 21 October 1999 the constitutionality of the Resolution of the Supreme Council of 31 January 1991 on the writing of names and family names in passports of citizens of the Republic of Lithuania, the State party considers that this decision did not prevent the author from availing himself of effective domestic remedies.

Author's comments on the State party's submissions on admissibility

5.1 On 29 October 2004, the author reiterates that protection against arbitrary or unlawful interference with the right to choose and change one's name is covered by article 17 of the Covenant. With regard to the State party's argument that his claim under article 26 is unsubstantiated, he submits that individuals whose mother tongue coincided with the official language are not affected by the 1991 Resolution. This raises the question of whether the author who is refused an opportunity to opt for a native spelling of his name is treated in a discriminatory manner in comparison with individuals who have this opportunity.

5.2 With regard to the argument of the State party that his claim under article 27 is manifestly ill-founded, the author argues that denying the spelling of his name in his mother tongue is detrimental to his identity, as the name no longer reflects his ethnic origin.

5.3 On the issue of non-exhaustion of domestic remedies, the author recalls that the decision of the Constitutional Court of 21 October 1999 is binding on all lower courts: any appeal against the administrative decision on his case would have been futile.

State party's submissions on merits

6.1 On 11 November 2004, the State party argues that there is no violation of article 17, taken alone or in conjunction with article 2. The individual's right relating to the use of names is not an absolute right and interference with the author's right to respect for his privacy constitutes a breach under article 17 unless it can be justified as lawful and not arbitrary. The competent authorities acted in conformity with the relevant legislation, i.e. the laws on passport and identity cards, as well as the 1991 Resolution. Moreover, the refusal to enter the name and family name

into an official document using Polish characters was reasonable. Nothing prevents the author from using his name and family name written in Polish characters in all his private dealings or in his signature. The Lithuanian alphabet does not contain Polish characters, but it also does not contain German, English, Chinese and other characters. The use of the State language in passports can be reasonably expected and justified. The State party argues that article 2 does not have an autonomous character and that the alleged violation of article 17 in conjunction with article 2 is ill-founded.

6.2 On article 26, the State party argues that it has not been shown that the differentiation of treatment between citizens who were born in the country and naturalized citizens discloses a discrimination pattern. The 1991 Resolution does not provide the legal basis for writing of names or family names in any other language than Lithuanian. Information included on the identity card and passport of all citizens shall be recorded in Lithuanian letters. The author has not substantiated his allegation that the legal regulation of the writing of names and family names of naturalized citizens discriminates against non-Lithuanian national citizens.

6.3 On article 27, the State party invokes general comment No. 23 (1994) in which the Committee referred to "the right of individuals belonging to a linguistic minority to use their language among themselves, in private or in public". In the present case, the author was not precluded from using his language in community with other members of the minority group "among themselves". It is reasonable to suggest that the use of names by and before the authorities should be distinguished from the use of names by members of minorities among themselves. The State party refers to the Explanatory Note to the 1998 Oslo Recommendations on the Linguistic Rights of National Minorities which mentions that "public authorities would be justified in using the script of the official language or languages of the State to record the names of persons belonging to national minorities in their phonetic form". The Lithuanian spelling of the author's name merely uses the script of the official language to record the name of a person belonging to a national minority in its phonetic form, since the sounds 'sz', 'cz' and 'w' in Polish are transcribed as 'š', 'č' and 'v' in Lithuanian. Consequently, domestic law and practice on the recording of names of persons belonging to linguistic minorities comply with article 27 of the Covenant.

Author's comments on the State party's submissions on merits

7.1 On 11 December 2006, the author reiterates that the imposed restriction on the writing of his name is inconsistent with article 17, and that a personal name, including the way it is spelt, is an essential element of personal identity. The author's personal name indicates that he belongs to a national minority. While he agrees that he can use his personal name in his native language in private dealings, he challenges the State party's refusal to use the native spelling of his personal name in official documents.

7.2 The author emphasizes that his request is restricted to the use of his mother tongue, Polish. Polish and Lithuanian are similar languages. A number of European States allow the use of other than official languages for public purposes, including the characterization of personal names in official documents using Latin spelling.

7.3 The author notes that draft legislation was proposed in 2005 "on writing of names and family names in documents". The bill was not adopted by Parliament, but the proposed legislation did provide that non-Lithuanian personal names written in Latin alphabet would be used in original form, except the letters that are absent in the Lithuanian language. In accordance with this solution, the author's name would be spelt *Michal Kleczkowski*, which would clearly indicate his ethnic identity.

Issues and proceedings before the committee

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules and procedures, decide whether or not it is admissible under the Optional Protocol of the Covenant.

8.2 The Committee notes that the author's uncle has brought a similar claim to the European Court of Human Rights which declared it inadmissible on 31 May 2001 (see paragraph 4.5 above). It recalls that the concept of "the same matter" within the meaning of article 5, paragraph 2 (a), has to be understood as including the same claim concerning the same individual before the other international body.[4] The present communication has been submitted by the same individual. Even if the same matter had already been examined by the European Court of Human Rights, the Committee notes that the State party has not entered a reservation to article 5, paragraph 2 (a), to preclude that matter from being examined by the Committee. Accordingly, it has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

8.3 With regard to the claim that the author's name should be spelt using Polish characters, the Committee considers that the author has not substantiated any claim under the Covenant. It thus finds that this part of the communication is inadmissible under article 2 of the Optional Protocol.

8.4 With regard to the author's claim that the spelling of his name should be modified so as to reflect his Polish origins, while only using Lithuanian letters (see paragraph 3.4 above), the Committee notes that the author has never presented this claim to the national authorities. In the circumstances, the Committee finds that article 5, paragraph 2 (b), of the Optional Protocol does preclude it from considering of the communication.

9. Accordingly, the Committee decides:

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

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

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

Notes

[1] See communication No. 453/1991, *Coeriel and Aurik v. The Netherlands*, Views adopted on 31 October 1994, para. 10.2.

[2] See communication No. 24/1977, *Lovelace v. Canada*, Views adopted on 30 July 1981, para. 16; and communication No. 197/1985, *Kitok v. Sweden*, Views adopted on 27 July 1988, para. 9.8.

[3] See communication No. 453/1991, *Coeriel and Aurik v. The Netherlands*, Views adopted on 31 October 1994, para. 6.1. See also European Court of Human Rights, *Burghartz v. Switzerland*, application No. 16213/90, judgement of 24 February 1994, para. 24; and *Stjerna v. Finland*, application No. 18131/91, judgement of 25 November 1994, paras. 37 and 39.

[4] See communication No. 75/1980, *Fanali v. Italy*, Views adopted on 31 March 1983, para. 7.2; and communication No. 1155/2003, *Leirvag and others v. Norway*, Views adopted on 3 November 2004, para. 13.3.

M. Communication No. 1305/2004, *Villamón v. Spain**
(Decision adopted on 31 October 2006, Eighty-eighth session)

Submitted by:	Víctor Villamón Ventura (represented by counsel, José Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	26 September 2001 (initial submission)
Subject matter:	Conviction of the author on insufficient evidence
Procedural issue:	Failure to substantiate claims
Substantive issue:	Failure of the court of second instance to reconsider the facts
Article of the Covenant:	14, paragraph 5
Article of the Optional Protocol:	2

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

Meeting on 31 October 2006,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 26 September 2001, is Mr. Víctor Villamón Ventura, a Spanish national born in 1930 and now retired. He claims to be the victim of a violation by Spain of articles 14, paragraph 5, and 26 of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by counsel, Mr. José Luis Mazón Costa.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

Factual background

2.1 On 21 September 1993, the author complained to the police that he had been threatened by a former neighbour, who accused him of sexually abusing his 10-year-old daughter. As a result of the complaint, the police launched an investigation that led to a criminal trial on charges of sexual assault of three minors, S.S.V. (born 3 October 1983), A.S.V. (born 22 February 1985) and M.T.G.P. (born 5 May 1983). The three children, who were friends of the author's daughter, claimed that they had on several occasions between 1991 and 1993 been sexually molested by the author and that he had also exposed his genitals to them.

2.2 On 16 December 1994, the Third Section of the Murcia Provincial Court found the author guilty on three counts of sexual assault, sentencing him to a prison term of one and a half years per count and awarding each child civil damages of 1 million pesetas.

2.3 The author claims that the only evidence produced by the prosecution was the girls' statements, which contained numerous contradictions and completely implausible allegations. He also claims to have been the victim of a conspiracy by the girls. He lists many points in the girls' statements which he considers ridiculous and draws particular attention to the statement made on 23 September 1993 by M.T.G.P., which in his view contains contradictory and/or absurd claims. According to the author, the Provincial Court accepted statements of a vague or very general nature as proven fact.

2.4 On 24 February 1995, the author submitted an appeal in cassation to the Supreme Court, which rejected it in a judgement dated 31 May 1995. In his appeal, the author claimed, among others, a violation of the right to presumption of innocence on the grounds that there was no evidence against him and that the statements made by members of his family showed that the events described as proven fact could not have taken place as stated in the judgement. The author cites the Supreme Court's inadmissibility decision in which the Court gives its view that, provided due account has been taken of logic and past experience, the trial court's assessment of credibility could not be reviewed in cassation.

2.5 In the author's view, the appeal in cassation, a procedure subject to constraints imposed by the Spanish system, which does not allow a review of errors made in the weighing of evidence, did not permit a full reassessment of the credibility of the minors' statements; and given the implausible nature of the girls' testimony he would have been acquitted had he received a genuine second hearing.

2.6 The author is of the view that domestic remedies have been exhausted with the judgement handed down by the Supreme Court. He acknowledges that he has not submitted an application for *amparo* to the Constitutional Court, but maintains that this option is pointless in the light of the Constitutional Court's consistently held position that an appeal to the Supreme Court complies with the requirement for a review established under article 14, paragraph 5, of the Covenant.

The complaint

3. The author claims a denial of his right to a genuine review of his criminal conviction and to non-discrimination in respect of remedies, in violation of articles 14, paragraph 5, and 26 of the Covenant. In the initial communication, the author had also claimed violations of article 14, paragraphs 1 and 2, of the Covenant, but withdrew the complaints relating to these allegations on 10 June 2004.

State party's observations on admissibility and the merits

4.1 By notes verbales dated 30 September 2004 and 31 May 2005, the State party submitted its observations on the admissibility and merits of the communication. The State party argues that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, for non-exhaustion of domestic remedies, inasmuch as there was no application for *amparo*. It also claims that the communication is inadmissible as constituting an abuse of the right to submit communications, inter alia because of the time that elapsed before its submission and its manifest lack of substance.

4.2 In the State party's view, domestic remedies have not been exhausted inasmuch as the Constitutional Court had no opportunity to state its opinion in *amparo* proceedings on the scope of review in cassation in the specific case presented by the author. The State party further argues that the fact that the communication initially invoked the rights to "benefit of the doubt" and equality of arms, a supposed right to a "verbatim record of the trial as a guarantee of due process", the right to transparent, public proceedings and to non-discrimination with regard to remedies highlights the failure to initiate *amparo* proceedings. The State party maintains that the remedy of *amparo* has proved effective, with even the Constitutional Court discussing the differences between the *Gómez Vázquez* case[1] and others in which the remedy of cassation has led to lengthy opinions on points of fact. The State party also draws attention to the evolution of court practice in cassation, a remedy that now clearly provides a review of the evidence examined in the trial court.

4.3 The State party further argues that the communication constitutes a manifest abuse of the right of submission, owing to (a) the timing of its presentation and (b) the fact that a part of it had been withdrawn. It points out that the communication was submitted on 26 September 2001, more than six years after the Supreme Court judgement allegedly constituting the violation, and that on 15 June 2004 nearly all the grounds for the complaint were withdrawn.

4.4 On the merits, and with regard to the Supreme Court ruling, the State party comments that, contrary to what the author claims, the Court reviewed the evidence and concluded that the trial court's consideration thereof had taken due account of logic and past experience and that the testimony of members of the author's family could not be given any greater weight. The grounds adduced for the alleged violation of the author's rights are generic, and do not relate to the case in point.

4.5 The State party maintains that the Supreme Court, in formulating its judgement, responded precisely to the request contained in the author's appeal, taking due account of the report of the trial and reviewing the testimony given by the witnesses. The State party argues that the Supreme Court carried out a review of the evidence. It notes that the author claims in his appeal that the trial court's judgement should be quashed on the sole basis of statements on

circumstantial points made by members of his family in his defence, which he considers sufficient to cast doubt on the consistent testimony of the three minors, which was given separately and without any communication between them, as provided for by law with regard to the examination of witnesses. The State party considers that in this case the Supreme Court had no obligation to take fresh statements from the girls, since the fact that they had been made legally and with all applicable safeguards was never challenged by the author. The author, it concludes, cannot claim to substitute his own assessment of the evidence for the logical, reasoned assessment thereof carried out by the courts.

Author's comments

5.1 With regard to the exhaustion of domestic remedies, the author repeats (27 July 2005) that the Constitutional Court consistently rejects any application for *amparo* made on grounds of failure to provide a second hearing. He refers to the Committee's conclusions on communications Nos. 1156/2003 (*Pérez Escolar v. Spain*, Views of 28 March 2006) and 986/2001 (*Semey v. Spain*, Views of 30 July 2003). According to the author, the Constitutional Court's case law holds the scope of the remedy of cassation to be consistent with the right to a second hearing under article 14, paragraph 5, of the Covenant. He further claims that the Supreme Court summarily rejected his appeal in cassation on 31 May 1995 and that the Constitutional Court's case law, then as now, held that the scope of the remedy of cassation was consistent with the right to a second hearing under article 14, paragraph 5, of the Covenant.

5.2 As to the absence of a proper or complete review of his conviction, the author maintains that it was not possible for the higher court to properly review the credibility of the testimony for the prosecution on which the conviction rested, since it confined itself to a superficial review on the ground of presumption of innocence. He repeats his claim that the girls' statements contained numerous inconsistencies and implausibilities.

Issues and proceedings before the Committee

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

6.2 The Committee has ascertained that the same matter is not being examined under any other international procedure of investigation or settlement, so that the provisions of article 5, paragraph 2 (a), of the Optional Protocol do not preclude its consideration of the complaint.

6.3 The Committee has noted the State party's argument that domestic remedies were not exhausted, since the alleged violations referred to the Committee were never brought before the Constitutional Court. However, the Committee recalls its established jurisprudence that it is only necessary to exhaust those remedies that have a reasonable prospect of success.[2] An application for *amparo* had no prospect of success in relation to the alleged violation of article 14, paragraph 5, of the Covenant, and the Committee therefore considers that domestic remedies have been exhausted.

6.4 The State party claims an abuse of the right to submit communications in view of the period of more than six and a half years that elapsed between the date of the Supreme Court judgement and the submission of the author's complaint to the Committee. The Committee observes that the Optional Protocol does not establish any deadline for the submission of communications, and that the period of time elapsing before doing so, other than in exceptional cases, does not of itself constitute an abuse of the right to submit a communication.[3]

6.5 The author alleges a violation of article 14, paragraph 5, of the Covenant, owing to the fact that the evidence for the prosecution that was decisive in his conviction in the lower court was not reviewed by a higher court, since Spain's remedy of cassation is not an appeal procedure but is admissible solely for specific reasons which expressly exclude the re-examination of the facts.

6.6 The Committee takes note of the author's argument that the Supreme Court judgement did not allow for a fresh assessment of the evidence and that the Court confined itself to reviewing the assessment made by the trial court. At the same time, the Committee finds that the judgement makes clear that the Supreme Court considered each of the author's arguments very carefully, particularly his argument that the statements made by members of his family showed that the events could not have taken place as described in the court judgement. In this regard, the Supreme Court found that the defence failed to take account of the difference between the assessment of witnesses' credibility and circumstantial evidence, and concluded that in this case due regard had been given to the rules of logic and past experience. Consequently, the Committee finds that this part of the communication has not been sufficiently substantiated for the purposes of admissibility and declares it inadmissible under article 2 of the Optional Protocol.

6.7 As to the author's claims of a violation of article 26 for discrimination in respect of remedies, the Committee finds that the author has failed to indicate what kind of allegedly discriminatory treatment, within the meaning of article 26, he suffered at the hands of the domestic courts. Consequently, the Committee finds that these allegations have not been sufficiently substantiated for the purposes of admissibility and declares this part of the communication inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

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

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

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

Notes

[1] Communication No. 701/1996, *Cesario Gómez Vázquez v. Spain*, Views of 20 July 2000.

[2] See, for example, communications Nos. 701/1996, *Cesario Gómez Vázquez v. Spain*, Views of 20 July 2000, para. 10.1; 986/2001, *Joseph Semey v. Spain*, Views of 30 July 2003, para. 8.2; 1101/2002, *Alba Cabriada v. Spain*, Views of 1 November 2004, para. 6.5; and 1293/2004, *Maximino de Dios Prieto v. Spain*, decision of 25 July 2006, para. 6.3.

[3] See communication No. 1101/2002, *Alba Cabriada v. Spain*, Views of 1 November 2004, para. 6.3.

N. Communication No. 1341/2005, *Zundel v. Canada**
(Decision adopted on 20 March 2007, Eighty-ninth session)

Submitted by:	Ernst Zundel (represented by counsel, Barbara Kulaszka)
Alleged victim:	The author
State party:	Canada
Date of communication:	4 January 2005 (initial submission)
Subject matter:	Holocaust denial - deportation of persons representing a threat to national security
Procedural issues:	Exhaustion of domestic remedies - abuse of the right of submission - inadmissibility *ratione materiae*
Substantive issues:	Arbitrary detention - detention conditions - fair hearing by a competent and impartial tribunal - presumption of innocence - undue delay - freedom of opinion and expression - discrimination - notion of "suit at law"
Articles of the Covenant:	7; 9, paragraphs 1 and 3; 10; 14, paragraphs 1, 2, and 3; 18; 19 and 26
Articles of the Optional Protocol:	3 and 5, paragraph 2 (b)

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

Meeting on 20 March 2007,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Ernst Zundel, a German citizen born in 1939, currently imprisoned in Germany after his deportation from Canada to Germany. He claims to be a victim of violations by Canada[1] of article 7; article 9, paragraphs 1 and 3; article 10; article 14, paragraphs 1, 2 and 3; article 18; article 19 and article 26 of the International Covenant on Civil and Political Rights. He is represented by counsel, Barbara Kulaszka.

* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Ms. Ruth Wedgwood.

1.2 On 10 January and 1 March 2005, the Special Rapporteur on New Communications and Interim Measures denied the author's requests for interim measures to prevent his deportation from Canada to Germany.

1.3 On 11 March 2005, the Committee's Special Rapporteur on New Communications decided to separate the consideration of the admissibility and merits of the communication.

The facts as presented by the author

2.1 The author lived in Canada for 42 years, from 1958 to 2000, as a permanent resident. In 1959 he married a Canadian and has two sons in Canada and several grandchildren. Towards the end of the 1960s, the author's application for Canadian citizenship was refused by the Minister for Immigration, without any reason being given to him. He has written and published materials from his own publishing company on what he describes as anti-German propaganda. In the 1980s, he published a booklet entitled "Did six million really die?", exploring the historical issue of the treatment of Jews during World War II by Germany, and expressing doubt that six million Jews were killed by the Nazis. It also questioned whether gas chambers ever existed in concentration camps such as Auschwitz and Birkenau. In 1984, he was privately charged by Sabina Citron, the head of the Canadian Holocaust Remembrance Association, with the criminal offence of spreading false news in this booklet. These proceedings were taken over by the Crown as a public prosecution.

2.2 According to the author in 1984, shortly before his trial began, a bomb exploded outside his house, damaging his garage. No-one was charged with this offence. He was beaten on the steps of the courthouse allegedly by members of a violent Jewish group when he appeared for court dates. No one was convicted for these attacks.

2.3 The author was convicted as charged and sentenced to fifteen months' imprisonment, plus three years' probation with the condition that he "not publish in writing or by speaking in public by word of mouth, directly or indirectly, in his name or in any other name, corporate or personal, anything on the subject of the Holocaust or on any subject related directly or indirectly to the Holocaust". The author appealed his conviction and was granted a new trial. In May 1988, he was convicted on the charge of spreading false news in the above-mentioned booklet and sentenced to nine months imprisonment. An appeal to the Ontario Court of Appeal was dismissed on 5 February 1990. However, on appeal to the Supreme Court of Canada, the author was acquitted in 1992, on the ground that the "false news" law was in violation of the author's guarantees to freedom of expression.

2.4 In 1993, the author applied for Canadian citizenship again. When this was revealed by the press, various newspaper stories and editorials demanded that he not be given citizenship because of his revisionist views. According to the author, in the spring 1994, several Marxist street groups attempted to drive him out of his neighbourhood. Pamphlets were distributed calling him a "hatemonger" and "white supremacist". Posters were put up across Toronto with his face in a "rifle sight", giving directions to his home and instructions on how to make Molotov cocktails. The author lodged complaints with the police but no investigation took place. On 14 April 1995, he received a razorblade attached to a mousetrap in his mail from the group called "Anti-Fascist Militia". The group warned that a bomb would be next. No one was charged in this context.

2.5 At the end of May 1995, a pipe bomb was mailed to the author. Suspicious of the parcel, he took it unopened to the police. Toronto police determined that it would have killed the person who opened it and anyone else within 90 metres of the blast. The author implies that the Canadian Security Intelligence Service knew about the bomb. Although two men were charged in March 1998, they were not charged with attempted murder of the author. In 2000, all charges against the two men were stayed.

2.6 In August 1995, the author was given notice that his application for citizenship had been suspended as the Minister for Citizenship and Immigration was of the view that reasonable grounds existed to believe that he was a threat to Canada's national security. In October 1995, he received a Statement of Circumstances outlining why he was a threat to security. While he had never committed any violence himself, his status in the "right wing" meant that he might advocate others to do so in the future. In December 2000, the author withdrew his application for citizenship.

2.7 In 2000 the author left Canada, to live with his wife in the United States. He was deported from the United States to Canada on 19 February 2003, on grounds of irregularities in immigration proceedings. He claimed refugee status and was initially detained under section 55[2] of the Immigration and Refugee Protection Act (the Act). On 24 February 2003, the Refugee Protection Division was notified by the Citizenship and Immigration Canada that pursuant to section 103 (1) of the Act, the Division was required to suspend consideration of the refugee claim on the grounds that the author's case had been referred to the Immigration Division for a determination on inadmissibility on grounds of national security.

2.8 The author has had a series of detention review hearings pursuant to section 58 of the Act. In each of these hearings, it was held that the Minister was taking steps to inquire whether reasonable grounds existed that the author was a threat to national security.

2.9 On 1 May 2003, the Minister of Citizenship and Immigration and the Solicitor General of Canada (the Ministers) issued a certificate finding the author to be inadmissible to Canada on grounds of security, under section 77 of the Act.[3] He was served with an arrest warrant, under section 82 of the Act,[4] while detained at Niagara Detention Centre. The matter was referred to the Federal Court of Canada for a review of the reasonableness of the security certificate and a review of the need for the author's continued detention, pending the outcome of security certificate reasonableness determination. Pursuant to section 77 of the Act, the Court reviewed the information presented by the Ministers in camera and determined that portions of the information should not be disclosed, as its disclosure would harm national security. On 5 May 2003, the Court ordered that the author be provided with a "Statement Summarizing the Information and Evidence" (the Summary), outlining the author's position in the white supremacist movement and his contact with its members and other right-wing extremists. In addition to the Summary, the Ministers provided the author with a Reference Index containing more than 1,600 pages of unclassified documents that support the information provided in the Summary.

2.10 On 6 May 2003, the author filed a Notice of Constitutional Question with the Federal Court of Canada. The Notice indicated that he would challenge the constitutionality of the security certificate scheme for non-compliance with the Canadian Charter of Rights and Freedoms (the Charter). In 2003, he also challenged his detention before the Ontario Superior Court of Justice for a writ of habeas corpus, at the same time as he challenged the

constitutional validity of the Act. On 14 October 2003, he foreclosed the Federal Court's consideration of his constitutional challenge by withdrawing his Notice of Constitutional Question. On 25 November 2003, the Superior Court declined to hear the application on grounds that it was an attempt to bypass the comprehensive statutory scheme and usurp a process already underway, and that the constitutional arguments were already before the Federal Court. This decision was confirmed on appeal on 10 May 2004 by the Ontario Court of Appeal and 21 October 2004 by the Supreme Court.

2.11 With reference to the review of the certificate proceedings, the author submits that "secret" evidence was submitted against him, to which neither he nor his lawyer had access. No witnesses were called against him during the hearing and the only evidence against him consisted of 5 volumes mainly of newspaper articles, other media articles, website printouts, extracts from books and similar materials written by people who the Ministers failed to call as witnesses. Unsuccessful motions were brought to have the Presiding Judge of the Federal Court (the Presiding Judge) step down from the case because of bias, including the fact that he was the former Solicitor General who was in charge of the Canadian Security Intelligence Service (CSIS), the organization providing all the evidence against the author during the time period in question. On the last of these motions, the Federal Court of Appeal held, on 23 November 2004, that he had fallen short of meeting the high threshold required to establish a reasonable apprehension of bias. At the time of the author's and State party's submissions, the author was still awaiting a decision of the Supreme Court of Canada as to whether it would hear an appeal of this decision (see paragraph 4.18 below on the Supreme Court's decision).

2.12 On 21 January 2004, the judge presiding at the security certificate and detention review hearing ordered the author's detention to continue, as he was found to present a danger to national security. The Court found that the author was directly involved with and had consulted a number of individuals who were within "the violent racist and extremist movement". Despite the author's contention that his involvement was limited to a general interest in their ideas, the Court found the author had dealt with these individuals to a great extent and in some cases, had funded their activities. The Court determined that the Ministers had met the test for establishing reasonable grounds to believe that the author was a danger to national security, warranting his continued detention. The Presiding Judge refused to grant bail although the author is not violent. The author contends that he is not entitled under the Act to any appeal against the decision of the Presiding Judge to deny him bail.

2.13 On 24 November 2004, the author filed a Statement of Claim in the Federal Court, claiming that the provisions of the Act under which he was detained violated sections 7, 9 and 10 (c)[5] of the Charter, and that his detention in solitary confinement, while the Federal Court was reviewing the reasonableness of the security certificate, was unlawful and unconstitutional.

2.14 The hearing of the reasonableness of the security certificate was completed on 4 November 2004. The Federal Court upheld the reasonableness of the security certificate in reasons issued on 24 February 2005. It found that the evidence in support of the certificate conclusively established that the author was a danger to the security of Canada. The author took no further legal steps to prevent the deportation made possible by the Federal Court's decision,

and was deported from Canada to Germany on 1 March 2005, where he was promptly arrested on charges of publicly denying the Holocaust. On 14 February 2007, the Regional Court of Mannheim convicted the author of incitement to racial hatred and for denial of the Shoah, and sentenced him to five years imprisonment.

The complaint

3.1 The author claims violation of articles 7 and 10 due to his prolonged detention from February 2003 to March 2005 and his conditions of detention. He complains that he suffers from depression as a result of his prolonged detention in solitary confinement. He also complains that: he is not allowed to have a chair in his cell; he is not allowed to wear shoes; lights are on 24 hours a day in his cell and only dimmed slightly at night; he is not allowed to use a pen, only a pencil stub; he is not allowed to take his herbal medicines for his arthritis and high blood pressure; his request to see a dentist was ignored for one year; he is only allowed 10 minutes a day outside and has no access to any gym or other facilities for walking or exercising; the cell in winter is cold, so that he has to wrap himself in sheets and blankets; the food is always cold and of poor quality; mail is often withheld for weeks; there are numerous unnecessary strip searches; he suffers from a "mass" in his chest which "may or may not be" cancerous. Despite being aware of this condition for over a year, the authorities refused to grant him bail.

3.2 The author claims a violation of article 9, paragraph 1, because of the failure of the State party to ensure the security of his person, in particular, because of the failure to investigate and prosecute the numerous threats and attacks on his person and property outlined above.

3.3 He claims a violation of article 9, paragraph 3, because of his alleged arbitrary and prolonged detention and because of the denial of bail. Although he was detained under national security legislation, he has never been informed of the "real" case against him. According to counsel, the government has admitted that the case against him does not prove that he is a threat to national security. Thus, it is in the secret proceedings that the real case against him is being presented to the judge without the author being privy to this information or given an opportunity to contest it. The detention hearing was not considered in a timely manner and it took eight months to decide to refuse bail. Bail was refused even though he is not violent, has no criminal record in Canada and has a record of fulfilling all bail conditions imposed on him from 1985 to 1992 during criminal proceedings then in process. There is no appeal procedure to question the denial of bail.

3.4 The author claims a violation of article 14, paragraph 1, as he was denied a prompt and fair hearing before a competent and impartial tribunal. He further claims a violation of article 14, paragraph 2, because he was not presumed innocent. The proceedings against him are not criminal but are under national security legislation. He is charged with no offence but classified as "engaging in terrorism", "being a danger to the security of Canada", "engaging in acts of violence that would or might endanger the lives or safety of person in Canada", and "being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage" in the above-noted acts. He faces deportation to Germany, where he may face further prosecution for offences not applicable in Canada. He claims that he should be presumed innocent and afforded due process and that the government should be required to prove its case beyond mere reasonableness. Finally the author claims a violation of article 14, paragraph 3, because of undue delay in bringing the case to trial, and a violation of all rights of due process

and fair hearing as he reasonably assumes that the Presiding Judge of the Federal Court is biased against him, as the former Solicitor General of Canada and had direct ministerial responsibility for CSIS in 1989, within the time frame during which the author became an alleged security threat.

3.5 The author claims a violation of articles 18 and 19, because in his view his detention is based on his opinions on historical matters and because of his expression of such opinions. He is classified as a national security threat because of what he allegedly might say in the future and what others might do who listen to him and read his materials. He has never been violent. Although the State party may not like his historical views, he has never been charged with inciting hatred against Jews or any other group in Canada, notwithstanding the efforts by many groups to have such charges laid against him. He claims that he is being held under national security allegations based solely on his belief that there are numerous aspects of the established historiography on the fate of the Jews during World War II that require further research and revision, and on his work in sharing that information with others. He argues that this is the type of activity that articles 18 and 19 are designed to protect, and that the national security charges against him are politically motivated and arbitrary, in violation of these articles.

3.6 Finally, he claims a violation of article 26, because over the years he has not been treated equally by the Canadian authorities, and has been subjected to discrimination and denied citizenship because of his historical and political opinions. Repeated complaints and prosecutions were made regarding the same publications including "Did Six Million Really Die?" These prosecutions were conducted under various statutes dealing with mail, crimes, human rights and national security, but all had the purpose of persecuting the author for his lawful opinions regarding World War II. The State party allegedly used the claim that he was a threat to the security of Canada to refuse his application for citizenship, thereby applying national security provisions in a discriminatory manner.

3.7 On the issue of exhaustion of domestic remedies, with reference to the proceedings pending in the Federal Court challenging his detention and the constitutionality of the legislation, the author claims that the case could take up to five years to be heard and argues that the pursuit of domestic remedies would be unreasonably prolonged. He adds that his detention is unlimited, because in the event the certificate was quashed as unreasonable, the Crown may issue a new certificate and start the entire process again.

3.8 The author claims not to have submitted his complaint to any other international procedure of investigation or settlement.

The State party's observations

4.1 On 9 March 2005, the State party challenged the admissibility of the communication on three grounds: non-exhaustion of domestic remedies, inadmissibility *ratione materiae* with respect to the claims under articles 9 and 14, and abuse of the right to submission with respect to the claims under article 9, paragraph 1.

4.2 The State party submits that the author is a leader of the white supremacist movement, with a long and notorious history in Canada. He has had associations with, and exercises influence over, influential and violent individuals and organizations within the white supremacist movement, both nationally and internationally, who have propagated violent messages of hate

and advocated the destruction of governments and multicultural societies. His status in the white supremacist movement is such that adherents are inspired to actuate his ideology. The State party believes that the author is engaged in the propagation of serious political violence to a degree commensurate with those who execute the acts. On this basis, it contends that the author is indeed a danger to the State party's national security and a threat to the international community, which justifies his deportation.

4.3 The State party points out that the hearing of evidence into the reasonableness of the security certificate and the need for ongoing detention occurred on various dates in 2003 and 2004. In 2003 in particular, the hearing was prolonged due to the repeated unavailability of author's counsel. The hearing was also interrupted several times by the author's last minute motions, including to have the presiding judge recuse himself for alleged bias, which all failed.

4.4 On admissibility, the State party submits that the author has failed to show that the availability of any domestic remedies would be unreasonably prolonged. The State party refers to the Committee's jurisprudence that seeking redress for alleged violations of rights and freedoms, like those guaranteed under the Charter and other public law remedies, via the normal judicial process would not be unreasonably prolonged within the meaning of article 5 (2) (b) of the Optional Protocol.[6] It further submits that the author has failed to exhaust available remedies and that he has implicitly admitted that he has not done so.

4.5 On the claims under article 7 and 10, the State party indicates that the Charter guarantees that conditions of detention respect the dignity of detainees. The author could have challenged his conditions of detention under any of Sections 2, 7, 8, 10 and 12 of the Charter. In addition, other more particular legal rules governed the author's detention, the enforcement of which by a domestic court through judicial review could have provided a remedy to the type of complaints made by the author.[7]

4.6 On the author's claims under article 9, paragraphs 1 and 3, relating to his detention, the State party submits that the author has initiated domestic legal proceeding based on the Charter, alleging essentially the same complaints that he raises under article 9 in the present communication. The author's constitutional action before the Federal Court of Canada alleges that the national security certificate process as applied to the author violates sections 7, 9 and 10 (c) of the Charter. As in this communication, the author alleges Charter violations based on the non-disclosure of all of the evidence against him, the duration of his detention, and the promptness and fairness of the hearing. In light of available domestic remedies, which are actually being pursued by the author, the State party submits that this portion of the communication is inadmissible for failure to exhaust domestic remedies.

4.7 On the author's claim under article 9, paragraph 1, relating to alleged violations arising from incidents dating from 1984 to 1995, the State party contends that the author has failed to demonstrate that he ever attempted to pursue domestic remedies that would have been available to redress any proven misconduct by law enforcement officials and/or Crown prosecutors. Various judicial remedies were and are potentially available to the author, including judicial review for *mala fides*, bias, flagrant impropriety, abuse of power, etc., and actions based on the Charter. Additionally, administrative complaint procedures could have provided effective remedies, but the author has not apparently pursued such remedies either. The author makes no claim to have pursued such remedies in relation to the law enforcement agencies that he seeks to impugn. Still in relation to the claim under article 9, paragraph 1, the State party adds that the

author did not act diligently in presenting his claims that it failed to protect his security by not investigating and prosecuting alleged attacks made against him and his property between 1984 and 1995. For the State party, a delay of ten to twenty years without reasonable justification renders this claim inadmissible as an abuse of the right of submission.[8]

4.8 On the author's claims under article 14, paragraphs 1 to 3, the State party indicates that the author has initiated domestic proceedings before the Federal Court of Canada alleging essentially the same complaints that he raises in this communication pursuant to article 14.[9] One action relates to the alleged bias of the judge presiding over the reasonableness of the national security certificate and the ongoing reviews of his detention,[10] while the other challenges the constitutionality of the national security certificate process as it applies to the author. In this constitutional challenge, the author makes claims under sections 7, 9 and 10 (c) of the Charter, in relation to the promptness and fairness of the hearing, including matters of standard of proof, disclosure of evidence and procedural rights, and in relation to the duration and lawfulness of his continued detention. Given available domestic remedies, which are actually and still being pursued by the author, the State party considers that this portion of the case is inadmissible for failure to exhaust domestic remedies.

4.9 As to the author's claims under articles 18 and 19 of the Covenant, the State party argues that section 2 of the Charter protects freedom of conscience, thought, opinion and expression, limited consistently with the terms of articles 18 and 19 of the Covenant where the needs of a free and democratic society so require. The author has failed to pursue this potential domestic remedy, and so this portion of his claim is also inadmissible.

4.10 On the discrimination claim under article 26, the State party indicates that section 15 of the Charter guarantees to everyone the right to equality without discrimination. It refers to the Committee's earlier decision in a case about the author,[11] and recalls that failure to pursue a section 15 claim domestically in relation to a particular discrimination complaint makes that complaint inadmissible before the Committee.

4.11 The State party argues that the author has failed to substantiate his claims. In relation to his claim under article 9, it points out that it relates to his detention as a threat to national security and refers to the Committee's jurisprudence that there is nothing arbitrary, ipso facto, about detention of an alien based on the issuance of a security certificate provided for by law.[12] For the State party, the communication clearly discloses that the author knows why he was detained pursuant to the Act, and knows the applicable legal standards that governed his detention and ultimate deportation. He had ample opportunity to make arguments before various courts and judges concerning the lawfulness of his continued detention, and to make arguments against the finding by the Ministers that he represents a threat to national security. By the express terms of the Act, as a permanent resident of Canada the author was entitled to have his detention reviewed at least every six months.[13] In the author's case, reviews did not lead to his release because he was repeatedly found to be a danger to national security. However, reviews are meaningful and can help to secure release from detention. The State party thus argues that this claim is incompatible *ratione materiae* with the Covenant.

4.12 On the claims under article 14, the State party submits that deportation proceedings do not involve either the determination of a criminal charge or rights and obligations in a suit at law, but are in the nature of the administration of public law. With respect to the "criminal charge" aspect of article 14, it claims that deportation proceedings are even less connected to the determination

of a criminal charge than extradition proceedings, which the Committee has viewed as not falling within the scope of article 14.[14] Consequently, the State party submits that those of the author's claims that relate specifically to paragraphs 2 and 3 of article 14 are inadmissible as incompatible *ratione materiae* with the Covenant.

4.13 With respect to the "suit at law" aspect of article 14, the State party reiterates its arguments in *V.R.M.B. v. Canada*,[15] that deportation proceedings are neither a determination of a "criminal charge" nor the determination of "rights or obligations in a suit at law". Rather, deportation proceedings are in the realm of public law and involve the State's ability to regulate citizenship and immigration. The Committee declined to express its view as to whether a deportation proceeding is a "suit at law" in that case, as well as in *Ahani v. Canada*, another case involving deportation proceedings of a person representing a threat to national security.[16]

4.14 The State party argues that, given the equivalence of article 6 of the European Convention and article 14 of the Covenant, the European Court's case law is persuasive that the deportation proceedings challenged by the author are not encompassed by article 14 of the Covenant. In this respect, it refers to the case of *Maaouia v. France*,[17] where the European Court held that the decision of whether or not to authorize an alien to stay in a country of which he is not a national does not entail any determination of his civil rights or obligations or of any criminal charge against him, within the meaning of article 6, paragraph 1, of the European Convention.[18]

4.15 Subsidiarily, the State party submits that the author has failed to substantiate that the security certificate and detention reviews were conducted other than in full accordance with article 14. The author's deportation, predicated on Canada's reasonable belief that he is a threat to national security, proceeded according to Canadian law in a fair and impartial manner affording the author the assistance of legal counsel and the opportunity to challenge evidence, including by way of examination of a representative of the CSIS. To the extent that the author was restricted in his ability to challenge all the evidence against him, this was done for national security reasons,[19] in accordance with Canadian law which the Committee has viewed as satisfactory,[20] and which is consistent with the Covenant (art. 13).

4.16 The State party submits that there was no bias with respect to the author's deportation proceedings. The domestic courts properly weighed the factual record and the applicable legal principles in rejecting the author's bias allegations. The State party invokes the Committee's established jurisprudence in this regard.[21] No case of arbitrariness and bias in evaluation of evidence can be made out by the author, let alone in a prima facie way. The State party submits that any article 14 claim based on allegations of bias is inadmissible pursuant to article 3 of the Optional Protocol.

4.17 On 16 September 2005, the State party informed the Committee that on 25 August 2005, the Supreme Court of Canada denied the author leave to appeal from the decision of the Federal Court of Appeal of 23 November 2004. The State party indicates that this decision does not affect its position that the communication is inadmissible, in particular with regard to the alleged bias of the judge presiding at the security certificate review hearing.

Authors' comments

5. On 3 November 2005, the author indicated that he wished to maintain his communication, but did not comment on the State party's observations.

Issues and proceedings before the Committee

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

6.2 The Committee notes that the State party challenges the totality of the communication. In respect of the author's claims under article 7 and 10 related to his conditions and length of detention, the State party contends that the author could have pursued remedies for violations of the Canadian Charter, in particular under section 12, according to which "Everyone has the right not to be subjected to any cruel or unusual treatment or punishment." In addition, the author could have complained about his detention conditions under the Ministry of Correctional Services Act, in particular under sections 28 on inmate complaints[22] and section 34 relating to segregation. In the absence of any comments or objection from the author, who filed a constitutional action under other sections of the Charter, the Committee concludes that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, for failure to exhaust domestic remedies.

6.3 With regard to the author's claims under article 9, paragraphs 1 and 3, because of his alleged arbitrary and prolonged detention and the denial of bail, the Committee notes that the author has introduced a constitutional action in the Federal Court of Canada, claiming that the national security certificate process applied to him violates sections 7, 9 and 10 (c) of the Charter. The Committee further notes that these sections, which deal with liberty, arbitrary detention and review of the validity of detention, cover in substance the author's claims of arbitrary and prolonged detention and denial of bail under article 9 of the Covenant. It observes that these proceedings remain pending. The Committee has taken note of the author's contention that the application of this remedy would be unduly prolonged. It observes that the author filed this action on 24 November 2004. At the time of the consideration of the communication, a little over two years had lapsed since the initial action. The author has not demonstrated why he believes that a constitutional challenge could take up to five years to be considered. In the circumstances, the Committee does not find that a delay of two years to consider a constitutional action is unduly prolonged. In view of the pending constitutional challenge, the Committee concludes that the author has failed to exhaust domestic remedies on these claims. Accordingly, this part of the communication is inadmissible pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

6.4 The claim under the same article that the author was not informed of the "real case" against him, with reference to the in camera hearings, appears to relate to, and is more appropriately dealt jointly with, the author's claims under article 14.

6.5 On the claim under article 9, paragraph 1, of an alleged failure of the State party to ensure the security of the author, the State party claims that this part of the communication constitutes an abuse of the right of submission. The Committee recalls that there are no fixed time limits for submission of communications under the Optional Protocol and that mere delay in submission does not of itself involve abuse of the right of communication.[23] However, in certain circumstances, the Committee expects a reasonable justification for such a delay. The alleged attacks against the author occurred between 1984 and 1995, i.e. twelve to twenty-three years ago. The Committee notes that the author has availed himself of the procedure under the Optional Protocol twice before, but that he did not take this opportunity to file such a claim before. In the

absence of any justification of such a delay, the Committee considers (French: le Comité estime …) that submitting the communication after such a time lapse should be regarded as an abuse of the right of submission. It finds that this part of the communication is inadmissible under article 3 of the Optional Protocol.

6.6 With regard to the author's claims under article 14, the Committee has noted the State party's contention that a constitutional action based on sections 7, 9 and 10 (c) of the Charter was still pending in the Federal Court. However, as noted above, those sections of the Charter relate to detention issues, and not to issues of fairness and impartiality of hearings, which are covered by article 14 of the Covenant. The Committee observes that, in his Statement of Claim for constitutional action, the author challenged not only his detention, but also the entire process governing the determination of whether the security certificate is reasonable. However, the Committee considers that the guarantees under article 14 of the Covenant are substantively different from those protected by article 9 of the Covenant, which in turn provides similar protection to the one provided by sections 7, 9 and 10 (c) of the Charter. It concludes that a pending constitutional action under articles 7, 9 and 10 (c) of the Charter does not preclude the Committee from examining claims under article 14 of the Covenant. In addition the proceedings relating to the alleged bias of the Presiding Judge were concluded on 25 August 2005, when the Supreme Court denied the author's leave to appeal from the Federal Court of Appeal's decision. The State party has not mentioned other remedies which could have been pursued by the author with respect to his claims under article 14. The Committee concludes that the author has exhausted domestic remedies in relation to claims under article 14, and that the communication is not inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.7 The Committee has noted the State party's argument that deportation proceedings do not involve either "the determination of any criminal charge" or "rights and obligations in a suit at law". It observes that the author has not been charged or convicted for any crime in the State party, and that his deportation is not a sanction imposed as a result of criminal proceedings. The Committee concludes that proceedings relating to the determination of whether a person constitutes a threat to national security, and his or her resulting deportation, do not relate to the determination of a "criminal charge" within the meaning of article 14.

6.8 The Committee recalls, in addition, that the concept of a "suit at law" under article 14, paragraph 1, of the Covenant is based on the nature of the right in question rather than on the status of one of the parties.[24] In the present case, the proceedings relate to the right of the author, who was a lawful permanent resident, to continue residing in the State party's territory. The Committee considers that proceedings relating to an alien's expulsion, the guarantees of which are governed by article 13 of the Covenant, do not also fall within the ambit of a determination of "rights and obligations in a suit at law", within the meaning of article 14, paragraph 1. It concludes that the deportation proceedings of the author, who was found to represent a threat to national security, do not fall within the scope of article 14, paragraph 1, and are inadmissible *ratione materiae*, pursuant to article 3 of the Optional Protocol.

6.9 As regards the claim under articles 18 and 19, the Committee observes that the author has not availed himself of the remedy offered by the Canadian Charter, under section 2, according to which "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including

freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association." This part of the communication is thus inadmissible under article 5, paragraph 2 (b), for failure to exhaust domestic remedies.

6.10 The Committee reaches the same conclusion with respect to the author's claim under article 26, as he has failed to pursue any remedy under section 15 of the Charter, which reads: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Although "discrimination on political or other opinion", which is explicitly referred to in article 26 of the Covenant, is not listed in Section 15 of the Charter,[25] the list is preceded and qualified by the terms "in particular", which suggests that the list is not exhaustive. The author could therefore have availed himself of this remedy and once more has failed to fulfil the requirements under article 5, paragraph 2 (b), of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under articles 3 and 5, paragraph 2 (b), of the Optional Protocol;

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

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

Notes

[1] The Covenant and the Optional Protocol entered into force for Canada on 19 August 1976.

[2] Section 55 (1) states: An officer may issue a warrant for the arrest and detention of a permanent resident or a foreign national who the offer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.

[3] Section 77 (1): "The Minister and the Solicitor General of Canada shall sign a certificate stating that a permanent resident or a foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality and refer it to the Federal Court, which shall make a determination under section 80."

[4] Section 82 (1): "The Minister and the Solicitor General of Canada may issue a warrant for the arrest and detention of a permanent resident who is named in a certificate described in subsection 77 (1) if they have reasonable grounds to believe that the permanent resident is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal."

[5] Section 7 of the Charter: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Section 9: "Everyone has the right not to be arbitrarily detained or imprisoned."

Section 10: "Everyone has the right on arrest or detention (a) to be informed promptly of the reasons therefore; (b) to retain and instruct counsel without delay and to be informed of that right; and (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful."

[6] The State party refers to communication No. 67/1980, *E.H.P. v. Canada*, decision of 27 October 1982, para. 8; communication No. 358/1989, *R.L. et al. v. Canada*, decision of 5 November 1991, para. 6.4; communication No. 228/1987, *C.L.D. v. France*, decision of 18 July 1988, para. 5.3; and communication No. 296/1988, *J.R.C. v. Costa Rica*, decision of 30 March 1989, para. 8.3.

[7] See sections 28 and 33-34 of the *Ministry of Correctional Services Act*, R.R.O. 1990 Reg. 778, which provides an avenue for inmates held in Ontario facilities, as was the author, to complain about their treatment.

[8] See communication No. 787/1997, *Gobin v. Mauritius*, Views adopted on 16 July 2001, para. 6.3.

[9] Although the author has now been deported from Canada, this fact does not preclude him in law from continuing with his action, nor does it necessarily deprive him of a meaningful remedy if he ultimately proves successful. Pursuant to s. 24 (1) of the Charter and s. 52 of the Constitution Act, 1982, Canadian courts have robust powers to remedy any constitutional wrongs.

[10] At the time of the State party's submissions, the author's latest attempt to have the Presiding Judge removed for bias was still pending before the Supreme Court of Canada, which was to decide whether to grant leave to appeal. Leave to appeal was denied on 25 August 2005.

[11] Communication No. 953/2000, *Zündel v. Canada*, inadmissibility decision of 27 July 2003, para. 8.6.

[12] Communication No. 1051/2002, *Ahani v. Canada*, Views adopted on 29 March 2004, para. 10.2. See also communication No. 236/1987, *V.M.R.B. v. Canada*, inadmissibility decision of 18 July 1988, para. 6.3.

[13] See Immigration and Refugee Protection Act, section 83 (2).

[14] Communication No. 1020/2001, *Cabal and Bertran v. Australia*, Views adopted on 7 August 2003, para. 7.6; and communication No. 961/2000, *Everett v. Spain*, para. 6.4.

[15] Communication No. 236/1987, *V.M.R.B. v. Canada*, Views adopted on 18 July 1988.

[16] Communication No. 1051/2002, *Ahani v. Canada*, Views adopted on 29 March 2004, para. 10.5.

[17] *Maaouia v. France*, application No. 39652/98, decision rendered by the European Court of Human Rights on 5 October 2000.

[18] The State party refers to more than ten decisions of the European court supporting this statement, and provides copies of all of them in its annexes. These include the cases of *Elvis Jakupovic v. Austria*, application no. 36757/97, judgement of the European Court of Human Rights on 15 November 2001; and *Veselin Marinkovic v. Austria*, application No. 46548/99, judgement of the European Court of Human Rights of 23 October 2001.

[19] See Immigration and Refugee Protection Act, Division 9: "Protection of Information".

[20] Communication No. 1051/2002, *Ahani v. Canada*, Views adopted on 29 March 2004, para. 10.5.

[21] See e.g., communication No. 1188/2003, *Riedl-Riedstein et al. v. Germany*, decision of 2 November 2004, para. 7.3.

[22] Section 28: "Where an inmate alleges that the inmate's privileges have been infringed or otherwise has a complaint against another inmate or employee, the inmate may make a complaint in writing to the Superintendent."

[23] Communication No. 787/1997, *Gobin v. Mauritius*, inadmissibility decision of 16 July 2001, para. 6.3.

[24] Communication No. 112/1981, *Y.L. v. Canada*, inadmissibility decision adopted on 8 April 1986, para. 9.1 and 9.2; communication No. 441/1990, *Casanovas v. France*, Views adopted on 19 July 1994, para. 5.2; communication No. 1030/2001, *Dimitrov v. Bulgaria*, decision on admissibility adopted on 28 October 2005, para. 8.3.

[25] Section 15, of the Charter: "15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

O. Communication No. 1355/2005, *Jovanovic v. Serbia**
(Decision adopted on 26 March 2007, Eighty-ninth session)

Submitted by:	Humanitarian Law Center
Alleged victim:	X
State party:	Serbia
Date of communication:	23 December 2004 (initial submission)
Subject matter:	Sexual abuse of a minor
Procedural issue:	Standing to represent the victim
Substantive issues:	Cruel, inhuman or degrading treatment - arbitrary or unlawful interference with privacy - rights of the child
Articles of the Covenant:	7, 17, and 24, paragraph 1, taken alone and read in conjunction with article 2, paragraphs 1 and 3
Article of the Optional Protocol:	1

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

Meeting on 26 March 2007,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 23 December 2004, is the Humanitarian Law Center, a non-governmental organization which monitors and investigates human rights violations in Serbia. It submits the complaint on behalf of X, a minor, born in 1992, a citizen of Serbia. The author claims violations of articles 7, 17, and 24, paragraph 1, each taken alone and read in conjunction with article 2, paragraphs 1 and 3, of the Covenant by Serbia. The Optional Protocol entered into force for Serbia on 6 December 2001.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

1.2 On 31 January 2005, the Special Rapporteur on New Communications and Interim Measures rejected the requests for interim measures to urge the State party to offer protection to the witnesses named in the complaint, to encourage the State party to prevent further interaction between the perpetrators of the sexual abuse and the victim, and to urge the State party to provide to the victim adequate counselling and continued supervision, as may be necessary.

1.3 On 27 September 2005, the State party requested that the admissibility of the communication be examined separately from the merits of the communication. On 27 September 2005, the Special Rapporteur on New Communications, on behalf of the Committee, determined that the admissibility and the merits of this case should be considered together.

Factual background

2.1 On 15 November 2002, X, a Roma boy aged 10, entered a bar in the village of A, where he met Vladimir Petrašković and Miodrag Radović. Petrašković invited X to drink beer, as a result of which he became intoxicated. Both men then obliged X to perform fellatio on them. Shortly afterwards, three other men named Aleksandar Janković, Maksim Petrović and Vojislav Brajković joined the table and the child was obliged to perform fellatio on all five men. The men and the child then left the bar and went to a discotheque where Radović urinated on the child's head. Thereafter, the men took the child to another bar where they obliged him to perform fellatio on all of them and urinated in his mouth. They threatened him not to say a word to anyone.

2.2 W, a public health nurse working in A learnt about the incident two days later. She met with X who recounted the events described above. The nurse noticed that the boy's mouth was swollen. The following day, she persuaded X to report the incident to the police. In early December 2002, Miroslav Lukic, President of the Municipal Court of A, mentioned X's case to the Public Prosecutor who had not yet been approached by the police.

2.3 On 27 December 2002, the victim submitted a complaint against the five men to the police. As a result, on 9 January 2003, the Office of the Požarevac District Public Prosecutor requested that the Požarevac District Court investigate the case. From 13 January 2003 onwards, the Humanitarian Law Center (hereinafter the HLC) acted as X's counsel. On 14 January 2003, the District Court decided to investigate Vladimir Petrašković and Miodrag Radović. By then, both men had already fled the country. Miodrag Radović was arrested in Austria and extradited to Serbia. On 24 January 2003, the District Court heard 13 witnesses amongst whom only X's parents confirmed his story. After the victim changed his testimony on 5 February 2003, the District Public Prosecutor dropped the charges on 5 March 2003 and the District Court cancelled its investigation on 10 March 2003.

2.4 According to the State party, the charges were dropped because of insufficient evidence: the victim had entirely changed his original statement to the police, telling the investigative magistrate that the accused had in fact not committed any offence. Moreover, the witnesses either gave accounts based on hearsay from local residents whose names they did not know, or denied the allegations altogether. Finally, no witness, including W, requested protection from the Office of the Public Prosecutor. According to the author, W testified before the investigating judge on 5 February 2003. She also told the HLC that during the same hearing, X first confirmed

that he had been sexually abused, and then, after a break, denied the accusations. Only the retractions were reflected in the court's records. A few weeks later, X contacted W and told her that his parents had forced him to modify his testimony.

2.5 X's story of sexual abuse received extensive media coverage. From January 2003 to June 2004, many articles appeared in the national printed media, focusing among other things, on the public outrage concerning the incident, the closure of criminal proceedings, the intimidation of witnesses and the suspected collusion between the alleged perpetrators and government officers.

2.6 According to the author, from November 2002 onwards, eyewitnesses and other A residents were threatened and bribed to keep silent about the sexual abuse of X by a group of local criminals. In December 2002, X's father received a telephone call from Miodrag Radović who offered him money if the boy changed his story. W, the nurse who testified on two occasions, received many threats. On 28 October 2004, the author submitted a request to the Chief of Public Security at the Ministry of Internal Affairs for police protection for W. This request went unanswered and the threats continued. W then also sought protection from the Chief of Police in Pozarevac, a nearby town. This request was denied.

2.7 In separate legal proceedings, X's parents were convicted of severe neglect of parental responsibility on 27 March 2002 and stripped of their parental rights by the Municipal Court of A on 28 January 2003. X and his five underage siblings were taken into care on 3 February 2003 and Vera Miscevic, a social worker at the Centre for Social Work of A, was appointed as their legal guardian.

2.8 After the charges were dropped by the Office of the Public Prosecutor on 10 March 2003, the victim was given eight days to initiate a private prosecution. The author did so, on his behalf, on 18 March 2003. At a hearing before the investigating judge on 1 April 2003, four additional witnesses were heard. Three of them confirmed that X had been sexually abused. On 9 April 2003, X's parents sought to withdraw the power of attorney from the HLC and abandon the private prosecution. However, by then, they had lost their parental rights over X. The HLC believes that X's parents have received some benefit in exchange for convincing their child not to pursue criminal proceedings against his abusers: the child's father spoke publicly about having been offered something if the child dropped his accusations. Shortly afterwards, the family home contained new furnishings which the parents were formerly unable to acquire.

2.9 On 7 May 2003, the Office of the Public Prosecutor rejected the HLC's request to investigate Aleksandar Janković, Maksim Petrović and Vojislav Brajković who were the three other men involved in the sexual abuse. It also informed Vera Miscevic, the child's guardian, that she could take over the criminal prosecution within eight days. On 16 May 2003, Vera Miscevic gave a power of attorney to the HLC which made another request for a more comprehensive investigation which would cover all five men. On 10 June 2003, she revoked it. As a result, the HLC's request was rejected on 18 June 2003 on the ground that it was not authorized to make such a request. The author filed an appeal with the Court of Appeal Section of the Pozarevac District Court which annulled on 27 June 2003 the decision to terminate the investigation and ordered that it be extended to include all five men. On 29 July 2003, Vera Miscevic granted again a power of attorney to the HLC. On 12 August 2003, she revoked it

again and for the last time. From then on, the HLC was barred from participating in the court proceedings and denied access to the case file. On 19 November 2003, the District Court suspended the investigation because the Centre for Social Work, citing the victim's state of health, decided not to pursue the case any further.

2.10 The HLC continued to monitor X's situation after August 2003, but had no information as to the timing or the conditions, if any, attached to the reinstatement of parental authority or whether the Centre for Social Work in A or Požarevac continued to exercise some supervisory responsibility over the child. According to the State party, the Municipal Court of A reinstated parental authority on 17 September 2004.

The complaint

3.1 The author claims a violation of article 7, taken alone and read in conjunction with article 2, paragraphs 1 and 3 of the Covenant. It submits that rape and other forms of sexual assault constitute treatment in violation of article 7.[1] In the present case, the treatment suffered by the victim clearly constitutes a cruel, inhuman and degrading treatment, especially in the light of his personal circumstances such as his age, his membership of the Roma group, his low mental ability and unstable emotional state. The State party should have investigated the incident promptly and impartially, and identified and prosecuted the perpetrators.

3.2 In addition or in the alternative, the author alleges a violation of the victim's right to privacy as protected by article 17, taken alone and read in conjunction with article 2, paragraphs 1 and 3. It recalls that the Committee's jurisprudence establishes that "privacy" includes attacks on dignity[2] and covers an individual's interactions with other persons,[3] including consensual and non-consensual sexual activity.[4] It considers that the treatment suffered by the victim constitutes an arbitrary and unlawful interference with his privacy.

3.3 The author alleges a violation of article 24, paragraph 1, taken alone and read in conjunction with article 2, paragraphs 1 and 3. It argues that States parties are required to adopt such measures of protection as are required by each child's status as a minor. The best interest of the child is the foremost consideration in assessing and addressing the needs of children. The author submits that through its acts and omissions the State party violated article 24, paragraph 1, because the national authorities were clearly not guided by the best interest of the child in making the decisions that affected him.

3.4 The author submits that the victim's abuse occurred against a backdrop of widespread discrimination against members of the Roma community. This factor contributed to the very occurrence of the abuse and the public manner in which it was played out.

3.5 With regard to the lack of express authorization to represent the victim, the author recalls the Committee allows a communication to be submitted on behalf of an alleged victim when the victim is unable to submit the communication personally, especially in cases concerning children. In its jurisprudence, the Committee had been guided not solely by the rules of domestic procedure in matters of standing and representation, but also by "the best interests of the child."[5] The author also refers to the test applied by the European Commission of Human Rights. When deciding over the standing of a solicitor who had represented minor children in domestic custody proceedings, the Commission examined (1) whether other or more appropriate representation existed or was available; (2) the nature of the links between the author and the

child; (3) the object and scope of the application introduced on the victim's behalf; and (4) whether there were any conflicts of interest.[6] The author submits that no alternative legal representation exists for the victim in this case, since neither the parents, nor the guardian were willing to initiate a private prosecution. It recalls that it was the child's former legal counsel in the domestic proceedings. As to the object and scope of the application, it notes that the present communication is confined to complaints that the domestic criminal investigation did not comply with standards enshrined in the Covenant. Finally, there are no possible conflicts of interest between the author and the victim in the pursuit of this communication since it addresses matters in which the author was duly authorized to represent the victim at the domestic level.

3.6 The author claims that all effective and adequate domestic remedies have been exhausted and that the State party failed to provide the victim with a legal or any other remedy for the violations he suffered. The HLC alleges that the authorities had sufficient information about the abuse to investigate and prosecute the offenders, but failed to do so. Local and prosecutorial authorities showed no willingness to investigate the case properly, and witnesses were threatened by the alleged perpetrators, with impunity. The Centre for Social Work in A granted and withdrew the power of attorney from the author several times in the span of three months, thereby sabotaging the author's efforts to move the prosecution forward, while the investigating judge granted the author's request to broaden the investigation only after the appeal (having rejected it twice before) and cancelled the investigation on three occasions before the final cancellation in November 2003.

3.7 The author requests the Committee to urge the State party to reopen the criminal investigation, to interview witnesses in a confidential manner, to protect such witnesses, to punish those responsible for abusing the victim and to provide appropriate psychological support to him. It also requests that adequate compensation be paid to the victim.

State party's submissions on admissibility and merits

4.1 By note verbale of 8 August 2005, the State party challenged the admissibility of the communication on the ground that the author has no standing before the Committee and that the communication is insufficiently substantiated. It argues that the author's submission does not make clear whether a violation of article 2 of the Covenant taken alone or read in conjunction with articles 7, 17, and 24, is also alleged.

4.2 Referring to former rule 90 (b) of the Committee's rules of procedure and the Committee's past jurisprudence,[7] the State party argues that the communication is inadmissible under article 2 of the Optional Protocol because the author has not justified its authority to submit the complaint on behalf of the victim. It distinguishes the decisions invoked by the author from the present case. The two Committee's decisions and two of the decisions of the European Court of Human Rights concern the standing of parents to submit complaints on behalf of their children where they were not recognized as their legal representatives.[8] In the present case, such a "special bond" between parent and child does not exist between the author and the victim. In the two remaining decisions of the European Court of Human Rights cited by the author,[9] the children were represented by their former counsel. However, counsel had represented the children up to the end of the domestic proceedings. Moreover, counsel's action on behalf of the children was previously or subsequently approved by the children's parents or foster parents. In the present case, the author's power of attorney was revoked before the end of the proceedings, both by the victim's parents and legal guardian. The author's communication to the Committee

was never approved by the victim's parents or legal guardian. The author never attempted to obtain such approval. Finally, all decisions invoked by the author involved custody and care procedures, which justified a more extensive interpretation of the criteria for representation, especially since the legal representatives had conflicting interests with the children themselves.

4.3 In any case, the State party submits that the criteria developed by the European Court of Human Rights are not fulfilled in the present case.[10] Firstly, regarding the question of whether other or more appropriate representation exists or is available, it contends that the author got involved with the case only *after* having been alerted by a journalist in January 2003, by which time the initial police investigation was almost completed. The author's power of attorney was revoked for the last time on 12 August 2003, while the investigation continued for another three months until being finally cancelled on 19 November 2003 when the victim denied the allegations for the second time. Appropriate representation other than by the author was thus available at the domestic level. As to the issue of representation before the Committee, the State party submits that other and more appropriate representation is available to the victim through his parents or "any lawyer or NGO in Serbia or in any other country" who has been duly authorized to act on the victim's behalf.

4.4 Secondly, for reasons explained above, regarding the nature of the links between the author and the victim, the State party submits that although the author acted as counsel for the victim for seven months (with interruptions), this link is not such as to allow the author to continue representing the victim before the Committee. It adds that the author's lack of knowledge as to the victim's present circumstances proves that whatever links may have existed between the author and the child, they no longer exist. Thirdly, the State party notes that while the author claims that the object and scope of the communication is confined to complaints about the domestic criminal investigation not complying with the standards contained in the Covenant, it is actually much broader.

4.5 Finally, on the existence of any conflicts of interest, the State party submits that even though the author may believe that it is acting in the victim's best interest, the author is not necessarily the best, nor the only authority to do so. It claims that there were no conflict of interest between the child and the Centre for Social Care which was the victim's legal guardian from 28 January 2003 until his parents' legal rights were restored. The Centre had in fact acted in the victim's best interest by revoking the author's power of attorney because the child's involvement in the proceedings would disturb his present condition.

4.6 By note verbale of 4 July 2006, the State party reiterated its arguments on the admissibility of the communication and commented on its merits. It recalls that article 14, paragraph 2, of the Covenant provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law; and that the District Court of Pozaverac has found insufficient evidence to continue the criminal investigation against the five alleged perpetrators. It refutes the author's claim that the treatment of the alleged victim by the competent authorities was discriminatory because of his Roma ethnic origin or social status.

4.7 The State party concedes that, during the investigation, the parents of the victim had first given and then revoked the power of attorney to a lawyer from the HLC, changed their statements, tried to obtain money from the suspected perpetrators in return for favourable statements and influenced the alleged victim in various ways, thus compromising the credibility of their evidence and prolonging the proceedings. As a result, the authorities have taken prompt

measures to have the alleged victim and his five siblings removed from this "unhealthy family environment". Steps were taken to ensure their rehabilitation and social integration. To that end, financial and material assistance was provided to the parents several times in 2003 and 2004. Following from the above, the State Party believes that there is no violation of any of the rights contained in articles 7, 17, 24, paragraph 1, read alone or in conjunction with article 2, paragraphs 1 and 3.

Author's comments

5.1 By letter dated 11 September 2006, the author argues that it should be allowed standing to represent the victim before the Committee. It recalls that the circumstances of the case clearly demonstrate that the victim is unable to submit the communication personally, which is a situation provided for in rule 96 of the Committee's rules of procedure. With regard to the State party's argument that the link between the author and the victim is not as close as to qualify the former to act on the latter's behalf, the author submits that while there is no biological link between itself and the victim, it acted as legal counsel for the victim and demonstrated a sustained willingness and ability to seek redress for the victim. Neither the parents, nor the legal guardian have acted in the best interests of the victim.

5.2 As for the State party's argument that the author is neither the sole, not the most competent authority to determine the best interests of the victim, the author recalls that it has already submitted many communications before several human rights treaty bodies and that this experience cannot be compared with that of any other organization in Serbia. This renders the author qualified to assess the reasons for instigating proceedings from the point of view of any victim. In the present case, the victim's interests are that those who sexually abused him should be punished.

5.3 With regard to the State party's observations on the merits of the communication, the author reiterates its earlier arguments. It noted that W is the only person who has been willing to testify about all the circumstances of the incident and that, as a result, she has received many threats. On 13 March 2006, she was even found guilty by the Belgrade Second Municipal Court of defaming Miodrag Deimbacher (formerly Radović), whom she had accused on national television of having sexually abused the child. By letter dated 19 December 2006, the author informed the Committee that this was upheld by the Belgrade District Court on 7 July 2006.

Issues and proceedings before the committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules and procedures, decide whether or not it is admissible under the Optional Protocol of the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With regard to the author's standing to represent the victim, the Committee recalls that rule 96 (b) of its rules of procedure provides that a communication should normally be submitted by the individual personally or by that individual's representative, but that a communication submitted on behalf of an alleged victim may, however, be accepted when it appears that the

individual in question is unable to submit the communication personally. Where it is impossible for the victim to authorize the communication, for instance where the victim has been killed, had disappeared or is held incommunicado, the Committee has considered a close family connection to be a sufficient link to justify an author acting on behalf of an alleged victim.[11] However, it has not considered that an individual had standing to act on behalf of a personal friend or an employee where no authorization had been obtained from the victim.[12] In this regard, the Committee recalls that it

> "has always taken a wide view of the right of alleged victims to be represented by counsel in submitting communications under the Optional Protocol. However, counsel acting on behalf of victims of alleged violations must show that they have real authorization from the victims (or their immediate family) to act on their behalf, that there were circumstances which prevented counsel from receiving such authorization, or that given the close relationship in the past between counsel and the alleged victim it is fair to assume that the victim did indeed authorize counsel to proceed with a communication to the Human Rights Committee."[13]

6.4 The Committee recalls that children must generally rely on other persons to present their claims and represent their interests, and may not be of an age or capacity to authorize any steps to be taken on their behalf. A restrictive approach should thus be avoided. Indeed, it has been the constant practice of the Committee to consider that a parent has standing to act on behalf of his or her children without explicit authorization from them.[14] While a parent is the most appropriate person to act on behalf of a child, the Committee does not exclude that the counsel of the child in the domestic proceedings may continue to present the child's claims to the Committee. Nonetheless, the Committee must still examine, as mentioned above, whether counsel has authorization from the child (or his or her immediate family) to act on his or her behalf, whether there are circumstances which prevented counsel from receiving such authorization, or that given the close relationship in the past between counsel and the child it is fair to assume that the child did indeed authorize counsel to proceed with a communication to the Committee.

6.5 In the present case, the Committee must decide whether the author which acted as counsel for the child for part of the domestic proceedings has standing to bring a communication to the Committee on his behalf, regardless of the fact that it has no authorization from the child, his legal guardian or his parents. The Committee notes that the author conceded that it was not authorized to act by the child, his legal guardian or his parents (para. 3.5 above). Indeed, the question of instructing the author to submit a communication to the Committee on behalf of the child has not been discussed with the child, his legal guardian or the parents. There is no indication either that the child, who was 12 at the time of the submission of the communication in 2004 and thus likely to be able to give his consent to the presentation of the a complaint, the legal guardian or the parents have, at any time, consented to the author's acting on behalf of the child.

6.6 The Committee also notes the author's argument that consent from the child, his legal guardian or his parents could not be obtained because all are under the influence of the alleged perpetrators of the sexual abuse. Nevertheless, the Committee also notes that after receiving the initial submission, it had asked the author to submit a power of attorney from the mother if she has regained parental authority or, if the child still has a legal guardian, to at least indicate consent to the examination of the case. On 14 January 2005, the author explained that it was

unable to provide such a power of attorney or agreement for the reasons already spelt out above. There is no indication that the author has sought to obtain informal consent from the child, with whom it is no longer in contact.

6.7 In the absence of express authorization, the author should provide evidence that it has a sufficiently close relationship with the child to justify it acting without such authorization. The Committee notes that the author acted as counsel for the child in the domestic proceedings between January and August 2003 with several interruptions. Since the author ceased to represent the child in the domestic proceedings in August 2003, it has not been in contact with him, his legal guardian or his parents. In such circumstances, the Committee cannot even assume that the child does not object, let alone consent, to the author proceeding with a communication to the Committee. Consequently, not withstanding that the Committee is gravely disturbed by the evidence in this case, it is precluded by the provisions of the Optional Protocol from considering the matter since the author has not shown that it may act on the victim's behalf in submitting this communication.

7. Accordingly, the Committee decides:

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

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

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

Notes

[1] See communication No. 981/2001, *Casafranca de Gómez v. Peru*, Views adopted on 23 July 2003, paras. 2.2 and 7.1.

[2] See communication No. 721/1996, *Boodoo v. Trinidad and Tobago*, Views adopted on 2 April 2002, para. 6.7.

[3] See communication No. 453/1991, *Coeriel and Aurik v. The Netherlands*, Views adopted on 31 October 1994, para. 10.2.

[4] See communication No. 488/1992, *Toonen v. Australia*, Views adopted on 31 March 1994, para. 8.2.

[5] See communication No. 417/1990, *Balaguer Santacana v. Spain*, Views adopted on 15 July 1994, paras. 6.1 and 9.2; and communication No. 901/1009, *Laing v. Australia*, Inadmissibility decision adopted on 9 July 2004, para. 7.3.

[6] See *S.P., D.P. and A.T. v. United Kingdom*, Admissibility decision, application No. 23715/94 (20 May 1996). See also *P., C. and S. v. United Kingdom*, application No. 56547/00, Admissibility decision (11 December 2001); and *C. and D. v. United Kingdom* and *S. and others v. United Kingdom*, applications No. 34407/02 and 34593/02, Inadmissibility decision (31 August 2004).

[7] See for instance communication No. 128/1982, *U.R. v. Uruguay*, Inadmissibility decision of 6 April 1983; communication No. 78/1980, *The Mikmaq tribal society v. Canada*, Inadmissibility decision of 29 July 1984.

[8] See communication No. 417/1990, *Balaguer Santacana v. Spain*, Views adopted on 15 July 1994, paras. 6.1 and 9.2; communication No. 901/1009, *Laing v. Australia*, Inadmissibility decision adopted on 9 July 2004, para. 7.3; *P., C. and S. v. United Kingdom*, application No. 56547/00, Admissibility decision (11 December 2001); and *C. and D. v. United Kingdom*, application No. 34407/02, Inadmissibility decision (31 August 2004).

[9] See *S.P., D.P. and A.T. v. United Kingdom*, Admissibility decision, application No. 23715/94 (20 May 1996); and *S. and others v. United Kingdom*, application No. 34593/02, Inadmissibility decision (31 August 2004).

[10] See *S.P., D.P. and A.T. v. United Kingdom*, Admissibility decision, application No. 23715/94 (20 May 1996).

[11] See for instance communication No. 5/1977, *Valentini de Bazzano v. Uruguay*, Views adopted on 15 August 1979, para. 5; and communication No. 1196/2003, *Bourchef v. Algeria*, Views adopted on 30 March 2006, para. 1.1.

[12] See communication No. 436/1990, *Solís Palma v. Panama*, Inadmissibility decision adopted on 18 July 1994, para. 5.2; and communication No. 16/1977, *Mbenge v. Zaire*, Views adopted on 25 March 1983, para. 5. See also communication No. 565/1993, *R. and M.H. v. Italy*, Inadmissibility decision adopted on 8 April 1994, para. 4.2.

[13] Communication No. 772/1997, *Y. v. Australia*, Inadmissibility decision adopted on 17 July 2000, para. 6.3.

[14] See communication No. 417/1990, *Balaguer Santacana v. Spain*, Views adopted on 15 July 1994, paras. 6.1 and 9.2; communication No. 901/1009, *Laing v. Australia*, Inadmissibility decision adopted on 9 July 2004, para. 7.3.

P. Communication No. 1359/2005, *Esposito v. Spain**
(Decision adopted on 20 March 2007, Eighty-ninth session)

Submitted by:	Mario Esposito (represented by counsel Mr. Emilio Ginés Santidrián)
Alleged victim:	The author
State party:	Spain
Date of communication:	8 July 2003 (initial submission)
Subject matter:	Extradition of a member of a Mafia-like organization from Spain to Italy
Procedural issues:	Failure to exhaust domestic remedies - insufficiently substantiated claims - abuse of the right to submit a communication - incompatibility *ratione materiae*
Substantive issues:	Prohibition of torture and cruel, inhuman or degrading treatment - prison conditions - violation of the right to due process
Articles of the Covenant:	7; 10, paragraph 1; and 14, paragraph 3 (d)
Articles of the Optional Protocol:	1, 2, 3 and 5, paragraph 2 (b)

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

Meeting on 20 March 2007,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 8 July 2003, is Mario Esposito, an Italian citizen born in 1959, who is currently serving a life sentence in Italy. He claims to be the victim of a

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

violation by Spain of articles 7, 10, paragraph 1, and 14, paragraph 3 (d), of the Covenant. He is represented by counsel, Mr. Emilio Ginés Santidrián. The Optional Protocol entered into force for the State party on 25 April 1985.

Factual background

2.1 On 30 June 1994, Interpol notified Spain's Central Magistrates' Court No. 5, the duty court, of the pretrial detention of the author and his imprisonment in Barcelona on the grounds of his alleged membership, as organizer and leader, of an armed Mafia-like organization known as the "Muzzolini clan". This organization, whose activities were linked to the Camorra, was active around Sessa Aurunca, Carinola and Cellole, with the objective of controlling businesses and shops in the region through the intimidation and extortion of the owners. The organization was disbanded in July 1993.

Proceedings in Spain

2.2 By note verbale of 1 July 1994, the Italian authorities submitted a request for the author's extradition to stand trial in Italy on one charge of association with organized crime and two charges of extortion (under Italian law; under Spanish law, these would be the equivalent of charges of unlawful assembly and making criminal threats, respectively). On the same date, the investigating judge in the case decided to upgrade the author's detention to pretrial imprisonment, setting in motion extradition proceedings against him in the Criminal Division of the National High Court.

2.3 By a decision of 10 July 1995, the National High Court acceded in part to Italy's request, agreeing to the extradition of the author to stand trial on one charge of association with organized crime and one of extortion, under Italian law. The National High Court rejected one of the charges of extortion, deeming it to be time-barred.

2.4 By note verbale of 17 March 1995, the Italian authorities had submitted a request to extend the grounds for extradition to enable the author to be tried in Italy for the offence of illegal possession of arms and a further offence of extortion (equivalent to the offences of storing weapons of war and making criminal threats, respectively, under Spanish law). By a decision of 9 October 1995, the National High Court acceded to the extended extradition request.

2.5 By a further note verbale of 30 October 1995, the Italian authorities submitted a second extended extradition request to enable the author to be tried in Italy on a new charge of murder and one of possession of arms.

2.6 In accordance with article 12 of the Passive Extradition Act,[1] the author appeared on 22 January 1996 before Central Magistrates' Court No. 5 and challenged the extradition order. On 30 January 1996, the investigating judge decided to refer the case to the Criminal Division of the National High Court. The author's defence attorney repeatedly objected to proceeding with the hearing in the National High Court, arguing that documentation was needed from the Italian Court of Cassation. The hearing was finally set for 14 January 1997 but was held in the absence of the author, who had already been extradited to Italy on 11 July 1996. During the hearing, the author's defence attorney repeated his objection to the extradition and pointed out that it was neither normal nor common for a requesting State to submit further

extradition requests concurrently to back up the first one. The National High Court, however, held that this kind of procedure was relatively common in extradition proceedings and was permitted by the European Convention on Extradition, to which the States members of the Council of Europe, including Spain and Italy, were parties.[2]

2.7 By a decision of 16 January 1997, the National High Court declared that the second extended request for the author's extradition was valid.

2.8 The author points out that he did not submit an appeal for *amparo* to the Spanish Constitutional Court because, according to the Court's jurisprudence, life imprisonment was compatible with the Spanish Constitution, so that such an appeal would have been ineffective in his case.

Proceedings in Italy

2.9 On 9 February 2000, the author was sentenced by the Corte di Assise di Santa Maria CV in Italy to:

(a) Nine years' imprisonment for association with organized crime, making criminal threats and possession of arms;

(b) Life imprisonment for murder, with nine months' daytime solitary confinement.

2.10 The author maintains that he was not present at the trial at the Corte di Assise di Santa Maria CV and that the sentence did not mention any of the three extradition procedures initiated against him in Spain, even though he could only be tried for the offences mentioned in the three decisions of the Spanish National High Court.

2.11 The author appealed against the sentence handed down by the Corte di Assise di Santa Maria CV, but the appeal was rejected by the Naples appeal court (Corte di Assise di Apelo di Napoli) on 29 April 2002. The first claim raised in the appeal was that the sentence passed by the court of first instance was null and void, as the trial court had no jurisdiction in the case. It was also argued in the appeal that Spain had granted the second extended extradition request, which was based on a murder charge, on certain conditions, one of which was that any sentence must not exceed 30 years' imprisonment.

2.12 By a ruling of 13 March 2003, the Italian Supreme Court dismissed the author's appeal in cassation.

The complaint

3.1 The author claims to be the victim of a violation of article 7, as the imposition of life imprisonment constitutes, in his view, cruel, inhuman or degrading treatment. He points out that although life imprisonment is not specifically mentioned in the European Convention on Extradition or in Spain's Passive Extradition Act, both instruments prohibit the subjection of convicted offenders to cruel, inhuman or degrading treatment. He adds that, in cases of extradition for offences punishable in the requesting State with life imprisonment, the Spanish National High Court, the organ responsible for dealing with extradition requests in Spain, has been demanding guarantees that the sentence will not exceed 30 years' imprisonment, the maximum allowed under the Spanish Criminal Code. According to the author, this practice is in

line not only with the Spanish Constitution, which prohibits the imposition of inhuman or degrading punishment, but also with the jurisprudence of the European Court of Human Rights. Moreover, in recent bilateral extradition treaties, Spain has included life imprisonment as a reason for automatically rejecting extradition, unless the requesting State guarantees that that penalty will be replaced by a term of imprisonment with a maximum limit.

3.2 The author maintains that the penalty imposed by the Corte di Assise di Santa Maria CV involves a violation of article 10, paragraph 1, taken in conjunction with article 7, paragraph 4, of the Covenant, on account of both the length of the sentence and the circumstances of its enforcement. He believes that Italy is failing to comply with the Standard Minimum Rules for the Treatment of Prisoners.

3.3 He also claims a violation of article 14, paragraph 3 (d), in that he was denied the right to be present at the hearing on 14 January 1997 before the Criminal Division of the Spanish National High Court, at which the second extended extradition request, based on one charge of murder and one of possession of arms, was considered. The reason for this was that he had already been extradited to Italy on 11 July 1996 pursuant to the National High Court's decision on the first extended extradition request. Nor was he present at his trial in Italy, despite the seriousness of the charges against him. He points out that the right to be present at your own trial means that the authorities have a duty to notify the accused and the defence attorney, with sufficient notice, of the date and place of the trial and to request that they appear, which was not done. He points out that, although extradition proceedings do not involve a judgement on a person's guilt, they are still a judicial procedure in which the court must guarantee the fundamental rights of the person facing extradition, especially when the extradition request could result in life imprisonment.

3.4 The author adds that Spain had granted the extradition request without insisting that any custodial sentence must not exceed 30 years and that the conditions in which it was to be served must not amount to inhuman and degrading punishment, in accordance with resolution (76) 2 of the Committee of Ministers of the Council of Europe, of 17 February 1976, on the treatment of long-term prisoners. He maintains that the Spanish authorities, in proceeding with his extradition, were obliged to prevent any possible violation of his fundamental rights by the Italian authorities.

State party's observations on admissibility and the merits

4.1 In its observations of 12 April 2005, the State party points out that the events referred to had taken place almost 10 years earlier, given that the author was extradited in 1996. According to the State party, while the Covenant does not set a time limit for submitting communications under the Optional Protocol, the communication in question should be declared inadmissible for being an abuse of the right to submit communications, taking into account the passage of such a long period of time.

4.2 The State party also points out that the alleged violations referred to by the author mostly concern Italy, and that Spain cannot respond to allegations of violations of human rights by other countries.

4.3 According to the State party, the author appears not to realize that the person facing extradition is not on trial in extradition proceedings, in which one State simply cooperates with another in pursuing criminal proceedings with all due process, so that the communication is incompatible *ratione materiae* with the Covenant.

4.4 With regard to the sole allegation concerning Spain, namely, the one relating to the National High Court's ruling that the second extended extradition request was valid, the author had not, in the State party's view, exhausted all available domestic remedies. The State party points out that an appeal could have been lodged with a higher court against the National High Court's decision of 16 January 1997 on the second extended extradition request, and that ordinary remedies would have been available to challenge the decision in such an appeal. Moreover, the author had not filed an appeal for *amparo* with the Constitutional Court.

4.5 The State party maintains that the arguments put forward by the author with regard to his absence from the hearing before the National High Court on 14 January 1997 are manifestly groundless. It points out that his presence at such a hearing is not required under Spain's Passive Extradition Act, article 12 of which provides only for the person facing extradition to appear before the investigating judge to agree to or challenge the extradition. This appearance took place on 22 January 1996. The State party adds that the author was not present at the hearing dealing with the second extended extradition request because he was in prison in Italy, serving a sentence passed in that country. In any case, the author's representative was present at the hearing.

Additional State party's observations

5.1 In its observations of 2 August 2005, the State party reaffirms its claim that the communication is inadmissible on grounds of abuse of the right to submit a communication, incompatibility *ratione materiae* with the Covenant, failure to substantiate the complaint and failure to exhaust domestic remedies.

Author's comments

6.1 In his comments of 3 March 2006, the author informs the Committee that his stay in the Italian prison is still governed by the emergency legislation on the prison regime regulated by article 41 bis *et seq*. of Act No. 354 of 26 July 1975, which means that he is in constant solitary confinement, with no visits or contact with his family allowed, which violates article 10 of the Covenant and the basic principles for the treatment of prisoners, as set out by the Council of Europe (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment) and the United Nations.

6.2 He insists that his current situation is the result of Spain's decision to extradite him to Italy without any of the guarantees stipulated in the European Convention on Extradition and without requiring that the sentence be in line with Spanish legislation, which does not provide for life imprisonment or the solitary confinement or prison restrictions imposed by Italy. He points out that, after he had been extradited to Italy, a new extended extradition request based on new facts was granted without his being present to defend himself and without notifying him of the new proceedings.

Issues and proceedings before the Committee

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

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

7.3 The State party maintains that the submission of the communication almost 10 years after the author's extradition to Italy constitutes an abuse of the right to submit a communication. The Committee notes that the author was extradited in July 1996 and submitted his complaint in July 2003. While in other circumstances the Committee might expect a reasonable explanation from the author for the substantial delay in submitting the communication, in the circumstances of the present case, and bearing in mind, in particular, that the author has been kept virtually incommunicado since he went to prison, the Committee considers that the passage of seven years after his deportation is not on its own sufficient to substantiate an abuse of the right to submit a communication.

7.4 As for the requirement that domestic remedies be exhausted, the Committee takes note of the State party's assertion that remedies were available in the domestic courts but the author made no use of them. However, the Committee observes that, once the author had been extradited, the remedies referred to would not have been effective for the purposes of a complaint by him about irregularities in the procedure followed in the National High Court, which culminated in the decision of 16 January 1997 to grant the second extended request for the author's extradition on one charge of murder and one of possession of arms.[3] Consequently, the Committee considers that article 5, paragraph 2 (b), does not prevent it from examining the communication.

7.5 The Committee takes note, however, of the State party's claim that the alleged violations referred to by the author are mainly attributable to Italy, not Spain. The Committee notes that the author's complaint in relation to articles 7 and 10 that the penalty imposed by the Corte di Assise di Santa Maria CV involved, by virtue of its duration and circumstances, cruel, inhuman or degrading treatment, refers to acts that took place outside the jurisdiction of the State party. It recalls that article 2 of the Covenant requires that States parties ensure to all individuals subject to their jurisdiction the rights recognized in the Covenant. Generally speaking, if a person is legally extradited, the State party concerned bears no responsibility under the Covenant for any violations of that person's rights that occur under the other State party's jurisdiction, and a State party can in no way be required to guarantee the rights of a person in another jurisdiction. Nevertheless, if a State party takes a decision regarding a person under its jurisdiction and the necessary and foreseeable consequence of that decision is the violation of that person's rights under the Covenant in another jurisdiction, the State party itself may be in violation of the Covenant.[4] In the present case, it cannot be asserted that the subjection of the author to treatment that violated the Covenant was the necessary and foreseeable consequence of his extradition to Italy. Consequently, the Committee considers that the communication is inadmissible with regard to articles 7 and 10, in accordance with article 1 of the Optional Protocol.

7.6 As for the complaint of a violation of article 14, paragraph 3 (d), the author alleges that there were certain irregularities on the part of the Spanish authorities with regard to the successive postponements of the hearing before the Criminal Division of the National High Court, which may explain why the author was extradited before it was held. The Committee notes that the author was not charged or found guilty of any offence in the State party, and that the decision to extradite him did not constitute a punishment resulting from a criminal procedure. The Committee therefore concludes that the extradition proceedings against the author do not constitute the determination of a criminal charge within the meaning of article 14 of the Covenant, and that the complaint relating to article 14, paragraph 3 (d), is inadmissible *ratione materiae*, in accordance with article 3 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 1 and 3 of the Optional Protocol;

(b) That the decision be transmitted to the State party and to the author.

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

Notes

[1] Act No. 4/1985 of 21 March.

[2] European Convention on Extradition of 13 December 1957, ratified by Spain on 21 April 1982.

[3] See the Views of the Committee in the case of *Weiss v. Austria*, adopted on 3 April 2003 (communication No. 1086/2002, para. 8.2).

[4] See the Views of the Committee in the case of *Kindler v. Canada*, adopted on 30 July 1993 (communication No. 470/1991, para. 6.2).

Q. Communication No. 1365/2005, *Camara v. Canada**
(Decision adopted on 24 July 2007, Ninetieth session)

Submitted by:	Souleymane Camara (not represented by counsel)
Alleged victim:	The author
State party:	Canada
Date of communication:	25 May 2004 (initial submission)
Subject matter:	Ill-treatment of detainee
Procedural issue:	Admissibility
Substantive issue:	Torture or cruel, inhuman or degrading treatment or punishment
Articles of the Covenant:	2, 7, 9, 10, 14, 16, 17
Articles of the Optional Protocol:	2, 5, paragraph 2 (b)

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

Meeting on 24 July 2007,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Souleymane Camara, a national of Mali where he is currently residing. He claims to be a victim of violations by Canada[1] of articles 2; 7; 9; 10; 14; 16; and 17, of the International Covenant on Civil and Political Rights. He is not represented by counsel.

The facts as presented by the author

2.1 On or about 10 June 2002, the author was arrested and taken to the South Division Edmonton Police Station, where he was asked to sign a document, failing which he would be detained. He alleges that he did not know why he was arrested and what the document in

* The following members of the Committee participated in the examination of the communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

question was. When he refused to sign it, he was placed in a cell, where he was repeatedly asked whether he had changed his mind. When he told the police to stop harassing him, several officers "attacked" him physically, forcing him to the floor, as a result of which he hurt his head and knee. He was then taken to the Downtown Division of the Edmonton Police Station, where his request for medical attention and tablets for a headache were repeatedly denied. The next day, he was brought before a judge who set a date for a hearing.[2] He had an interpreter. The following day a Justice of the Peace ordered his release.

2.2 On or about 12 June 2002, the author was arrested and detained at the South Division Edmonton Police Station for the second time. He allegedly was not informed of the reason for his arrest. One of the officers, assuming that he was from Rwanda or the Congo, allegedly stated that his people were all "paranoid killers". The author was told in French to undress. When he corrected the police officer's French, the latter became angry and undressed him, while he was filmed. The author was released after three days, and after posting bail. On 24 September 2002, he was arrested again and released after a few hours.[3] On 24 December 2002, he complained to the Edmonton Police Service about his treatment on 10 and 12 June 2002. The author alleges that the Crown Office allegedly offered to drop the charges against him, if he agreed to withdraw his charges against the officers of the Edmonton Police Service. He claims that he rejected this deal.

2.3 On 21 August 2003, the Acting Chief of Police informed the author that, following an investigation, his allegations against the police officers, had been dismissed as "not sustained" on all counts. On 4 and 25 September 2003, the author was informed that the rest of his complaints were dismissed, as they had not been sustained or had been withdrawn by the author.

2.4 The author was arrested again on 23 April 2003 and detained at the Edmonton Remand Centre until 9 September 2003. When he complained about the poor quality and insufficient quantity of food at the Centre, the institution's doctors recommended that a special diet should be provided to him. From 20 May to 6 June 2003, the author alleges to have been denied [sufficient] water and food. He eventually received a special diet from 7 June 2003.

2.5 On 24 May 2003, two of the guards forced the author to undress, while three female inmates and five female guards looked on. On 9, 14 and 19 July 2003, he was allegedly "pepper-sprayed" by guards, locked in a dark and cold cell, handcuffed, blindfolded and forced to walk backwards while his ankles were chained. During the last incident, two guards forced him to lie down on the floor, stood on his back, pulled his ears and bent his wrists until they bled. The author complains that his letters were opened and that on three occasions during his detention, he was attacked by convicted inmates, who injured him twice.[4]

2.6 The author subsequently complained to the Ombudsman. On 2 and 14 July 2003, he was advised that the alleged denial of sufficient water and food would be investigated, while his alleged assault by prison guards was outside the competence of the Ombudsman's Office as it related to a criminal offence. On 29 July 2003, the author was informed that the investigation would be extended to his allegation that the Director of the Remand Centre did not allow him to complain to the police. On 17 September 2003, the Ombudsman closed the file, having established that the author was not denied an adequate diet, but had refused to eat because he wanted a special diet, which was eventually provided to him. He also found that the author had been allowed to complain to the police.

2.7 On 9 September 2003, the author was deported from Canada to Mali.[5] Following his deportation, he appealed the results of the investigation by the Edmonton Police Service (para. 2.3) to the Alberta Law Enforcement Review Board. By letter of 13 November 2003, the Board advised him that appellants, as well as the police officers concerned, are required to attend the Board hearing to testify under oath. On the basis of such testimony, the Board would issue a written decision. On 26 May 2004, the Board reminded the author of the procedural requirement to attend his hearing. On the basis of e-mail correspondence with the author, the Board presumed that he was presently unable to appear before the Board and concluded that it was unable to review the matter. On 7 July 2004, the author replied that the reason for his deportation was precisely to obstruct the judicial process by preventing him from pursuing his charges against the police officers. He requested the Board to review his case on the basis of the files available with the Canadian judicial and police authorities. The Board did not act on this request and refused to review his complaint on the basis of a file he sent from Mali.

The complaint

3.1 The author claims that his ill-treatment by the police at the Downtown Division and South Division of the Edmonton Police Station and Remand Service (paras. 2.1, 2.2, 2.4 and 2.5), including the denial of [sufficient] food and water, amounts to a violation of article 7 of the Covenant. In addition, he claims that the Edmonton Police Service failed to investigate his complaints impartially and independently.

3.2 The author also claims that his repeated arrests, without being informed of the reasons, were arbitrary and in breach of article 9, and that the opening of his letters, the ridicule to which he was subjected by female staff when he was in a state of undress, violated article 17.

3.3 The author further claims that his deportation on 9 September 2003, one week before his court hearing, scheduled for 18 September 2003, was planned to deny him his right to equal access to the courts to pursue his charges against the police officers.

3.4 As regards domestic remedies, the author submits that upon return to Mali he met with the Canadian Consul, on 17 September 2003, who advised him that he was not eligible for re-entry into Canada and would, therefore, be unable to attend any court hearings.

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

4.1 On 19 August 2005, the State party contested the admissibility, merits and the facts as presented by the author. It provides detailed information, which it had submitted, on 24 February 2004, to the Special Rapporteur on Torture in response to similar allegations submitted to him. On the facts, the State party submits that the author is a citizen of Mali who entered Canada on a student visa on 11 October 1997, which authorized him to remain until 31 August 2000. On 5 December 2000, it was noted that he had overstayed his visa and that he was in Canada without authorization. On 12 December 2000, his student visa was reinstated and he was authorized to remain until 30 April 2002.

4.2 On 10 June 2002, the author was arrested for the alleged assault of his roommate the day before. He was taken to the South Division Edmonton Police Station, where he was charged with assault. After his transfer to the Downtown Division Edmonton Police Station, he was released the next day by a Justice of the Peace by way of recognizance, on various conditions,

including the condition that he avoid contact with the complainant of the assault. The author subsequently breached the recognizance on three occasions for which he was arrested on 12 June, and 2 December 2002 and subsequently released**.** In the meantime, on 18 September 2002, the author's request for an extension of his student visa was refused, as he had failed to appear at the scheduled interview.

4.3 On 2 April 2003, the trial on the assault charge was heard in French, at the author's request, and the judgement was reserved. On 23 April 2003, the author was arrested on four new charges: two relating to defacing of a mosque and two to breaching bail conditions by allegedly contacting the complainant of the original assault. He remained in detention as he could not meet bail. On 25 April 2003, he was arrested by immigration authorities and detained in immigration detention on the basis of a Detention Order, as it was considered unlikely that he would appear for further proceedings. On 27 June 2003, the author was found guilty of the assault and received a suspended sentence of 12 months' probation.

4.4 On 30 July 2003, in light of the author's conviction and proof that he was not a Canadian citizen, a Deportation Order was issued against him. He did not apply for judicial review of the order, but did apply for a Pre-Removal Risk Assessment, without giving any reason why he might require protection from being returned to Mali. On 15 August 2003, it was determined that he was not in need of protection. He did not seek leave to apply for judicial review of this decision either. According to the State party, when foreign nationals are ready for removal but criminal charges remain pending against them, immigration officers review the nature of the charges. If the charges are not serious, the Crown Prosecutor's office may consider staying charges for deportation purposes. As the remaining charges in this case were not considered of a serious nature, the author was deported on 9 September 2003, and the pending charges against him were subsequently stayed by the court on 18 September 2003. The State party denies that the prosecutor in charge of the author's case offered to drop the remaining charges against him in exchange for the author's withdrawal of his complaints against members of the Edmonton Police Service.

4.5 On admissibility, the State party submits that the author has not sufficiently substantiated his allegations of violations under articles 7 and 10, paragraph 1. His allegations are uncorroborated and contradicted by documentary evidence. On 10 June 2002, after being taken to the South Division Police station, he was initially cooperative. The arresting officer tried to release him from custody with an Appearance Notice, on the basis of which an accused may be released from custody. Although the content of the Note was explained in both English and French, the author refused to sign it and refused to attend court on the date specified.

4.6 Due to the author's insistence that he would not attend court, the arresting officer decided to bring him before a Justice of the Peace and requested that he be released on conditions. For this purpose, he had to be transferred to the Downtown Division. He was held there in a cell while awaiting transportation. When the arresting officer was closing the door of the cell, the author tried to escape. For this reason, the officer in question considered that he should be searched and requested the assistance of four other officers. Despite repeated requests to cooperate in a search, the author refused to comply. Two officers handcuffed him, with his hands behind his back. He was then placed on his stomach and searched. No more force was used than was necessary to control the author. A sergeant watched the search and considered that it was conducted properly. The subsequent investigation determined that the author had a minor abrasion to his knee, which did not need medical attention. As for his alleged headache, the

policy of the Edmonton Police Service is only to provide prescribed medication to prisoners held in temporary holding facilities. His headache was not considered to be an emergency requiring medical assistance.

4.7 The author's complaint was investigated by the Internal Affairs Section of the Edmonton Police Service, which indicated that the complaint related to one particular officer who participated in the restraint and search. The investigation indicated that, due to the absence of definitive evidence to either prove or disprove the allegation, the complaint was "not sustained". The State party submits that in the circumstances of the case, the action taken by the officers was reasonable, proportionate and not an excessive use of force. The author did not complain of being hit or physically abused nor did he exhibit injuries that could be attributed to physical abuse. The State party adds that it investigated the author's allegations as expeditiously and thoroughly as possible.

4.8 As to his claim that he was denied sufficient food and water, between 19 May and 9 June 2003, the State party submits that, on 23 April 2003, the author was medically examined after admission to the remand centre. He requested a pork-free diet for religious reasons, which was approved. On 20 May 2003, a correctional officer interviewed the author with respect to his refusal to eat his supper, as the records indicated that he had missed three consecutive meals. The author replied that he was not eating as he was not hungry. Pursuant to standard procedure, he was transferred to the infirmary to be monitored for food and fluid intake on a 24-hour basis. The author specified that he would eat the following types of food: French bread for breakfast, no bread for lunch and supper and rice, chicken, fish, beef, vegetables, potatoes and fruit. The State party explains that the menu at the Edmonton Remand Centre is developed by a dietician on the basis of established nutritional guidelines. The same menu is used for all inmates, with exceptions for medical or religious requirements. The author continued to refuse meals, stating that he would only eat what he had specifically requested. The records indicate that he was offered food and fluids at every meal. Special food items were approved for him on 29 May, but he only drank a nutritional supplement and ate sporadically during this time. As he complained about the size of the meals, from 4 June his portions were doubled to encourage him to eat. The State party submits that at no time during the period in question did the author complain about being "denied food and water". While it is well documented that he did not eat many meals, it is clear that this was his own choice. Due to his refusal to eat, substantial efforts were made to monitor his physical and mental health and to encourage him to eat.

4.9 As to the complaint of alleged "assaults" by guards on 9, 14 and 19 June 2003, the State party submits that this complaint is unsubstantiated, as the author has failed to provide the minimum amount of detail requested. Nevertheless, it submits that the records suggest the following. On 10 June 2003, the author was admitted to the health unit for observation, as he had missed three consecutive meals. There is no indication of any other incident involving the author on this day or on 14 June. However, the author may have been mistaken about the date as, on 15 June 2003, the record indicates that he had to be restrained after spitting at the cell camera and threatening staff. He managed to wiggle out of a belly chain and, as staff attempted to retrieve the chain, he waved it around and refused to comply with instructions. He was warned that Oeoresin Capsicum spray (OC Spray) would be administered if he did not comply with directions. As he refused to comply, the spray was used and he was placed in handcuffs. He was immediately decontaminated and examined by a duty nurse, who noted that there were no medical concerns. The State party submits that the use of the OC Spray (an organic,

non-chemical product colloquially known as "pepper spray") was measured, proportional and reasonable in response to the author's behaviour and in full compliance with the guidelines and limitations on its use imposed by policy documents.[6] The police investigated this incident and determined that there was insufficient evidence to support criminal charges against any of the Remand Centre staff.

4.10 The State party refers to another recorded incident on 9 June 2003. At 10.00 a.m., the author created a disturbance by banging and kicking his cell door and demanding his breakfast. His behaviour continued despite being told that breakfast was served at 11.00 a.m. on the weekend. As a result, the Emergency Response team arrived to remove him from the unit. They asked him to kneel on his bunk to be handcuffed. He refused and was warned three times that if he did not comply, OC Spray would be administered. It was subsequently administered and when it took effect, he was handcuffed and examined by a nurse. According to the State party, the author complained about this incident to the police, which, following an investigation, concluded that there was insufficient evidence to support criminal charges. The use of the spray was justified, reasonable, and was neither arbitrary nor excessive.

4.11 As to the allegation that, on 24 May 2003, the author was seen in a state of undress by female staff, the State party notes that there are no records of any complaint made to the Director of the Remand Centre by the author concerning this alleged incident, despite prior advice from the Ombudsman that he should do so before involving the Ombudsman himself. The State party submits that this complaint is inadmissible for non-exhaustion of domestic remedies. In the alternative, it is unsubstantiated for purpose of admissibility. The records indicate that the author created the conditions of undress by stripping himself of the security clothing that he was requested to wear while housed on Unit 2D (a mental health unit). He wrapped himself in a security blanket instead. During the night of 23 to 24 May, he covered up the lens of the camera in his unit, after which he was temporarily taken to another unit. Upon being returned to his cell, he began ripping up his blanket to cover the camera. The blanket was therefore removed from him. On 25 May, he removed the mattress cover from his bed and began "wearing it". Later that day, his blanket was returned but he still refused to wear the security clothing. While it is possible that the author was seen in a state of undress by female staff or inmates, this was a result of his own actions and not a deliberate attempt to degrade or humiliate him by the guards.

4.12 As to the complaint that the author's arrests were arbitrary, the State party submits that the Internal Affairs Section of the Edmonton Police Service investigated both allegations and found that with respect to the first arrest, the allegation was unfounded, as the author had been informed of the reasons for his arrest in English and French. As to the second arrest, after speaking with the investigating officer, the author decided not to proceed with it. In addition, the author never complained in domestic proceedings that he was not informed of the reasons for his arrest. Thus, the State party submits these complaints are inadmissible on grounds of non-substantiation and non-exhaustion of domestic remedies.

4.13 As to the claims under article 14 that the author's deportation was "planned" to prevent him testifying against members of the police service, the State party submits that the author's complaints against the police and remand staff are administrative in nature and thus not "suits at law" within the meaning of article 14, paragraph 1. In the alternative, this claim is insufficiently substantiated. At the time of his deportation, the author's complaints had already been investigated and he had been informed of the findings with respect to two of the allegations.

While his claim suggests that he intended to testify about the alleged police abuses in court, he could previously have done so at the trial of his assault charge, which had taken place on 2 April 2003. Criminal courts have an inherent power to stay or dismiss charges where police conduct merits punishment. In the event that the author's complaint is based on his apparent inability to pursue his appeal to the Law Enforcement Review Board, the State party submits that the author had been informed by the Board, in its 13 November 2003 letter, that he was required personally to attend the hearing, so as to give evidence under oath. He could have requested the Board to make alternative arrangements in the specific circumstances of the case to proceed with the appeal despite his inability personally to attend, or he could have attempted to apply for judicial review of the Board's decision to terminate consideration of his appeal.

4.14 As to his claims under articles 14, paragraph 1, and 16 the State party submits that, as the author has not indicated how these rights have been violated, these claims are inadmissible on grounds of non-substantiation. As to his claim, under article 17, that his letters were opened, the State party submits that, as there are no records to indicate that the author ever complained to the Director of the Remand Centre, this claim is inadmissible for non-exhaustion. In the alternative, it submits that the opening of prisoners' correspondence is authorized and strictly limited by provincial legislation and subject to detailed policy controls.[7] With respect to the claim of a violation of the same article on the grounds that he was seen in a state of undress by female staff and inmates, the State party refers to the facts as set out above. As to the claim under article 2, the State party submits that article 2, paragraph 3, does not recognize an independent right to a remedy, and is thus incompatible with the provisions of the Covenant.

5. In his comments of 21 July 2006 on the State party's submission, the author disputes the facts as presented by it and reiterates his initial claims.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee notes that each of the author's claims is disputed by the State party, which has provided substantial information to explain every incident alleged to have violated his rights. Other than denying the State party's version of all the events, the author has failed to corroborate or provide any evidence, medical or otherwise, of the ill-treatment he is alleged to have suffered at the hands of the State party's police authorities. The Committee also notes that the majority of these claims, in particular those concerning physical abuse and denial of adequate food and water were investigated either by the Ombudsman or the Edmonton Police Service, which found that none of the claims were substantiated. The author claims that these bodies were neither impartial nor independent but does not explain on what grounds he makes this claim. The fact that an investigation does not find for the complainant does not in itself demonstrate a lack of independence on the part of the investigating body. According to the State party, the claims which were not investigated were either not advanced at all by the author before any domestic authority, or were not made to the relevant authority (arbitrary arrest, state of undress and letter opening). The author does not dispute this as to the complaint that the author was deported to

prevent his testifying before a court, the Committee notes that the author has not explained what proceedings before which court was scheduled for hearing at the time of his deportation. This complaint is therefore inadmissible for non-substantiation.

6.3 For all of the aforementioned reasons, the Committee finds that the author has failed to substantiate any of his claims, for purpose of admissibility, and that additionally he has failed to exhaust domestic remedies with respect to his claims relating to the alleged arbitrary arrests, the forced removal of clothing and the opening of his letters. Thus, the communication is inadmissible under article 2; and article 5, paragraph 2 (b), of the Optional Protocol.

7. The Human Rights Committee therefore decides:

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

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

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

Notes

[1] The Covenant and the Optional Protocol to the Covenant both entered into force for the State party on 19 May 1976.

[2] The author does not say why he was brought before the Court and of what he was charged.

[3] He does not say why he was arrested.

[4] No further details are provided on these alleged assaults.

[5] The author does not say why he was so deported.

[6] The State party has provided a number of provincial policy documents on the use of this spray.

[7] It refers to the Committee jurisprudence (case No. 74/1980, *Estrella v. Uruguay*, Views adopted on 29 March 1983, para. 9.2) recognizing the legitimacy of measures of control over prisoner's correspondence, and considers this complaint non-substantiated.

R. Communication No. 1367/2005, *Peterson v. Australia** (Decision adopted on 31 October 2006, Eighty-eighth session)

Submitted by:	Tim Anderson (not represented by counsel)
Alleged victim:	The author
State party:	Australia
Date of communication:	26 July 2004 (initial submission)
Subject matter:	Right to compensation following reversal of conviction
Procedural issues:	Admissibility *ratione temporis* - admissibility *ratione materiae* - reservation
Substantive issue:	Reversal of conviction after "final decision"
Articles of the Covenant:	2, paragraph 3; and 14, paragraph 6
Articles of the Optional Protocol:	1, 2 and 3

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

Meeting on 31 October 2006,

Adopts the following:

Decision on admissibility

1. The author of the communication dated 26 July 2004 is Tim Anderson, an Australian citizen, born on 30 April 1953. He claims to be a victim of violations by Australia of articles 2, paragraph 3; and 14, paragraph 6 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Australia on 25 December 1991. He is not represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in adoption of the Committee's decision.

Factual background

2.1 In 1978, the author was a member of an organization known as Ananda Marga, a religious movement based in India, which was under investigation in connection with a bombing at the Sydney Hilton Hotel in which three people died. The same year, he was arrested and charged with conspiracy to murder a politician by means of explosives, but not in relation to the hotel bombing. On 8 August 1979, he was convicted by the Supreme Court of New South Wales of conspiracy to murder and sentenced to sixteen years imprisonment. His subsequent appeals were dismissed. In 1985, fresh evidence emerged and pursuant to a judicial inquiry, the author was pardoned by the State government of New South Wales on 15 May 1985. He was released, having spent seven years in jail. An inquiry into his conviction uncovered evidence of police criminality, but no disciplinary action was taken against the police officers concerned. In March 1987, the author applied for and was paid $100,000 by the State government by way of "rehabilitation compensation" pursuant to an *ex gratia* system run by the executive government of the State of New South Wales, whereby the State considers claims for compensation on a case by case basis.

2.2 In 1989, the author was arrested and charged with the murder of the three people who died in the bombing of the hotel in 1978. On 25 October 1990, he was convicted by the Supreme Court of New South Wales on three charges of murder and sentenced to an unspecified term of imprisonment. He appealed to the Court of Criminal Appeal which, on 6 June 1991, quashed his conviction and directed that a verdict of acquittal be entered on the three charges. The author was then released from jail. An investigation was instigated into the conduct of the prosecutor, including his apparently deliberate failure to examine a key witness on important issues. On 17 September 1991, the author made another application to the State government for compensation. The State government refused to consider it pending the results of the inquiry into the prosecutor's conduct. This inquiry lasted from 1991 until 2003, when the last of the charges of misconduct against the prosecutor were finally dismissed by the Administrative Decisions Tribunal on 30 April 2003. In 10 May 2004, the author was advised by the Attorney General of New South Wales that, given the decision of the Administrative Decisions Tribunal, his claim for compensation was rejected.

The complaint

3. The author claims a violation of articles 2, paragraph 3; and 14, paragraph 6 of the Covenant. He argues that despite being acquitted in 1991 and released from prison, he did not have access to compensation "according to law", as required by article 14, paragraph 6. He states that he has had no effective remedy to this violation of his rights, in contravention of article 2, paragraph 3. He recalls that the compensation paid to him in 1987 was an arbitrary *ex gratia* amount, subject to no legal process. He argues that, although his acquittal in 1991 stemmed from unfairness in trial procedure, rather than from fresh evidence, this second case was linked to the first. He argues that the absence of a proper legal compensation procedure at the time of his first prosecution led to a lack of accountability, and contributed to his second prosecution.

State party's admissibility and merits observations

4.1 By note verbale of 17 October 2005, the State party challenged the admissibility of the communication. It recalls that alleged violations which occurred prior to the entry into force of the Optional Protocol are inadmissible *ratione temporis*.[1] It acknowledges that there are

exceptions to this rule where the effects of the event in question have extended into the period after the entry into force of the Optional Protocol or where the alleged violation continues to have effects which in themselves constitute a violation of the Covenant after the entry into force of the Covenant. In such cases, the continuing violation must be an affirmation, after the entry into force of the Optional Protocol, by clear act or by clear implication, of the previous violation amounting to a fresh and separate violation independent of the original.[2] The State party also recalls that the Committee has previously held that a failure to compensate an author after the entry into force of the Optional Protocol does not thereby constitute an affirmation of a prior violation by the State party.[3] Moreover, the Committee has held that a failure to take other remedial measures does not, in itself, constitute a fresh or separate violation.[4] The State party also invokes the jurisprudence of the European Court of Human Rights on article 3 of Protocol No. 7, which is the equivalent to article 14, paragraph 6, according to which neither a conviction, nor the quashing of a conviction, which occurs prior to the entry into force of an obligation can be regarded as a continuing violation. The State party recalls that, in the present case, all events, with the exception of the rejection of the author's compensation claim, occurred prior to the entry into force of the Optional Protocol for Australia. Consequently, it submits that the communication is inadmissible *ratione temporis* so far as it relates to the circumstances surrounding the two convictions and the respective claims for compensation. On the issue of whether the failure to provide compensation constitutes a continuing violation, it argues that the failure to compensate or take other remedial measures in this case does not constitute a continuing violation.

4.2 For the State party, the claim under article 14, paragraph 6, is inadmissible *ratione materiae* for three alternative reasons. Firstly, while the author's complaint is that the *ex gratia* payment procedure is administrative and not legal in nature, the State party recalls that it has formulated a reservation to article 14, paragraph 6, expressly stipulating "that the provision of compensation for miscarriage of justice in the circumstances contemplated in paragraph 6 of article 14 may be by administrative procedures rather than pursuant to specific legal provision". It recalls that the Committee has previously noted the validity of this particular reservation.[5] The State party notes that the scope of application of the reservation is clear and confined so as not to defeat the object and purpose of the Covenant. Therefore, its obligation to provide mechanisms for compensation permits procedures that are administrative in nature.

4.3 Secondly, the State party argues that in the second set of proceedings started in 1989, there was no "final decision" convicting the author of a criminal offence. It recalls that the Committee has interpreted "final decision" to mean one which, for one reason or another, is not subject to further appeal.[6] Consequently, the Committee has held that a conviction at first instance which is overturned on appeal is not a final decision.[7] The State party recalls that the *travaux préparatoires* to the Covenant confirm that article 14, paragraph 6, was not intended to apply to individuals convicted of a criminal offence which could still be appealed. The proposal to remove the word "final" was rejected. It also argues that this interpretation is consistent with paragraphs 5 and 7 of article 14. In the present case, the State party argues that the decision of the Court of Criminal Appeal on 6 June 1991 was the final decision and that that decision was to acquit, rather than convict.

4.4 Thirdly, the State party argues that the conviction was not "reversed" because of a "new or newly discovered fact". It recalls that the Committee has previously held that the reversal of a conviction through the ordinary process of appellate review is not a reversal on the basis of a "new of newly discovered fact".[8] In the present case, the author's conviction was overturned

during the ordinary process of appellate review. The two grounds for appeal were that there was unfairness in the way the trial was conducted and that the judge misdirected the jury. There was thus no ground of appeal dealing with the emergence of any facts which were unknown to the trial court at first instance.

4.5 With regard to the claim under article 2, paragraph 3, the State party argues that it is inadmissible because it cannot be invoked in isolation.[9] Since the claims relating to paragraph 14, paragraph 6, are inadmissible, the author cannot invoke article 2 of the Covenant.

4.6 If the Committee were to find that the communication is admissible, the State party argues that the communication discloses no violation of article 14, paragraph 6, on three alternatives bases. Firstly, it argues that its reservation explicitly permits the provision of compensation via administrative procedures. Secondly, the author's conviction was not a final decision. Thirdly, the conviction was not "reversed" because of a "new or newly discovered fact". With regard to the claim under article 2, paragraph 3, the State party argues that it is not proven, since the claims under article 14, paragraph 6, are not proven.

Author's comments

5.1 By letter dated 10 December 2005, the author argues that the events complained of cover a very long period, from 1978 to 2004. He submits that the lack of an effective remedy for the violation of his rights during that period leaves him vulnerable to further attack, especially when the State party is formulating and now has in place new forms of arbitrary arrest and detention under an "anti-terrorist" rationale. He submits that the State party continues to violate his rights under articles 2, paragraph 3; and article 14, paragraph 6.

5.2 With regard to the State party's reservation to article 14, paragraph 6, the author recalls that the reason given by the State party in its third periodic report to the Committee was not valid: statutory procedures are objected to simply because they do not currently exist. He argues that the reservation defeats the object and purpose of the treaty.

5.3 With regard to the State party's argument that there was no "final decision" convicting the author of a criminal offence, the author submits that there was a final decision in the first case, but not in the second case. However, both cases involve a single attempt to implicate him in the same crime and he has thus treated them as a single prosecution, in two stages.

5.4 With regard to the State party's argument that the conviction was not reversed because of a "new or newly discovered fact", the author recalls that the first conviction was reversed because of a "new or newly discovered fact", whereas the second conviction was reversed on legal grounds. However, he argues again that he has treated both cases as a single prosecution, in two stages.

5.5 With regard to article 2, paragraph 3, the author recalls that the State party has failed to provide effective remedies for miscarriages of justice generally, including those that fall within the terms of article 14, paragraph 6. He argues that the provision of compensation generally, including under the terms of article 14, paragraph 6, constitutes an effective remedy. He submits that the State party has not responded to his complaint that it has failed to hold accountable police and prosecutors for their wrong doings.

Additional comments by the State party

6. By note verbale of 8 March 2006, the State party submits that a failure to discipline certain police and prosecutors after entry into force for alleged misconduct that occurred prior to entry into force would be insufficient to constitute an affirmation by act or clear implication such that it could be said to amount to a fresh, separate, independent violation. It recalls that article 14, paragraph 6, does not require a State to follow a certain procedure to provide compensation to an individual in certain cases of miscarriage of justice. In the absence of any stated requirement, a State may implement its obligation as it deems appropriate in the context of its domestic systems. In response to the author's submission that the implementation of administrative processes defeat the object and purpose of the Covenant, the State party recalls that its reservation to article 14, paragraph 6 has not been objected to, which is an inherent acknowledgement that it does not defeat the object and purpose of the Covenant.

Issues and proceedings before the Committee

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

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

7.3 The Committee takes note of the State party's objection that the communication is inadmissible *ratione temporis*, insofar as it relates to events which occurred prior to the entry into force of the Optional Protocol for Australia on 25 December 1991. It recalls that it cannot consider alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the State party, unless these violations continue after that date or continue to have effects which in themselves constitute a violation of the Covenant.[10] It notes that the first conviction on 8 August 1979, the decision to pardon the author on 15 May 1985 and the decision to compensate him in May 1987 all predate the entry into force of the Optional Protocol for the State party. The Committee does not consider that this alleged violation continued to have effects after May 1987, which would in themselves have constituted violations of the author's Covenant rights. This part of the communication is therefore inadmissible *ratione temporis* under article 1 of the Optional Protocol, insofar as it relates to the first conviction, pardon and payment of compensation.

7.4 Insofar as the communication relates to the second conviction on 25 October 1990, the acquittal of the author on 6 June 1991, the request for compensation made on 17 September 1991 and the decision to deny compensation made on 10 May 2004, the Committee recalls that article 14, paragraph 6 provides for compensation according to the law to a person who has been convicted of a criminal offence by a final decision and has suffered punishment as a consequence of such conviction if his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.[11]

7.5 The Committee observes that the author's conviction by the Supreme Court of New South Wales of 25 October 1990 was quashed by the Court of Criminal Appeal on 6 June 1991. The decision of the Supreme Court of New South Wales was subject to appeal and did not therefore constitute a "final decision" within the meaning of article 14, paragraph 6. The final decision was the decision of the Court of Criminal Appeal which acquitted the author. Accordingly, the Committee considers that article 14, paragraph 6, does not apply in the present case, and this claim is inadmissible *ratione materiae* under article 3 of the Optional Covenant.[12]

7.6 The Committee recalls that article 2 of the Covenant can be invoked by individuals only in conjunction with other articles of the Covenant, and notes that article 2, paragraph 3 (a), stipulates that each State party undertakes "to ensure that any person whose rights or freedoms […] are violated shall have an effective remedy". Article 2, paragraph 3 (b), provides protection to alleged victims if their claims are sufficiently well-founded to be arguable under the Covenant. A State party cannot be reasonably required, on the basis of article 2, paragraph 3 (b), to make such procedures available no matter how unmeritorious such claims may be.[13] Considering that the author's claims in the present case have been declared inadmissible *ratione temporis* and *ratione materiae*, his allegation of a violation of article 2 of the Covenant is also inadmissible under article 2 of the Optional Protocol.

8. Accordingly, the Committee decides:

(a) That the communication is inadmissible under articles 1, 2 and 3 of the Optional Protocol;

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

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

Notes

[1] See communication No. 520/1992, *E. and A.K. v. Hungary*, Inadmissibility decision adopted on 7 April 1994, para. 6.4; communication No. 579/1994, *Werenbeck v. Australia*, Inadmissibility decision adopted on 27 March 1997, paras. 9.2 and 9.3; communication No. 771/1997, *Baulin v. Russian Federation*, Inadmissibility decision adopted on 31 October 2002, para. 6.2; and communication No. 1060/2002, *Deisl v. Austria*, Views adopted on 27 July 2004, para. 10.3.

[2] See communication No. 1060/2002, *Deisl v. Austria*, Views adopted on 27 July 2004, para. 10.3; communication No. 646/1995, *Lindon v. Australia*, Inadmissibility decision adopted on 20 October 1998, para. 6.6; communication No. 851/1999, *Zhurin v. Russian Federation*, Inadmissibility decision adopted on 2 November 2004, paras. 6.4 and 6.5; and communication No. 516/1991, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, para. 4.5.

[3] See communication No. 520/1992, *E. and A.K. v. Hungary*, Inadmissibility decision adopted on 7 April 1994, para. 6.6.

[4] See communication No. 983/2001, *Love et alii. v. Australia*, Views adopted on 25 March 2003, para. 7.3.

[5] See communication No. 880/1999, *Irving v. Australia*, Inadmissibility decision adopted on 1 April 2002, para. 1.2.

[6] See communication No. 89/1981, *Muhonen v. Finland*, Views adopted on 8 April 1985, para. 11.2; and communication No. 880/1999, *Irving v. Australia*, Inadmissibility decision adopted on 1 April 2002, para. 8.4.

[7] See communication No. 408/1990, *W.J.H. v. The Netherlands*, Inadmissibility decision adopted on 22 July 1992, para. 6.3; and communication No. 963/2001, *Uebergang v. Australia*, Inadmissibility decision adopted on 22 March 2001, para. 4.3.

[8] See communication No. 868/1999, *Wilson v. The Philippines*, Views adopted on 30 October 2003, para. 6.6; and communication No. 880/1999, *Irving v. Australia*, Inadmissibility decision adopted on 1 April 2002, para. 8.4.

[9] See communication No. 268/1987, *H.G.B. and S.P. v. Trinidad and Tobago*, Inadmissibility decision adopted on 3 November 1989, para. 6.2; communication No. 398/1990, *A.M. v. Finland*, Inadmissibility decision adopted on 23 July 1992, para. 4.2; and communication No. 972/2001, *Kazantzis v. Cyprus*, Inadmissibility decision adopted on 7 August 2003, para. 6.6.

[10] See communication No. 24/1977, *Lovelace v. Canada*, Views adopted on 30 July 1981, para. 7.3; and communication No. 1060/2002, *Deisl v. Austria*, Views adopted on 27 July 2004, para. 10.3.

[11] See communication No. 408/1990, *W.J.H. v. The Netherlands*, Inadmissibility decision adopted on 22 July 1992, para. 6.3; communication No. 880/1999; *Irving v. Australia*, Inadmissibility decision adopted on 1 April 2002, para. 8.3; and communication No. 963/2001, *Uebergang v. Australia*, Inadmissibility decision adopted on 22 March 2001, para. 4.2.

[12] See communication No. 408/1990, *W.J.H. v. The Netherlands*, Inadmissibility decision adopted on 22 July 1992, para. 6.3; communication No. 880/1999, *Irving v. Australia*, Inadmissibility decision adopted on 1 April 2002, para. 8.3; and communication No. 963/2001, *Uebergang v. Australia*, Decision on admissibility adopted on 22 March 2001, para. 4.3.

[13] See communication No. 972/2001, *Kazantzis v. Cyprus*, Inadmissibility decision adopted on 7 August 2003, para. 6.6; communication No. 1036/2001, *Faure v. Australia*, Views adopted on 31 October 2005, para. 7.2; and communication No. 1229/2003, *Dumont de Chassart v. Italy*, Inadmissibility decision adopted on 25 July 2006, para. 8.9.

S. Communication No. 1370/2005, *González and Muñoz v. Spain**
(Decision adopted on 24 July 2007, Ninetieth session)

Submitted by:	José Antonio González Roche and Rosa Muñoz Hernández (represented by counsel, José Luís Mazón Costa)
Alleged victims:	The authors
State party:	Spain
Date of communication:	1 September 2002 (initial communication)
Subject matter:	Evaluation of the evidence and full review of the conviction and sentence by a higher tribunal - undue delay in the proceedings - absence of a verbatim record - presumption of innocence
Procedural issues:	Non-exhaustion of domestic remedies - failure to sufficiently substantiate the alleged violations
Substantive issues:	Right to have the evidence - conviction and sentence reviewed by a higher tribunal according to law
Articles of the Covenant:	14, paragraphs 1 and 5
Article of the Optional Protocol:	2

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

Meeting on 24 July 2007,

Adopts the following:

Decision on admissibility

1. The authors of the communication, dated 1 September 2002, are José Antonio González Roche and Rosa Muñoz Hernández, born in 1967 and 1959 respectively. They claim to be the victims of violations by Spain of article 14, paragraphs 1, 2, 3 (c) and 5, of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The authors are represented by counsel, José Luís Mazón Costa.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

Factual background

2.1 The authors state that on 14 February 1996 they travelled to the Isla de Margarita, Venezuela, to celebrate St. Valentine's Day. A man named Pedro López García, who comes from the same home town as Rosa Muñoz Hernández, was travelling on the same flight for reasons of his own. When he returned to Spain, on 21 February 1996, Pedro López García was detained at the airport after having been found to be in possession of cocaine. In September 1996, the police arrested the authors and charged them with having brought cocaine into Spain when they returned from their trip to the Isla de Margarita in February 1996. The evidence against the authors consisted of a statement by Pedro López García incriminating them.

2.2 On 8 March 1999 the Provincial High Court of Madrid sentenced each of the authors to a prison term of eight years and one day and a fine of 110 million pesetas for the offence of cocaine trafficking. The authors submitted an appeal in cassation to the Second Division of the Supreme Court, but the application was dismissed on 21 November 2001. They subsequently filed for *amparo* with the Constitutional Court, and this appeal was also rejected, on 1 July 2002.

2.3 The authors applied to the Ministry of Justice for a pardon, alleging a violation of their rights under the Covenant. They applied to the Provincial High Court for a suspension of sentence, which was granted.

The complaint

3.1 The authors claim to have been deprived of their right under article 14, paragraph 5, of the Covenant to a full review of their conviction and sentence by a higher tribunal, because they were unable to have the credibility of Pedro López García's statement - the evidence on which the verdict hinged - examined in the Supreme Court. The authors allege that Pedro López García implicated them as part of a sentence-reduction deal with the prosecutor, and that his sentence was in fact reduced to three years' imprisonment. They add that the Supreme Court denied them the opportunity to examine the credibility of the testimony, stating that testimony could "only be examined by a court that had observed the oral evidence at first hand, that is to say, directly and in person", and they recall the Committee's case law in *Gómez Vásquez*.[1]

3.2 The authors argue that the absence of a verbatim record of the public hearing violates article 14, paragraph 1, of the Covenant, because where there is no verbatim record reflecting the entire proceedings there can be no fair trial. They also claim a violation of article 14, paragraph 5, of the Covenant because there can be no effective appeal without a verbatim record. The authors assert that an application for *amparo* would be unsuccessful in this regard and that, in any event, the Constitutional Court has already found that the absence of a verbatim record does not constitute a procedural defect.

3.3 Rosa Muñoz Hernández claims a violation of her right to presumption of innocence because the Supreme Court established her guilt on the basis of mere conjecture and supposition rather than conclusive proof. She argues that the Court assumed, on the basis of Pedro López García's statement, that, as José Antonio González Roche's partner, she must have been aware of the drug trafficking activities, and that it was unlikely that a domestic servant could afford a trip costing €1,000 and obtain a week's leave from work. She was not given the benefit of the doubt.

3.4 The authors claim that the fact that five years and three months passed between their arrest in September 1996 and the rejection of their application for *amparo* in July 2002 constitutes a violation of their right to be tried without undue delay, under article 14, paragraph 3 (c), of the Covenant. They maintain that this delay was unjustified.

3.5 The authors contend that the Constitutional Court's failure to rule on the alleged violation of article 14, paragraph 5, of the Covenant, is itself a violation of that provision, as well as of article 14, paragraph 1. They argue that the failure of a judicial body to rule on a claim is a breach of the right to due process.

State party's observations

4.1 In its written submissions of 30 April and 4 August 2005, the State party argues that the communication should be declared inadmissible under articles 2 and 3 of the Optional Protocol, for failure to exhaust domestic remedies and because it is manifestly unfounded and an abuse of the right to submit communications. The State party adds that the authors themselves refer in their appeals to the evidence considered by the domestic courts, though they dispute the courts' conclusions; and that the Supreme Court ruling clearly reflects a review of that evidence.

4.2 According to the State party, there is no indication of any limitations on the evidence or on the reconsideration of the evidence. In this case the Supreme Court conducted an evaluation and review of the facts and the evidence, so it is not comparable with the *Gómez Vásquez* case. The State party recalls the Committee's case law[2] that in specific cases where an appeal in criminal cassation includes thorough review of the conviction and sentence, there is no violation of article 14, paragraph 5, of the Covenant.

4.3 The State party contends that the proceedings were not unreasonably lengthy, since this was a complex case involving the investigation and trial of an offence committed by a criminal gang, with 10 people on trial at the same time. Moreover, that complaint was not raised in the domestic courts.

4.4 The State party claims that there is no right in law to a verbatim record of the trial; in any case, the record of proceedings was signed by the authors' lawyers, who could have submitted a complaint at the time. Furthermore, the oral hearing was documented in a record certified by the clerk of the court, which is not a summary, as the authors claim, but a representation of what actually took place. According to the State party, the central issue in the communication is the dispute over the facts declared proven in the judgement. The State party recalls the Committee's case law that findings of fact are, in principle, a matter for the State party's own courts.

4.5 The State party maintains that domestic remedies have not been exhausted for the purposes of article 2 of the Optional Protocol, since the authors' complaints regarding the alleged constraints on the effective review of the conviction and sentence were not put to the Supreme Court and, in the case of Ms. Muñoz Hernández, were not even raised in the application for *amparo*. Nor was any complaint put to the trial court or the Supreme Court regarding the unreasonable length of proceedings.

Authors' response to the State party's submissions

5.1 In their letter of 31 October 2005, the authors claim that in an appeal in cassation there can be no full review of a conviction in accordance with article 14, paragraph 5, of the Covenant, because the court is unable to review the credibility of witness statements or the evaluation of the evidence by the lower court, except, theoretically, in the extreme case of an error in the examination of a reliable, authentic document that is not contradicted by other evidence, which rarely happens. The authors add that their convictions were based on prosecution testimony that could not be reviewed by a higher tribunal.

5.2 The authors argue that an error in the evaluation of the evidence cannot constitute a ground for appeal in the remedy of cassation to the Supreme Court, as it can in the remedy of appeal against other criminal sentences. The only ground on which they could appeal was the violation of the presumption of innocence, which they did. The authors claim that, since the Gómez Vázquez decision, the State party has tried to adjust its language to suit the Committee's requirements, but in reality continues to carry out only a limited reconsideration of convictions, rather than a full or genuine review. They claim that the Supreme Court confines itself to a consideration of "whether the evaluation of the evidence was rational", and does not consider the evaluation of the evidence in itself.

5.3 The authors claim that, in a ruling of 26 December 2000, the Supreme Court made a general statement to the effect that in no case of appeal in cassation was it admissible to seek a review of the credibility of statements made at trial, which could "only be examined by a court that had observed the oral evidence at first hand, that is to say, directly and in person". They argue that the remedy of cassation is confined to points of law and an interpretation of the right to presumption of innocence that assumes that the evidence was obtained by lawful means, and the right not to be convicted in the absence of any evidence.

5.4 The authors contend that the length of the criminal proceedings was unreasonable, since they lasted five years and three months and there was nothing to justify that delay. They claim that, in its Views on communication No. 526/1993, *Hill v. Spain*,[3] the Committee found that proceedings lasting three years had been unreasonably lengthy, despite the State party's argument that the delay was due to the complexities of the case.

5.5 The authors maintain that, in contrast with the civil procedure, Spanish criminal procedure does not provide for a verbatim record, thus precluding a re-evaluation of the evidence. They state that they did in fact raise the failure to conduct a full or effective review of the conviction and the issue of undue delay in their application for *amparo* and argue that it is an inherent obligation of States parties to guarantee a reasonable duration for criminal proceedings. Furthermore, in its decision on inadmissibility, the Constitutional Court made no reference to their complaint of lack of a second hearing.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee has ascertained that the same matter has not been submitted to any other procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The Committee notes the authors' contention that the absence of a verbatim record of the public hearing violated article 14, paragraph 1, of the Covenant, because where there is no verbatim record reflecting the entire proceedings there can be no fair trial. The Committee also notes, however, that, as the State party points out, the authors did not raise this complaint in the Spanish courts. The Committee accordingly decides that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, since domestic remedies were not exhausted.

6.4 As to the complaint relating to article 14, paragraph 3 (c), of the Covenant, the Committee observes that, as asserted by the State party, the complaint of undue delay in the proceedings was not submitted to the domestic courts. The Committee therefore considers that this part of the complaint is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, as domestic remedies have not been exhausted.

6.5 The Committee notes the authors' submissions that they have been deprived of their right under article 14, paragraph 5, to a full review of their conviction and sentence by a higher tribunal because the Supreme Court did not examine the credibility of Pedro López García's statement, and that, in the case of Rosa Muñoz Hernández, there was a violation of the right to presumption of innocence because the Supreme Court established her guilt on the basis of mere conjecture. The authors also claim that the Constitutional Court's failure to rule on the alleged violation of article 14, paragraph 5, of the Covenant, is itself a violation of that provision, as well as of article 14, paragraph 1. The State party maintains that in the authors' case, the Supreme Court conducted a thorough evaluation and review of the facts and the evidence, and it recalls the Committee's case law that, in principle, the evaluation of facts and evidence is a matter for State parties' domestic courts, unless such evaluation is manifestly arbitrary or constitutes a denial of justice.

6.6 The Committee notes that, in the copy of the 20 November 2001 ruling of the Criminal Division of the Supreme Court in the case of José Antonio González Roche, the Supreme Court took account of the statements of other co-defendants, documentary evidence of the purchase of tickets, evidence from his bank account, and the fact that he was unemployed. In the case of Rosa Muñoz Hernández, the Court also considered circumstantial evidence relating to her employment and the funds she had at her disposal to pay for such a trip, and came to the conclusion that the evidence, although circumstantial, was sufficient to warrant conviction. The Committee accordingly considers that, in this case, the authors have not substantiated their allegations with respect to article 14, paragraph 5, of the Covenant for the purposes of admissibility, and concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides that:

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

(b) This decision shall be communicated to the State party, the authors, and the authors' counsel.

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

Notes

[1] Communication No. 701/96 of 20 July 2000.

[2] Communication No. 1356/2005, *Antonio Parra Corral v. Spain*, decision of 29 March 2005, para. 4.3.

[3] Adopted on 2 April 1997.

T. Communication No. 1384/2005, *Petit v. France**
(Decision adopted on 24 July 2007, Ninetieth session)

Submitted by:	Robert and Marie-Françoise Petit (represented by counsel, Alain Garay)
Alleged victim:	The authors
State party:	France
Date of communication:	1 November 2004 (initial submission)
Subject matter:	Challenge to the amount paid in compensation for grubbing-up vines
Procedural issue:	Previous examination by the European Court of Human Rights
Substantive issue:	Right to a fair trial
Articles of the Covenant:	14 and 15
Article of the Optional Protocol:	5, paragraph 2 (a)

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

Meeting on 24 July 2007,

Adopts the following:

Decision on admissibility

1. The authors of the communication, dated 1 November 2004, are Robert and Marie-Françoise Petit, French nationals. They claim to be victims of violations by France of articles 14 and 15 of the International Covenant on Civil and Political Rights. They are represented by counsel, Alain Garay. The Covenant and the Optional Protocol thereto entered into force for France on 4 February 1981 and 17 May 1984 respectively.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Edwin Johnson Lopez, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Ms. Christine Chanet did not participate in adoption of the Committee's decision.

Factual background

2.1 In 1965, Mr. Petit took an emphyteutic lease on some plots of land in Corsica with Ms. Corteggini, the landowner. The author, who had planted vines on the land, decided to grub them up, and this entitled him to European Community assistance in the form of a grubbing-up premium allocated by the Office National Interprofessionnel des Vins (ONIVINS). Grubbing-up the vines, according to ONIVINS, required the agreement of the owner. The owner made her agreement conditional on having part of the premium paid to herself ("a sum of 300,000 francs applying to 50 per cent of the premium"), and concluded a contract to this effect with the author on 15 May 1991. The Albaretto Estate, of which the author is the founder and sole partner, received a grubbing-up premium in proportion to its yield. The premium was paid into Ms. Petit's account on 30 December 1992, but no payment was made to the owner, who filed a complaint against the authors.

2.2 On 8 April 1998, the investigating magistrate in charge of the case, Ms. Spazzola, referred it to the criminal court. On 1 December 1998, the High Court of Bastia, ruling as a criminal court, found Mr. Petit guilty of abuse of trust and fraud, and Ms. Petit guilty of possession of an item obtained by abuse of trust. In contravention of domestic law, one of the judges trying the case in the High Court was the same Ms. Spazzola who had acted as investigating magistrate in the case.

2.3 In a ruling dated 15 December 1999, the Court of Appeal of Bastia upheld the guilty verdict against the authors, but found that the offence described as fraud in fact constituted an abuse of trust. It appears from the ruling that, in contravention of domestic law, two of the magistrates acting in the proceedings were husband and wife, one representing the Public Prosecutor's Office (Mr. Mesclet, counsel), and the other (Ms. Mesclet) sitting as a judge. In a ruling dated 18 October 2000, the criminal division of the Court of Cassation rejected an appeal by the authors, stating that the ground of the appeal, namely that both Mr. and Ms. Mesclet had acted in the case, was based on a purely technical error in the reference material accompanying the ruling.

2.4 The authors filed an initial application with the European Court of Human Rights (case registered as No. 27582/02). On 21 September 2004, the Court declared the application inadmissible on the grounds that "the Court has not identified any indication of a violation of the rights and freedoms guaranteed by the Convention or its Protocols".

2.5 In separate proceedings, the Albaretto Estate claimed that a higher premium was payable because of a mistake over the yield. On 23 June 1993, ONIVINS rejected this claim. On 11 August 1993, the Albaretto Estate applied to the Administrative Tribunal of Paris for this decision to be quashed. The case was transferred, first to the Council of State, then to the Administrative Tribunal of Bastia, which rejected the application on 22 October 1998. On 11 April 2002, the Administrative Appeal Court of Marseille upheld the decision of the Bastia Tribunal. On 19 March 2003, the Council of State denied the Albaretto Estate permission to appeal, stating that none of the grounds for appeal it advanced would make the case admissible.

2.6 On 23 August 2002, Mr. Petit filed a second application with the European Court of Human Rights on behalf of the Albaretto Estate (case registered as No. 41247/02). In this application, he complained of the excessive length of the proceedings before the administrative

courts. The application was resolved by a friendly settlement formally recorded in a decision of the Court dated 1 June 2004, thus bringing the proceedings to a close. The decision sets out the terms of the settlement, including the following statement by the author:

> "I note that the French Government is prepared to pay me the sum of 7,000 (seven thousand) euros by way of friendly settlement in the matter arising from the above-mentioned application with the European Court of Human Rights.
>
> "I accept this offer and also renounce any other claim against France in connection with the facts behind this application. I declare this case to be definitively settled.
>
> "The present statement forms part of the friendly settlement reached between the Government and myself."

2.7 Meanwhile, Mr. Petit submitted a third application to the European Court of Human Rights on his own behalf and on behalf of the Albaretto Estate (case registered as No. 36883/03). Here he complained of a violation of article 6 of the Convention on the grounds that no reasons were given for the Council of State's decision of 19 March 2003 and that the procedure for considering applications to appeal was unfair. He alleged a violation of article 13 of the Convention since no effective remedy had been available to him. He also alleged a violation of article 1 of Protocol No. 1 to the Convention because the premium for grubbing-up was too low. On 25 January 2005, the Court ruled this application inadmissible on the grounds that it could not "identify any indication of a violation of the rights and freedoms guaranteed by the Convention or the Protocols thereto".

The complaint

3.1 The authors claim to be victims of a violation of article 14 of the Covenant. They state that the irregular composition of the High Court and Court of Appeal of Bastia was incompatible with the principles of impartiality and a fair hearing protected under article 14 of the Covenant on Civil and Political Rights.

3.2 The authors claim a violation of article 15 of the Covenant because they were found guilty of breach of trust under article 408 of the former Criminal Code, instead of article 314-1 of the new Criminal Code.

3.3 The authors complain that the legal proceedings in the administrative courts over the grubbing-up premium that they contested with ONIVINS were unreasonably lengthy: the case was referred to the administrative tribunal in Bastia in February 1994, but the Council of State did not reach a final decision until March 2003. They assert that the procedure whereby applications to appeal on points of law to the Council of State are or are not accepted is unfair and obscure, and they consider this to be a violation of their right to an effective remedy under article 14 of the Covenant. They consider that ONIVINS did not take their comments into account. Lastly, they contend that the small size of the grubbing-up premium they received demeaned their property.

3.4 The authors state that they have exhausted all domestic remedies. The authors also claim that the European Court of Human Rights has not "examined" their case within the meaning of article 5, paragraph 2 (a), of the Optional Protocol and the State party's reservation.

3.5 The authors request damages in compensation for the injury they have suffered.

State party's observations on admissibility

4.1 On 15 June 2005, the State party disputed the admissibility of the communication. Firstly, it points out that it has entered a reservation in relation to article 5, paragraph 2 (a), of the Optional Protocol, and refers to the Committee's case law on this type of reservation.[1] It notes that the case concerns the same individuals as did the case before the European Court of Human Rights and that they are invoking the same substantive rights before the Committee. The authors put forward no new facts beyond those already set out in their application to the Court, and are simply bringing the same complaint before a different international authority. The State party's reservation therefore applies in this case.

4.2 The State party takes the view that the complaints under articles 14 and 15 have already been examined by the European Court of Human Rights, which did not "identify any indication of a violation of the rights and freedoms guaranteed by the Convention or its Protocols" in its decision of 21 September 2004 (complaint No. 27582/02).

4.3 In a note verbale of 16 January 2007, the State party points out that the part of the complaint that refers to the unreasonable length of the proceedings was resolved through a friendly settlement (with the assistance of the European Court, complaint No. 41247/02). It therefore concludes that this part of the communication is inadmissible.

4.4 The State party stresses that the other complaints relating to the proceedings over the amount of the grubbing-up premium have already been examined by the European Court of Human Rights, which did not "identify any indication of a violation of the rights and freedoms guaranteed by the Convention or its Protocols" in its ruling of 25 January 2005 (complaint No. 36883/03).

Authors' comments

5. In their comments of 20 January 2007, the authors insist that the State party's reservation does not apply because the European Court of Human Rights has not "examined" the substance of their complaints.

Issues and proceedings before the Committee

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

6.2 In accordance with article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that two similar complaints filed by the authors were found inadmissible by the European Court of Human Rights on 21 September 2004 (complaint No. 27582/02) and 25 January 2005 (complaint No. 36883/03). In those two decisions, the Court "did not identify any indication of a violation of the rights and freedoms guaranteed by the Convention or its

Protocols". The Committee recalls that at the time it subscribed to the Optional Protocol, the State party entered a reservation to article 5, paragraph 2 (a), of the Optional Protocol, specifying that the Committee "shall not have competence to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement". The Committee notes that the European Court of Human Rights has already "examined" this case within the meaning of article 5, paragraph 2 (a), insofar as its decisions of 21 September 2004 and 25 January 2005 were not solely concerned with procedural issues.[2]

6.3 The Committee notes that the only complaint not examined by the European Court of Human Rights, which concerned the unreasonable length of proceedings (complaint No. 41247/02), was resolved by a friendly settlement formally recorded by the Court in a decision dated 1 June 2004. This complaint had been lodged with the Court on behalf of the Albaretto Estate. The Committee also notes, however, that Mr. Petit signed the statement of friendly settlement (see paragraph 2.6 above). In these circumstances, the Committee believes that, even though Mr. Petit might have signed the statement on behalf of the Albaretto Estate, it would seem that, from his use of the first person, he was also giving his personal undertaking to respect the friendly settlement. The Committee concludes that the European Court of Human Rights has already "examined" this complaint adequately within the meaning of article 5, paragraph 2 (e) and that the State party's reservation is applicable in this instance.

7. The Human Rights Committee therefore decides:

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

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

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

Notes

[1] See communication No. 998/2001, *Althammer v. Austria*, Views adopted on 8 March 2003, para. 8.4.

[2] See communication No. 944/2000, *Mahabir v. Austria*, decision on inadmissibility adopted on 24 October 2004, para. 8.3; communication No. 990/2001, *Irschik v. Austria*, decision on inadmissibility adopted on 19 March 2004, para. 8.4; communication No. 1002/2001, *Wallmann v. Austria*, Views adopted on 1 April 2004, paras. 8.5 to 8.7; and communication No. 1396/2005, *Rivera Fernández v. Spain*, decision on inadmissibility adopted on 28 October 2005, para. 6.2.

U. Communication No. 1386/2005, *Roussev v. Spain** (Decision adopted on 24 July 2007, Ninetieth session)

Submitted by:	Tchanko Roussev Gueorguiev (not represented by counsel)
Alleged victim:	The author
State party:	Spain
Date of communication:	5 April 2004 (initial submission)
Subject matter:	Minimum guarantees of due process and lack of proper review of the conviction and sentence during the appeal
Procedural issues:	Failure to exhaust domestic remedies - international *lis pendens* - insufficient substantiation of the complaint
Substantive issues:	Right to minimum guarantees of due process - right to have the conviction and sentence reviewed by a higher tribunal according to law
Articles of the Covenant:	14, paragraphs 3 (b), 3 (e) and 5
Articles of the Optional Protocol:	2 and 5, paragraphs 2 (a) and 2 (b)

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

Meeting on 24 July 2007,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 5 April 2004, is Tchanko Roussev Gueorguiev, a Bulgarian citizen born in 1969. The author alleges that he is a victim of violations by Spain of article 14, paragraphs 3 (b) and 3 (e), and article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is not represented by counsel.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

Factual background

2.1 On 20 June 2000, the Burgos Provincial Court sentenced the author to six years' imprisonment and specific disqualification from exercising the right to passive suffrage and ordered him to pay legal costs for sexual assault, taking into account the mitigating circumstance of inebriation, and to three weekends' detention for battery.

2.2 In the Provincial Court's ruling, the following were given as relevant established facts:

(i) In the early hours of the morning of 29 August 1999, the author drove V.P., who was working as a waitress in the Pub Varadero in Burgos, after the premises had closed, to the author's home, where he compelled her by force to have sexual relations with him using two condoms, one of which broke during the sexual act;

(ii) On the same day, V.P. filed a complaint against the author at the Burgos Police Station and arranged to have herself admitted immediately to hospital for physical and gynaecological forensic tests. According to the report of the physical examination, V.P. presented a number of bruises and inflammation of the nose, lip, neck, clavicle and inner thighs. The gynaecological report found symptoms of vulvitis and traces of semen;

(iii) On the same day, police officers arrived at the author's home and arrested him; they found him asleep in his bedroom, with two condoms bearing traces of semen, one of which appeared to be broken, on the floor.

2.2 The author alleges that, during his trial before the Burgos Provincial Court, he admitted to having had sexual relations with the alleged victim on the night in question, but that he had done so with her consent, and he denied that he had ever hit or raped her. He argues that he was convicted on the basis of "abstract statements by the prosecution and by the forensic physician". He further claims that the Provincial Court rejected the application submitted by the defence to postpone the trial and to call as a witness the psychiatrist who was treating the victim for bulimia and borderline personality disorder. The defence also requested that the National Institute of Toxicology should issue a report supplementary to the report already issued, transmitting samples of the defendant's blood in order to determine whether the semen found in the condoms was the author's.

2.3 The author further claims that the lawyer who represented him during the oral proceedings ceased to represent him at the beginning of September 2000 and that in January 2001 he received a letter informing him that a lawyer had been appointed to represent him during the appeal. He alleges that this lawyer never had access to the case documents. He adds that at the end of May 2001 he learned that on 7 December 2000 this lawyer had initiated an appeal without ever having contacted the author. The grounds for the appeal were the following: (i) error of form, in the refusal to postpone the trial and call the psychiatrist as a witness; (ii) error of law, in the appraisal of the documentary evidence consisting of the psychiatric report; and (iii) violation of the law by infringement of article 24, paragraph 2, of the Spanish Constitution, which recognizes the fundamental right to the use of evidence, in the refusal to conduct a DNA test.

2.4 On 16 July 2001, the Supreme Court rejected the appeal and upheld the decision of the Burgos Provincial Court. On the matter of calling the psychiatrist as a witness, the

Supreme Court held that such evidence was unnecessary because V.P.'s illness and treatment were already a matter of record, since during the oral proceedings the defence had conducted a thorough cross-examination of the forensic physicians who had examined the complainant. The Supreme Court also found that the Provincial Court had made a correct appraisal of the psychiatric report. Lastly, the DNA test had been rejected principally because the defendant had already admitted to having had sexual relations with the victim on the night in question.

2.5 The author states that he applied to the Constitutional Court for *amparo*. He maintains that on 25 September 2001 the Burgos Provincial Court notified his legal representative of the decision that his sentence was enforceable. He says that he received notification of this decision by ordinary mail and that he was informed that he had 20 days in which to submit an application for *amparo*, but that he did not know how or where to apply. He notes that on 14 October 2001, having no lawyer to advise him, he submitted a request to the Burgos Provincial Court to appoint an attorney and a legal representative to apply on his behalf. Once these were appointed, an application was filed with the Constitutional Court on 4 March 2002 alleging a violation of the right to a second hearing and of the right of defence as a result of the Provincial Court's refusal to allow the summoning of the psychiatrist as a witness or the conducting of a DNA test. This application was rejected on 14 March 2002 because it had been submitted after the deadline reckoned from the date of notification of the Supreme Court decision. The author notes that the application would have been unsuccessful in any case, since the Constitutional Court does not accept applications for *amparo* based on violations of the right to a second hearing established in article 14, paragraph 5, of the Covenant.

2.6 On 18 July 2002, the author submitted an application to the European Court of Human Rights, which was declared inadmissible on 13 November 2003 on the grounds that domestic remedies had not been exhausted, since the application for *amparo* had been submitted to the Constitutional Court after the deadline. The author argues that his complaint was not considered by the European Court, since the Court rejected it on formal grounds and did not consider the substance of the complaint. He adds that, in any case, the European Court does not have jurisdiction in Spain with respect to the right to a second hearing, since Spain has not ratified Protocol No. 7 to the European Convention on Human Rights.

The complaint

3.1 The author alleges a violation of article 14, paragraph 3 (b), of the Covenant as a result of the rejection of his request for a DNA test. He takes the view that this refusal infringed his right to have adequate facilities for the preparation of his defence. He argues that this evidence was necessary in order to demonstrate that the semen found on V.P.'s clothing and body was not his. He points out that a certain period of time would have elapsed between the time when the victim claimed, in her initial statement, to have closed the premises and the time she arrived at the author's home, meaning that she could have been assaulted on the way. He stresses that the trial court's refusal to admit the DNA evidence was arbitrary and unreasonable.

3.2 The author argues that the refusal to suspend the oral proceedings and to call the psychiatrist who had treated V.P. as a witness violated his right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, as provided for in article 14, paragraph 3 (e), of the Covenant. The author claims that this evidence was proposed in time and in due form and was pertinent in determining whether the illnesses from which V.P. was suffering (bulimia and borderline personality disorder) led her on some

occasions to fabulate only about her eating habits, or whether that tendency could extend to other areas of her life. He adds that there is no record that the forensic physicians who testified in the oral proceedings were specialists in psychiatry, and that it has thus not been determined that they were able to give information with full technical knowledge of V.P.'s diagnosis and that "there could have been doubts as to the forensic physician's impartiality". The author further argues that the alleged victim's word was the only incriminating evidence against him.

3.3 Lastly, the author alleges that the Spanish Criminal Procedure Act prevents effective appeal against the conviction and sentence to a higher court that reviews the evidence and the judgement at first instance, thereby violating article 14, paragraph 5, of the Covenant.[1] He maintains that the Supreme Court confined itself to upholding the decision of the sentencing court and at no point reviewed the evidence used to justify the conviction and sentence.

State party's observations on admissibility

4.1 On 20 June 2005, the State party submitted its observations on the admissibility of the communication. The State party alleges that the communication is inadmissible because domestic remedies have not been exhausted. It points out that the author himself recognizes that he has failed to exhaust domestic remedies because he submitted his application for *amparo* late, and that his purported justification of alleged omissions by lawyers or legal representatives has nothing whatsoever to do with the State party's responsibility. It adds that the alleged futility of the remedy of *amparo* can equally be dismissed inasmuch as it is expressly established in article 5, paragraph 2 (b), of the Optional Protocol that the only exception to the exhaustion rule occurs when the application of the remedies is unreasonably prolonged. It argues that the effectiveness of an appeal cannot be equated with acceptance of the appellant's claims. It points out that an unduly broad interpretation of the Protocol would make it possible to dispense with domestic remedies to the extent that relevant case law had been established by the domestic courts, which would clearly be contrary to the letter and spirit of article 5, paragraph 2 (b).

4.2 The State party argues that the communication is also inadmissible because it has been submitted to another international court, the European Court of Human Rights, which declared the author's claim inadmissible on 13 November 2003. It cites the Committee's doctrine with respect to article 5, paragraph 2 (a), of the Optional Protocol, according to which it interpreted the declaration made by Spain upon ratification of the Optional Protocol in the form of a reservation; in that reservation Spain expresses its understanding that the provisions of article 5, paragraph 2 (a), apply also to communications the consideration of which has been completed under another international procedure.[2]

4.3 The State party alleges an abuse of the right of submission of communications, given that the author is attempting to use the Covenant to revisit to a case three years after the enforceable domestic ruling was handed down.

4.4 It further claims that the communication is clearly without merit, since it is merely a discussion of facts deemed established by domestic courts, whose decisions cannot be branded as arbitrary.

4.5 Lastly, the State party points out that the Supreme Court considered all the matters of fact raised by the complainant.

Author's comments

5.1 In his comments dated 8 September 2006, the author stresses that the remedy of *amparo* was not available, since he was not notified of the Supreme Court's final decision, meaning that he was unable to challenge that ruling in *amparo*. He further points out that the Supreme Court's decision did not state which remedy he could apply for, giving the impression that the decision was not subject to appeal. He states that even if he had submitted his application for *amparo* in time and in due form, it would never have been successful with respect to his complaint regarding the right to a second hearing. He points out that the Committee has stated on previous occasions that failure to exhaust domestic remedies does not preclude the Committee from examining complaints against Spain in relation to article 14 of the Covenant.[3] He adds that article 5, paragraph 2 (b), of the Optional Protocol does not require exhaustion of domestic remedies where the application of the remedies is unreasonably prolonged.

5.2 The author claims that the State party's contention that "omissions by lawyers or representatives of the complainant have nothing whatsoever to do with the State party's responsibility" would be valid only if the author had chosen and appointed his lawyer and legal representative himself. He points out that, in his case, the lawyer and legal representative who submitted the appeal were court-appointed, meaning that it was the State party's obligation to act in a way that ensured that the complainant could effectively exercise his right of defence and right to representation.

5.3 The author stresses that he tried to address an appeal to the European Court of Human Rights but that that body declared the application inadmissible for failure to exhaust the remedy of *amparo* in Spain, and did not examine the case. He further stresses that, in any case, the European Court does not have jurisdiction in Spain with respect to the right to a second hearing because Spain has not ratified Protocol No. 7, which recognizes that right.

Issues and proceedings before the Committee

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

6.2 The Committee takes note of the State party's allegations that the same case has been examined under another procedure of international agreement or settlement, the European Court of Human Rights, meaning that Spain's reservation with respect to article 5, paragraph 2 (a), of the Optional Protocol is applicable. However, the Committee notes that in this case the Court did not actually examine the complaint submitted by the author, its decision being based solely on a strictly formal matter - failure to exhaust domestic remedies - without any examination of the substance of the complaint. Consequently, the Committee takes the view that the case does not raise any issues under article 5, paragraph 2 (a), of the Optional Protocol, as amended by the reservation formulated by the State party.[4]

6.3 The Committee further notes the State party's allegations that domestic remedies have not been exhausted, since the application for *amparo* was not submitted before the deadline established by law. It takes note also of the author's allegations with respect to alleged irregularities in the appointment of his attorney and legal representative and in his notification of the Supreme Court's decision, which he cites as the reasons that he was unable to meet the

deadline established by law to challenge the decision through the remedy of *amparo*. Likewise, the author claims that this remedy would have been unsuccessful in any case, given the Constitutional Court's systematic dismissal of applications for *amparo* that are based on the right to a second criminal hearing. The Committee refers to its case law, in which it had repeatedly held that the exhaustion rule applies only to remedies that have a reasonable chance of success.[5] The remedy of *amparo* had no chance of success with respect to the alleged violation of article 14, paragraph 5, of the Covenant, and the Committee therefore takes the view that domestic remedies have been exhausted with respect to this part of the communication. As to the complaints based on article 14, paragraphs 3 (b) and 3 (e), of the Covenant, the Committee notes that the State party has not challenged the alleged irregularities mentioned by the author with respect to the appointment of his legal representatives and the failure to notify him of the appeal decision, which the author claims justified the late submission of his application for *amparo*. The State party has confined itself to stating that these matters do not fall within its remit. The Committee takes the view that the State has an obligation to ensure that any person accused of a crime can exercise the right of defence and the right of appeal, and regrets that the State party offered no reasonable explanation for the procedural irregularities described. Consequently, the Committee takes the view that domestic remedies have also been exhausted with respect to this part of the communication.

6.4 The Committee takes note of the State party's argument that the communication should be dismissed on the grounds of abuse of the right of submission of communications, given that three years have elapsed since the final appeal decision was issued. In view of the circumstances of the case - in particular, the procedural irregularities claimed by the author - as well as the prior practice of the Committee with respect to deadlines for the submission of communications, the Committee is not convinced that the mere fact that three years have elapsed since the final decision was handed down is sufficient to constitute abuse of the right of submission of communications.[6]

6.5 As to the author's complaints with respect to article 14, paragraphs 3 (b) and 3 (e), of the Covenant that the trial court refused to admit evidence which, in his view, proved fundamental to establishing the author's guilt, the Committee observes that these complaints refer to the appraisal of the evidence proposed during the trial, a matter which in principle falls to the national courts, as numerous examples in the Committee's case law attest, unless this evaluation was clearly arbitrary or constituted a denial of justice.[7] In the present case, the Committee takes the view that the author has failed to demonstrate, for the purposes of admissibility, that the conduct of the State party's courts was arbitrary or constituted a denial of justice, and consequently declares the author's allegations to be inadmissible under article 2 of the Optional Protocol.

6.6 As to the complaint based on article 14, paragraph 5, of the Covenant, the Committee notes that, in the circumstances of this case, the Supreme Court examined at length each of the grounds for appeal, all of which related to the appraisal of the facts and evidence by the Burgos Provincial Court, and that it reasonably dismissed the three grounds. The Committee therefore takes the view that this part of the communication has not been sufficiently substantiated for the purposes of admissibility and declares it to be inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

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

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

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

Notes

[1] In support of this claim, the author cites the Views of the Committee in the cases of *Cesario Gómez Vásquez v. Spain* (communication No. 701/1996) and *Sineiro v. Spain* (communication No. 1007/2001).

[2] The State party cites the Committee's decision in the case of *Arturo Navarra Ferragut v. Spain* (communication No. 1074/2002), adopted on 31 March 2004, para. 6.2.

[3] The author cites the Committee's Views in the cases of *Cesario Gómez Vásquez v. Spain* (communication No. 701/1996) and *Semen v. Spain* (communication No. 986/2001).

[4] See communication No. 1389/2005, *Bertelli Gálvez v. Spain*, decision of 25 July 2005, para. 4.3.

[5] See, for example, communications No. 701/1996, *Cesario Gómez Vásquez v. Spain*, Views adopted on 20 July 2000, para. 10.1; No. 986/2001, *Joseph Semey v. Spain*, Views adopted on 30 July 2003, para. 8.2; No. 1101/2002, *Alba Cabriada v. Spain*, Views adopted on 1 November 2004, para. 6.5; No. 1293/2004, *Maximino de Dios Prieto v. Spain*, Views adopted on 25 July 2006, para. 6.3; and No. 1305/2004, *Villamón Ventura v. Spain*, decision of 31 October 2006, para. 6.3.

[6] See, for example, communications No. 1086/2002, *Weiss v. Austria*, Views adopted on 3 April 2003, and No. 744/1997, *Linderholm v. Croatia*, decision of 23 July 1999.

[7] See, inter alia, communications No. 867/1999, *Smartt v. Republic of Guyana*, Views adopted on 6 July 2004, para. 5.3; No. 917/2000, *Arutyunyan v. Uzbekistan*, Views adopted on 29 March 2004, para. 5.7; No. 927/2000, *Svetik v. Belarus*, Views adopted on 8 July 2004, para. 6.3; No. 1006/2001, *Martínez Muñoz v. Spain*, Views adopted on 30 October 2003, para. 6.5; No. 1084/2002, *Bochaton v. France*, decision of 1 April 2004, para. 6.4; No. 1120/2002, *Arboleda v. Colombia*, Views adopted on 25 July 2006, para. 7.3; No. 1138/2002, *Arenz v. Germany*, decision of 24 March 2004, para. 8.6; No. 1167/2003, *Ramil Rayos v. Philippines*, Views adopted on 27 July 2004, para. 6.7; and No. 1399/2005, *Cuartero Casado v. Spain*, decision of 25 July 2005, para. 4.3.

V. Communication No. 1391/2005, *Rodrigo v. Spain**
(Decision adopted on 24 July 2007, Ninetieth session)

Submitted by:	Benito Javier Rodrigo Alonso (not represented by counsel)
Alleged victim:	The author
State party:	Spain
Date of communication:	29 August 2004 (initial submission)
Subject matter:	Failure to conduct a full review of the lower court decision in cassation
Procedural issues:	Failure to exhaust domestic remedies, insufficient substantiation of the alleged violations
Substantive issues:	Right to have sentence and conviction reviewed by a higher court in accordance with the law
Articles of the Covenant:	14, paragraphs 1, 2 and 5; 15, paragraph 1; and 26
Articles of the Optional Protocol:	2 and 5, paragraph (2) (a) and (b)

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

Meeting on 24 July 2007,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 29 August 2004, is Benito Javier Rodrigo Alonso, a Spanish national born in 1959. He claims to be the victim of violations by Spain of article 14, paragraphs 1, 2 and 5, article 15, paragraph 1, and article 26 of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is not represented by counsel.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

The facts as described by the author

2.1 On 6 February 1998, at the airport of Frankfurt am Main, Germany, customs officials opened a parcel which had been sent from Bolivia to Javier Rodrigo Alonso, containing 200 grams of cocaine. On the same day, the German authorities sent the parcel to the Spanish authorities. On 17 February the author was arrested by a Spanish official of the customs surveillance service as he was preparing to collect the parcel at a post office in Ibiza. The author was taken to the offices of the customs surveillance service, where the parcel was opened in the presence of a judicial official. The author claims that the parcel had been tampered with, since it was open on one of its sides.

2.2 On 1 December 1998, the Provincial High Court of Palma de Mallorca sentenced the author to 10 years' imprisonment and a fine of 30,480,000 pesetas (about 183,000 euros). During the trial, the author claimed that the procedure followed when the parcel was opened violated the right to privacy in communications, and that this unlawful act invalidated the evidence obtained as a result. The author also considers that the decision of the Provincial High Court introduced an element which was not established during the trial. The judgement stated that a green C-1 sticker was attached to the parcel. However, according to the author, the parcel did not bear such a sticker, and consequently could not be opened by the German authorities.

2.3 The author lodged an appeal in cassation against the judgement of the Provincial High Court on the following grounds: (i) an error of fact in the grounds for the judgement in respect of the value of the drugs; (ii) introduction in the judgement of an element which had not been established, namely, the existence of the green C-1 sticker; (iii) violation of correspondence, as the parcel was opened in Frankfurt without any intervention or authorization by the courts; (iv) violation of correspondence, as the parcel was opened in Spain without the presence of a judge; and (v) violation of the presumption of innocence. On 10 April 2000, the Supreme Court rejected all the grounds cited by the author except for the first. The Court found that there had been an error of fact in respect of the value of the drugs and accepted the argument, reducing the total amount of the fine imposed by the lower court. According to the author, the Supreme Court confined itself to ruling on the grounds for the appeal, and at no time reviewed the evidence on which the Provincial High Court had based its decision. The author lodged an application in the Supreme Court for judicial review of the facts in March 2004, which was flatly rejected on 9 March 2004.

2.4 The author indicates that he has exhausted domestic remedies. In his opinion, it was pointless to make an *amparo* application to the Constitutional Court claiming a violation of his right to a second hearing owing to the Court's established practice in denying such remedies. He adds that the remedy would be equally ineffective in respect of the violation of his right to the presumption of innocence, since the Court cannot modify facts established during the trial and evidence cannot be evaluated by a higher court.

2.5 On 14 February 2001, the author lodged a complaint with the European Court of Human Rights, which on 31 May 2002 declared the communication inadmissible on the grounds that domestic remedies had not been exhausted, because of failure to pursue the remedy of *amparo* in the Constitutional Court. The author claims that the European Court has no jurisdiction in respect of Spain where the right of appeal is concerned because Spain has not ratified Protocol No. 7 to the European Convention, which recognizes the right of appeal.

The complaint

3.1 The author alleges a violation of article 14, paragraph 5, of the Covenant. He claims that he was unable to secure a full review of the court ruling by a higher court because the remedy of cassation is limited and relates only to matters of law or issues of procedure and does not allow evidence to be challenged, since the Supreme Court cannot re-evaluate the evidence.[1] The author claims that, in this case, the Provincial High Court introduced an element which was not established during the trial: that the parcel bore a green C-1 sticker. The appeal ruling dismissed this argument, holding that it had not been raised during the trial, thus breaching the principle of equality.[2] According to the author, this ground for the appeal was supported by documentary evidence including a photocopy of the wrapping without any type of sticker, the record of the opening of the parcel, which made no mention of the green sticker, and the record of the receipt of the parcel, which described the external characteristics of the parcel without referring to stickers of any kind.

3.2 The author also alleges a violation of article 14, paragraphs 1 and 2, on the grounds that: (i) the parcel was reopened in Spain without the presence of a judge; (ii) the evidence obtained unlawfully could not be used against him; (iii) the claim that the parcel bore a green C-1 sticker was arbitrarily introduced into the court judgement as a fact, making it impossible for him to challenge it during the trial. He states that the Provincial High Court of Mallorca evaluated the evidence in a completely arbitrary manner.

State party's observations on admissibility

4.1 By means of a note verbale dated 30 January 2006, the State party submitted its observations on the admissibility of the communication. It contends that the communication is inadmissible on grounds of non-exhaustion of domestic remedies, as the remedy of *amparo* was not sought. It also holds that the communication is inadmissible because it constitutes an abuse of the right to submit communications, because it is clearly without merit and because it has already been submitted under another procedure of international settlement, the European Court of Human Rights.

4.2 According to the State party, domestic remedies have not been exhausted because the Constitutional Court did not have the opportunity to rule on an *amparo* application in the specific case of the author in respect of the extent of the review conducted in cassation. The State party cites the 3 April 2002 ruling of the Constitutional Court (STC 70/02, First Chamber), in which the Court held that:

> "… there is a functional similarity between the remedy of cassation and the right to review of conviction and sentence set forth in article 14.5 of the [Covenant], provided that the scope for review in cassation is interpreted broadly and the right under the Covenant is interpreted not as the right to a second hearing with full retrial, but as the right to verification by the higher court of the correctness of the proceedings in the lower court … It is not correct to state that our system of cassation is confined to analysis of issues of law and issues of form and does not allow the review of evidence … Currently, by virtue of article 852 [of the Criminal Procedure Act], the remedy of cassation can be sought in any case on the grounds of violation of a constitutional principle. And under article 24.2 [of the Constitution] (fair trial and presumption of innocence), the Supreme Court may check both the lawfulness of the evidence on which the judgement is based and its adequacy in

overriding the presumption of innocence and the reasonableness of the inferences drawn. Consequently, [the petitioner] has an option which allows full review, in the sense of an opportunity to address not only issues of law but also the matters of fact on which the declaration of guilt is based, through checks of the application of procedural rules and the evaluation of the evidence".

4.3 The State party also cites the decisions of the Committee in the *Parra Corral*[3] and *Carvallo Villar*[4] cases, where the Committee considered the review of the judgement by means of the remedies of cassation and *amparo* to be adequate for the purposes of article 14, paragraph 5, of the Covenant. It also refers to the decisions on the *Bertelli Gálvez*[5] and *Cuartero Casado*[6] cases, where the Committee also considered the remedy of cassation to be adequate to fulfil the requirements of the Covenant.

4.4 According to the State party, the author concedes that domestic remedies have not been exhausted, seeking to justify his non-use of the remedy of *amparo* on grounds of its alleged ineffectiveness. However, following the decision in the *Gómez Vázquez* case, the remedy of *amparo* is perfectly effective, which has been demonstrated by the fact that in cases where such remedies were previously denied, the Constitutional Court now rules on the merits. Another approach is to consider, analysing in practical terms the scope of the review carried out in this specific case, that an adequate review has been conducted, not only of issues of law, but also of matters of fact. The remedies must exist and be available, but they cannot be considered to be ineffective solely because they have failed to satisfy the author's claims. The State party adds that excessively broad interpretation of the Protocol would give rise to the possibility of dispensing with domestic remedies in cases where established practice of the domestic courts exists, which would seem clearly contrary to the letter and spirit of article 5, paragraph 2 (b).

4.5 Likewise, the State party holds that the communication clearly lacks merit in view of the fact that the Supreme Court ruling broadly settles the issues raised in the appeal, in particular those related to the prosecution evidence which overrides the presumption of innocence. It is clear from the Supreme Court's decision that the Court carried out a full review of the conviction and sentence. The remedy of cassation related almost exclusively to facts and evidence, to the extent that the argument relating to the value of the drugs was accepted and the sentence modified.

4.6 Lastly, the State party points out that "the same matter" has been brought before the European Court of Human Rights, which declared the complaint inadmissible on the grounds that domestic remedies had not been exhausted. The State party cites the Committee's Views in the *Ferragut Pallach v. Spain* case,[7] where the Committee considered that the Spanish text also related to situations where such examination had been concluded, and that Spain had had the clear intention to uphold the meaning of the Spanish text of the Optional Protocol, concluding that its declaration was equivalent to a reservation, extending article 5, paragraph 2 (a), of the Protocol to cover communications the consideration of which had been completed under another international procedure. Consequently, the State party calls on the Committee to declare the communication inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

4.7 The State party also calls for the communication to be declared inadmissible on the grounds that domestic remedies have not been exhausted, in accordance with article 2 and article 5, paragraph 2 (b), of the Protocol, and that it constitutes an abuse of the purpose of the Protocol in accordance with articles 2, 3 and 5, paragraph 2.

Comments by the author

5.1 In his comments dated 15 May 2006, the author repeats that the judgement handed down by the Provincial High Court of Palma de Mallorca could only be appealed by means of the remedy of cassation before the Supreme Court, which confined itself to ruling on the grounds for the appeal. At no time did the Supreme Court review the evidence on which the Provincial High Court based its conviction.

5.2 Article 847 of the Criminal Procedure Act lays down that judgements handed down by courts in oral proceedings can be appealed in cassation only on the grounds of error of law or error of form. The special nature of this remedy makes it impossible to challenge the evidence used by the trial court and restricts the review to the procedural or legal aspects of the judgement. In this way, all lower court decisions relating to elements which are set out in the judgement as established are final, and it is not possible for the court of cassation to evaluate the evidence anew.

5.3 The author explains that, in the light of the Committee's jurisprudence, he lodged an application in the Supreme Court for judicial review of the facts, citing new evidence which demonstrated the error of the trial court. The Court decided that the author was seeking a review of the entire process of hearing the evidence, and simply shelved the application.

5.4 According to the author, the Provincial High Court of Palma de Mallorca denied him justice by evaluating the facts in a manifestly arbitrary manner, and the Supreme Court in cassation confined itself to upholding the conviction, while correcting the value assigned to the drugs in an arbitrary manner. He claims that the Supreme Court, in cassation, carries out a limited examination of whether the conclusions reached by the lower court are arbitrary or amount to a denial of justice, which is not in keeping with article 14, paragraph 4 (sic), of the Covenant.

5.5 Concerning the State party's claim that domestic remedies have not been exhausted, the author explains that, even if he had lodged an application for *amparo*, it would have failed, and that the Constitutional Court cannot modify elements regarded as established by the trial court. He also contends that the Constitutional Court dismisses *amparo* applications for review of sentence. Lastly, he points out that data published in the Spanish press show that in 2003 the Constitutional Court denied 97 per cent of *amparo* applications made to it. He concludes that the application had no prospect of success, and refers to the Committee's jurisprudence in the *Gómez Vázquez* and *Joseph Semey* cases.[8]

5.6 Concerning the State party's claim that the communication has already been examined by the European Court, the author points out that the European Court declared his communication inadmissible on the grounds of non-exhaustion of domestic remedies because he had not lodged an *amparo* application with the Constitutional Court. He repeats that the matter was therefore not studied by the European Court, which did not examine any issue of substance. Under the Committee's jurisprudence, in applying this admissibility requirement, the matter must have been examined by another procedure of international settlement. Moreover, he holds that the European Court lacks jurisdiction in respect of Spain where the right of appeal is concerned because Spain has not ratified Protocol No. 7, article 2 of which recognizes the right of appeal in criminal matters.

5.7 Lastly, the author claims violation of the rights set out in article 15, paragraph 1, and article 26 of the Covenant on the grounds that, following the Supreme Court's decision raising the threshold of "significant quantities" of drugs to 750 grams of cocaine, the competent courts apply this decision and impose sentences of three to six years for public health offences when the amount of cocaine seized is under 750 grams. The author claims that he is serving a 10-year sentence for an amount of roughly 400 grams of cocaine despite having applied for a reduction in his sentence through the normal legal channels. He concludes that the State party has breached the principles of equality and non-discrimination.

Issues and proceedings before the Committee

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

6.2 The Committee takes note of the claims based on article 14, paragraphs 1 and 2, concerning the reopening of the parcel in Spain in an allegedly unlawful manner and the arbitrary introduction into the lower court's judgement of a reference to the existence of a green C-1 sticker. The Committee considers that these allegations relate essentially to the evaluation of the facts and the evidence carried out by the Spanish courts. It reiterates its settled jurisprudence that it is generally for the courts of the States parties to evaluate facts and evidence, except where such evaluation was clearly arbitrary or amounted to a denial of justice.[9] The Committee considers that the author has failed to demonstrate, for the purposes of admissibility, that the conduct of the courts of the State party in the author's case was arbitrary or amounted to a denial of justice, so that this part of the communication must also be declared inadmissible under article 2 of the Optional Protocol.

6.3 Likewise, concerning the author's claim in relation to article 15, paragraph 1, and article 26, that he is serving a sentence which is more severe than that applied currently by the courts in respect of the amount of drugs seized, the Committee notes that the author has not provided any information on any remedies he may have sought in the domestic courts. Consequently, the Committee finds that this part of the communication is also inadmissible on the grounds of non-exhaustion of domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

6.4 Concerning the State party's claim that the communication is inadmissible because the same matter has been brought before the European Court of Human Rights, the Committee notes that the Court did not *examine* the case within the meaning of article 5, paragraph 2 (a), of the Optional Protocol, since its decision was based solely on procedural grounds and did not involve any consideration of the merits of the case.[10] Therefore, the Committee considers that no issue arises with regard to article 5, paragraph 2 (a), of the Optional Protocol as modified by the State party's reservation to this provision.

6.5 The Committee takes note of the State party's claims that domestic remedies have not been exhausted since the alleged violations referred to the Committee were never brought before the Constitutional Court, and that, since the decision on the *Gómez Vázquez* case, the remedy of *amparo* is perfectly effective. The Committee observes that the Supreme Court's ruling in the author's case predated the Committee's decision on the *Gómez Vázquez* case. The Committee also reiterates its settled jurisprudence that it is only necessary to exhaust those remedies that

have a reasonable prospect of success.[11] The application for *amparo* had no prospect of success in relation to the alleged violation of article 14, paragraph 5, of the Covenant, and the Committee therefore considers that domestic remedies have been exhausted.

6.6 The Committee takes note of the author's claims under article 14, paragraph 5, that the Supreme Court failed to conduct a full review of the conviction handed down by the Provincial High Court, confining itself to ruling on the grounds of the appeal in cassation without reviewing the evidence on which the Provincial High Court based its conviction, and in particular dismissing the argument relating to the introduction of a non-established element in the Provincial High Court's judgement, namely the existence of the green C-1 sticker, considering that the issue had been raised for the first time in cassation. However, the Committee notes that the Supreme Court conducted a review of the decision handed down by the Provincial High Court, a review which focused essentially on issues of fact and evidence. It notes that, as the State party indicates, the Court even accepted the argument based on the error of fact in the valuation of the drugs, correcting the valuation and substantially reducing the fine imposed at first instance. Concerning the argument relating to the existence of a green C-1 sticker, the Committee notes that the Court considered that that issue had not been raised within the prescribed period, and that in any event sufficient documentary proof existed in the form of the document signed by two officials of the customs surveillance service confirming the existence of the sticker. The Committee concludes that it follows from the Supreme Court ruling that the Court carefully considered the author's arguments, examining in detail the facts and evidence presented in his application and conducting a full review of the judgement handed down by the Provincial High Court. In the light of the above, the Committee considers that the author's complaint under article 14, paragraph 5, has not been sufficiently substantiated for the purposes of admissibility, and concludes that it is inadmissible under article 2 of the Optional Protocol.

7. The Committee consequently decides:

(a) That the communication is inadmissible in accordance with article 2 of the Optional Protocol;

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

[Adopted in English, French and Spanish, the Spanish being the original version. It will subsequently be published in Arabic, Chinese and Russian as part of the annual report of the Committee to the General Assembly.]

Notes

[1] The author cites the Committee's decisions in communications Nos. 701/1996, *Gómez Vázquez v. Spain*, Views of 20 July 2000, and 986/2001, *Joseph Semey v. Spain*, Views of 30 July 2003.

[2] The Supreme Court also took the view that: "there is also proof in a document signed by two officials of the customs surveillance service that the parcel sent to the defendant bore a green C-1 sticker, and although they were not summoned to the oral hearing, since there was no

discussion on this point, account must be taken of the document, which was even requested as documentary evidence for the petitioner's defence". Supreme Court, criminal division, ruling No. 686/2000 of 10 April 2000, p. 9. However, in the appeal to the Supreme Court, the author claims that the indictment, as well as the committal order, contains no reference to the parcel bearing such a sticker. The record of the proceedings states: "It also bore a green C-1 customs declaration sticker used for letters or similar objects the weight and dimensions of which are less than those previously stated and which originate in countries or territories outside the European Union."

[3] See communication No. 1356/2005, *Parra Corral v. Spain*, decision of 29 March 2005, paras. 4.2 and 4.3.

[4] See communication No. 1059/2002, *Carvallo Villar v. Spain*, decision of 28 October 2005, para. 9.5.

[5] See communication No. 1389/2005, *Bertelli Gálvez v. Spain*, decision of 25 July 2005.

[6] See communication No. 1399/2005, *Cuartero Casado v. Spain*, decision of 25 July 2005.

[7] See communication No. 1074/2002, *Ferragut Pallach v. Spain*, decision of 31 March 2004, para. 6.2.

[8] See communications Nos. 701/1996, *Gómez Vázquez v. Spain*, Views of 20 July 2000 and 986/2001, *Joseph Semey v. Spain*, Views of 30 July 2003.

[9] See, for example, communications Nos. 541/1993, *Errol Simms v. Jamaica*, decision of 3 April 1995, para. 6.2, 842/1998, *Serguey Romanov v. Ukraine*, decision of 30 October 2003, para. 6.4; 1399/2005, *Cuartero Casado v. Spain*, decision of 25 July 2005, para. 4.3.

[10] See communication No. 1389/2005, *Bertelli Gálvez v. Spain*, Views of 25 July 2005, para. 4.3.

[11] See, for example, communications Nos. 701/1996, *Gómez Vázquez v. Spain*, Views of 20 July 2000, para. 10.1; 986/2001, *Joseph Semey v. Spain*, Views of 30 July 2003, para. 8.2; 1101/2002, *Alba Cabriada v. Spain*, Views of 1 November 2004, para. 6.5; 1293/2004, *Maximino de Dios Prieto v. Spain*, decision of 25 July 2006, para. 6.3 and 1305/2004, *Villamón Ventura v. Spain*, decision of 31 October 2006, para. 6.3.

W. Communication No. 1419/2005, *Lorenzo v. Italy**
(Decision adopted on 24 July 2007, Ninetieth session)

Submitted by:	Francesco de Lorenzo (represented by counsel, Andrea Saccucci)
Alleged victim:	The author
State party:	Italy
Date of communication:	1 February 2005 (initial submission)
Subject matter:	Trial of former Cabinet Minister on corruption charges
Procedural issues:	Previous examination of the case by the European Court of Human Rights
Substantive issues:	Trial by an independent and impartial tribunal
Articles of the Covenant:	2, paragraph 1; articles 14, paragraph 1; 14, paragraph 3 (d); 14, paragraph 5; and 26
Article of the Optional Protocol:	5, paragraph 2 (a)

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

Meeting on 24 July 2007,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 1 February 2005, is Francesco de Lorenzo. The author claims violations of articles 2, paragraph 1; 14, paragraph 1; 14, paragraph 3 (d); 14, paragraph 5; and 26 of the Covenant by Italy. The Optional Protocol entered into force for Italy on 15 December 1978. He is represented by counsel, Andrea Saccucci.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

Factual background

2.1 The author was Minister of Health of Italy between 1989 and 1992. In 1993, the Offices of the Prosecutor in Naples and Milan opened an investigation into the unlawful financing of political parties. As a result of the investigation, several charges were brought against the author. On 12 May 1994, the judge of the preliminary investigation of Naples ordered that the author be remanded in custody. The author challenged the order before the Court of Cassation and requested the transfer of his case to the Panel for Ministerial Offences (hereinafter the Panel), since the charges brought against him concerned certain activities allegedly carried out in the exercise of his official ministerial functions. On 20 July 1994, the Court of Cassation granted his request and referred the case to the Panel established within the Naples Tribunal. On 6 August 1994, the Panel remanded the author in custody. The author challenged his detention alleging the lack of impartiality and independence of the Panel. On 5 September 1994, the Panel rejected the appeal, maintaining that it was an independent judicial body.

2.2 On 29 October 1994, the Panel separated the procedure concerning the author from that concerning the other co-accused. The author was committed to stand trial before the Tribunal of Naples on 97 charges, including corruption, breach of the law regarding financing of political parties and membership of a criminal association, aggravated by the participation of more than 10 persons.

2.3 The author's trial lasted from November 1994 to March 1997. On 16 December 1994, the author challenged the constitutionality of Law No. 219 of 1989 alleging a violation of the right to an independent and impartial tribunal guaranteed by the Italian Constitution because the Panel was empowered to act as prosecutor and as judge of the preliminary hearing. The author also argued that the order of 29 October 1994 committing him for trial was null and void because the Panel lacked competence to adopt it, and requested the re-joiner of his procedure with that concerning his co-accused. On 27 December 1994, the Tribunal of Naples rejected all the challenges and requests. On 12 January 1995, the author was released from detention due to his poor health. On 11 October 1995, he submitted a request for suspension of the trial because of cancer treatment. The Tribunal rejected this request.

2.4 During the trial, 86 of the author's co-accused who had been summoned to testify as witnesses chose to remain silent. Pursuant to article 513 of the Italian Code of Criminal Procedure, the Tribunal of Naples authorized the reading of the incriminating statements made by these witnesses to the prosecutor during the preliminary investigation.

2.5 On 8 March 1997, the Tribunal of Naples found the author guilty on many counts of corruption and violations of the law on the financing of political parties. He was found guilty of having established a criminal association and sentenced to eight years and four months of imprisonment and a fine.

2.6 Both the author and the prosecutor appealed to the Naples Court of Appeal. The author requested, inter alia, that the procedure before the Tribunal of Naples be declared null and void because the decision to commit him to stand trial was adopted by the Panel which, according to him, lacked independence and impartiality, and because the decision to separate the proceedings was made by an incompetent body.

2.7 In response, the Court of Appeal re-opened the case and summoned most of the co-accused to appear in court. The majority of them again availed themselves of their right to remain silent. As a result, statements made during the preliminary investigation were used again. On 7 July 2000, the Court of Appeal found the author guilty of several counts of corruption and violations of the law on the financing of political parties. It upheld the appeal of the prosecutor, finding that the applicant did participate in a criminal association with at least 10 other persons. It rejected the author's arguments regarding the incompetence of the Panel to commit him for trial and to separate the proceedings. The author's sentence was reduced to 7 years, 5 months and 20 days of imprisonment. The author challenged the decision of the Court of Appeal before the Court of Cassation.

2.8 On 14 June 2001, the Court of Cassation acquitted the author on some of the charges and reduced his sentence to 4 years, 10 months and 10 days of imprisonment. It did not refer the case back to the Court of Appeal. Nonetheless, it ruled out the applicability of aggravating circumstances in relation to the charges of criminal association.

2.9 On 14 February 2002, the author filed a request for rectification of errors before the Court of Cassation alleging that the Court should have referred the case back to the Court of Appeal in relation to the charge of membership of a criminal association. On 27 March 2002, the Court of Cassation rejected the request.

2.10 Back on 21 July 2000, the Tribunal of Naples had already acquitted some of the author's co-accused. On 7 May 2004, the author's request for re-opening the trial based on the existence of a conflict between his conviction and the acquittal of his co-accused in separate proceedings was rejected by the Naples Court of Appeal.

2.11 Within the context of another criminal procedure pending against the author, the Panel had requested on 24 May 2001 an opinion from the Constitutional Court on the constitutionality of the Law No. 219 of 1989 allowing it to simultaneously exercise the functions of prosecutor and judge of the preliminary investigation. By judgment No. 134 of 11 April 2002, the Constitutional Court held that the Panel should refer the file to the public prosecutor who should then request that the accused be committed to stand trial before the ordinary competent judge. It accepted that the separation of investigative and judicial functions was required by Law No. 81 of 1987, as well as by article 6 of the European Convention on Human Rights.

2.12 On 7 April 2003, the then Minister of Justice affirmed that the interpretation adopted by the Constitutional Court was the only one compatible with the constitutional principles of equality, presumption of innocence and fair trial. However, he also noted that the judgment could not be applied retroactively to proceedings already concluded, including those concerning the author.

2.13 On 31 January 2001, the author submitted an application to the European Court of Human Rights alleging that:

- His conviction on the basis of statements of witnesses that he had no opportunity to examine violated articles 6 (1) and 3 (d) of the European Convention on Human Rights;[1]

- That the refusal to adjourn the trial while the author was undergoing cancer treatment violated articles 6 (1) and 6 (3) (c) of the Convention;[2]

- That the reading by the public prosecutor before the Tribunal of Naples of several statements made by the co-accused during the preliminary investigation violated article 6 (1) of the Convention;

- That the unspecified nature of the accusations and the modification during the trial of the legal qualification of one of them violated articles 6 (1) and 6 (3) (a) and (b) of the Convention;[3]

- That the lack of impartiality and independence of the "Panel for Ministerial Offences" violated article 6 (1) of the Convention;

- That the difference in treatment between the author and his co-accused, especially regarding the application of new rules concerning the admissibility of evidence collected during the investigation, violated article 14, read in conjunction with article 6, of the Convention;[4]

- That the fact that the author was compelled to appear at his own trial despite poor health violated articles 3 and 8 of the Convention;[5]

- And that the fact that his conviction of having set up a criminal association was not substantially reviewed by a higher tribunal violated article 2 of Protocol No. 7 to the Convention.[6]

2.14 On 12 February 2004, the European Court declared the majority of these claims manifestly unfounded. The claim regarding the impartiality of the Panel was declared incompatible *ratione materiae* with article 6 of Convention because the guarantees provided for therein apply only to tribunals called upon to determine criminal charges.[7] Accordingly, the similar claim made under article 14, read together with article 6, was also declared inadmissible as incompatible *ratione materiae* with the Convention.

The complaint

3.1 The author alleges a violation of article 14, paragraph 1, because of the lack of impartiality of the Panel, and a violation article 2, paragraph 1, and article 26 because of the discriminatory nature of the special procedure concerning ministerial offences.

3.2 The author alleges a violation of article 14, paragraph 1, because of the reading by the prosecutor into the file during the opening hearing of statements made during the preliminary investigation.

3.3 The author alleges a violation of article 14, paragraph 3 (d), because the refusal of the Tribunal to adjourn the trial deprived him of his right to actively and effectively participate in the trial.

3.4 The author alleges a violation of article 14, paragraph 5, because he was denied the right to a review of his conviction and sentence concerning the charge of membership in a criminal association since the Court of Cassation did not refer the case back to the trial court to have the conviction reviewed.

3.5 The author alleges a violation of article 2, paragraph 1, article 26 and article 14, paragraphs 1 and 3, because of the discriminatory application of the new rules of evidence adopted after his trial ended. He argues that the discrepancy in the application of the new rules of evidence resulted in a different treatment of the author and the other co-accused and violated the principle of equality before the law.

3.6 The author submits that he exhausted domestic remedies and that the same matter is not being examined under another procedure of international investigation or settlement. Regarding the State party's reservation to article 5, paragraph 2 (a), of the Optional Protocol, he argues that his application to the European Court of Human Rights was "not examined" by the Court, since in relation to some complaints, his application was declared incompatible *ratione materiae* with the provisions of the European Convention on Human Rights. Other claims were declared manifestly ill-founded and thus inadmissible. Although the facts complained of under the Covenant are the same which were previously submitted to the European Court, the author submits that the rights violated and the legal arguments are substantially different from those relied upon in the proceedings before the European Court or have not been "examined" by the latter.

State party's submissions on admissibility

4.1 By note verbale of 18 July 2006, the State party challenged the admissibility of the communication on the ground that it entered a reservation to article 5, paragraph 2 (a), of the Optional Protocol. It notes that the author's claims under the Covenant and those previously submitted under the European Convention of Human Rights largely converge and that the same substantive rights are at stake. The "same matter" was thus clearly submitted to the European Court of Human Rights which carefully "examined" it.

4.2 The State party notes that the author himself concedes that the same matter has already been examined by the European Court of Human Rights. Nonetheless, the author claims that his legal arguments are "substantially different from those relied upon in the proceedings before the European Court". The State party recalls that, according to the Committee's consistent jurisprudence, a matter is deemed to have already been investigated when the parties, the complaints advanced and the fact adduced in support are the same: the Committee has never identified "same legal arguments" as one of the elements constituting "the same matter".[8] In any case, it is difficult to identify any genuine new legal argument, since the claims and legal reasoning of the author, as well as the facts adduced to support them, perfectly coincide with those contained in his application before the European Court. Moreover, the State party notes that the same substantive rights are invoked before the Committee.

4.3 With regard to the two claims which were declared inadmissible as incompatible *ratione materiae* with the Convention, the State party notes that the Court in fact examined these claims in detail, reaching the conclusion that the author has used arguments referring not to the direct behaviour of the judicial court, but of the public prosecutor or the Panel evaluating the admissibility to trial of the former Minister, to imply lack of independence and impartiality of national tribunals. As result of this detailed examination, the two claims cannot be newly

examined by the Committee. In any event, the State party submits that they are equally incompatible *ratione materiae* with the Covenant under article 3 of the Optional Protocol. Indeed, the Covenant only envisages situations where the determination of rights and obligations in a suit at law is at stake and the abstract evaluation of the independence and impartiality of an organ as the Panel would not be covered by the Covenant. This Panel only judged the issue of whether the author could stand trial, while the ordinary trial was conducted by regular tribunals whose behaviour has been examined by the European Court.

4.4 Finally, the State party argues that the author has not exhausted all available domestic remedies, as he did not oppose the constitution of the Panel.

Author's comments

5.1 By letter dated 30 December 2006, the author reiterates that the "matter" under consideration by the Committee is not "the same" which has already been "examined" by the Court. He insists that the Court has not "examined" claims that it declared incompatible *ratione materiae* with the Convention. In any event, he recalls that some of his claims refer to rights and freedoms which are not explicitly enshrined in the Convention or are protected in a clearly restrictive manner if compared with the corresponding rights and freedoms of the Covenant.

5.2 With regard to the alleged failure to exhaust domestic remedies, the author reaffirms that he has pursued all available and effective remedies.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules and procedures, decide whether or not it is admissible under the Optional Protocol of the Covenant.

6.2 In accordance with article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that a similar complaint filed by the author was declared inadmissible by the European Court of Human Rights on 12 February 2004 (application No. 69264/01). Most claims were declared inadmissible because they were manifestly ill-founded, others were declared inadmissible because they were incompatible *ratione materiae* with the European Convention of Human Rights. The Committee also recalls that when the State party adhered to the Optional Protocol, it entered a reservation to article 5, paragraph 2 (a), specifying that the Committee "shall not have competence to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement".

6.3 In the instant case, the Committee is seized of the "same matter" as the European Court. As to whether the Court "examined" the same matter, the Committee observes that most of the author's claims were declared inadmissible as manifestly ill-founded by the Court (see para. 2.14 above), a conclusion for which it gave extensive justification. In that respect, the Committee concludes that the Court indeed "examined" most of the author's allegations and that the State

party's reservation to article 5, paragraph 2 (a), of the Optional Protocol, applies.[9] In respect of the author's remaining claim regarding the Panel, which was declared inadmissible as incompatible *ratione materiae* by the European Court, the Committee considers that the Court did not *examine* this claim within the meaning of article 5, paragraph 2 (a).[10]

6.4 The Committee notes the State party's argument that the author did not exhaust domestic remedies. It does however consider that the author exhausted domestic remedies since he raised the issue of the independence and impartiality of the Panel before the Panel itself, the Naples Court of Appeal and the Constitutional Court. Nonetheless, the Committee notes that the European Court of Human Rights considered that the main purpose of article 6, paragraph 1, of the European Convention of Human Rights, as far as criminal matters are concerned, is to ensure a fair trial by a tribunal competent to "determine" any criminal charge and that the guarantees of independence and impartiality for a fair trial concern only jurisdictions called upon to determine the innocence or guilt of the accused.[11] Similarly, the Committee considers that article 14, paragraph 1, mainly applies to "courts and tribunals" that deliver judgment in a criminal case. In the present case, the Panel for Ministerial Offences could only determine whether the author should be committed to stand trial, not whether he was guilty as charged. It was a *sui generis* jurisdiction which exercised the functions of prosecutor and judge of the preliminary investigation and the author himself requested that his case be transferred to this Panel. In such circumstances, the Committee considers that this part of the communication is inadmissible *ratione materiae* under article 3 of the Optional Protocol.

6.5 With regard to the author's related claim under article 26 concerning the discriminatory nature of the special procedure concerning ministerial offences, the Committee notes that it was the author himself who requested that his case be transferred to the Panel (see again para. 2.1 above). The author is supposed to have made this request in full knowledge of the competences granted to the Panel by Law No. 219 of 1989. The Committee considers that the author has failed to demonstrate how the transfer of his case to the Panel amounts to discrimination. It therefore considers that the author has failed adequately to substantiate a violation of article 26 for purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

7. Accordingly, the Committee decides:

(a) That the communication is inadmissible under article 2; article 3; and article 5, paragraph 2 (a) of the Optional Protocol;

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

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

Notes

[1] Article 6 (1) provides that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." Article 6 (3) (d) provides that everyone charged with a criminal offence has the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

[2] Article 6 (3) (c) provides that everyone charged with a criminal offence has the right "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".

[3] Article 6 (3) (a) and (b) provides that everyone charged with a criminal offence has the right "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him" and "to have adequate time and facilities for the preparation of his defence".

[4] Article 14 provides that "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[5] Article 3 provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Article 8 provides that:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[6] Article 2 of Protocol No. 7 provides that:

> "1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal."

[7] See European Court of Human Rights, judgement of 12 February 2004, application No. 69264/01.

[8] See communication No. 168/1984, *V.O. v. Norway*, inadmissibility decision adopted on 17 July 1985, para. 4.4.

[9] See communication No. 121/1982, *A.M. v. Denmark*, inadmissibility decision adopted on 23 July 1982, para. 4; and communication No. 584/1994, *Valentijn v. France*, Inadmissibility decision adopted on 22 July 1996, para. 5.2.

[10] See communication No. 441/1990, *Casanovas v. France*, Views adopted on 19 July 1994, para. 5.1.

[11] See European Court of Human Rights, decision of 12 February 2004, application No. 69264/01, p. 26.

X. Communication No. 1424/2005, *Anton Armond v. Algeria**
(Decision adopted on 1 November 2006, Eighty-eighth session)

Submitted by:	Armand Anton (represented by counsel, Alan Garay)
Alleged victim:	The author
State party:	Algeria
Date of communication:	24 November 2004 (initial submission)
Subject matter:	Dispossession of property following the declaration of independence of the State party
Procedural issues:	Inadmissibility *ratione temporis*, inadmissibility *ratione materiae*
Substantive issues:	Right of peoples to dispose freely of their natural wealth and resources; freedom to choose one's residence; arbitrary or illegal interference, together with slander and prejudice to reputation; violation of minority rights; discrimination with respect to dispossession and property rights
Articles of the Covenant:	1, 12, 17 and 27; 2, paragraph 1, and 26, separately or in combination; 26 and 17 in combination; and 5
Articles of the Optional Protocol:	1 and 3

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

Meeting on 1 November 2006,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

In accordance with rule 90 of the Committee's rules of procedure, Ms. Christine Chanet did not take part in the adoption of this decision.

The text of two individual opinions signed by Committee members Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Nisuke Ando and Ms. Ruth Wedgwood, are appended to the present document.

Decision on admissibility

1. The author of the communication, dated 24 November 2004 and supplemented by the comments submitted on 10 January 2005 and 1 September 2005, is Armand Anton.[1] Mr. Anton is a French citizen born at Oran in Algeria on 18 November 1909. He claims to have been the victim of violations by Algeria of articles 1, 12, 17 and 27; article 2, paragraph 1, and article 26, separately or in combination; articles 26 and 17 in combination; and article 5 of the International Covenant on Civil and Political Rights. He is represented by counsel, Alain Garay. The Covenant and the Optional Protocol thereto entered into force for the State party on 12 December 1989. The Special Rapporteur on New Communications and Interim Measures of the Committee decided that the question of admissibility of the communication should be considered separately from the merits.

Factual background

2.1 Armand Anton was born and lived in Algeria as a French citizen. There, he set up the companies "Établissements Bastos-Anton" and "Établissements Armand Anton", dealing in spare parts and accessories for cars and tractors, industrial supplies, equipment for cellars and rubber products. In 1956, he became a real estate agent and set up a non-trading company with the intention of building and putting up for sale two apartment blocks in Oran. The company subsequently purchased several lots in Oran. On 14 July 1962, following the declaration of Algerian independence on 3 July 1962, the author left Algeria for France.

2.2 France adopted legislation providing for compensation for dispossessed French property owners who left the State party following the signing of the "Evian agreements"[2] by three French ministers and the Algerian representatives on 18 March 1962. Being eligible under the act of 26 December 1961 on the reception and resettlement of French nationals from overseas,[3] he filed a petition for the protection of his property in Algeria with the agency responsible for protecting the property and interests of repatriated citizens[4] on 21 December 1962. On the basis of the ordinance of 12 September 1962,[5] he filed two powers of attorney with the French authorities authorizing the agency to implement any protective measures that might be required. The first, filed on 4 March 1965 under number 159,232, concerned all the business and office equipment belonging to him. The second, filed on 3 June 1965 under number 172,273/IM, concerned 12 apartments and 10 business premises. Counsel submits that the French authorities ultimately took no protective measures to safeguard the author's property rights.

2.3 The author was also eligible under the Act of 15 July 1970[6] introducing a national contribution towards compensation of dispossessed French property owners. The National Agency for Compensation of French Overseas Nationals (ANIFOM), a French government institution, assigned the author a case number - 34F008811 - relating to the property he owned in Algeria. By decision No. 148,099 of 17 June 1977, ANIFOM authorized an advance compensation payment that was considerably lower than the actual value of the property. These measures were taken by France under articles 2[7] and 12[8] of Act No. 70-632 of 15 July 1970. Under the acts of 2 January 1978[9] and 16 July 1987,[10] the author subsequently received additional compensation.

2.4 The intervention by France did not result in the author obtaining fair compensation corresponding to the 1962 value of the confiscated property, even though the State party has been sovereign and independent since 1962. The author recounts the history of the State party's

independence and notes that, after the signing of the Evian agreements on 18 March 1962, the State party was unable or unwilling to assume its responsibilities, which include ensuring the safety and protecting the moral and material interests of Algeria's resident populations. In particular, the Evian agreements and the guarantees contained therein were not honoured, although the head of the Algerian delegation had stated that "the Algerian delegation, mandated by the National Council of the Algerian Revolution and on behalf of the Algerian Government, declares its commitment to respect these political and military agreements and to ensure their implementation". Counsel for the author refers, inter alia, to the text of the 1 July 1962 referendum and a work dated 1964[11] (*Consultation*), concluding that, as a result of the referendum, the Evian declarations assumed the status of a treaty under international law.

2.5 With regard to the measures taken by the State party concerning the property of persons who had left its territory, counsel distinguishes several periods, based on the analysis contained in *Consultation*. During the first period, from July to September 1962, the dispossessions had no legal basis. They were isolated acts of individuals, groups of individuals, or even local authorities without a mandate, which elicited no clear response from the State party. Later, the ordinance of 24 August 1962[12] governed the fate of vacant properties (not used, occupied or enjoyed by their legal owner for at least two months), placing them under prefectural administration. The ordinance was intended to protect the properties and preserve the owners' rights. In most cases, what it did was to provide a legal justification for the current state of affairs and perpetuate it, thus encouraging further dispossessions, with decisions being left to the discretion of prefects without any safeguards or prior formalities and without any effective avenue of redress. However, according to *Consultation* some restitutions were ordered and actually carried out. The decree of 23 October 1962[13] prohibited and annulled all contracts for the sale of vacant property, including sale and rental agreements concluded abroad after 1 July 1962. The properties affected by such annulments were reclassified as vacant within the meaning of the ordinance of 24 August 1962. The decree of 18 March 1963[14] established conditions and safeguards for declaring property vacant and provided a legal remedy.[15] Those remedies were ineffective, however, since the judges who heard the cases took a long time to deliver their decisions, and new provisions virtually removed all judicial guarantees. In fact, the decree of 9 May 1963[16] excluded any possibility of appeal, except through a departmental commission[17] and added to the notion of vacancy the broad notion of public order and social peace, giving the authorities near sovereign powers of discretion. From a procedural point of view, the presiding judges of courts seized of interim relief applications filed under the 18 March 1963 decree declared themselves not competent, since property management now fell under new legislation that did not provide for applying to an interim relief judge. The discretionary appeal commissions provided for in the decree were never set up.

2.6 The author cites *Consultation*, according to which, in the absence of time limits on the measures prescribed by these provisions, what was happening was a form of disguised expropriation, even if in strictly legal terms the titular owners did not lose their property rights. *Consultation* also states that the legislation concerning the nationalization of farms (decree of 1 October 1963)[18] was silent on the issue of compensation and that all property belonging to foreigners was transferred to the State,[19] contrary to what was stipulated in the Evian agreements, which prohibited any discrimination and stipulated that fair compensation must be awarded prior to any expropriation. Lastly, counsel submits that Opinion No. 16 Z.F. on the transfer of the proceeds of harvests on properties previously owned by French farmers and nationalized by the decree of 1 October 1963[20] was the only compensation officially granted to

French nationals who had lost their property. The Opinion provided for the payment of 10 million old francs as social compensation to be distributed among market gardeners and growers. However, negotiations concerning vacant property were unsuccessful.[21] On 21 December 1962, the author contacted the Directorate of the Centre for Counselling and Rehabilitation of Repatriated Persons in Algiers to obtain information on the steps to be taken to protect his property.

The complaint

3.1 The author complained of violations of six different kinds: (a) deprivation of property and means of subsistence of the French minority through expropriation (article 1 of the Covenant); (b) loss of the right to choose one's residence freely in Algeria (art. 12); (c) unlawful interference with the applicants' home in Algeria, together with attacks on their honour and reputation (art. 17); (d) violation of the applicants' rights as members of a minority group with a distinct culture (art. 27); (e) discriminatory measures constituting a violation of rights involving differential and unjustified treatment by the State with respect to dispossession of property (articles 2, paragraph 1, and 26 separately or in combination and articles 17 and 26 in combination); and (f) discrimination in respect of the author's property rights (art. 5). The author considers that rights of individuals acquired under the predecessor State must be safeguarded by the successor State, that that principle is part of general international law[22] and that the failure to recognize the principle of acquired rights entails the international responsibility of States.[23] In practice, the State party should have upheld and protected the property rights of French nationals repatriated from Algeria, which was not the case.

3.2 In respect of the exhaustion of domestic remedies, the author is of the view that these avenues of recourse have no prospect of success. First, the failure to set up the Court of Guarantees provided for in the Evian agreements has resulted in a procedural deadlock, where it should have ordered investigations, annulled laws incompatible with the Declaration of Guarantees and ruled on all compensation measures. Second, under the regulations authorizing dispossession, certain avenues of redress were opened, but other decrees closed them (see above, paragraph 2.5). The author refers to a note by the Secretary-General of the Government of the State party dated 11 March 1964 stating that in adopting the decree of 9 May 1963, "the Government was motivated by the desire to prevent further submission of cases to the courts", and points out that the departmental commissions therefore limited themselves to hearing the case and issuing an opinion, leaving the final decision to the national commission chaired by the Minister of the Interior. However, this commission was never set up. He also considers that, while avenues of redress do exist (administrative tribunals in the case of farms, for example), their chance of being successful on the merits is negligible.

3.3 *Consultation* indicates that the following remedies were available to the injured owners in theory. First, they could file in the Supreme Court:[24] (1) annulment proceedings in respect of the decrees introducing the vacant property regime, the decree of 9 May 1963 and that of 1 October 1963; (2) an appeal against the decisions of the national commission ruling on appeals against measures enforcing the decree of 9 May 1963; (3) an appeal against prefectural decisions taken in application of the decree of 1 October 1963; (4) an appeal against decisions declaring property vacant; (5) an application for judicial review of appeals court judgements rendered under the procedure established by article 7 of the decree of 18 March 1963; or (6) an application for judicial review when the seizure of property is the result of an administrative act. Second, it was possible to appeal to an interim relief judge against possible future decisions

declaring property vacant. Lastly, an administrative appeal could be filed with the commissions established by the decree of 9 May 1963 against decisions placing property under State protection or declaring property vacant. Three proceedings were instituted before the president of the Court of Major Jurisdiction of Algiers by virtue of the decree of 18 March 1963[25] and were successful in that the Court either declared the decisions null and void or ordered surveys that found the property not to be vacant. Encouraged by these three orders, many other proceedings were instituted, but the favourable judgements could not be implemented. The appeals filed by virtue of the decree of 9 May 1963 never led to a result, because the commissions were never set up. Two decisions were rendered in May 1964 setting aside the order of the president of the Court of Algiers and affirming that the interim relief judge remained competent to hear disputes under the 18 March 1963 decree. Two appeals were also filed with the Court of Constantine, but decisions have not yet been rendered.

3.4 Thus, according to *Consultation*, all possible proceedings were instituted. Either the Algerian courts declared themselves not competent (lack of remedy owing to refusal to render judgement); or they referred the case to the administrative commission provided for by the decree of 9 May 1963, which was never set up (again, lack of remedy owing to refusal to render judgement); or they granted the appeal, but the decision was not enforced (lack of remedy owing to failure to execute). As for appeals to the Supreme Court, *Consultation* concludes that, while possible, in practice applications for judicial review of administrative decisions stand little chance of success.[26] Counsel submits that, since no French citizen exiled from Algeria has obtained satisfaction for the dispossession suffered, the burden of proof is on the State party.[27] The author has demonstrated that domestic remedies have no prospects of success.[28]

3.5 In view of the impossibility of obtaining justice in the State party, a number of French citizens exiled from Algeria turned to France. The Council of State rejected 74 appeals on 25 November 1988, 17 February 1999 and 7 April 1999 (cases *Teytaud and others*).[29] They subsequently turned to the European Court of Human Rights,[30] which found that "the applicants were dispossessed of their property by the Algerian State, which is not a party to the Convention".

3.6 With regard to the admissibility of the communication, the author argues that it was submitted by an individual who, when violation of the Covenant first occurred, was subject to the State party's jurisdiction;[31] that he is personally the victim of violations that have continued since 1962; and that the matter has not been submitted to another procedure of international investigation or settlement. With regard to the Committee's jurisdiction *ratione temporis*, counsel considers that the effects of the alleged violations of the rights enshrined in the Covenant are continuing and lasting. While the Committee in principle has no jurisdiction *ratione temporis* over acts of a State party prior to its ratification of the Optional Protocol, the Committee becomes competent if the acts in question continue to have effects after the entry into force of the Optional Protocol and continue to violate the Covenant or have effects which in themselves constitute a violation of the Covenant.[32] This view has also been upheld by the International Law Commission.[33]

3.7 With regard to the fact that the author had to wait until 2004 to submit his case to the Committee, counsel notes that article 3 of the Optional Protocol declares inadmissible "any communication … which it considers to be an abuse of the right of submission of such communications". According to counsel, since the Covenant and the Optional Protocol set no time limits on submission, and that, in keeping with Committee jurisprudence,[34] the author

provides explanations to justify the delay, the submission of the communications in 2004 in no way constitutes an abuse of the right of submission. In the first place, the appeals submitted to domestic courts in Algeria since 1962 have been unsuccessful. Second, Algeria only ratified the Covenant and its Optional Protocol in 1989. Third, as a result, the author and the French citizens exiled from Algeria, as French nationals and for reasons of nationality and culture, naturally turned to their national authorities in France, rather than addressing a foreign State. Fourth, the recourse to French and European proceedings (from 1970 to 2001) explains the time elapsed between 1962 and 2004. Fifth, in August 2001 the French citizens exiled from Algeria were informed that all remedies had been exhausted,[35] which explains the delay between September 2001 and January 2004, when counsel was asked to look into the case and submit it to the Committee. Sixth, on 5 December 2002 the French President proclaimed the adoption of a fourth piece of legislation providing for national contributions in favour of the repatriated French, which raised hopes for a definitive and comprehensive solution. However, bill No. 1499 of 10 March 2004 did not include a reparation mechanism to ensure compensation for confiscated property. Lastly, counsel refers to the Committee's jurisprudence concerning statutes of limitations in respect of contentious cases: "Further, with regard to time limits, whereas a statute of limitations may be objective and even reasonable *in abstracto*, the Committee cannot accept such a deadline for submitting restitution claims in the case of the authors, since under the explicit terms of the law they were excluded from the restitution scheme from the outset."[36] For the Committee, the impossibility of exercising remedy is sufficient to declare the proceedings admissible from the standpoint of time.

3.8 With respect to the alleged violation of article 1, paragraph 2, of the Covenant, the author claims to be an individual victim of a series of serious infringements of the exercise of a collective right: the right of French citizens exiled from Algeria. It is only because of his belonging to this community that he suffered serious infringement of his individual exercise of collective rights, in particular the inability to dispose freely of his natural wealth and resources, including the right to own property and the right to work.

3.9 With regard to the alleged violation of article 12, counsel considers that the conditions of the flight from Algeria are comparable to exile.[37] As a result of Algerian legislation on vacant property and confiscations, the author was unable to take up residence in Algeria or remain there. He was unable to choose his residence freely and yet was never officially notified of any restrictions of the kind provided for in article 12, paragraph 3. The author's deprivation of the freedom to choose his residence was incompatible with the rights enshrined in the Covenant.

3.10 With regard to the allegation of violation of article 17, the author submits that the dispossession measures never took legal form.[38] The regime instituted by the Algerian State derogated from the principle of lawfulness within the meaning of article 17. The interference with the privacy, family and home of the author had no basis in Algerian law. The State had no legal authority to proceed as it did purely through administrative regulations, and did not provide any legal protection that would have prevented his flight, emigration and exile.[39]

3.11 On the allegation of violation of article 27, the author identifies himself as a member of a minority whose right to enjoy his own culture, in community with the other members of his group, was destroyed in 1962. General comment No. 23[40] states that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources" (para. 7) and that "protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned,

thus enriching the fabric of society as a whole" (para. 9). The question of the legal treatment of the members of the French minority in Algeria before and after 19 March 1962 has never been resolved in practice regarding the exercise of their cultural rights. The author has been deprived of his rights as a result of the lack of effective guarantees for the French minority; having been forced into exile, his right to access his native culture and language in Algeria has been interfered with, within the meaning of *Lovelace*.[41]

3.12 On the allegation of violation of articles 2, paragraph 1, and 26, separately or in combination, and of articles 26 and 17 in combination, counsel recalls that the Committee has established a direct correlation between articles 26 and 2. The exercise of rights recognized in the Covenant should be protected from discrimination, in other words, without distinction on the basis of different status or situation. Protection under article 26 is autonomous in nature, and "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant".[42] The author is a victim in this particular case of the continuing confiscation of his property, based on discriminatory legislation that has impeded the exercise of his property rights without any objective, reasonable justification. The Committee has stated that "confiscation of private property or the failure by a State party to pay compensation for such confiscation could still entail a breach of the Covenant if the relevant act or omission was based on discriminatory grounds in violation of article 26 of the Covenant".[43] The Algerian act of 26 July 1963[44] concerning confiscated property established the general principle of selectively and discriminatorily declaring property that had belonged to the "agents of colonization" to be State property. Under certain conditions, nationalized property was then returned, solely to the benefit of "individuals of Algerian nationality"[45] whose land had been nationalized, contrary to the guarantees under the Covenant and the Committee's jurisprudence.[46]

3.13 Moreover, the compensation mechanism of 17 March 1964[47] exclusively benefits one particular population group (farmers), thus constituting discrimination of which the author is a victim. The mechanism established an arbitrary distinction in treatment that benefited farmers alone with no justification: the obligation to compensate without discrimination is the corollary of the right to nationalize.[48] The Committee has on other occasions decided that "the confiscations themselves are not here at issue, but rather the denial of a remedy to the authors, whereas other claimants have recovered their properties or received compensation therefor",[49] and that "legislation must not discriminate among the victims of the prior confiscations, since all victims are entitled to redress without arbitrary distinctions".[50] There was therefore a violation of articles 2, paragraph 1, and 26 of the Covenant, separately or in combination, and of articles 26 and 17 in combination.

3.14 The claimed violation of article 5 of the Covenant stems from the destruction of the author's rights and freedoms in 1962. According to counsel, the scope of article 5, paragraph 2, also enables him to raise the question of implementation of article 17 of the Universal Declaration of Human Rights. Taking into account the above-mentioned claimed violations, article 5 was also violated.

3.15 As for the mental pain and anguish suffered by the author, counsel maintains that the author's relocation entailed very serious moral damage based on continuing mental suffering and emotional anguish, together constituting a "confiscation" trauma. This calls for an official

recognition by the State party of its responsibility in violating the author's fundamental rights. Counsel expressly requests the Committee to note that the State party, which is in breach of its obligations under the Covenant and under its domestic legislation, is obliged to remedy this series of violations. In the author's opinion, satisfaction in this case would constitute an appropriate way of compensating the moral damage. There would be a degree of satisfaction in achieving recognition of the fact that there are good grounds for the communication. He does not, however, lose sight of the need for reparation in the form of just and equitable financial compensation[51] for his confiscated property in Algeria.

State party's observations

4. In its observations of 17 October 2005, the State party argues that the communication should be declared inadmissible. The facts cited relate to a specific period in Algerian history and pre-date the adoption of the Covenant (December 1966) and its entry into force (March 1976). Furthermore, the State party became a party to the Covenant only when it ratified it on 12 December 1989. Moreover, according to the rules of procedure, referral to the Committee is only permissible once domestic remedies have been exhausted. This appears not to have been the case for the author who, as a French national, should first address the competent authorities in his own country.

Additional comments by the parties

5.1 In a letter dated 10 January 2006, counsel refers to his previous explanations for the delay in submission of the communication. Owing to the institution of compensatory measures in France, the author believed that the State party was not legally liable for the confiscation. The principle according to which certain factual situations suspend limitation for an action for compensation is recognized in international law. As for the State party's argument regarding the "specific period in Algerian history", counsel fails to understand how this reference to history demonstrates the inadmissibility of the communication and asks the State party to explain its remark so that he can respond. The State party does not challenge his repeated affirmation of the continuing effect of the claimed violations[52] after the entry into force of the Covenant owing to the fact that the State party, contrary to the Evian agreements and domestic law, has not established the Court of Guarantees.

5.2 Regarding exhaustion of domestic remedies, the author reiterates that adequate and effective domestic remedies have never been available to him in Algeria. He recalls the position of the Algerian authorities - which is well-known and has been vehemently asserted since the dispossession - which is either to eliminate the legal remedies or not to see them through so that the violations come to an end. The author is not obliged to pursue remedies, given that no French person from Algeria has obtained satisfaction for dispossession.[53] In its reply, the State party provides no solution or conclusion to the technical and legal questions raised by the author. As for the State party's argument that the author should seek redress in his own country (France) regarding a dispute over Algerian Government measures, counsel questions why the author should be obliged to involve France. Counsel refers to his exchange of correspondence with various French authorities in 2005, indicating that the highest French public authorities have barred proceedings. The author explicitly requests that the State party indicate the avenues of recourse available to him in Algeria so that he can satisfy the alleged obligation to have exhausted them.

6.1 In its observations of 3 April 2006, the State party maintains that the communication constitutes a serious violation of international law in that it calls into question the principle of decolonization. The communication is motivated by the definitive loss of the author's residence and property in Algeria, which were guaranteed and protected by the provisions of the Covenant. While the author maintains that domestic remedies have no prospect of success and are therefore unavailable, the Covenant did not enter into force until 23 March 1976 and was not ratified by the State party until 12 December 1989, which was 27 years after the French had voluntarily left Algeria. The Committee cannot therefore admit a retroactive application, since the events on which this communication is based took place in July 1962. The non-retroactivity principle is generally applicable to all international legal instruments, which can only be implemented with respect to events that took place after their entry into force. Moreover, article 28 of the 1969 Vienna Convention on the Law of Treaties codifies international practice as follows: "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."

6.2 Subsidiarily, the State party argues that it is clear from the communication that the author, far from exhausting the remedies available to him, did not even try to use any of the mechanisms set up by the Evian agreements (Declaration of Principles concerning Economic and Financial Cooperation, articles 12[54] and 13) or the remedies available through Algerian administrative agencies and courts. The author left Algeria of his own free will, based on an assessment of the situation that, in the event, proved to be wrong. Many other French nationals made the choice to remain and found that no measures were taken against them by the Algerian authorities and that they were allowed to enjoy quiet possession of their property. Those that abandoned their property left it uncared for, creating a situation dangerous to public order. That being the case, the Algerian authorities were obliged to find solutions. Moreover, the author has not submitted any document or evidence demonstrating that he has exercised the remedies made available in Algeria since 1962. According to rule 76 [now rule 78] of the rules of procedure of the Committee, the author must show that all domestic remedies have been exhausted in order for a communication to be considered. He cannot simply affirm that they are sure to be unsuccessful, ineffective and useless, a statement that demonstrates, moreover, an unjustified prejudice against the Algerian system of justice. The State party has never disputed the author's right to bring his case before its courts. Algerian law allows for that possibility, and the Constitution provides for the independence of the judiciary, which in a good many cases has ordered the Algerian State to pay compensation or to annul its acts when they have been judged to be contrary to international conventions or to domestic law. For the above reasons, the communication is inadmissible.

7. In his letter of 15 June 2006, counsel for the author argues that the State party has not responded to his comments with relevant arguments. In its initial observations, the State party took the view that the author should apply to the authorities of his own country, whereas it now says that the author could have recourse to the Algerian courts, without indicating which tribunals, which rights and which jurisprudence would apply. As to the reference to the author's "voluntary" departure from Algeria and the claim that French nationals who remained in Algeria continued to enjoy quiet possession of their property, counsel notes that the State party has adduced no evidence in support of its view of the facts. Lastly, counsel points out that the State party has not replied in detail to his arguments concerning the exhaustion of domestic remedies or the continued violation of the Covenant. With regard to the continued violation, the distinction between a non-recurring illicit act with continuing effects and a continuing illicit act requires a

subtle analysis of the facts and the law. The deciding body will have jurisdiction if the dispute between the parties (claims and responses) arises after entry into force, even if the disputed facts or the situation that led to the dispute are of an earlier date. If, however, the reason for the claim (or the source of the dispute) is a set of facts (subject matter) subsequent to the critical date, the deciding body will have jurisdiction even if the illicit nature of the acts lies in the modification of or failure to maintain a situation created earlier. The effect of temporal conditions therefore necessitates a close study of the facts and the law, and the question should be joined to the examination of the merits.

Issues and proceedings before the Committee

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

8.2 The Committee notes the author's complaint relating to the status of his family's property in 1962 and observes that, irrespective of the fact that those events occurred prior to the entry into force of the Optional Protocol for the State party, the right to property is not protected under the Covenant. Any allegation concerning a violation of the author's right to property per se is thus inadmissible *ratione materiae* under article 3 of the Optional Protocol.[55]

8.3 The author claims that the violations of his rights under articles 1, 12, 17 and 27; articles 2, paragraph 1, and 26, separately or in combination; articles 26 and 17 in combination; and article 5 continued after the entry into force of the Optional Protocol for the State party on 12 December 1989. The State party argues that all the author's claims are inadmissible *ratione temporis*. The Committee considers that it is precluded from examining violations of the provisions of the Covenant that occurred prior to the entry into force of the Protocol for the State party, unless those violations continued after the entry into force of the Protocol.[56] A continuing violation is to be interpreted as the affirmation, by act or by clear implication, of previous violations by the State party. The measures taken by the State party prior to the entry into force of the Optional Protocol for the State party must continue to produce effects which, in themselves, would constitute a violation of any of the rights established in the articles invoked subsequent to the Protocol's entry into force.[57] In the present case the Committee notes that the State party has adopted certain laws since the entry into force of the Covenant and the Protocol regarding the restitution of certain property to persons of Algerian nationality. However, the author has not shown that these laws apply to him, since they concern only persons "whose land has been nationalized or who have given their land as a gift under Ordinance No. 71-73 of 8 November 1971" (see paragraph 2.2).[58] The only remaining issue, which might arise under article 17, is whether there are continuing effects by virtue of the State party's failure to compensate the author for the confiscation of his property. The Committee recalls that the mere fact that the author has still not received compensation since the entry into force of the Optional Protocol does not constitute an affirmation of a prior violation.[59] The claims are therefore inadmissible *ratione temporis*, under article 1 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 1 of the Optional Protocol and article 93, paragraph 3, of the rules of procedure;

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

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

APPENDIX

Concurring opinion of Committee members Ms. Elisabeth Palm, Sir Nigel Rodley and Mr. Nisuke Ando

Although we are in agreement with the majority's findings in paragraphs 8.2 and 8.3 we are of the opinion that the communication should have been declared inadmissible for abuse of the right of petition and that paragraphs 8.2 and 8.3 should have been replaced by a new paragraph 8.2 drafted as follows:

8.2 The Committee notes the delay of 15 years in this case between the ratification of the Optional Protocol by the State party in 1989 and the submission of the communication in 2004. It observes that there are no explicit time limits for submission of communications under the Optional Protocol. However, in certain circumstances, the Committee is entitled to expect a reasonable explanation justifying such a delay. In the present case, the Committee notes counsel's various arguments which, in his view, explain why the author was forced to wait until 2004 to submit the communication to the Committee (see paragraph 3.7). With regard to the argument that the State party only ratified the Covenant and the Optional Protocol in 1989, this does not explain why the author did not begin proceedings in the State party at that stage. The Committee notes counsel's arguments relating to the proceedings lodged by other persons in France and before the European Court of Human Rights, which were concluded by inadmissibility decisions in 2001 before the European Court. However, nothing indicates that the author himself lodged any such proceedings in France or before the European Court. The Committee also notes that the author received compensation from France in 1977, 1980 and 1988,[60] and that it is only after becoming aware of bill No. 1499 of 10 March 2004,[61] in France which did not include a reparation mechanism to ensure further compensation for property confiscated in Algeria, that the author decided to file against the State party, not before its domestic courts and administrative agencies, but directly before the Committee. The Committee is of the view that the author could have had recourse against the State party once the latter had acceded to the Covenant and the Optional Protocol, and that the proceedings in France did not prevent him from instituting proceedings against Algeria before the Committee. No convincing explanation has been provided by the author to justify the decision to wait until 2004 in order to submit his communication to the Committee. The Committee considers that submitting the communication after such a delay without a reasonable explanation amounts to an abuse of the right of submission and finds the communication inadmissible under article 3 of the Optional Protocol.[62]

Finally we want to point out that this communication can be seen as a pilot case as the Committee has received more than 600 similar communications. It is therefore of a special interest to decide on what ground the communication should be declared inadmissible.

(*Signed*): Ms. Elisabeth Palm

(*Signed*): Sir Nigel Rodley

(*Signed*): Mr. Nisuke Ando

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

Dissenting opinion of Committee member Ms. Ruth Wedgwood

The author raises a number of claims concerning property that he argues was taken without compensation in the course of his departure from Algeria. In its prior case law, the Human Rights Committee has concluded that the right to property, and the right to prompt, adequate, and effective compensation for any expropriation of property, is not protected as such by the International Covenant on Civil and Political Rights.[63] Nonetheless, under the Committee's case law, unwarranted discrimination in a seizure of property or in the provision of compensation may violate article 26 of the Covenant.[64] The Human Rights Committee has held, in a notable series of cases, that a State "responsible for the departure" of its citizens, cannot later rely upon the absence of national residency or citizenship as an adequate reason to exclude an affected claimant from a provision for restitution.[65]

On 25 September 1995, the State party in this case adopted a statute to provide restitution to persons "whose land has been nationalized", so long as they are of Algerian nationality (see decision of the Committee, para. 8.3). The author in this case has stated that he was deprived of 12 apartments and 10 business premises after his flight from Algeria. It would appear that these apartments were built on his land. The author also states that he also owned "several lots" in the town of Oran (see decision of the Committee, paras. 2.1 and 2.2). The State party has not disputed these factual claims. Nor has the State party explained how declaring properties to be "vacant" (while rejecting requests for restitution) in order to facilitate their resale is any different in effect or intention from nationalization.

Thus, there would appear to be a possible claim of discrimination in regard to the State party's statutory scheme for restitution, adopted after the State party joined the Covenant and the Optional Protocol. In addition, in at least one case, the Committee has deemed the inability to resume a protected residence by virtue of a government act to have a continuing effect after the date of its adoption.[66]

It is certainly true that situations of historical transition can present real difficulties in addressing individual claims of right. The State party also has faced parlous circumstances in the intervening years. But we ought to address the issues forthrightly, rather than retreating to an admissibility finding based on *ratione temporis* that does not sit comfortably with the rest of our case law.

(*Signed*): Ruth Wedgwood

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

Notes

[1] Armand Anton died on 12 August 2005. His wife Alice and his children Jacqueline and Martine are maintaining the communication before the Committee as his successors.

[2] See the section entitled "Provisions concerning French citizens of ordinary civil status": "[…] Their property rights will be respected. No measures of dispossession will be taken against them without their being granted fair compensation previously established. They will receive guarantees appropriate to their cultural, linguistic and religious characteristics. […] A Court of Guarantees, an institution of domestic Algerian law, will be responsible for ensuring that these rights are respected."

[3] Act No. 61-1439 of 26 December 1961 on the reception and resettlement of French nationals from overseas.

[4] Counsel provided copies of letters from 1962 and 1965. The author also wrote to the French Prime Minister on 28 December 1966.

[5] Ordinance No. 62-1106 of 19 September 1962 establishing an agency responsible for protecting the property and interests of repatriated citizens.

[6] Act No. 70-632. The compensation was to serve as "an advance on claims against foreign States or beneficiaries of the dispossession" (art. 1), in relation to the expropriation of real property ordered in Algeria prior to 3 July 1962 (art. 12). Also see Decree No. 70-1010 of 30 October 1970.

[7] "Natural persons fulfilling the following conditions are eligible for compensation: (1) they were dispossessed, before 1 June 1970 and as a result of political events, of property mentioned in title II of the present Act and located in a territory previously under the sovereignty, protectorate or trusteeship of France … ."

[8] "The dispossession mentioned in article 2 must be a consequence of nationalization, confiscation or a similar measure taken in application of a law or regulation or administrative decision, or of measures or circumstances that resulted, de facto or de jure, in the loss of possession and use of the property. The expropriation of real property ordered in Algeria prior to 3 July 1962 … falls within the meaning of dispossession as described above, if no compensation was awarded."

[9] Act No. 78-1 of 2 January 1978 on compensation of French nationals repatriated from overseas dispossessed of their property.

[10] Act No. 87-549 of 16 July 1987, which aimed at a final settlement of all cases of lost or "confiscated" overseas property.

[11] *Consultation sur les droits des français atteints en Algérie par des mesures de dépossession*, G. Vedel, R.W. Thorp, Ch. De Chaisemartin, P. Lacombe, and A. Ghanassia (1 December 1964).

[12] Ordinance No. 62-020 of 24 August 1962 concerning the protection and administration of vacant property.

[13] Decree No. 62-03 of 23 October 1962 regulating the transaction, sale, rental, concession, lease or sublease of movable or immovable property. Agencies were established to collect rent. *Consultation* indicates that, in response to the owners' protests, certain claims were taken to court, the property was declared vacant or requisitioned. It further states that "apparently instructions were given to allow owners residing outside Algeria to appoint representatives to collect their rent and manage the apartment blocks, but they were never implemented".

[14] Decree No. 63-88 of 18 March 1963 governing vacant properties.

[15] Within two months, before the competent interim relief judge of the prefecture in question. According to *Consultation*, "this was a fast, inexpensive procedure that could constitute […] an effective means of enforcing the recognition of and respect for their rights. But, again, the implementation of the decree fell short of the expectations raised by its content".

[16] Decree No. 63-168 of 9 May 1963 concerning the placement under State protection of movable and immovable property whose acquisition, management, development or use might undermine public order or social peace provided that prefectural decisions placing the property under State protection could only be appealed within one month, before a departmental commission. All previous provisions not in conformity with the decree were repealed.

[17] Established by Decree No. 63-222 of 28 June 1963 regulating appeal against prefectural decisions placing certain properties under State protection. Appeals could be filed with the prefect, who would transmit the application to a departmental and, subsequently, to a national commission set up within the Ministry of the Interior.

[18] Decree No. 63-388 of 1 October 1963 declaring farms belonging to certain natural or legal persons State property.

[19] While there was no transfer of vacant property. According to *Consultation*, six economic sectors were in effect nationalized.

[20] Opinion published in the *Official Journal* of the Algerian Republic for 17 March 1964.

[21] Decree No. 63-64 of 18 February 1963 fixing compensation for the occupation of residential business premises considered vacant explicitly provided that the owners of vacant property would receive no compensation and deferred consideration of their rights to later provisions.

[22] Counsel cites the Permanent Court of International Justice cases *German Settlers in Poland*, Advisory Opinion of 10 September 1923, *P.C.I.J., Series B, No. 6*, pp. 15 and 36; *Certain German Interests in Polish Upper Silesia*, Judgement of 25 May 1926, *P.C.I.J., Series A, No. 7*, pp. 20-21.

[23] Counsel cites the Permanent Court's Judgement of 26 July 1927 in the *Factory at Chorzów* case, *P.C.I.J., Series A, No. 9*, pp. 27-28.

[24] Established by Act No. 63-218 of 18 June 1963.

[25] However, the decrees nationalizing agricultural property, tobacco plantations, flour mills, semolina factories, transport firms, cinemas, etc., did not provide for any amicable settlement procedure or litigation. Only administrative appeals were possible.

[26] It mentions a range of legal arguments that could have been used.

[27] He cites communication No. 4/1977, *William Torres Ramirez v. Uruguay*, Views adopted on 23 July 1980, para. 9.

[28] He cites communication No. 84/1981, *Hugo Gilmet Dermit v. Uruguay*, Views adopted on 21 October 1982, para. 9.4; and communications Nos. 221/1987 and 323/1988, *Cadoret and Le Bihan v. France*, Views adopted on 11 April 1991, para. 5.1.

[29] With regard to an appeal filed against the decisions rendered on 11 July 1996 by the Administrative Appeal Court of Paris, the Council of State ruled on 17 February 1999 that the French State was not responsible, since the Evian agreements "included no clauses or promises guaranteeing French citizens residing in Algeria that in case they were deprived of their property by the Algerian State, the French Government would compensate them for their loss".

[30] See applications Nos. 48754/99 and 49721/99; Nos. 49720/99 and 49723/99; Nos. 49724-25/99 and 49729/99; 49726/99 and 49728/99; 49727/99 and 49730/99, *Teytaud and others v. France*, inadmissibility decision of 25 January 2001; and applications Nos. 52240/99 to 52296/99, *Amsellem and others v. France*, inadmissibility decision of 10 July 2001.

[31] He cites communication No. 409/1990, *E.M.E.H. v. France*, Views adopted on 2 November 1990, para. 3.2; and communication No. 74/1980, *Miguel Angel Estrella v. Uruguay*, Views adopted on 29 March 1983.

[32] Citing communication No. 24/1977, *Sandra Lovelace v. Canada*, Views adopted on 30 July 1981, para. 7.3; communication No. 28/1978, *Weinberger Weisz v. Uruguay*, Views adopted on 29 October 1980, para. 6; communication No. 30/1978, *Bleier v. Uruguay*, Views adopted on 29 March 1982, para. 7; communication No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983; communication No. 196/1985, *Gueye v. France*, Views adopted on 3 April 1989, para. 5.3; and communication No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996.

[33] Article 25.

[34] He refers to communication No. 787/1997, *Gobin v. Mauritius*, decision on admissibility adopted on 16 July 2001, relating to a five-year delay (the facts dating from 1991 and the communication being submitted in 1996), in which the Committee ruled that "there are no fixed time limits for submission of communications under the Optional Protocol and that the mere delay in submission does not in itself constitute an abuse of the right of communication. However, in certain circumstances, the Committee expects a reasonable explanation justifying a delay. In the absence of such explanation, the Committee is of the opinion that submitting the communication after such a time lapse should be regarded as an abuse of the right of submission, which renders the communication inadmissible".

[35] He provides a letter of 20 August 2001 from the former counsel addressed to Mr. Esclapez informing him of the decision of the European Court of Human Rights not to admit the claims in the case of *Amsellem and others v. France*, which was subsequently transmitted to the 57 applicants on 27 August 2001, and which expresses the view that "these decisions put a definite end to all the proceedings instituted".

[36] Communication No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, para. 5.9.

[37] He refers to the first draft of article 12, which contained the expression "No one shall be subjected to arbitrary exile". *Official Records of the General Assembly, tenth session* (1955), annexes, document A/2929, p. 38, para. 50.

[38] See general comment No. 16, paras. 2 and 3.

[39] See communication No. 760/1997, *Rehoboth Baster Community v. Namibia*, Views adopted on 25 July 2000.

[40] General comment No. 23, 8 April 1994.

[41] Communication No. 24/1977, *Lovelace v. Canada*, Views adopted on 30 July 1981, para. 15.

[42] See general comment No. 18, para. 13.

[43] Communication No. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, para. 11.3.

[44] Act No. 63-276 of 26 July 1963 concerning property confiscated and retention by the colonial administration.

[45] Article 3, Ordinance No. 95-26 of 30 Rabi' al-thani 1416, corresponding to 25 September 1995, amending and supplementing Act No. 90-25 of 18 November 1990 concerning land planning, with reference to Act No. 62-20 of 24 August 1962.

[46] Communication No. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995; communication No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996.

[47] Opinion No. 16 Z.F., published 17 March 1964, solely concerned French farmers whose property had been nationalized, and authorized them to transfer "the proceeds from their wine and cereal harvests after deducting operating costs".

[48] General Assembly resolution 1803 (XVII) of 14 December 1962, entitled "Declaration on permanent sovereignty over natural resources", para. 4: "the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law". Counsel also refers to article 2 of the Charter of Economic Rights and Duties of States adopted on 12 December 1974 (General Assembly resolution 3281 (XXIX)).

[49] Communication No. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, para. 11.4.

[50] Para. 11.6. See also communication No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996; and communication No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, para. 5.8.

[51] See communication No. 747/1997, *Des Fours v. Czech Republic*, Views adopted on 30 October 2001, para. 9.2.

[52] Referring to communication No. 196/1985, *Gueye v. France*, Views adopted on 3 April 1989; communication No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996 (para. 6.3); and communication No. 6/1977, *Sequeira v. Uruguay*, Views adopted on 29 July 1980.

[53] Communication No. 4/1977, *William Torres Ramírez v. Uruguay*, Views adopted on 23 July 1980, para. 9.

[54] "Algeria shall ensure without any discrimination the free and peaceful enjoyment of patrimonial rights acquired on its territory before self-determination. No one will be deprived of these rights without fair compensation previously determined." (Title IV - Guarantee of acquired rights and previous commitments, United Nations, *Treaty Series*, vol. 507, No. 7395, p. 63.)

[55] See communication No. 566/1993, *I.S. v. Hungary*, Views adopted on 23 July 1996, para. 6.1, and communication No. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, para. 4.3.

[56] In accordance with its consistent jurisprudence; see communication No. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, para. 4.5, and communication No. 310/1988, *M.T. v. Spain*, decision on admissibility adopted on 11 April 1991, para. 5.2.

[57] See communication No. 566/1993, *I.S. v. Hungary*, Views adopted on 23 July 1996, para. 6.1.

[58] See article 3, Ordinance No. 95-26 of 30 Rabi' al-thani 1416, corresponding to 25 September 1995, amending and supplementing Act No. 90-25 of 18 November 1990 concerning land planning, with reference to Ordinance No. 62-20 of 24 August 1962.

[59] See communication No. 520/1992, *E. and A.K. v. Hungary*, decision on admissibility adopted on 7 April 1994, para. 6.6.

[60] Act No. 87-549 of 16 July 1987, which aimed at a final settlement of all cases of lost or confiscated overseas property.

[61] Act No. 2005-158, on national recognition of, and payment to, repatriated French nationals, was adopted on 23 February 2005. Its two main objectives relate to those repatriated and to harkis. As to those persons repatriated, the law aims to repay the amounts which had been

deducted from compensation paid in the 1970s to them, and which related to resettlement loans. These loans had been granted to those who wished to start businesses in France. As to the harkis, the law provides for an *allocation de reconnaissance* (gratitude payments).

[62] See communication No. 787/1997, *Gobin v. Mauritius*, decision on admissibility adopted on 16 July 2001, para. 6.3, and communication No. 1434/2005, *Fillacier v. France*, decision on admissibility adopted on 27 March 2006, para. 4.3.

[63] See communications Nos. 520/1992, *E. and A.K. v. Hungary*, para. 6.6, and 275/1988, *S.E. v. Argentina*.

[64] See communications Nos. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995; 586/1994, *Adam v. Czech Republic*; 857/1999 *Blazek et al. v. Czech Republic*; and 747/1997 *Des Four Walderode v. Czech Republic*.

[65] See communication No. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, para. 11.6.

[66] See communication No. 24/1977, *Lovelace v. Canada*, Views adopted on 30 July 1981, para. 13.1.

Y. Communication No. 1438/2005, *Taghi Khadje v. Netherlands** (Decision adopted on 31 October 2006, Eighty-eighth session)

Submitted by:	Hamid Reza Taghi Khadje (represented by counsel, Pieter Bogaers)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	14 October 2005 (initial submission)
Subject matter:	Asylum
Procedural issue:	Non-substantiation of claim
Substantive issues:	Prohibition of torture and cruel, inhuman or degrading treatment, prohibition of arbitrary arrest or detention, unfair "suit at law", right to peaceful assembly, right to join trade unions
Articles of the Covenant:	7, 9, 14, 21 and 22
Article of the Optional Protocol:	2

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

Meeting on 31 October 2006,

Adopts the following:

Decision on admissibility

1.1 The author of the communication dated 14 October 2005 is Hamid Reza Taghi Khadje, born on 1 April 1976, an Iranian citizen currently residing in the Netherlands. He claims to be a victim of violations by the Netherlands of articles 7, 9, 14, 21 and 22 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the Netherlands on 11 March 1979. He is represented by counsel, Pieter Bogaers.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

1.2 On 15 March 2006, the Special Rapporteur for New Communications, on behalf of the Committee, determined that the admissibility of this case should be considered separately from the merits.

Facts as presented by the author

2.1 The author became politically active in Iran after his military service in 1998. In May 1999, he obtained employment at the Electricity Department of the Oil Refinery in Abadan, where he met Mr. Farid Marefioun, a member of the Labour Union. He began attending their meetings and met the leaders of the Labour Union, whose aim was to fight for workers and inform them about their rights. The Labour Union was also opposed to the privatization of the Oil Refinery. He explains that the Labour Union is not per se illegal, but that it must toe the party line or face legal consequences. On behalf of the workers employed at the Oil Refinery, he brought problems to the attention of the management. As a result, he was ordered to stop these activities.

2.2 On 1 June 2000, two leaders of the Labour Union were arrested after a general strike in Abadan. The author participated in a sit-in strike on that day at the oil refinery, requesting the release of the two leaders. Those responsible for maintaining order intervened to end the strike and the author hit some of the officials. In the ensuing chaos, he managed to escape arrest and fled the city. In the meantime, he heard that the authorities were looking for him and his brother Mohammad was arrested. He left Iran for the Netherlands on 21 June 2000. His sister Mahnaz also fled to the Netherlands with her husband. His brother was allegedly detained for six months to a year. While he was detained, his mother was harassed by Iranian agents who searched her house. He was released some time between July 2002 and January 2003. Since then, he has had to report to the police station once a month and to provide information about the whereabouts of the author.

2.3 A first asylum application was lodged on 31 July 2000. It was rejected by the Ministry of Justice on 1 June 2001. The author's appeal to the District Court of The Hague was rejected on 18 September 2002. A further appeal to the Administrative Jurisdiction Division of the Council of State (Raad van State) was rejected on 1 November 2002. A second asylum application was lodged on 1 May 2003 and rejected on 2 May 2003. The author appealed, but the decision was confirmed by the District Court of The Hague on 28 May 2003. A further appeal to the Administrative Jurisdiction Division of the Council of State was dismissed on 27 June 2003, since no new facts or circumstances had emerged.

The complaint

3.1 The author claims a violation of article 7 of the Covenant, because he is still wanted by the Iranian government and because upon his return, he would be subjected to torture or to cruel, inhuman and degrading treatment or punishment. He claims a violation of article 9, because he would be subjected to arbitrary arrest or detention. He also claims violations of articles 21 and 22, because he will be denied the right of peaceful assembly and the right to join trade unions.

3.2 With regard to article 14, the author argues that as it appears from the domestic judicial decisions, the State party has not fulfilled its obligations to conduct a thorough investigation into the facts. He recalls that in the decision on his first asylum application, it was held against him

that he had failed to provide evidence of his identity. When he subsequently submitted identity papers in support of his second asylum application, the assessment of his credibility remained unchanged. He also argues that the State party has started a pilot programme to expel Iranians who have exhausted all legal remedies, and that he is at risk of being expelled by force to Iran at any moment, even though no deportation order has in fact been issued.

State party's observations on the admissibility of the communication

4.1 By note verbale of 5 January 2006, the State party challenged the admissibility of the communication, arguing that the author failed to complain in the domestic proceedings about alleged violations of articles 9, 21 and 22, thereby denying the national courts the opportunity to respond to those complaints. It considers that the author has thus not exhausted domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol.

4.2 By note verbale of 8 March 2006, the State party also challenged the admissibility of the complaints based on articles 7 and 14. Firstly, it points out that the author had ample opportunity to defend his case before the national courts, and recalls that the denial of his first asylum application was judged on the merits by the District Court of The Hague on 18 September 2002. The Court concluded that his claim that, if returned to Iran, he would face a real risk of being subjected to ill-treatment, was unsubstantiated. His appeal against this judgement was rejected by the Council of State. Similarly, the appeal against the denial of his second asylum application was declared unfounded by the District Court of The Hague. This decision was again upheld on appeal by the Council of State. The State party thus considers that the national authorities have carried out a thorough investigation into the facts of the case. Secondly, the State party recalls that the right to complain to the Committee is not intended to provide an opportunity for consideration of complaints *in abstracto* about national legislation and practice.[1] It considers that the author has not submitted any specific complaints about the asylum proceedings, let alone substantiated them.

Authors' comments

5. By letter dated 1 May 2006, the author reiterates that he did not fail to complain about violations of articles 9, 21 and 22 in the domestic proceedings. He recalls that he explained during the asylum procedure how he had cooperated with the Labour Union, how he had to sign a declaration to stop his trade union activities, and how he escaped arbitrary arrest. He reiterates his general remarks about the Dutch asylum procedures.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 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 that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 As to the claims that the State party would violate article 7, article 9, article 21 and article 22, if the author was returned to Iran knowing that he is likely to be subjected to cruel,

inhuman or degrading treatment or arbitrary detention, upon his arrival, and that his rights to peaceful assembly and the right to join trade unions will be denied, the Committee notes that no order has in fact been made for his forcible return to Iran. It is not an inevitable consequence of a failed application for asylum that a deportation will take place.[2] In these circumstances, the Committee need not determine whether the proceedings relating to the author's asylum application fell within the scope of application of article 14 (determination of rights and duties in a suit at law).[3] It accordingly concludes that these claims are inadmissible as insufficiently substantiated under article 2 of the Optional Protocol.

7. Accordingly, the Committee decides:

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

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

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

Notes

[1] See communication No. 35/1978, *Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, Views adopted on 9 April 1981, para. 9.2.

[2] See communication No. 1204/2003, *Booteh v. The Netherlands*, Inadmissibility decision adopted on 30 March 2005, para. 6.2.

[3] See communication No. 1051/2002, *Ahani v. Canada*, Views adopted on 29 March 2004, para. 10.5; and communication No. 1302/2004, *Khan v. Canada*, Inadmissibility decision adopted on 25 July 2006, para. 5.3.

Z. Communication No. 1446/2006, *Wdowiak v. Pologne**
(Decision adopted on 31 October 2006, Eighty-eighth session)

Submitted by:	Mrs. Barbara Wdowiak (not represented by counsel)
Alleged victim:	The author
State party:	Poland
Date of communication:	8 December 2005 (initial submission)
Subject matter:	Access to justice, requirement that appeal be prepared by counsel
Procedural issues:	Same matter examined under another international procedure; State party's reservation; exhaustion of domestic remedies
Articles of the Covenant:	14 (1)
Articles of the Optional Protocol:	5 (2) (a), (b)

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

Meeting on 31 October 2006

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Mrs Barbara Wdowiak, a Polish national, born 1946. She claims to be a victim of violation by Poland of her rights under article 14, paragraph 1, of the Covenant.

1.2 On 25 March 2006, the Special Rapporteur on New Communications and Interim measures decided to separate the examination of the admissibility of the communication separately to the merits.

1.3 The Optional Protocol entered into force for the State party on 7 February 1992.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Roman Wieruszewski did not participate in the adoption of the Committee's decision.

The facts as submitted by the author

2.1 In 1995, the author filed an application in the District Court in Kozhienicach seeking restitution of part of a small property to which she claimed to be entitled. On 28 June 1995, the court rejected her application, for lack of evidence. In March 1998, new facts were discovered, and the author filed a cassation appeal with the Regional Court in Radom on 9 August 1999, seeking to have the case reopened under the relevant provisions of the Civil Code.[1]

2.2 On 13 August 1999, the Radom Regional Court dismissed her appeal on the basis that the appeal failed to comply with section 393 (1) of the Civil Code, which provides that an appeal must be prepared and filed only by a qualified lawyer or legal consultant. The Court thus did not examine the merits of her appeal.

2.3 The author appealed the decision of the Radom Regional Court to the Supreme Court, which, on 20 January 2000, dismissed her appeal on the basis that it had not been prepared by a qualified lawyer.

2.4 The author explains that she was not represented by a lawyer because she had been refused a court appointed lawyer, and had no financial means to retain one herself. She states that she presented evidence to the Supreme Court of her poor financial situation.

2.5 On 26 April 2000, the author submitted an application to the European Court of Human Rights, in which she set out the above facts. On 11 October 2001, the European Court declared her complaint inadmissible, on the grounds that she had not exhausted domestic remedies.

The complaint

3. The author claims that she was deprived of her right to a fair hearing of her rights in a suit of law, in violation of article 14, paragraph 1, and that this occurred merely because she could not afford to pay a lawyer to represent her.

State party's observations on admissibility

4.1 In its submission dated 23 March 2006, the State party challenges the admissibility of the communication.

4.2 It submits that the issue raised by the author was examined and dismissed by the European Court of Human Rights, which noted that the author had failed to appeal in accordance with relevant formalities and that therefore domestic remedies had not been exhausted.[2]

4.3 Secondly, the State party submits that the European Court was correct in its finding that domestic remedies have not been exhausted. The Supreme Court's decision noted that inability to pay for the cost of legal assistance was not an exception to the requirement that appeals be filed by qualified lawyers. However, the Court also noted that this fact can make a person eligible for free legal assistance. The State party submits that it transpires from the case file that the author did not lodge a motion in the Regional Court seeking the appointment of a lawyer *ex officio*.

4.4 In addition, on the merits, the State party submits that the requirement that a cassation appeal be filed by a qualified lawyer is designed to guarantee a high quality of appeals, and to protect the Supreme Court from a backlog of vexatious appeals. It is not a restriction on access to courts, as a person may be granted free legal assistance. This is provided for in article 117 of the Civil Code.

Author's comments on the State party submissions

5. In her comments dated 17 May 2006, the author emphasizes that when filing her appeals to the court, she described her situation and explained that she did not have any financial means to retain a private lawyer. The Supreme Court understood her position but did not appoint a lawyer to assist her, and did not explain to her how she could have her matter substantively examined by the court.

Issues and proceedings before the Committee

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

6.2 Pursuant to article 5, paragraph 2 (a), of the Optional Protocol, the Committee must establish whether the same matter is not being examined under another procedure of international investigation or settlement. It notes that on 26 April 2001, the author submitted a similar complaint to the European Court of Human Rights, which was declared inadmissible on 11 October 2001, for non-exhaustion of domestic remedies. It recalls that when acceding to the Optional Protocol, the State party entered a reservation which 'excludes the procedure set out in article 5, paragraph 2(a), in cases where the matter has already been examined under another procedure of international investigation or settlement' (emphasis added). Whilst the State party has not explicitly invoked this reservation, its reliance on the decision of the European Court of Human Rights which dismissed the author's earlier complaint may be understood as a reference to its reservation. The Committee must therefore decide whether the decision of the European Court constitutes an "examination" of the "same matter" as that which is before the Committee. It recalls its jurisprudence that an inadmissibility decision which entailed an at least implicit consideration of the merits of a complaint amounts to an "examination" for the purpose of article 5, paragraph 2 (a) of the Optional Protocol. On the other hand, the Committee has also previously held that a finding of inadmissibility for purely procedural reasons, without addressing the merits of a case, does not amount to "examination", for purposes of admissibility.[3] In this instance, the decision of the European Court was procedural in nature, finding that the author had not exhausted domestic remedies. Accordingly, in the present case, the Committee considers that the same matter has not been "examined" by another procedure of international investigation or settlement.

6.3 In relation to the question of exhaustion of domestic remedies, the Committee notes the undisputed fact that the author has not complied with the formal requirements for filing an appeal, namely that the appeal be prepared and filed by a qualified lawyer or legal consultant. In the present case, the substantive issue that the author seeks to have the Committee examine is inextricably linked with these formal requirements. The author claims that the formal requirements amounted to a denial of access to justice; the corollary of this submission is that there are no "available" or "effective" remedies for a person in her financial state. However, the

Committee notes the State party's submission that the author did not lodge with the Regional Court a motion exempting her from court fees and for the appointment of a lawyer *ex officio*. While the author has presented evidence to the Supreme Court, why her financial situation did not allow her to retain a lawyer, she has not substantiated that she was unable to file such a motion with the Regional Court without the assistance of legal counsel. In the absence of such further information, the Committee cannot conclude that the author has exhausted available domestic remedies, and declares the communication inadmissible under 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 the present communication will be transmitted to the parties, for information.

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

Notes

[1] Section 403 (2) allows for the re-examination of cases where new facts or evidence is later discovered.

[2] Poland acceded to the Protocol with the following reservation: "Poland accedes to the Protocol while making a reservation that would exclude the procedure set out in article 5 (2) (a), in cases where the matter has already been examined under another procedure of international investigation or settlement." The State Party does not specifically refer to this reservation in its submission in the present case.

[3] See communication No. 1389/2005, *Luis Bertelli Gálvez v. Spain*, inadmissibility decision adopted on 25 July 2005, para. 4.3.

AA. Communication No. 1451/2006, *Gangadin v. Netherlands** (Decision adopted on 26 March 2007, Eighty-ninth session)

Submitted by:	Mr. Rabindranath Gangadin (represented by counsel, Mr. E. Hummels)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	12 January 1998 (initial submission)
Subject matter:	Unfair criminal proceedings and treatment of counter-claims; inappropriate police investigation of complaints
Procedural issues:	Sufficient substantiation for purposes of admissibility
Substantive issues:	Fair trial; equality before the courts and the law
Articles of the Covenant:	14, 26
Article of the Optional Protocol:	2

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

Meeting on 26 March 2007,

Adopts the following:

Decision on admissibility

1. The author of the communication, initially dated 12 January 1998, is Mr. Rabindranath Gangadin, of unknown citizenship and date of birth, currently living in the Netherlands. The author claims to be a victim of violations of articles 14 and 26 of the Covenant by The Netherlands. He is represented by counsel, Mr. E. Hummels.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

Factual background

2.1 The author describes two sets of factual incidents. In the first, a neighbour of the author allegedly damaged the author's car on 19 February and again on 19 November 1990. The author thereupon commenced proceedings for damages against the neighbour. On 19 February 1991, the author presented a witness statement by a Mr. G., according to which the latter claimed to have seen the neighbour inflict the damage in question. On 24 February 1992, after having been allegedly bribed by the neighbour, Mr. G. made an allegedly false statement to the magistrate. The proceedings concluded thereafter, with the author failing to win compensation for the damage to his car.

2.2 In September 1992, the author allegedly procured a statement from Mr. G to the effect that he had given false information to the magistrate. Mr. G. later denied having made such a statement, and the author himself was prosecuted under the charge of making a false statement. On 20 September 1995, the Utrecht District Court convicted the author and sentenced him to a fine of NFL 2,000 and two months conditional imprisonment. On 27 September 1995, the author applied to the Court of Appeal for an order directing prosecution of the neighbour and Mr. G. On 18 December 1996, the Court of Appeal denied the author's motion. On 7 July 1998, the Court of Appeal adjusted the sentence downward to two months imprisonment, while, on 14 September 1999, the Supreme Court rejected his appeal.

2.3 In the second incident, in June 1991, under cover of written loan, the aforementioned Mr. G. allegedly borrowed NFL 5,000 from the author. In June 1994, Mr. G., claiming both that he had not borrowed any monies and that the deed of loan was invalid, sought criminal prosecution of the author. The author, in turn, sought Mr. G's prosecution for improper approach to the police. The public prosecutor denied the author's request, while, on 18 December 1996, the Court of Appeal rejected the author's motion that the prosecutor be directed to prosecute Mr. G. The author was successful at first instance with an underlying civil suit concerning the loan, but the finding was reversed on appeal.

2.4 On 8 December 1997, a Committee of three of the former European Commission of Human Rights unanimously decided that, in light of the material in its possession and in so far as the matters of complained of by the author were within its competence, there was no appearance of a violation of any of the rights and freedoms set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms or its Protocols.

The complaint

3.1 The author argues that in both cases, the Court of Appeal rejected his requests to order the prosecution of the other party to the dispute, while the author himself was prosecuted. The author claims accordingly that he was a victim of violations of the principles of fairness and equality before the courts and the law, protected by articles 14 and 26 of the Covenant.

3.2 The author further contends that the police was biased against him and did not appropriately inquire into the substance of his complaints, as the father in law of the neighbour in the first incident was a police officer who acted on his behalf. He states that he was the victim of various crimes ranging from arson in 1996, to "attempted manslaughter" in 1997 and damage to

his car at various occasions, and that the police refused to investigate his complaints because of "negative information" they had about him. This information is said to have followed the author from town to town when he moved.

Issues and proceedings before the Committee

Consideration of admissibility

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

4.2 The Committee notes, with respect to the author's claims of equality before the courts and the law, that the Covenant does not require parties to proceedings to be placed in an identical formal position, but rather that such distinctions as may be made are based upon reasonable and objective grounds.[1] The author has not shown that the decisions of the Court of Appeal not to accede to the author's motions that the opposing parties in the suits in question be prosecuted was motivated by anything other than the assessment of the facts made by the Court and that the distinction made between the author, who was convicted, and the other parties was not based upon reasonable and objective grounds, consistent with the requirements of the Covenant. The Committee accordingly finds that the claims of violations of articles 14 and 26 of the Covenant have been insufficiently substantiated, for purposes of admissibility, and are thus inadmissible under article 2 of the Optional Protocol.

4.3 As to the author's remaining claims, the Committee considers that the author has not sufficiently substantiated an issue under the Covenant in respect thereof. As a result, these claims are similarly inadmissible under article 2 of the Optional Protocol.

5. Accordingly, the Committee decides:

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

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

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

Note

[1] See, for example, *Kavanagh v. Ireland*, Case No 819/1998, Views adopted on 4 April 2001.

BB. Communication No. 1452/2006, *Chytil v. Czech Republic** (Decision adopted on 24 July 2007, Ninetieth session)

Submitted by:	Mr. Renatus J. Chytil (not represented)
Alleged victim:	The author
State party:	The Czech Republic
Date of communication:	16 January 2006 (initial submission)
Subject matter:	Discrimination on the basis of citizenship with respect to restitution of property
Procedural issues:	Abuse of right of submission
Substantive issues:	Equality before the law; equal protection of the law
Article of the Covenant:	26
Article of the Optional Protocol:	3

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

Meeting on 24 July 2007,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Renatus J. Chytil, born in 1925 in the former Czechoslovakia. He claims to be a victim of violations by the Czech Republic of his rights under article 26 of the International Covenant on Civil and Political Rights.[1] He is not represented by counsel.

Factual background

2.1 On 13 June 1948, the author escaped from Czechoslovakia. He was recognized as a political refugee in Germany, before emigrating to the United States of America, where he acquired US citizenship in 1957, thereby losing his Czech citizenship pursuant to a bilateral

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

treaty, the 1928 Naturalization Treaty.[2] In 1948, the Czechoslovak authorities confiscated his law certificates and professional degree allowing him to practice law. According to the author, the following property was confiscated over time by the Czechoslovak authorities:

- The Vonmiller textile mill at Zamberk, East Bohemia, confiscated in 1945, which was subsequently privatized in 1995;

- About 1.500 kg of gold coins and bars. The author claims that the gold which was confiscated by the Nazis during World War II was recovered in Germany, and taken and stored in the United States. The author further claims that his family gold was commingled with 18.4 metric tons of the Czech gold labelled as "monetary restitution gold", and shipped by the United States government to the regime in Prague in February 1982. The author did not receive compensation from the United States government;

- The Chytil family villa in 1983, while the author's mother and sister were visiting him in California. Both subsequently obtained political asylum in the United States;

- The LITAS construction businesses, nationalized and confiscated in 1948; and

- Other land, buildings and investments.

2.2 In 1990, pursuant to Act 119/1990, the author's doctorate and professional certificate of *magister juris* were returned to him. He made a statement on 19 January 1994 before the constitutional committee of the Czech parliament. He also sought restitution of the family's former property and gold by lodging a complaint before the Czech Constitutional Court for violation of human rights and other matters on 10 June 1994. On 26 November 1995, and according to the author, the Czech Constitutional Court denied him standing on the ground that he was not an entitled person under law, as required by article 3 of the Act No. 87/1991, since he did not meet the continuous nationality criterion. He claims that this decision is final and no appeal is allowed. He tried to pursue his case, which was denied on 4 March 1996 by an assistant judge of the Czech Constitutional Court.

The complaint

3. The author invokes the Committee's jurisprudence against the Czech Republic (communication No. 516/1992, *Simunek et al v. Czech Republic*, Views adopted on 19 July 1995)[3] and recalls that it has found violations of the Covenant in situations similar to his. He claims that the Czech government's failure to restitute his property to him violates article 26 of the Covenant.

The State party's submission on admissibility and merits

4.1 On 11 August 2006, the State party commented on the admissibility and merits of the communication. On the facts, the State party clarifies that the author apparently did not regain Czech citizenship, and that on 18 April 1994, he applied to the Constitutional Court in a submission designated as "an action against the violation of human rights and submittal of a petition for an amendment of the law". In this submission, he sought the repeal and amendment of certain provisions of Act No. 87/1991 on Extra-Judicial Rehabilitations, the restitution of his

property, and compensation for his rights *in rem* and inheritance rights amounting to more than US$ 50 million. On 29 November 1995, the Constitutional Court dismissed his application, and on 4 March 1996, the Constitutional Court set aside the author's complaint against the 29 November 1995 decision.

4.2 The State party recalls that Section 1 of Act No. 87/1991 applies to the mitigation of certain property and other injustices which arose in the period from 25 February 1948 to 1 January 1990. The Act lays down preconditions for raising claims relating to forfeiture of property and items, as well as the rules governing compensation, and the scope of such claims. Under Section 2, the forfeited property or item is either surrendered, or financial compensation is provided. Pursuant to Section 3, subsection 1, "eligible persons" are those persons who were rehabilitated under Act No. 119/1990, whose property item passed into State ownership in specified instances, provided the person is a Czech or Slovak citizen. The person liable to surrender the property, as defined by Section 4, must surrender the property item upon a request made in writing by the eligible person, who has proved his entitlement to the property item and who has specified how the State came to have the item. If the item is a movable item, the eligible person must also prove where the movable is situated. Section 5, subsection 2, provides that the eligible person must request the liable person to surrender the property item within six months of the entry into force of the Act. If the liable person fails to surrender the property item, the eligible person may bring his claims to a court within one year. Further, Section 8 of the Act specifies that the eligible person has a right to financial compensation if the property item is not surrendered to him. An application in writing for financial compensation must be filed within one year of the entry into force of the Act, or within one year of the day of the judgment whereby the request for surrender of the item was rejected.

4.3 On admissibility, the State party recalls that the author has not proved in any way, whether at the national level or before the Committee, that he presented his restitution claim to the 'liable persons' or, as applicable, to the ordinary courts of the Czech Republic, nor has he shown that he presented the claim within the time limit specified in Section 5 of Act No. 87/1991. Thus, he has clearly failed to exhaust domestic remedies.

4.4 As regards the proceedings before the Constitutional Court, the author deprived himself of the opportunity for the Court to consider, and decide on, his petition. The author's application to the Court of 18 April 1994 suffered from procedural defects that prevented the Court from considering it.[4] The author did not submit a copy of the decision on the latest remedy provided by the law for the protection of his rights, and omitted to be represented by a lawyer (a requirement before the Constitutional Court). As a result, he was requested by the Constitutional Court, on 22 June 1994, to remedy these defects. In his reply, he merely presented additional reflections *de lege ferenda* on the issue of Czech restitution legislation, and the defects in his petition were not remedied. Therefore, on 29 November 1995, the Constitutional Court dismissed his application.[5]

4.5 In addition, the author failed first to approach the 'liable person' or, as applicable, seize the ordinary courts with his restitution request (see Section 4 and 5 of Act No. 87/1991). Since the Constitutional Court cannot substitute these authorities' activities in their decision-making powers in restitution claims, it had to dismiss this part of the author's application in accordance with section 43, subsection 1(e).[6] For the same reason, it dismissed the author's petition for an

amendment to Act No. 87/1991, as only Parliament has the power to do so. For these reasons, the author failed to exhaust domestic remedies and the communication is inadmissible in accordance with articles 2 and 5, paragraph 2 (b), of the Optional Protocol.

4.6 Secondly, the State party argues that the author failed to substantiate his claims related to the discriminatory treatment in the decision-making on his restitution claim. He only lists the property items the surrender of which he seeks. However, under Section 5 of Act No. 87/1991, he should support his restitution titles, document his claim to the surrender of the property or the way in which it was taken by the State, and, in the case of movables, he should indicate the place where these items are located. His communication is therefore inadmissible under article 2 of the Optional Protocol.

4.7 Thirdly, the State party considers that the communication is inadmissible on the ground of abuse of the right of submission (article 3 of the Optional Protocol). While the Optional Protocol does not set fixed time limits for submitting a communication, and a mere delay in submission does not itself involve abuse of the right of submission, the State party recalls the jurisprudence of the Committee which expects a reasonable and objectively understandable explanation to such a time lapse.[7] In the present case, the author submitted his communication to the Committee on 16 January 2006, while the latest domestic decision in the matter is the Constitutional Court's decision of 4 March 1996. The author does not explain the 10-year delay, and thus the communication is inadmissible for abuse of the right of petition, within the meaning of article 3 of the Optional Protocol.

4.8 On the merits, the State party argues that the communication contains nothing which would indicate any prohibited discrimination against the author. The author has not documented any decision by the national authorities dismissing his restitution claims, which would be at variance with the requirements of article 26, nor is the State party aware of any such decision. According to the information provided, only two decisions were made in this case, namely the Constitutional Court decisions of 29 November 1995 and 4 March 1996. These decisions do not carry any suspicion of prohibited discrimination. Should the author wish to object that Czech restitution legislation requires, inter alia, as a precondition for a valid restitution claim, citizenship of the State party, the State party does not contest this fact. However, the existence *per se* of this precondition does not constitute prohibited discrimination against the author. Prohibited discrimination against the author could only occur where the national authorities adopted a decision rejecting his restitution claim on the ground of his failure to meet this precondition.[8] Here, no such decision has been adopted. The Constitutional Court dismissed the author's applications solely on the basis of procedural reasons, not on the basis of applying the precondition of citizenship. Therefore, there has been no violation of article 26 of the Covenant.

Author's comments

5. On 28 February 2007, and in relation to the State party's claims that he failed to provide documentary evidence on his properties, the author refers to his initial communication and the list of confiscated properties which he provided. The author invokes the *Simunek* decision[9] in support of his claim that the citizenship issue is discriminatory and incompatible with the requirements of article 26. As to the argument that he did not exhaust domestic remedies, he argues that even if he had been re-naturalized as a Czech citizen,[10] he would breach the State party's requirement of continued nationality. Only Czecho-Slovak citizens enjoy restitution rights under Act No. 87/1991, and he is not an 'eligible person' under Section 3 of the Act.

Although the residency condition was removed by the State party in 1993, the discriminatory citizenship condition remains. Under these conditions, the author, as a U.S. citizen and not a continuous Czech citizen, has no standing in Czech courts of law and therefore is unable to exhaust domestic remedies. Under the 'entitled person' definition, his rights to a remedy do not exist. In his view, the State party uses procedural rules to block restitution, and therefore breaches the *Simunek* precedent and article 26.[11] He concludes that his communication should be declared admissible.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 As to the State party's argument that the submission of the communication to the Committee amounts to an abuse of the right of submission under article 3 of the Optional Protocol, the Committee notes that the last decision in the file is the decision of the Constitutional Court of 4 March 1996, rejecting the author's request to appeal the previous decision of 29 November 1995. Thus, a period of almost 10 years passed before the author submitted his case to the Committee on 16 January 2006. The Committee notes that there are no fixed time limits for submission of communications under the Optional Protocol and that mere delay in submission does not of itself, except in exceptional circumstances, involve an abuse of the right to submit a communication.[12] In this instance, although the State party raised the issue that the delay amounts to an abuse of the right of petition, the author has not explained or justified why he waited for nearly 10 years before bringing his claims to the Committee. Taking into account the fact that the *Simunek* decision of this Committee[13] was rendered in 1995, and that the file indicates that the author was aware of this decision soon thereafter,[14] the Committee thus regards the delay to be so unreasonable and excessive as to amount to an abuse of the right of submission, and declares the communication inadmissible pursuant to article 3 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 3 of the Optional Protocol;

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

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

Notes

[1] The Covenant was ratified by Czechoslovakia in December 1975 and the Optional Protocol in March 1991. The Czech and Slovak Federal Republic ceased to exist on 31 December 1992. On 22 February 1993, the Czech Republic notified its succession to the Covenant and Optional Protocol.

[2] Treaty of Naturalization, concluded between Czechoslovakia and the United States of America on 16 July 1928 (date of entry into force: 14 November 1929).

[3] The author indicates that he was the first to bring the *Simunek* decision of the Committee to the attention of the United States Government in 1996. The author also includes the text of a submission dated 19 March 1999, addressed to the Chairman of the Commission on Security and Cooperation in Europe, which refers to *Simunek*.

[4] The State party explains that Section 30, subsection 1, of Act No. 182/1993 on the Constitutional Court provides that natural and legal persons, as parties or enjoined parties to proceedings before the Constitutional Court, shall be represented by a barrister, or a commercial lawyer, or a notary public. Section 34, subsection 1, of the Act provides that the petition for the initiation of proceedings shall be lodged with the Constitutional Court in writing. The petition must clearly indicate the person lodging the petition, what matter the petition concerns, and what the petition pursues. The petition must also be signed and dated. It should contain an account of the relevant facts and evidence referred to. Section 43, subsection 1, provides that the judge rapporteur shall dismiss the petition in a Resolution, without holding a hearing and without calling the parties, (a) if the petitioner has failed the remedy the defects in his petition within the time limit given to him for this purpose, or (b) if the petition was lodged after the time limit stipulated in the law, […] (e) if it is a petition for the consideration of which the Constitutional Court has no competence, or (f) if the petition is inadmissible, unless the law stipulates otherwise. Section 72, subsection 2, provides that a constitutional appeal can be lodged within sixty days. This time limit starts running on the day of the last decision on the latest remedy the law provides for the protection of the right, and if there is no such remedy, on the day on which the fact which is the subject matter of the constitutional appeal arose. Section 75, subsection 1, provides that a constitutional appeal is inadmissible if the appellant has not exhausted all procedural remedies provided by the law for the protection of his rights; a petition for the permission to reopen proceedings is not regarded as such remedy.

[5] The State party provides a translation into English of the Resolution of the Constitutional Court of the Czech Republic, File Ref. II US 62/94-35: the author "failed to lodge his constitutional appeal through a barrister, he failed to prove his membership of the Czech Bar association, and he failed to submit a copy of the decision on the latest remedy provided by the law for the protection of his rights". It appears that the part of the complaint requesting a review of the constitutionality of Act No. 87/1991 were dismissed as proceedings on this matter where already under way (Pl. ÚS 3/94): "the admission of the petition was prevented by the obstacle of litispendence, i.e. a case instigated under Section 35, subsection 2 of the Act on the Constitutional Court […] it was not possible to accord to the appellant the status of an enjoined party, because in the light of the defects in his petition he could not be regarded as an eligible petitioner".

[6] "Decisions on indemnification and restitution are made by the authorities named in Act No. 87/1991 rather than the Constitutional Court, which is called to review the constitutionality of their decision-making" (see translation provided by the State party).

[7] The State party refers to communication No. 787/1997, *Gobin v. Mauritius*, inadmissibility decision of 16 July 2001, which the Committee declared inadmissible as the communication had been submitted five years after the alleged violation of the Covenant, holding that the author did not provide "convincing explanation" to justify the delay (para. 6.3).

[8] The State party refers to communication No. 516/1992, *Simunek et al v. Czech Republic*, Views adopted on 19 July 1995.

[9] Communication No. 516/1992, *Simunek et al v. Czech Republic*, Views adopted on 19 July 1995.

[10] The author claims he never lost Czech citizenship in light of the law of *ius sanguinis*.

[11] The author also refers to article 46 of the 1907 Hague Convention which states that "private property cannot be confiscated".

[12] See communication No. 787/1997, *Gobin v. Mauritius*, Inadmissibility decision of 16 July 2001, para. 6.3, communication No. 1434/2005, *Claude Fillacier v. France*, Inadmissibility decision of 27 March 2006, para. 4.3 and communication No. 1101/2002, *José María Alba Cabriadav. Spain*, Views adopted on 1 November 2004, para. 6.3.

[13] Communication No. 516/1992, *Simunek et al v. Czech Republic*, Views adopted on 19 July 1995.

[14] See footnote 3.

CC. Communication No. 1453/2006, *Brun v. France**
(Decision adopted on 18 October 2006, Eighty-eighth session)

Submitted by:	André Brun (represented by counsel, François Roux)
Alleged victim:	The author
State party:	France
Date of communication:	15 November 2005 (initial submission)
Subject matter:	Criminal conviction for destruction of a field of genetically modified maize
Procedural issues	Concept of "victim"
Substantive issues:	Right to live in a healthy environment, right to take part in the conduct of public affairs
Articles of the Covenant:	2, paras. 3 (a) and (b), 6, 17 and 25 (a)
Articles of the Optional Protocol:	1 and 2

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

Meeting on 18 October 2006,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Mr. Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Ms. Christine Chanet did not participate in adoption of the Committee's decision.

The text of an individual opinion signed by Mr. Hipólito Solari-Yrigoyen is appended to the present document.

Decision on admissibility

1.1 The author of the communication, dated 15 November 2005, is André Brun, a French citizen. The author claims to be the victim of violations by France of articles 2, paragraphs 3 (a) and (b), 6, 17 and 25 (a) of the International Covenant on Civil and Political Rights. He is represented by counsel, François Roux. The Covenant and its Optional Protocol entered into force for France on 4 February 1981 and 17 May 1984, respectively.

1.2 On 3 May 2006, the Special Rapporteur for new communications, on behalf of the Committee, determined that the admissibility of this case should be considered separately from the merits.

Factual background

2.1 On 28 April 2000, the Minister of Agriculture issued an order, after consultation with the study group on the dissemination of biomolecularly engineered products, authorizing the company Biogemma to conduct an open-field trial of genetically modified organisms (GMOs). Groups of which the author was a member had demanded that the Minister of Agriculture put a stop to Biogemma's dissemination of GMOs, under threat of destruction of the field trials.

2.2 On 26 August 2001, 200 persons, including the author, met in Cléon d'Andran (France) to demonstrate against the GMO crops. The aim of the demonstration was to destroy a plot of transgenic maize, to dump the uprooted crops in front of the Prefecture and to be received as a delegation by the Prefect. The demonstrators destroyed the plot of transgenic maize.

2.3 Following these events, Biogemma, the company responsible for the destroyed transgenic maize crops, had 10 of the persons who had participated in this action summoned before the Criminal Court of Valence for joint destruction of property belonging to other persons.

2.4 On 8 February 2002, the Criminal Court of Valence imposed fines and prison sentences on the 10 persons. The author received a three months' suspended sentence and a fine of 2,000 euros. On 14 March 2003, the Grenoble Appeal Court upheld the judgement of the court of first instance with regard to the author's conviction, but revised the sentence to a two months' suspended prison sentence and a fine of 300 euros. In a judgement of 28 April 2004, the Court of Cassation rejected the author's appeal.

The complaint

3.1 The author claims that he is the victim of a violation by France of articles 2, paragraphs 3 (a) and (b), 17 and 25 (a) of the Covenant. With regard to article 17, the author maintains that, in the context of the uncertainty surrounding GMO open-field trials, the domestic courts should have recognized the legitimacy of the act of destroying the transgenic maize crops and that they had acted out of necessity to protect the environment and health. He argues that the State party has not taken the necessary measures to prevent the violation of article 17 in the broader sense. The author explains in detail the jurisprudence of the European Court of Human Rights relating to pollution cases. He considers that "the Committee should proceed by analogy, referring to the jurisprudence developed by the European Court of Human Rights, and prepare an extensive interpretation of article 17", under which the concept of private and family

life encompasses the right to live in a healthy environment. If the Committee interprets the provision in this way, the author argues that the Committee will find a violation of article 17.

3.2 The author invokes the "precautionary principle" and considers that the medium- and long-term risks of GMOs on health and the environment should be taken into account. He argues that, at present, in the current state of knowledge on the use of GMOs, there has been no precise and coherent response concerning the long-term health and environmental risks. Consequently, the precautionary principle should be applied. In the absence of State intervention, the author considers that, by destroying the field of transgenic maize, the persons convicted at the national level, including the author, acted to prevent risks to public health and the environment associated with experiments which are not subject to any a priori controls.

3.3 The author considers that the planting of transgenic crops in open fields inevitably results in the contamination of conventional crops by genetically modified crops. He argues that the current minimum distances between GMO trial fields and non-GMO fields are ineffective. Thus, the destruction of the transgenic maize crops is necessary to safeguard the assets of conventional and organic farmers.

3.4 The author argues that there is no system of compensation for conventional and organic farmers should their production be found to contain GMOs which they themselves did not introduce. In addition, it is difficult to identify who is responsible, because of the complexity of the legal strategies used by companies to conduct open-field GMO trials.

3.5 The author believes that he acted out of necessity to protect his environment. He recalls that, under French law, the state of necessity arises when a person is in a situation such that, in order to protect an overriding interest, he or she has no other option but to commit an illegal act.

3.6 With regard to article 25, the author considers that in 2001, the year when the act in which he participated was committed, there had been no public debate to allow ordinary citizens to take an active part in the decisions of the public authorities concerning the environment. For this reason, acts of destruction were carried out by groups of farmers and citizens to trigger a debate with the State and the establishment of commissions to consider the question of the use of genetically modified crops and their health and environmental risks. The author claims that a majority of French people (farmers and consumers) is opposed to GMOs, but the State has a very restrictive position in that it continues to allow field trials of GMOs without prior public consultation. He therefore believes that the State party has not respected the provisions of article 25 (a) and has exceeded its authority in terms of environmental policy.

3.7 Concerning article 2, paragraphs 3 (a) and (b), the author considers that citizens have no legally recognized means of being heard and influencing the decisions of the public authorities concerning GMOs. He argues that the French legislative machinery does not allow him to have effective access to justice prior to the commencement of GMO field trials and that he is therefore unable to challenge the decisions which directly affect him in his private and family life.

3.8 Concerning the exhaustion of domestic remedies, the author argues that he invoked the substance of article 8 of the European Convention on Human Rights, which guarantees respect for private and family life in the same way as article 17 of the Covenant. The author therefore considers domestic remedies to have been exhausted.

3.9 The author notes that he has not submitted the same case to the European Court of Human Rights. It has, however, been submitted by other complainants who were among those also convicted by the Criminal Court of Valence.

State party's observations on admissibility

4.1 In a note verbale of 20 April 2006, the State party disputes the admissibility of the communication. First, the State party considers the communication inadmissible on the grounds that the author is not a victim. It recalls that complainants must have a personal interest in making a claim and that the Optional Protocol cannot be used to initiate a class action or to review domestic legislation[1] *in abstracto*. In order for the author to be considered a victim, he must establish that the disputed text has been applied to his disadvantage, thereby causing him definite direct personal harm. In the present case, the author claims to have been the victim of a violation of his right to privacy, as guaranteed by article 17 of the Covenant, through his criminal conviction. The State party stresses that the author was convicted by the criminal courts for acts of deliberate destruction or damaging of property belonging to other persons committed jointly with others, the penalties for which are set out in article 322-1 ff. of the Criminal Code. This conviction has no direct or indirect connection to the regulations concerning GMOs. The State party also notes that the author is not claiming any personal impact on his health or his environment. Consequently, it concludes that the invocation of a mere risk that has not been defined with certainty cannot be considered a determining factor for qualifying the author as a victim under the provisions of the Covenant.

4.2 Second, the State party considers the communication inadmissible on the grounds of incompatibility *ratione materiae* in respect of its claims under both articles 17 and 25. It argues that the right to healthy food and environment does not stem from either the text of article 17 of the Covenant or its interpretation by the Committee in general comment No. 16 on this issue. Rather, the concept of private and family life is to be defined in contrast to the public domain. The State party therefore considers the communication incompatible *ratione materiae* with article 17. With regard to article 25, the author argues that "the citizens who participated in the acts of 26 August 2001 acted because they did not have the effective legal means to enable civil society to have an input into the laws adopted". The State party considers that such an interpretation of the right to participate directly in public affairs does not follow from article 25 or from the Committee's general comment No. 25. The communication is therefore incompatible *ratione materiae* with article 25.

4.3 Third, the State party considers the communication inadmissible on the ground that domestic remedies have not been exhausted. It recalls that the event at the root of the complaint submitted by the author was the order of the Minister of Agriculture of 28 April 2000, which authorized the company Biogemma deliberately to release GMOs. It also recalls that, under French law, it is possible to request the annulment of a ministerial order by lodging an appeal to the Council of State alleging an abuse of authority. Such an appeal, if the judge confirms the illegality of the act, serves to cancel the ministerial order retroactively. In the case in question, rather than following this appeal procedure which is open to all persons aggrieved by an administrative decision, the author chose to demand that the Minister of Agriculture put a stop to the dissemination of GMOs and to destroy the property of a third party. He did not, therefore, use the remedies available to him.

4.4 Finally, the State party considers the communication inadmissible on the grounds that it constitutes an abuse of rights. In this case, the objective of the communication submitted by the author is to provoke a public debate on GMO crops in France. Consequently, it constitutes both an abuse of procedure and an abuse of rights.

Author's comments on the observations of the State party

5.1 In his comments of 5 July 2006 the author maintains that he regards himself as personally targeted as a victim. He recalls that his conviction for the offence in question was directly linked to the lack of legislation on GMOs, for his original argument in this case was that there existed a state of necessity requiring the prevention of an imminent danger arising from the open-field sowing of transgenic maize. He considers therefore that he was a direct victim of a specific case of the application of legislation impairing his exercise of the rights guaranteed by the Covenant. He cites the jurisprudence of the European Court of Human Rights, which has made theoretical checks on the compliance of legislation with the European Convention in some of its decisions. He makes a distinction between the situation of the authors of the communication *Bordes and Temeharo v. France* and his own situation, for he believes himself to have been a potential direct victim of the threats resulting from the dissemination of GMOs in the environment in the course of the field trials, which constitute a real and imminent danger to his enjoyment of privacy and family life and to his quality of life.[2]

5.2 On the Committee's competence *ratione materiae* in respect of article 17, the author stresses that there is a link between the protection of the environment and the effective protection of certain rights and fundamental freedoms set out in articles 17 and 6 of the Covenant. He cites several relevant international instruments and recalls that the Committee's general comment No. 16, which states that interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant. The right to respect for the privacy of personal and family life and of the home obliges the State to take all necessary measures to protect individuals against any interference by the public authorities or private persons in the exercise of the guaranteed right. According to the author the interference must be justified and proportionate in the light of the provisions, aims and objectives of the Covenant. In this case the interference by the authorities consisted in their failure to take the necessary measures to prevent the threats to the author's health and environment associated with the dissemination of GMOs in the open field. The State party even violated the author's rights a second time by prosecuting him for having tried to terminate the violation of which he was a victim and by securing his conviction.

5.3 On the Committee's competence *ratione materiae* in respect of article 25, the author stresses that citizens did not have an effective and efficient remedy to prevent the threats posed by the GMO open-field trials to the environment and public health. He asserts that article 25 (a) contains a procedural obligation inherent in the guaranteed right to ensure participation in the decision-making process, and that this procedural obligation implies the rights to information, to participation and to appropriate remedies. He points out that at the time of the events in question he did not have the means of obtaining useful and relevant information to enable him to participate in the decision-making process conducted by the public authorities with a view to authorizing the open-field sowing of GMO crops. It is in this sense that article 25 was violated, for the public authorities did not allow the author to participate in the environmental decision-making process. The author maintains that the public authorities did not produce the required prior assessments and did not inform the public of the possible dangers of the

dissemination of GMOs in the open field. The Council of State recently revoked a decision of the Ministry of Agriculture authorizing the deliberate sowing of transgenic maize on the ground that the technical file, which ought to have contained all relevant information for assessing the impact of the tests on public health and the environment, was not in order.[3] He believes therefore that he is fully justified in invoking article 25 (a) in conjunction with article 2, paragraphs 3 (a) and (b).

5.4 Concerning the exhaustion of remedies, the author considers that he has in fact exhausted all domestic remedies, for the Court of Cassation rejected his appeal on 28 April 2004. With regard to application to the administrative courts the author points out that article 5, paragraph 2 (a), of the Optional Protocol does not refer to the exhaustion of all the domestic remedies available under the Constitution or administrative, civil and criminal law. It is not mandatory to exhaust all conceivable remedies in order to render the application admissible. He recalls that he was unable to apply to the administrative courts since no administrative decision had been taken against him and accordingly no administrative remedy was immediately available to him. In any event, an administrative remedy is no longer available to the author at this stage of the proceedings. The author points out that, although the State party criticized the authors of several earlier communications for failing to avail themselves of administrative remedies, the Committee had nonetheless concluded that it could consider those communications.[4]

5.5 The author maintains that, in view of the danger posed by the contamination of traditional and biological crops by the genetically modified crops, he could not delay his action or await the judicial outcome of an application for cancellation of the permit to disseminate GMOs. In any event, a decision by the administrative court would not have been taken until after the sowing of the genetically modified crops and it would not have prevented their sowing or the contamination of other crops as a result of the GMO field tests. The author points out that in similar cases rulings on applications to the administrative jurisdictions seeking cancellation of permits for the dissemination of GMOs in the open field were not made until two years after the issuance of the permits, leaving plenty of time for the GMO field tests to contaminate traditional and biological crops growing nearby.

5.6 Lastly, the author adds that article 6 was also violated and asserts that the promotion of a healthy environment contributes to the protection of the right to life. He cites a decision of the Committee concerning radioactive wastes in which the Committee observed that the communication raised serious issues with regard to the obligation of States parties to protect human life under article 6, paragraph 1, without however finding that this provision had been infringed.[5]

Issues and proceedings before the Committee

6.1 Before examining a complaint submitted in a communication, the Human Rights Committee must determine, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 In accordance with article 5, paragraph 2 (a), of the Optional Protocol, the Committee ascertained that the same matter was not being examined under another procedure of international investigation or settlement.

6.3 Concerning the author's allegations relating to articles 6 and 17 of the Covenant, the Committee observes that no person may, in theoretical terms and by *actio popularis*, object to a law or practice which he holds to be at variance with the Covenant.[6] Any person claiming to be a victim of a violation of a right protected by the Covenant must demonstrate either that a State party has by an act or omission already impaired the exercise of his right or that such impairment is imminent, basing his argument for example on legislation in force or on a judicial or administrative decision or practice. [7] In the present case, the Committee notes that the author's arguments (see paragraphs 3.2 to 3.5) refer to the dangers allegedly stemming from the use of GMOs and observes that the facts of the case do not show that the position of the State party on the cultivation of transgenic plants in the open field represents, in respect of the author, an actual violation or an imminent threat of violation of his right to life and his right to privacy, family and home. After considering the arguments and material before it the Committee concludes therefore that the author cannot claim to be a "victim" of a violation of articles 6 and 17 of the Covenant within the meaning of article 1 of the Optional Protocol.

6.4 The Committee notes the author's complaint under article 25 (a) of the Covenant to the effect that the State party denied him the right and the opportunity to participate in the conduct of public affairs with regard to the cultivation of transgenic plants in the open field. The Committee points out that citizens also take part in the conduct of public affairs by bringing their influence to bear through the public debate and the dialogue with their elected representatives, as well as through their capacity to form associations. In the present case the author participated in the public debate in France on the issue of the cultivation of transgenic plants in the open field; he did this through his elected representatives and through the activities of an association. In these circumstances the Committee considers that the author has failed to substantiate, for purposes of admissibility, the allegation that his right to take part in the conduct of public affairs was violated. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.[8]

6.5 The Committee points out that article 2 of the Covenant may be invoked by individuals only in relation to other provisions of the Covenant and observes that article 2, paragraph 3 (a), provides that each State party shall undertake "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy". Article 2, paragraph 3 (b), guarantees protection to alleged victims if their complaints are sufficiently well-founded to be arguable under the Covenant. A State party cannot reasonably be required, on the basis of article 2, paragraph 3 (b), to make such procedures available in respect of complaints which are less well-founded.[9] Since the author of the present complaint has failed to substantiate his complaint for purposes of admissibility under article 25, his allegation of a violation of article 2 of the Covenant is also inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

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

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

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

Notes

[1] See *Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, communication No. 35/1978, decision adopted on 9 April 1981, para. 9.1.

[2] See *Bordes and Temeharo v. France*, communication No. 645/1995, decision on inadmissibility of 22 July 1996, para. 5.5.

[3] Council of State, *Fédération des syndicats agricoles MODEF v. Monsanto SAS*, decision of 28 April 2006.

[4] See *Maillé v. France*, communication No. 689/1996, Views adopted on 10 July 2000, para. 6.3; and *Vernier and Nicolas v. France*, communications Nos. 690-691/1996, Views adopted on 10 July 2000, para. 6.2.

[5] See *E.H.P. v. Canada*, communication No. 67/1980, decision on inadmissibility of 27 October 1982, para. 8.

[6] See *E.P. and others v. Colombia*, communication No. 318/1988, decision on inadmissibility of 25 July 1990, para. 8.2; and *Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, communication No. 35/1978, Views adopted on 9 April 1981, para. 9.2.

[7] See *E.W. and others v. Netherlands*, communication No. 429/1990, decision on inadmissibility of 8 April 1993, para. 6.4; *Bordes and Temeharo v. France*, communication No. 645/1995, decision on inadmissibility of 22 July 1996, para. 5.5; *Beydon and 19 other members of the association "DIH Mouvement de protestation civique" v. France*, communication No. 1400/2005, decision on inadmissibility of 31 October 2005, para. 4.3; and *Aalbersberg and others v. Netherlands*, communication No. 1440/2005, decision on inadmissibility of 12 July 2006, para. 6.3.

[8] See *Beydon and 19 other members of the association "DIH Mouvement de protestation civique" v. France*, communication No. 1400/2005, decision on inadmissibility of 31 October 2005, para. 4.5.

[9] See *Kazantzis v. Cyprus*, communication No. 972/2001, decision on inadmissibility of 7 August 2003, para. 6.6; and *Faure v. Australia*, communication No. 1036/2001, Views adopted on 31 October 2005, para. 7.2.

APPENDIX

Partially dissenting opinion by Committee member Mr. Hipólito Solari-Yrigoyen

I partially disagree with the majority view. I agree with the ruling of inadmissibility, based, however, not only on article 2 of the Optional Protocol but also on article 3, since I agree with the view of the State party (para. 4.4) that the author committed an abuse of rights by submitting the communication without justification or evidence of his alleged victimization.

(*Signed*): Hipólito Solari-Yrigoyen

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

DD. Communication No. 1468/2006, *Winkler v. Austria**
(Decision adopted on 24 July 2007, Ninetieth session)

Submitted by:	Mr. Hermann Winkler (represented by counsel, Mr. Alexander H.E. Morawa)
Alleged victim:	The author
State party:	Austria
Date of communication:	31 January 2006 (initial submission)
Subject matter:	Discriminatory treatment of adult adoptees
Procedural issues:	"Same matter" having been examined by an international procedure of investigation or settlement; non-exhaustion of domestic remedies; evaluation of facts and evidence
Substantive issues:	Equality before the courts, arbitrary interference in family life, discrimination
Articles of the Covenant:	2, paragraph 1; 14, paragraph 1; 17 and 26
Articles of the Optional Protocol:	2 and 5, paragraphs 2 (a) and (b)

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

Meeting on 24 July 2007,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Hermann Winkler, an Austrian citizen born on 23 November 1957. He claims to be the victim of a violation by Austria of article 14, paragraph 1; article 17, read alone or in conjunction with article 2, paragraph 1; and article 26 of the International Covenant on Civil and Political Rights. He is represented by counsel, Mr. Alexander Morawa. Austria became a party to the Optional Protocol on 10 December 1987.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

Factual background

2.1 After losing his parents (in 1968 and 1974 respectively), the author met an elderly childless couple in the mid-1980s, Alfred and Rosa Laubmaier. Rosa Laubmaier owned an apartment in Salzburg, but lived together with her husband in another apartment most of the time, as well as a lakefront property in Upper Austria. Mrs. Laubmaier's only blood relatives were a niece, Mrs. Schwaighofer, and her descendants including Johannes Krauss.

2.2 The author and the Laubmaiers soon developed a personal relationship, and as early as 1985, the Laubmaiers even started to consider the author as a possible adoptive son. Their primary concern was to find a person who would take care of them when they were in need. The author was initially not interested, but several years later, when he began thinking about options for his children's high school education, he seriously considered the proposal. The Laubmaiers and the author concluded a written adoption contract and signed it on 4 and 12 July 1990 respectively. Under Austrian law, adoption confers upon the adoptive parents and children rights equal to those established by biological birth. Adoptions of both minors and adults are effected by a contract between the adoptive parent(s) and the adoptee, though the law imposes certain limits and preconditions on adoptions of adults. With respect to inheritance rights, the law entitles adopted children to the enjoyment of the same status as biological children born in wedlock. Adoption contracts require judicial approval which a competent court will give upon joint petition by the prospective adopting parent(s) and adopted child if the requirements provided for by the law are met. In the case of the author, the adoption contract was not submitted to the court for validation, as requested by the law.

2.3 The author married in 1988 and had 2 children (in 1985 and 1989). As the family had housing problems, his wife and children moved to live with her parents in the province of Styria while the author, a policeman, stayed in Salzburg during the week as he could not obtain a re-assignment to the local police force in Styria. The Laubmaiers wanted the author and his family to move to their apartment in Salzburg, but the family had become accustomed to living in the countryside, and it proved too difficult for the author to move his family back to Salzburg. The Laubmaiers were rather demanding of the author, which was incompatible with his police officer work schedule. Therefore, the Laubmaiers and the author agreed to cancel the adoption contract and signed a notarized document to that effect on 14 November 1990. They nevertheless continued to maintain close relations. On 7 February 1991, the Laubmaiers stated in writing to the author their will to keep the adoption contract of July 1990 despite its cancellation by the notary, thus reinstating the adoption as stipulated in this contract; again, no court approval was sought. In October 1992, the Laubmaiers allegedly drafted a letter declaring that they wanted to revoke the adoption, but they did not give legal effect to this letter, and the parent-child relationship continued until the Laubmaiers' deaths in 1994.

2.4 On 3 November 1988 Mrs. Laubmaier wrote her will, stipulating that her husband would inherit the lakefront property which, in case of his death, would be passed on to her niece, Mrs. Schwaighofer. She also stipulated that Johannes Krauss would receive the Salzburg apartment. On 13 February 1991, Mrs. Laubmaier changed her will of 1988 to the effect that the author was to inherit, after the death of her husband, the lakefront property, instead of her niece Mrs. Schwaighofer. She also deleted from her will the paragraph which gave her great grandnephew, Johannes Krauss, her Salzburg apartment, thus leaving open to whom that apartment would go.

2.5 In early spring 1994, Mrs. Schwaighofer entered into contact with the Laubmaiers and offered her assistance. She was given the use of the Laubmaiers' Salzburg apartment and was entrusted with a savings account that she was allowed to use for herself.

2.6 Mr. and Mrs. Laubmaier died on 14 April and 6 June 1994 respectively. It was discovered that Mrs. Laubmaier had changed her will on 26 May 1994, stating that her niece would inherit everything except for her apartment. This modified will left the ownership issue of the Salzburg apartment unresolved. As Mrs. Schwaighofer did not accept her inheritance and refused to sign a statement of acceptance, the author declared that he would accept the inheritance based on his status as an adopted son.

2.7 On 1 July 1994, the author petitioned the District Court of Oberndorf near Salzburg to approve the adoption contract of July 1990 but forgot to make the necessary arrangements to have his name changed to Laubmaier, which was one requirement of the adoption contract. The District Court rejected his petition, and so did the Regional and Supreme Courts. The latter however indicated that the approval would in principle have had to be given if the author had complied with the name change requirement. After a series of proceedings, the Salzburg Regional Court, on 25 June 1997, authorized the adoption contract. This paved the way for the Salzburg District Court to issue, on 7 July 1999, a decree transferring the inheritance in its entirety to the author.

2.8 Following this transfer of the Laubmaier inheritance, the great grandnephew of the author's adoptive mother, Johannes Krauss, initiated legal proceedings against the author, challenging his entitlement to the inheritance in so far as the Salzburg apartment of the deceased was concerned. He argued that the intention of Mrs. Laubmaier for him to inherit the apartment had survived the various changes in her will, as well as the adoption of the author. On 5 January 2001, the Salzburg Regional Court found in favour of Mr. Krauss and ordered the author to consent to the transfer of the apartment to the nephew. The judgement contains the following paragraphs:

> "In sum, the court has the impression that the defendant [the author] has acted in quite a calculating fashion. Having the adoption contract 'in his pocket', he led the Laubmaiers to believe that nothing matters anymore, and thereby avoided having to be close to them, which was no doubt exhausting. The fact that he grabbed both real properties in the inheritance proceedings, although he allegedly had merely been promised the apartment, makes him look bad. That he ignored the wish of the deceased to preserve their family name adds to this picture."

The author appealed the judgement, and on 14 May 2001, the Linz Court of Appeals dismissed his appeal, but allowed a further appeal to the Supreme Court. On 6 September 2001, the Supreme Court rejected the appeal as inadmissible.

2.9 On 8 November 2001, the author received an anonymous letter alleging that Mrs. Laubmaier's intention was not to give her apartment to Mr. Krauss but rather to him as her adoptive son. With the letter, a note, handwritten by Mrs. Laubmaier on 23 October 1989 and modified on 7 January 1993, was enclosed. Therefore, on 15 November 2001, the author filed a lawsuit asking for proceedings in the Salzburg Regional Court to be reopened. On 30 August 2002, the Court rejected his petition. He appealed to the Linz Court of Appeal, which dismissed the appeal on 19 February 2003 on the basis that the newly discovered evidence was

inadmissible. The author filed a further appeal with the Supreme Court, complaining in particular of the absence of procedural fairness and of a possibility to be heard about the issues which the Court of Appeal had taken into consideration to render its decision. The Supreme Court rejected the appeal on 12 June 2003, but the decision was communicated to the author only on 29 July 2003.

2.10 On 19 August 2003, the author complained to the European Court of Human Rights, alleging breaches of article 6, paragraph 1, of the European Convention of Human Rights and article 1 of the 1st Protocol. His application was declared inadmissible on 24 October 2003, as the application did not disclose any appearance of a breach of the rights guaranteed by the Convention or its Protocols.

The complaint

3.1 The author claims that through the judiciary's manifest arbitrariness against adopted adults, the State party violated his right to equality before the courts under article 14, paragraph 1, as well as his right to equality under article 26 of the Covenant. He argues that the law imposes certain restrictions on adult adoptions. Adult adoptees and their adopting parents must prove an existing parent-child relationship, while in case of minors, a mere intent to establish such a relationship is sufficient. In addition, those seeking approval of an adoption contract involving an adult adoptee need to demonstrate that concrete circumstances exist to justify the adoption. By identifying adult adoptions as "weak", the Austrian legal system attaches a certain negative stigma to them, which has very practical effects on how adopted adults are viewed and treated in court cases (especially inheritance matters). Indeed, the author affirms that the trial judge and the Court of Appeal disclosed a discernible trend of actively favouring the distant biological relatives and of discrediting the author.

3.2 To substantiate his claim of bias and arbitrariness, the author refers to the judgement of the Salzburg Regional Court of 5 January 2001[1] in the first set of proceedings, which said he was a "calculating" individual, having misled his adoptive parents and worked tirelessly to obtain as many material possessions as possible, whereas the author claims his case does not support such conclusions. The author also complains that the court of first instance incorporated judgmental statements into the "summary of the facts" to discredit the author, without supporting evidence. To him, the purpose of doing so was to create the impression that the author had a monetary motive when agreeing to the adoption. He further states that the bias of the judiciary against him is repeated through the choice of vocabulary used to convey disbelief. Finally, the courts allegedly use evidence "selectively" and to the disadvantage of the author.

3.3 The author requests the Committee to assess how the evidence was handled and how the judges conducted themselves when rendering judgement. He suggests that this will reveal a deep-rooted bias of the judiciary against him because he is an adult adoptee. He asserts that the Committee is equally empowered to examine the interpretation of a will's disposition to the extent that it discloses arbitrariness.[2]

3.4 The author further claims to be the victim of a violation of article 17, read alone and in conjunction with article 2, paragraph 1, as the State party has interfered with his family life. He argues that the relationship between adoptive parents and children falls within the scope of article 17. He considers that the right to pass on one's possessions, especially in case of death, to a descendant or other family member, is encompassed in the right to family life.

The State party's admissibility observations

4.1 On 3 July 2006, the State party challenged the admissibility of the communication. It states that the author merely complains about the inheritance proceedings instituted by him with respect to the Salzburg apartment and disagrees with the communication's evaluation of the conduct of, and assessment of evidence in, the inheritance proceedings before the Salzburg Regional Court and its judgement of 5 January 2001.

4.2 The State party challenges the admissibility of the communication on three grounds. It argues that the matter before the Committee is the "same matter" as that which was considered by the European Court of Human Rights (ECHR). It invokes article 5, paragraph 2 (a), of the Optional Protocol and its reservation,[3] and recalls that the author filed an application in the ECHR on 19 August 2003, which was declared inadmissible on 4 November 2003.[4] The facts underlying the author's complaint to the ECHR and to the Committee are the same. In his application to the ECHR, the author complained about an alleged violation of his right to a fair and unbiased hearing (article 6 of the European Convention) and a violation of the property guarantee.

4.3 The State party recalls that in his communication to the Committee, the author complains of alleged violations of article 2, paragraph 1; article 14, paragraph 1; article 17 and article 26 of the Covenant. According to the State party, articles 14 and 6 of the European Convention are similar, respectively, to articles 2, paragraph 1, and 14 of the Covenant. It concedes that there is no counterpart in the Convention to article 14, paragraph 1, of the Covenant, but understands the complaint to be in substance about the alleged procedural defects of the court proceedings which were also the subject matter in the case before the ECHR. The State party acknowledges that the complaint under article 17 may have to be examined by the Committee. It points out, however, that with regard to that article, the author is exclusively challenging the evaluation of facts and evidence and that in essence the alleged procedural defects are the same as the ones complained of to the ECHR. The State party concludes that the communication has been "examined" by the European Court and is therefore inadmissible.

4.4 The State party contends that the author failed to exhaust domestic remedies. The author complains that the judge conducting the hearing at the Salzburg Regional Court was biased. The Austrian legal system provides for a suitable and effective remedy in such cases: an application may be filed for disqualifying the judge pursuant to section 19, paragraph 2, of the Jurisdiction Act. If the application is accepted, the case is transferred to another judge and the measures taken by the challenged judge in the proceedings are null and void. The author did not resort to this remedy and thus failed to exhaust domestic remedies.

4.5 With regard to the author's claims of inequality in the law between child and adult adoptees, the State party notes that he would have had to raise these concerns in the judicial proceedings granting the application, under article 7, paragraph 1, of the Federal Constitution. The Court would then have been under the obligation, under article 140, paragraph 1, of the Constitution, to file a substantiated request with the Constitutional Court for reviewing the laws to be applied in such proceedings. The author could have filed such a request himself, under the same provision of the Constitution. The author did not do so and therefore failed to exhaust domestic remedies.

4.6 The State party argues that the author essentially seeks an examination of the national judicial decision on the merits, in particular in relation to findings of fact and evidence. It claims that the communication is clearly intended to have the Committee operate as a fourth instance, and as an instance to review the judgment of the ECHR.

4.7 According to the State party, the communication may be understood as challenging the Austrian legal system in respect of the adoption of adults. It points out that the author was granted adoption and that therefore he cannot be aggrieved. It notes that abstract review of legal provisions is inadmissible under article 2 of the Optional Protocol.

Author's comments on admissibility

5.1 On 5 September 2006, the author submits that there is no reason to declare the communication inadmissible in relation to article 17. The author further explains that although the facts underlying his complaints to the ECHR and to the Committee are the same, his claims are different. His complaint to the Committee relates to the very aspect of article 14, paragraph 1, which is unique and secures an additional right not contained in the parallel norm of the European Convention: the right to equality before the courts, and the ensuing prohibition of discriminatory practice by the courts. The author is alleging a discriminatory practice by the courts, on the basis of articles 2, paragraph 1, 14, paragraph 1, and 26, read together. That aspect goes beyond formal adherence to rules of procedure and, thus, beyond the scope of article 6, paragraph 1, of the European Convention.

5.2 On the issue of exhaustion of domestic remedies, the author submits that the challenge of trial judges, although formally available in Austrian law, is not an effective remedy to rectify the partiality of a judge as the standard of proof is excessively high. He outlines the general principles and practice in Austria regarding challenge of judges. He refers to the jurisprudence of the Supreme Court[5] and indicates that in civil cases, as opposed to criminal cases, judges can also be challenged *after* their decision on the merits has been made, if the reasons for the challenge have manifested themselves only when or after the lower court's judgement has been given.

5.3 The author furthermore argues that the partiality of the judge became apparent only in his written judgement of 5 January 2001, in which he demonstrated arbitrariness through use of unfounded expressions of resentment towards the author. As the partiality did not manifest itself prior to the written judgement, the author was not in a position to challenge the judge before he handed down his decision. He therefore raised the issue in the appeal brief, claiming that several statements of the trial judge were unfounded and constituted an expression of emotionality of the court.

5.4 The author claims that he has not requested a review *in abstracto* of domestic legislation, but rather provided information on the regulatory framework and its application in his case. The violations of his rights do not stem from <u>what</u> the courts decided, but rather from <u>how</u> they arrived at their conclusion. He therefore contends that his communication is admissible.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the communication is admissible under the Optional Protocol.

6.2 The State party has challenged the admissibility of the communication on the ground that the "same matter" has already been examined by the ECHR, in particular with respect to the author's claim under article 14, paragraph 1, of the Covenant. It also notes the author's contention that the claims brought to the ECHR differ from his claims to the Committee. His claim to the ECHR under article 6 of the European Convention was based on an alleged breach of his right to a fair and unbiased hearing, while his claim before the Committee is based on an alleged violation of his right to equality before the courts.

6.3 The Committee recalls that, despite certain differences in the interpretation of article 6, paragraph 1, of the European Convention and article 14, paragraph 1, of the Covenant by the competent organs, both the content and scope of these provisions largely converge.[6] In the light of the similarities between the two provisions, and on the basis of the State party's reservation, the Committee must decide whether the decision of the European Court constitutes an "examination" of the "same matter" which is also before the Committee. It recalls its jurisprudence[7] that an inadmissibility decision which entailed the at least implicit consideration of the merits of a complaint amounts to an "examination", for the purpose of article 5, paragraph 2(a), of the Optional Protocol. It recalls that the European Court should be considered to have gone beyond the examination of purely procedural admissibility criteria when declaring the application inadmissible because it does "not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols". The Committee finds that the author's contention that the judgement of the Salzburg Regional Court of 5 January 2001 with its negative evaluation of the author's conduct is evidence of the court's bias and amounts to unequal treatment is in essence identical to his claim of a violation of the principle of procedural fairness as raised in his application to the European Court of Human Rights. The Committee thus considers itself precluded from reviewing the examination of the author's claim by the European Court under article 6, paragraph 1, of the European Convention. It finds this part of the communication inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

6.4 With respect to the author's claim, under article 26 of the Covenant, of inequality in the law between adult and minor adoptees, in particular with respect to the burden that lies with adult adoptees to prove an already existing parent-child relationship, the Committee notes that the State party has identified a remedy available under article 7, paragraph 1, of the Federal Constitution. It further notes that the author has not contested the availability nor the potential effectiveness of this remedy, which he could have availed himself of, had he wished to contest the alleged inequality in the law at the domestic level. Accordingly, it finds this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.5 On the author's claim under article 17, that the State party has interfered arbitrarily with his family life by deciding the inheritance matters in a discriminatory fashion, the Committee considers that this claim amounts to a claim of review of the evaluation of evidence by the domestic courts. It recalls its jurisprudence that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence, or to examine the interpretation of domestic legislation by national courts, unless it can be ascertained that the evaluation or interpretation

was clearly arbitrary or amounted to a denial of justice.[8] In the light of the material before the Committee, the author has failed to substantiate, for the purpose of admissibility his claim of arbitrariness. Accordingly, the Committee considers that the author's claim under article 17 is inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

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

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

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

Note

[1] Quoted above in para. 2.8.

[2] The author refers to communications Nos. 301/1988 (§6.4), 567/1993 (§4.4), and 835/1998 (§4.2).

[3] Austria ratified the Optional Protocol "… on the understanding that, further to the provisions of Article 5 (2) of the Protocol, the Committee provided for in Article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms."

[4] The Court ruled that "In so far as the complaints fall within the competence of the Court, the Court has concluded, based on all the documents at its disposal, that the application does not disclose any appearance of a breach of the rights guaranteed by the Convention or its Additional Protocols."

[5] See Supreme Court Judgement, 6 Ob 276/05i (15 December 2005).

[6] See for example communication No. 989/2001, *Kollar v. Austria*, decision on admissibility of 30 July 2003, para. 8.6.

[7] See communication No. 1396/2005, *Jesús Rivera Fernández v. Spain*, Decision on Admissibility of 28 October 2005, para. 6.2.

[8] See communication No. 541/1993, *Simms v. Jamaica*, inadmissibility decision of 3 April 1995.

IX. FOLLOW-UP OF THE HUMAN RIGHTS COMMITTEE ON INDIVIDUAL COMMUNICATIONS UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

This report sets out all information provided by States parties and authors or their counsel since the last Annual Report (A/61/40).

State party	**ALGERIA**
Case	Medjnoune Malik, 1297/2004
Views adopted on	14 June 2006
Issues and violations found	Arbitrary and unlawful arrest and detention, incommunicado detention, trial undue delay, failure inform him of charges against him - Articles 7, 9, paragraphs 1, 2 and 3; and 14, paragraphs 3 (a) and (c).
Remedy recommended	To bring the author immediately before a judge to answer the charges against him or to release him, to conduct a full and thorough investigation into the incommunicado detention and treatment suffered by him since 28 September 1999, and to initiate criminal proceedings against the persons alleged to be responsible for those violations, in particular, the ill-treatment ... appropriate compensation.
Due date for State party response	27 October 2006
Date of reply	None
State party response	None
Author's response	On 9 April 2007, the author informed the Committee that the State party had failed to implement its Views. Even since its Views the author's case was brought before the Cour de Tizi-Ouzou on two occasions without being heard. In addition, an individual living in Tizi-Ouzou claims to have been threatened by the judicial police to give false testimony against the author. This individual along with another (his son) claim to have been previously tortured in February and March 2002 for refusing to give evidence against the author i.e. to say that they saw him in the area where the victim was shot. The first individual was later sentenced to three years imprisonment on 21 March 2004 for belonging to a terrorist group and the other acquitted whereupon he fled to France where he was given refugee status.

Case	Boucherf, 1196/2003
Views adopted on	30 March 2006
Issues and violations found	Disappearance, arbitrary and unlawful arrest - Articles 7 and 9 (re. the author's son) and 7 (re. the author, in conjunction with a violation of article 2, paragraph 3.
Remedy recommended	An effective remedy, including a thorough and effective investigation into the disappearance and fate of the author's son, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the author and her family for the violations suffered by the author's son ... to prosecute criminally, try and punish those held responsible for such violations ... to take measures to prevent similar violations in the future. The Committee associates itself with the request made by the Special Rapporteur on new communications and interim measures dated 23 September 2005 (see paragraph 1.2) and reiterates that the State party should not invoke the provisions of the draft amnesty law (*Projet de Charte pour la Paix et la Réconciliation Nationale*) against individuals who invoke the provisions of the Covenant or have submitted or may submit communications to the Committee.
Due date for State party response	6 July 2006
Date of reply	None
State party response	None
Author's response	On 30 March 2006, the author's mother informed the Committee that one year since its Views were adopted, the State party has made no effort to implement them: no investigation has been carried out and no criminal prosecution/s made. Contradictory information has been provided by the State party to the author's mother. Firstly, she was told that the author had not disappeared and then on 14 July 2004 she received an official notification that he had disappeared, without any explanation. As no investigation has taken place and having received information herself from a witness that her son had died in prison as a result of torture, she is not satisfied with the State party's current explanation that he has disappeared. She may seek compensation on the basis of the official notification of disappearance. However, the receipt of such compensation is subject to her future silence on the matter pursuant to the Amnesty Law (*Charte pour la Paix et la Réconciliation Nationale*). She objects to this law inter alia as it results in impunity as well as much distress for the disappeared person's family and in certain cases is not even granted on the grounds that the spouse has an income. Such compensation under such a condition cannot be considered "appropriate" under international law.

State party	**AUSTRALIA**
Case	C., 900/1999
Views adopted on	28 October 2002
Issues and violations found	Immigration detention of refugee applicant with psychiatric problems - Articles 7, and 9, paragraphs 1 and 4.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. As to the violations of articles 7 and 9 suffered by the author during the first period of detention, the State party should pay the author appropriate compensation. As to the proposed deportation of the author, the State party should refrain from deporting the author to Iran. The State party is under an obligation to avoid similar violations in the future.
Due date for State party response	6 February 2003
Date of reply	16 March 2007 (The State party had previously responded on 10 February 2003, 28 September 2004 and 16 August 2006)
State party response	The Committee will recall that, as set out in Annual Reports A/58/40 and A/60/40, the State party had previously advised the Committee that the author had been released from the Maribyrnong Immigration Detention Centre into home detention. He was living in a private home in Melbourne, and was free to move about within the Australian community provided he was in the presence of one of his nominated relatives. On 16 August 2006, the State party confirmed that the author was not currently held in immigration detention. It contested that it had violated any of the author's rights, reiterated its arguments provided prior to consideration of the communication and provided further information. As to the violation of article 7 with respect to his detention, it referred to the jurisprudence of the ECHR for the proposition that the detention of a mentally ill person for criminal offences did not amount to a breach of article 3 (equivalent to article 7 of the Covenant). It claimed that in finding such a breach, the Committee has placed an obligation on States to release detainees who suffer from mental illness per se in order to comply with article 7, without regard for the circumstances and conditions of each complainant's detention. The Committee does not give any guidance as to how the complainant suffered cruel, inhuman or degrading treatment and does not make clear at which point the complainant's treatment became cruel, inhuman or degrading.

As to the violation of article 7 with respect to his deportation, the State party submitted that the situation in Iran for Assyrian Christians has improved greatly in recent years, such that there is no longer a "real risk" that the complainant will be exposed to a violation of his rights under the Covenant. It referred to one case of the ECHR in which the Court found in favour of the applicant, but only on the bases of the absence of adequate medical facilities in St. Kitts and the fact that he was in an advanced stage of his illness and removal would have precipitated his death. It also submitted that although the drug Clozaril is still not readily available in Iran another equivalent drug "Clozapine" is locally available. Thus, there was no basis for the finding of a violation of article 7 if the author were to be deported. It also stated that there is currently no plan to remove the author but if the situation changes the State party will inform the Committee.

On the violation of article 9, paragraph 1, while the State party denied that the author's detention violated this provision, it submitted that in June 2005, the government announced a number of changes to both the law and the handling of matters relating to people in immigration detention, including that: alternative arrangements rather than tradition detention would be made for the detention of unlawful non-citizen families; all decisions on primary protection visas would occur within three months; all reviews by the Refugee Review Tribunal will occur within three months, regular reporting to Parliament on cases exceeding the time limit; the situation of persons detained for two years or more will be reported upon to the Ombudsman every six months for assessment; the Minister of Immigration and Multicultural Affairs has an additional non-compellable powers to grant visas to persons in detention and to specify alternative arrangements for a person's detention and conditions to apply; and the Migration Regulations 1994 create a new bridging visa to enable the release of persons in immigration detention into the community whose removal from Australia is not reasonably practicable at the current time. However, the State party maintained its argument that the provisions under which the author was detained were found to be legally valid by the High Court in several decisions, including recent decisions.

The State party submitted that the author had access to judicial review of the lawfulness of his detention at all times, thus satisfying article 9 (4). In its view, this provision does not require that the merits of that detention must be open to review by the court. It aligned itself with the individual opinion of Sir Nigel Rodley. In conclusion, for the reasons expressed above, the State party did not accept that it should pay the complainant compensation.

	On 16 March 2007, and in response to a query from the Rapporteur on the status of his detention, the State party clarified that the author has been the holder of a permanent Protection Visa Class 866, since 15 March 1995 and was released from home detention on 10 May 2005.
Author's response	On 19 October 2004, the author responded to the State party's submission of September 2004, confirming that he was in "home detention" but that his movements were restricted as described by the State party. He stated that as the deportation order had not been revoked, he was still at risk of deportation, and no compensation had been paid for his unlawful detention.
Committee's Decision	While welcoming the author's release from detention, the Committee regrets the State party's refusal to accept the Committee's Views and considers the dialogue ongoing.
Case	Winata, 930/2000
Views adopted on	26 July 2001
Issues and violations found	Removal from Australia of Indonesian parents of Australia-born child - Articles 17; 23, paragraph 1; and 24, paragraph 1.
Remedy recommended	To refrain from removing the authors from Australia before they have had an opportunity to have their applications for parent visas examined, with due consideration given to the protection required by their child's status as a minor.
Due date for State party response	12 November 2001
Date of reply	28 July 2006
State party response	The State party contests that it has violated any of the articles of the Covenant with respect to this case and relies on the individual opinions therein. It reiterates its arguments made on the merits. On the violation of article 17, it does not accept that it should refrain from enforcing its migration laws in cases where unlawful non-citizens are said to have established a family life. It refers to other Views of the Committee in which it failed to find violations of article 17 in removal cases where the authors had existing families in the removing State. It cites jurisprudence of the ECHR, which has found inter alia that article 8 (equivalent to article 17) does not recognize a right to choose the most suitable place to develop family life and may not choose the place of residence for their family simply by unlawfully remaining in the country in which it wishes to raise its family.

	As to the violation of article 23, the State party submits that this provision does not regulate the details of how the family is specifically to be protected. This provision must be read against the background of the acknowledged right of Australia, under international law, to control the entry, residence and expulsion of aliens. If Mr. Winata and Ms. Li are required to leave Australia, the Government will not prevent their son from leaving with them or travelling to Indonesia to visit them. Although Barry Winata is no longer a minor, having reached his 18th birthday on 2 June 2006, the State party submits that before he turned 18 he was afforded the same measures of protection as other children in Australia. There is nothing to suggest that he would not eventually adjust to the changes involved in any move to Indonesia. The State party informs the Committee that Mr. Winata and Ms. Li are currently living unlawfully in the State party. They are the subject of an outstanding request under article 417 of the Migration Act 1958 for the Minister of Immigration to use her discretionary power to allow them to remain in Australia. This request will not however be processed until they are located. In the meantime, there are no plans to remove them from Australia and the State party will inform the Committee if this situation changes.
Case	Coleman, 1157/2003
Views adopted on	17 July 2006
Issues and violations found	Freedom of expression - Article 19, paragraph 2.
Remedy recommended	An effective remedy, including quashing of his conviction, restitution of any fine paid by the author pursuant to his conviction, as well as restitution of court expenses paid by him, and compensation for the detention suffered as a result of the violation of his Covenant right.
Due date for State party response	2 November 2006
Date of reply	5 February 2007
State party response	The State party does not accept the Committee's view that the reaction to the author's conduct amounted to a breach of article 19 (2) of the Covenant. It reiterates its submission that section 8 (2) (e) of *Townsville City Council Local Law No. 39* ("the Council By-Law") is a restriction on freedom of expression which is provided by law and necessary for the protection of public order and therefore permitted by article 19 (3) (b) of the Covenant. It agrees with the statement contained in the concurring individual opinions

of Committee members Mr. Nisuke Ando, Mr. Michael O'Flaherty and Mr. Walter Kälin that it is wholly consistent with the Covenant to have in place a permit system to strike appropriate balances between freedom of expression and countervailing interests.

Such a permit system is designed to balance the rights of individuals to exercise their freedom of expression and the legitimate countervailing interests of the community generally, and in particular other users of the pedestrian mall, including the public in having a shopping environment which is free from undue noise or interference, the traders and shop owners in ensuring that potential customers have access to their shops and a pleasant environment in the mall is maintained, other individuals or groups who may wish to legitimately use the public space for other activities; or other individuals who may also wish to exercise their freedom of expression.

The State party acknowledges that the mere existence of some permit systems which are of extremely broad application may amount to an unacceptable restriction on freedom of expression. By contrast, the Council By-Law only requires a permit in a relatively small public area and leaves other areas of the city available for public speeches. The Council By-Law also allows a political speech such as the one given by the author to be given within the pedestrian mall without a permit, provided the speech is given from a booth set up for political purposes. It refers to the Committee's jurisprudence for the preposition that the right to freedom of expression does not guarantee an unfettered right to use a particular premises or area.[1] The critical issue is whether the application of the permit system by the authorities to the particular circumstances of the author's case was permissible under article 19 (3). The author declined to seek a permit and therefore did not afford the authorities the opportunity to grant or deny a permit. In fact, in proceedings in the District Court of Queensland, where the District Court dismissed an appeal by the author against his conviction against the Council By-Law, as well as in correspondence with various authorities concerning the conviction, the author maintained that he did not or should not be required to obtain a permit. The author had previously engaged in activities in the mall as part of his "free speech" campaign, which were seen by the Council (and allegedly by members of the general public) as disruptive and detracting from the enjoyment of the mall

[1] *Ernst Zündel v. Canada*, communication No. 953/2000, *Auli Kivenmaa v. Finland*, communication No. 412/1990.

by the general public, particularly during the mall's busiest days, such as days on which the "Cotters Market" were held. The Council had, as a result of Mr. Coleman's campaign, agreed to introduce a designated podium to allow persons to give addresses.

The address giving rise to the author's complaint was given on 20 December 1998, a day when the "Cotters Market" was taking place at the pedestrian mall. The Council has indicated that "Mr. Coleman would be likely to receive a permit if he applied for one for a day other than a Cotters Market day, and that Council would be likely to arrange for an alternative venue to the Flinders Mall if Mr. Coleman remained committed to making the address on a Cotters Market day".

The State party also notes that the detention of the author which eventually resulted from the offence was not merely a result of the author giving a public address without a permit, but was a result of the author's refusal to pay the fine imposed for this offence by the Queensland Magistrate's Court. In the author's conviction in the Queensland Magistrate's Court, the prosecution submitted that a fine should be imposed due to the contempt with which the author treated the Magistrate's Court proceedings. Nevertheless the Magistrate canvassed a number of alternative sentencing options permitted under Queensland law including probation orders or community service orders. These alternative options were refused by the author, apparently based on his belief that he should be entitled to give public addresses in the mall without requiring a permit. The author had also refused offers from other people to pay the fine on his behalf. His failure to pay resulted in his arrest, during which he also resisted arrest and was charged with obstructing a police officer. The decision to imprison him appears to be influenced by his repeated history of breaching the Council By-Law both before and after the occasion in question, and his persistent refusal to accept the legitimacy of any sanctions for his disregard of the Council By-Law.

The State party submits that consideration should be given to the overall circumstances of the case. Based on these circumstances the Australian Government believes that the treatment of the author was not disproportionate and does not accept the view that he is entitled to any remedy.

Committee's Decision The Committee regrets the State party's refusal to accept the Committee's Views and considers the dialogue ongoing.

Case	Brough, 1184/2003
Views adopted on	17 March 2006
Issues and violations found	Detention of a juvenile aborigine - Articles 10 and 24, paragraph 1.
Remedy recommended	Effective remedy, including adequate compensation.
Due date for State party response	6 July 2006
Date of reply	15 February 2007
State party response	The State party maintains its view that the communication is inadmissible and does not accept the Committee's view that it violated any of the author's rights. It submits that the Committee did not give due weight to the fact that the author was involved in a serious incident at the Kariong Juvenile Detention Centre, which indicated significant risk implications for the safety of the author himself and his fellow inmates during his time at the Parklea Correctional Centre. The Committee failed to note that the author was not transferred directly from Kariong Juvenile Detention Centre to Parklea Correctional Centre. As submitted in its response to the Committee, he spent 10 days at the Metropolitan Remand and Reception Centre (MRRC) before he was transferred to Parklea Correctional Centre. He was received by this Centre as a result of behaviour in the juvenile system that could not be safely managed in that environment. During these 10 days he was assessed and staff prepared a management plan which identified his risks and needs and ways in which they could be addressed. His experiences at Parklea cannot be considered in isolation from the behaviour that preceded his placement there. His self-harming behaviour was exhibited before this introduction into this facility and should be understood as a manifestation of his complex and challenging personality, rather than an outcome of his treatment. His behaviour while in custody represented the continuation of a long-term pattern, which began in 1994 at the age of 12 and which the staff at Parklea were attempting to manage. The Committee did not advance that the author had seen a psychologist on several occasions while in his safe cell. Further details of his treatment could not be provided, as the author refused to consent to the release of medical records. The State party sets out a number of changes introduced since 1999 designed to enhance the management of offenders with complex needs. Risk intervention protocols have been revised to ensure a

greater emphasis on interaction with those inmates who have been identified as being at risk of self-harm or suicide. This includes a Reception Assessment for new inmates to identify "at risk" inmates and necessary arrangements for their safety. A Mental Health Screening Unit was opened in early 2006 at the main male adult reception gaol at Silverwater. This unit forms part of the second tier integrated system that allows for the identification of and intervention for persons with a mental illness entering a correctional facility. Another screening unit for women is nearing completion at the Maulawa Correctional Centre.

There have been improvements at the Parklea Correctional Centre where inmates have access to specialised mental health staff who work closely with the Department of Corrective Services staff at MRRC at the Silverwater Correctional Centre to ensure persons with a mental illness are managed appropriately. There have also been improvements in the range of psychotropic medications available to treat mentally-ill patients.

The Department of Corrective Services now has responsibility for the management of Kariong Juvenile Correctional Centre, so that the management of juvenile inmates in this centre is now based on the same system of case management as within adult correctional centres. This means that it is less likely to be necessary to transfer an offender under the age of 18 to an adult prison for management.

The New South Wales Government has developed a plan to address the needs of Aboriginal people, which includes initiatives relating to justice, education and health. This initiative will implement programs focussing on early intervention, diversion and breaking the cycle family violence to reduce the over-representation of Aboriginal people in the criminal justice system.

Author's response

On 30 April 2007, the author responded to the State party's submission. He regrets the State party's response noting that it failed to address the substance of the complaint made by him. It focused on the programmes undertaken by him since 2005 but not on the substantive issues raised in the communication. It failed also to address his transfer to adult correctional facilities and his treatment whilst at an adult correctional facility in breach of articles 10 and 24.

(This information was added after the consideration of the report for the purposes of inclusion in the annual report.)

Case	Shafiq, 1324/2004
Views adopted on	31 October 2006
Issues and violations found	Mandatory immigration detention and no right to review - Article 9, paragraphs 1 and 4.
Remedy recommended	An effective remedy, including release and appropriate compensation.
Due date for State party response	6 February 2007
Date of reply	25 May 2007
State party response	The State party states that on 21 March 2007, the Minister for Immigration and Citizenship granted the author a Removal Pending Bridging Visa (RPBV) and he was released from detention. The RPBV was introduced by the Australian Government in May 2005. It provides for the release from detention, pending removal from Australia, of persons in immigration detention whose removal is not reasonably practicable at the time. A RPBV may be granted using the non-delegable power of the Minister for Immigration to grant a visa to a person in immigration detention if the Minister thinks it is in the public interest to do so. This power is provided for in section 195A of the *Migration Act 1958* (Migration Act). As a RPBV holder, the author is entitled to a range of social support benefits: work rights and job matching through Centrelink; access to certain Centrelink benefits, such as Special Benefit and Rent Assistance; access to Medicare benefits; access to the Early Health Assessment and Intervention services; eligibility for torture and trauma counseling. Since the grant of the RPBV, Mr. Shafiq is no longer in any form of immigration detention. He remains voluntarily in the suburb of Glenside in Adelaide and attends the Royal Adelaide Hospital Psychiatric Campus in that suburb where he is being treated for a mental illness. The State party contests that it has violated article 9 (4), as in its view the obligation on State parties is to provide for review of the lawfulness of detention. There can be no doubt that the term "lawfulness" refers to the Australian domestic legal system. There is nothing apparent in the terms of the Covenant that "lawful" was intended to mean "lawful at international law" or "not arbitrary". The author had the opportunity, as a person in immigration detention in Australia, to take proceedings before the High Court of Australia to determine the legality of the decision to detain him under the

	Migration Act. He could have sought to invoke the original jurisdiction of the High Court under section 75 of the Australian Constitution to obtain a writ of mandamus or other appropriate remedy to enable him to be released from detention. He could have also sought this remedy in the Federal Magistrates Court pursuant to section 476 of the Migration Act. Finally, he could have also sought the remedy of habeas corpus in the High Court or the Federal Court. In light of the above, the State party does not accept that the author is entitled to be paid compensation pursuant to article 2 (3) (a).
Committee's Decision	While welcoming the author's release from detention, the Committee regrets the State party's refusal to accept the Committee's Views, notes that no compensation has been provided, and considers the dialogue ongoing.
State party	**BELARUS**
Case	Bondarenko and Lyashkevich, 886/1999 and 887/1999
Views adopted on	3 April 2003
Issues and violations found	Secrecy of date of execution of family member and place of burial - article 7.
Remedy recommended	An effective remedy, including information on the location where the authors are buried, and compensation for the anguish suffered by the family.
Due date for State party response	23 July 2003
Date of reply	1 November 2006
State party response	It refers to the notion of torture as defined in article 1 of the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment, and notes that this notion does not include pain or anguish that result from lawful sanctions, that are inseparable from the sanctions or have been caused by chance as a result of their application. Neither in the Convention not in any other international legal act it is not defined what has to be understood under the terms of other cruel, inhumane, or degrading or humiliating the human dignity treatment or punishment. The State party states that torture or other cruel acts are criminalised in its Criminal Code (arts. 128 (2) and (3), and art. 394). It states that the death penalty is applied in Belarus only in relation to a limited number of particularly cruel crimes, accompanied by premeditated deprivation of life under aggravating circumstances and may not be imposed on individuals that have not attained the

age of 18, and against women and man that are over 65 at the moment of commission of the crime. A death sentence may be substituted by a life imprisonment.

Pursuant to article 175 of the Criminal Execution Code, *CEC*, a death sentence that has become executory can only be carried out after the receipt of official confirmation that all supervisory appeals have been rejected and that the individual was not granted a pardon. Death sentences are carried out by firing squad in private. The execution of several individuals is carried out separately, in the absence of the other convicted. All executions are carried out in the presence of a prosecutor, a representative of the penitentiary institution where the execution takes place, and a medical doctor. On exceptional basis, a prosecutor may authorize the presence of additional persons.

Pursuant to article 175 (5), of the *CEC*, the penitentiary administration of the institution where the execution took place is obliged to inform the court that has pronounced the sentence that the execution was carried out. The court then informs the relatives of the executed individual. The body of the executed is not given to the family, and no information about the burial place is provided. The State party concludes that the death penalty in Belarus is provided by law and constitutes a lawful punishment applied to individuals that have committed specific particularly serious crimes. The refusal to inform the relatives of a sentenced to death of the date of execution and burial place is also provided by law (the *CEC*).

In light of the previous, the State party affirms that in the present cases, the moral anguish and stress caused to the mothers of the sentenced to death cannot be seen as the consequence of acts, that had the objective to threaten or punish the families of the convicted, but rather as anguish, that occur as a result of the application of the State party's official organs of a lawful sanction and are not separable from the this sanction, as provided in article 1 of the Convention against Torture.

In connection with the authorities' refusal to deliver the body of those executed for burial, and the refusal to divulge the burial place, the State party adds that these measures are provided by law not with the aim of punishing or threatening the relatives of those executed, leaving them in a state of uncertainty and moral anguish, but because, as it was shown by the practice of other States that apply the death penalty, burial places of criminals sentenced to death constitute "pilgrimage" sites for individuals of mental instability.

In relation to the case of Mr. Lyashkevich, the State party adds that the main allegations of the author relate to her son's alleged conviction on the grounds of indirect evidence, in violation of article 6, of the Covenant. In this relation, the State party observes that the Committee's finding of a violation of Mrs. Staselovich's (the mother of the victim and author of the communication) rights under article 7, of the Covenant, because she was not informed of the date of execution of her son and the authorities' refusal to reveal his burial place, differs from the object of the communication. In addition, neither the author nor her counsel have ever mentioned that the lack of information about the date of execution or the burial site location has caused any psychological harm to the author; they did not appeal to the State party's competent authorities in this relation.

The State party also notes that the author has failed to provide comments on the State party's merits observations, in spite of the fact that several reminders were sent to her in this regard. In light of the above information, the State party concludes that it cannot agree with the Committee's conclusions in the two communications, that article 7, of the Covenant was violated.

Finally, the State party informs the Committee that its Parliament has asked the Constitutional Court to examine the question of the compliance of the relevant Criminal Code provisions regulating the application of the death penalty, with the provisions of the Constitution and the State party's international obligations.

Further action taken

On 30 October 2006, follow-up consultations were held with Mr. Lazarev, First Secretary of the Mission of Belarus, Mr. Shearer, Special Rapporteur on the Follow-up to individual complaints and the Secretariat.

The Rapporteur explained the follow-up procedure and his new role as Rapporteur. He highlighted to Mr. Lazarev that the State party had only responded to the Committee's Views in three of the ten cases in which the Committee had found violations of the Covenant (Svetik, 927/2000, Malakhovsky, 1207/2003 and Bandazhewsky, 1100/2002). The response in the latter case, in which it was stated that the author was given early release was sent to the author for comment.

On the State party's response to Malakhovsky, in which the State party challenged the Committee's Views, Mr. Lazarev reiterated what he had said in an earlier meeting that this was a very famous case in Belarus and the issue of religious freedom is a very sensitive one. He stated that strict legislation on religious groups was introduced in the State party following several suicides of members of cults. Thus, the social context as well as the purely legal context

	should be recognized by the Committee. The Rapporteur noted that it was unlikely that the State party would change its view of this decision and informed Mr. Lazarev that in such circumstances where a State party provides cogent arguments against the Committee's findings the latter while regretting its position and considering the dialogue ongoing will pursue the matter less vigorously. The necessity to respond on the other seven cases in which the Committee found violations was impressed upon Mr. Lazarev and in particular the need to provide remedies to the authors of these violations. Mr. Lazarev expressed his appreciation of the meeting with the Rapporteur and ensured him that he would relay the Rapporteur's concerns to his capital.
Committee's Decision	The Committee regrets the State party's refusal to accept the Committee's Views and considers the dialogue ongoing.
Case	Bandajevsky, 1100/2002
Views adopted on	28 March 2006
Issues and violations found	Arbitrary arrest, unlawful detention, inhuman conditions of detention, court not established by law, no right to review - articles 9, paragraphs 3, and 4; 10, paragraph 1; 14, paragraphs 1 and 5.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Bandajevsky with an effective remedy, including appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.
Due date for State party response	6 July 2006
Date of reply	On 29 August 2005, the State party replied to the Working Group on Arbitrary Detention. This information was not provided to the Committee until 24 July 2006.
State party response	It states that, in accordance with the ruling of 5 August 2005 by the court of Diatlov region, Grodno oblast, the author was released early from serving the remainder of his sentence delivered on 18 June 2001.
Author's response	On 22 August 2006, the author confirms that he was released, but informs the Committee that he has not received any compensation.

Case	Svetik, 927/2000
Views adopted on	8 July 2004
Issues and violations found	The limitation of the liberty of expression did not legitimately serve one of the reasons enumerated in article 19, paragraph 3. Therefore, the author's rights under article 19, paragraph 2 of the Covenant had been violated.
Remedy recommended	Effective remedy, including compensation amounting to a sum not less than the present value of the fine and any legal costs paid by the author.
Due date for State party response	18 November 2004
Date of reply	12 July 2005
State party response	As presented in its interim report from the eighty-fourth session, the State party had responded on 12 July 2005. It confirmed that the Supreme Court had studied the Committee's Views, but had not found any grounds to reopen the case. The author had been convicted not for the expression of his political opinions, but for his public call to boycott the local elections. Accordingly, the State party concluded that it cannot agree with the Committee's findings that the author is a victim of violation of article 19, paragraph 2, of the Covenant.
Author's response	On 19 February 2006, the author confirmed the outcome of the Supreme Court consideration of this case. His application did not reveal any new grounds for the annulment of previous court decisions, "notwithstanding the change of law and the examination of his case by the Human Rights Committee". He states that he also appealed his case to the Constitutional Court (exact date not provided), requesting the annulment of the Supreme Court's judgement. By letter of 2 December 2004, the Constitutional Court informed him that it is not empowered to interfere with the work of ordinary jurisdictions. The author claims that the State party has not published the Committee's Views.
Further action taken	See above for information on a follow-up meeting that was held in October 2006.
Committee's Decision	The Committee regrets the State party's refusal to accept the Committee's Views and considers the dialogue ongoing.

Case	Viktor Korneenko, 1274/2004
Views adopted on	31 October 2006
Issues and violations found	Freedom of association - article 22, paragraph 1.
Remedy recommended	An appropriate remedy, including reestablishment of "Civil Initiatives" and compensation.
Due date for State party response	5 February 2007
Date of reply	27 February 2006
State party response	The State party notes that if the Committee had requested further clarification on certain issues (the subject of paragraphs 7.5 and 7.6 of the Views) prior to consideration of the case it could have ensured a proper examination of and a more balanced decision by the Committee. It submits that the Gomel regional association "Civil Initiatives" was dissolved in compliance with the Belarus Constitution and law. Article 29, paragraph 2, of the Law "On Public Associations" of 4 October 1994, stipulates that an association can be dissolved by court order if it again undertakes, within a year, activities for which it had already received a written warning. Dissolution of a public association by court order follows internationally established practice of dissolving of this type of legal entities. In the course of its activities, "Civil Initiatives" repeatedly violated domestic law. On 13 May 2002, the Department of Justice gave a written warning to the "Civil Initiatives'" about improper use of equipment, received through foreign grants. Paragraph 4, part 3, clause 5.1, part 3, of Presidential Decree No. 8 "On Certain Measures for the Improvement of the Procedure for Receipt and Use of Foreign Grants" of 12 March 2001, prohibits the use of such grants for, inter alia, the preparation of gatherings, meetings, street processions, demonstrations, pickets, strikes, the production and dissemination of propaganda materials, as well as the organization of seminars and other forms of propaganda activities among general public. Violation of the Decree's requirements by the trade unions and other public associations, as well as receipt of foreign grants by political parties and their organizational structures may result in their dissolution through the application of relevant procedures even after a single violation. Lawfulness of the first written warning was confirmed by the Gomel Regional Court on 4 November 2002 and by the Supreme Court on 23 December 2002.

Despite the first warning, "Civil Initiatives" once again violated domestic law. From November 2001 to March 2003, Department of Justice undertook an inspection of "Civil Initiatives'" statutory activities and found out that it used foreign grants for the production of propaganda material, as well as for other forms of propaganda activities among the general public. The State party submits a list of materials that, in its opinion, contains propaganda. The arguments of "Civil Initiatives'" representatives that these materials were produced with the use of equipment, other than that received through foreign grants, are not corroborated by sufficient and reliable evidence.

Contrary to article 50 of the Belarus Civil Code, "Civil Initiatives" engaged in the establishment of unregistered district branches and a number of independent organizational structures as "resource centres" not envisaged by its own Statutes; omitted reference to its proper legal status as a public association; distorted its title in the information bulletins; violated its own Statutes and Belarus Electoral Code and did not bring its letterhead in compliance with legal requirements. The State party submits a short description of the facts illustrating each of the above violations of the law related to the procedure and requirements applicable to the legal entity's documentation. Article 57, paragraph 2, sub-paragraph 2, of the Belarus Civil Code envisages a procedure for the dissolution of a legal entity by court order when it conducts its activities without a license; or when the activities are prohibited by law; or with repeated and serious violations of law; or systematically conducting activities that run contrary to its Statutes.

In view of the abovementioned violations, the Department of Justice filed a suit in the Gomel Regional Court, requesting the dissolution of "Civil Initiatives". The latter was dissolved by court order on 17 June 2003. This decision was upheld by the Supreme Court on 14 August 2003, which concluded that the Gomel Regional Court had thoroughly examined all the facts and pertinent evidence and correctly applied substantive and procedural law. Lawfulness and relevance of the decision on dissolution was examined by the Supreme Court on cassation and through the supervisory review procedure, as well as by the Republican Prosecutor's Office also through the supervisory review procedure. The State party submits that there were no grounds for the review of the aforementioned judicial decisions.

Further action taken See above for information on a follow-up meeting that was held in October 2006.

Committee's Decision The Committee regrets the State party's refusal to accept the Committee's Views and considers the dialogue ongoing.

State party	**BURKINA FASO**
Case	Sankara et al. 1159/2003
Views adopted on	28 March 2006
Issues and violations found	Inhuman treatment and equality before the Courts - Articles 7 and 14, paragraph 1.
Remedy recommended	The State party is required to provide Ms. Sankara and her sons an effective and enforceable remedy in the form, inter alia, of official recognition of the place where Thomas Sankara is buried, and compensation for the anguish suffered by the family. The State party is also required to prevent such violations from occurring in the future.
Due date for State party response	4 July 2006
Date of State party's response	30 June 2006
State party response	The Committee will recall that the State party provided its response on the follow-up to this case on 30 June 2006. It stated that it is ready to officially acknowledge Mr. Sankara's grave at Dagnoin, 29 Ouagadougou, to his family and reiterates its submission prior to the decision that he has been declared a national hero and that a monument is being erected in his honour. It submitted that on 7 March 2006, the Tribunal of Baskuy in the commune of Ouagadougou ordered a death certificate of Mr. Sankara, deceased on 15 October 1987 (it does not mention the cause of death). Mr. Sankara's military pension has been liquidated for the benefit of his family. Despite offers by the State to the Sankara family of compensation from a fund set up on 30 March 2001 by the government for victims of violence in political life, Mr. Sankara's widow and children have never wished to receive compensation in this regard. On 29 June 2006, and pursuant to the Committees' Views to provide compensation, the government had assessed and liquidated the amount of compensation due to Ms. Sankara and her children as 43 4450 000 CFA (around 843,326.95 US$). The family should contact the fund to ascertain the method of payment it they wish to receive it.

The State party submitted that the Views are accessible on various governmental websites, as well as distributed to the media.

Finally, it submitted that the events which are the subject matter of these Views occurred 15 years ago at a time of chronic political instability. That since that time the State party has made much progress with respect to the protection of human rights, highlighted, inter alia, in its Constitution, by the establishment of a Minister charged with the protection of human rights and a large number of NGOs.

Author's comments

On 29 September 2006, the authors commented on the State party's submission as follows. They dispute the adequacy of all the remedies set out in the State party's submission. They highlight the failure by the State party to initiate inquiry proceedings to establish the circumstance of Mr. Sankara's death. This request was reiterated by the authors on 17 May 2006 after the Committee's Views. However, on 21 June 2006, the Procurator refused to refer the matter to the Minister of Defence to commence a judicial inquiry, arguing (as on the previous occasion) that it was "time-barred". In the authors' view the only effective remedy would be an impartial judicial inquiry into the cause of his death. The Committee itself in para. 12. 6 has already rejected the prescription arguments provided by the State party. The authors state that the "decision" of 7 March 2006 to unilaterally modify the falsified death certificate of Mr. Sankara of 17 January 1988 was done ex parte during proceedings which were secret and of which the authors only became aware in the State party's response on follow-up to this case. In their view this constitutes an independent and further violation of article 14, paragraph 1 on behalf of the authors. As to the recognition of his burial place, the authors state that no records, direct witness evidence, burial record, DNA analysis, autopsy or forensic report are provided which would constitute an "official record" in relation to the burial remains of Mr. Sankara. True "official recognition" of the place where his remains are buried can only come after a judicial inquiry establishes the circumstances of his death and burial by direct witness evidence, burial record, DNA analysis, autopsy or forensic reports. As to the entitlement to a military pension, the authors state that such entitlement is irrelevant for the purposes of providing a remedy for the violations found. As to the receipt of compensation from the Compensation Fund of Political Violence, the authors submit that as the Committee itself found in considering the admissibility of this case, the pursuit of an application through the existing Compensation Fund for Victims of Political Violence doe not qualify as an effective and enforceable remedy under the Covenant given the context of the grave breaches of article 7 rights. The State party cannot now re-argue that an ex post facto indemnity available pursuant to the non-contentious

	Compensation Fund for Victims of Political Violence qualifies as an "effective remedy" under the Covenant. In addition, any such application would require the Sankara family to abandon their rights to have the circumstances of Mr. Sankara's death established by judicial inquiry and waiver of all rights to seek remedies before the courts. On 19 June 2007, the authors reiterate the inadequacy of the State party's efforts to provide a remedy. They submit that they still do not know the author's exact burial place, which could only be ascertained through a thorough investigation into the circumstances of his death - something which has not to date been undertaken. They submit that the sum in compensation offered is derisory considering that the violations found have been ongoing since 1987.
State party	**CANADA**
Case	Ominayak, 167/1984
Views adopted on	26 March 1990
Issues and violations found	Minority rights - Article 27
Remedy recommended	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.
Due date for State party response	No record of date
Date of reply	6 September 2006 (The State party had previously responded on 25 November 1995)
State party response	The Committee will recall that in a follow-up response of 25 November in 1995, the State party stated that the remedy was to consist of a comprehensive package of benefits and programmes valued at $45 million and a 95 square mile reserve. At the time, negotiations were still ongoing as to whether the Band should receive additional compensation. On 6 September 2006 (as was set out in the interim follow up report from the eighty-eighth session), following a request for further information on the negotiations, the State party provided substantial information on the negotiations to date. It submitted that, according to paragraph 33 of its Views (set out under remedy recommended

above), the Committee stated that its proposal to rectify the situation (the 1989 settlement offer) was an appropriate remedy within the meaning of article 2 of the Covenant. It submitted that the Lubicon Lake Cree have yet to accept the remedy that it has proposed.

According to the State party, it did not appear that there had been extensive logging in the area of land claimed by the Lubicons as traditional use territory since the Views. Oil and gas exploitation have been ongoing with the lands claimed by the Lubicon for traditional use since the Views. In October 2005, two operating partners signed an agreement with the Lubicon giving them a say in oil well drilling on the land which they claim. These companies have indicated that the Lubicon will be consulted by them on future drilling plans before they apply to the Province of Alberta for further permits.

Throughout the 1990s and into the present, serious attempts have been made by the Government of Canada to reach a negotiated settlement with the Lubicon Lake Cree. In the latest round of negotiations, which ended in 2003, every aspect of the State party's offer to the Lubicon Lake Cree was enhanced over previous offers, including the offer which was found by the Human Rights Committee to be appropriate to remedy the threat to the Lubicon Lake Cree under article 27 of the Covenant.

The Lubicon Lake Cree leadership, and its negotiators, have always insisted on a full settlement of all aspects of their claim. Even where there has been substantial agreement by all parties to the negotiations on many aspects of the Lubicon Lake Cree claim, a settlement has been beyond the reach of the parties. The negotiators for the Lubicon Lake Cree have indicated that the Lubicon Lake Cree are only willing to negotiate the self-government aspect of their claim on their terms, and consequently have been unwilling to continue to negotiate toward a settlement of those aspects of their claim which are relevant to this communication and for which there is substantial agreement, including the question of the amount and location of the land and the construction of a new community.

According to the State party, since 2003, the negotiators for the Lubicon Lake Cree have been unwilling to reopen negotiations. In 2005, they declined an offer from the State party for a partial settlement, which was made on the basis that it was without prejudice to the remaining, unresolved aspects of their claim.

The State party submitted that it is committed to a resolution of the Lubicon Lake Cree's claim that is fair to all parties. And is committed to a resolution of those aspects of the Lubicon Lake Cree claim that would deliver the proposed remedy found appropriate by

the Human Rights Committee in its Views. It is willing to resume negotiations at any time should the Lubicon Lake Cree be willing to return to the negotiating table.

Author's response

Many petitions were received in the months of January and February 2006, from various individuals in France (relationship to authors unknown), requesting the Committee to follow-up on this case and claiming that the current situation of the Lubicon Lake Band was "intolerable".

The State party's submission was sent to the authors on 22 September 2006, with a deadline until 22 November 2006 for comments. On 8 April 2007, the authors provided a substantial and detailed response to the State party's submission of 126 pages. On 5 May 2007 a summary of 36 pages was provided.

On the issue of logging, the authors submit that since the Views and following years of failure to consult, protests, broken agreements etc. there is currently a tenuous unstable "standoff" between the Lubicon and forestry companies. This standoff is continually being tested and challenged by the forestry companies and both levels of Canadian government. As to oil and gas exploitation, they submit that the process of agreement mentioned by the State party was not as straightforward as suggested by the State party but did finally culminate in a written agreement with the companies involved on 14 October 2005.

The authors confirm that there have been no negotiations since November 2003 and refer to the 1989 offer as a "take-it-or-leave-it" offer and that the Committee will have to consider whether it is an appropriate remedy. In their view, the recommendation of the Committee in its Views was advising both sides to continue to negotiate in good faith and this is consistent with what it says in its Concluding Observations of 2005. The authors contest that the subsequent offers made by the State party "enhanced" the 1989 offer and submit that in fact the 1992 "re-packaged" version of the offer from 1989, when the impact of inflation was taken account, actually amounted to less than the 1989 offer. They deny that they refused to negotiate, but submit that the government negotiators tabled positions that they themselves refused to negotiate saying that they had no mandate to negotiate them. All that is required for negotiations to continue, they say, is for the government negotiators to return with a mandate to negotiate long-standing settlement items in good faith, including financial compensation and recognition of the right of self-government as part of a settlement of Lubicon land rights. They submit that the State party has ignored a number of written offers by them to return to the table on such terms. They state that the offer of partial settlement referred to by the State party from 2005 did not include key settlement items: economic

development, financial compensation or self-government. No settlement, they submit, will be possible unless the State party is prepared to negotiate all outstanding settlement issues in good faith including financial compensation and self government as part of a settlement of Lubicon Land Rights. Thus, the authors submit that the Committee must clarify its position on the 1989 offer as set out in its Views - upon which Canada's position relies.

Committee's Concluding Observations

Pursuant to the Committee's consideration of the State party's report, during the eighty-fifth session, the Committee adopted the following Concluding Observation with respect to this case:

"The Committee is concerned that land claim negotiations between the Government of Canada and the Lubicon Lake Band are currently at an impasse. It is also concerned about information that the land of the Band continues to be compromised by logging and large-scale oil and gas extraction, and regrets that the State party has not provided information on this specific issue (arts. 1 and 27).

The Committee considered that "The State party should make every effort to resume negotiations with the Lubicon Lake Band, with a view to finding a solution which respects the rights of the Band under the Covenant, as already found by the Committee. It should consult with the Band before granting licences for economic exploitation of the disputed land, and ensure that in no case such exploitation jeopardizes the rights recognized under the Covenant." (CCPR/C/CAN/CO75)

[The Committee members may wish to note the following concluding observation made by the CESCR on this issue during its 1-19 May 2006 session:

"38. The Committee strongly recommends that the State party resume negotiations with the Lubicon Lake Band, with a view to finding a solution to the claims of the Band that ensures the enjoyment of their rights under the Covenant. The Committee also strongly recommends that the State party conduct effective consultation with the Band prior to the grant of licences for economic purposes in the disputed land, and to ensure that such activities do not jeopardize the rights recognized under the Covenant."]

Committee's Decision

The Committee notes the complexity of the issues raised by both parties, observes that they are still not in agreement on an appropriate remedy and urges them to continue their efforts to find a solution to the authors' claims in conformity with the Covenant.

State party	**COLOMBIA**
Case	Becerra Barney, 1298/2004
Views adopted on	11 July 2006
Issues and violations found	Right to a fair trial, faceless judges - Article 14.
Remedy recommended	An effective and appropriate remedy.
Due date for State party response	26 October 2006
Date of reply	31 January 2007
State party response	On 31 January 2007, the State Party submitted the following information. It recalls that Law 288 of 1996 established instruments to ensure compensation for victims of human rights violations. This law was adopted principally in order to expedite reparations when an international organ adopts a decision in individual communications presented to it against the State of Colombia. Article 2 of this law established that cases where decisions have been adopted by international human rights organs will be submitted to the Committee of Ministers which is constituted by the Ministers of the Interior, Justice and Law, External Affairs, and National Defence. This Committee may adopt a favourable recommendation in the event that certain elements of fact and law, and the Constitution, are present. This Committee may also adopt a negative recommendation when it considers that these elements are not present. Such was the finding in this particular case. The Committee's decision is based on constitutional principles and concluded that the State of Colombia afforded the author all of his fundamental constitutional rights, in particular that of due process that were at the time possible. With regard to the Law of Public Order or Regional Justice (Ley de Orden Público o Justicia Regional) the Committee of Ministers took into account that this law was, at the time, considered constitutional by the Constitutional Court of Colombia. The State party submits that the violation that is attributed to the State of Colombia of the author's right to a public hearing is not in itself a breach, as the non-public character of the procedure was at the time indispensable to preserve the interests of justice. Such a situation is provided for in other human rights treaties to which Colombia is party, for example article 8 paragraph 5 of the American Convention on Human Rights. The State party recalls that at the time of the procedure against Mr. Becerra Barney under the

Law of Regional Justice, the country was confronting a grave public security situation, in particular because of the multiple attacks against officials of the judiciary perpetrated by the drug cartels. The State party also recalls that once the situation had subsided, this Law, which had been considered constitutional by the country's Constitutional Court, was repealed as had been recommended by different international human rights organs.

Author's comments On 2 May 2007, the author responded to the State party's submission. He notes that not only his right to a public hearing was violated but also his right to be present during the trial held against him. He further notes that article 8.5 of the American Convention on Human Rights, which provides for the "interests of justice", as an exception to the public hearing rule, does not allow the sentencing of a person in absentia. He observes that the State party misinterprets Law 288 of 1996, which was specifically adopted in order to enforce the Committee's Views. Article 2 states that the decision of the Committee of Ministers shall be favorable when a decision has been previously adopted by the Human Rights Committee and the Inter-American Commission. He stresses the State party's obligation to provide him with an effective remedy and adequate compensation.

Committee's Decision The Committee regrets the State party's refusal to accept the Committee's Views and considers the dialogue ongoing.

State party **THE CZECH REPUBLIC**

Case The following 11 cases have been decided against the Czech Republic: Simunek et al (516/1992) (property restitution), Adam (586/1994) (property restitution), Blazek (857/1999) (property restitution), Marik (945/2000) (property restitution), Kříž (1054/2000) (property restitution), Des Fours Walderode (747/1997) (property restitution), Brok (774/1997) (property restitution), Fabryova (765/1997) (property restitution), Pezoldova (757/1997) (denial of access to documents for restitution claim), Czernin (823/1998) (maintenance of nationality), L.P. (946/2000) (right of access to child).

State party response On 26 March 2007, the State party provided the following written responses with respect to each case:

With respect to the following cases: *Simunek et al - 516/1992*; *Adam - 586/1994*; *Blazek - 857/1999*; *Marik - 945/2000*; and *Kříž - 1054/2000*; the State party informs the Committee that the modification of legislation removing the nationality condition would not be supported by Parliament as such an amendment would have to be retrospective, thereby opening the entire restitution process.

With respect to *Des Fours Walderode (747/1997)*:
On 14 March 2002, the Constitutional Court considered that the nationality condition did not apply retrospectively to the author. Subsequently, the author made numerous claims (around 21) relating to different property and against different people before the Tribunals of Liberec and Semily. In January 2007, 4 of these procedures were closed following withdrawal, 2 were rejected, as the author did not comply with other conditions of the restitution law and 11 remain pending. The State party admits that the entire procedure has and continues to be long but explains that the long delay results from many factors including the complexity of the restitution law, the number of properties involved, insufficient information provided etc. The State party also submits that the author's wife has a case pending before the ECHR on the issue of undue delay in the consideration of the restitution claims. A Decision against the State party would be likely to result in the provision of compensation.

Brok (774/1997): Compensation of 2,236,870 CZK (around 79,000 euros) was made to the family through a Government programme implemented for Holocaust victims. The author's family has accepted the compensation offered.

Fabryova (765/1997): Compensation of 1,542,839 CZK (around 54,500 euros) was offered to the family through a Government programme implemented for Holocaust victims. The family of Ms. Fabryova has not been satisfied with the compensation offered. A new claim for restitution was filed and an appeal of a negative decision remains pending.

Pezoldova (757/1997) (denial of access to documents to prove restitution claim): The State party refers to its response of July 2005, in which it informed the Committee that an *ex gratia* payment would be made to the author.

On 1 February 2006, the author responded on the State party's submission, submitting inter alia on the issue of the *ex gratia* payment that no such offer had been made.

Czernin (823/1998): The State party submits that the issue of the author's request to maintain his Czech nationality is ongoing and that an appeal lodged before the Supreme Administrative Court is pending. It admits that the affair has been going on since 1995 and has thus been unduly delayed through no fault of the author. Payment of an ex gratia compensation to the author is being considered, primarily because of the issue of delay in the adjudication of the author's request. However, it is very complex in fact and law.

L.P. (946/2000): Case involving denial of contact between the author and his son. The State party admits that the domestic authorities did not regulate the problem efficiently. However, the courts above all the courts must take into account the best interests of the minor and that it was precisely the author's obstructions which prevented the District Court from making a judgment on the merits relating to the custody of the minor. Since the Views, the State party submits that the author's wife was charged several times and convicted of having frustrated contact between her son and his father. On 11 September 2003, she was fined 30 800 CZK for failing to abide by the judgment of 2 October 1995 (allowing access to the father as a provisional measure). As to the civil issue and the delays in 2001 and 2002, the State party submits that such delays were caused by objective factors. However, since the Committee's Views the president of the District Court must present a report each month to the ministry on the conduct of the affair. Following several court hearings since the Views on the issue of access to the father, the Court of Appeal confirmed on 28 July 2006 the district courts decision to cancel this 2 October 1995 judgment on the basis of an expert psychological report. From 2003 to 2005 the matter was examined by a mediator who concluded that the protection authority could no longer guarantee contact between the author and his son as the minors own opinion could no longer be ignored, given his age, (born 1989) and that he continually expresses his wish not to have any contact with his father, refusing to go with him.

The author has filed a case before the European Court which was considered partially admissible on 10 January 2006, relating to the delay in the guardianship proceedings and the right to respect for family life since 25 July 2002, the date of the Committee's Views. If successful the ECHR can suggest a remedy.

Further action taken

The Committee will recall that on 18 October 2005, the special rapporteur on follow-up to communications met with the Ambassador and another representative from the Permanent Mission, regarding follow up to the Committee's Views on Czech cases.

The Ambassador informed Mr. Ando that some governmental offices were willing to implement at least some of the recommendations regarding the property cases on an ad hoc basis. The Mission had requested the governmental commission in charge of dealing with individual cases submitted to international bodies, to provide the Committee with written information regarding developments in this respect. The Ambassador also indicated that, regarding some of the cases, no further legal remedies exist. In order for the alleged victims to be able to file new claims the restitution legislation should be modified in Parliament. The information provided on each case during this meeting is set out in the A/61/40.

State party	**EQUATORIAL GUINEA**
Case	Primo Essono (414/1990) (torture, poor conditions of detention, arbitrary arrest and detention and freedom of opinion), Oló Bahamonde, Ndong et al., (468/199) (arbitrary arrest and detention, freedom of opinion and unfair trial) and Mic Abogo (1152 and 1190/2003) (torture, unfair trial and arbitrary arrest and detention)
Further action taken	The Committee will recall that the State party has not provided responses to any of the findings of violations by the Committee. On 30 October 2006, a joint meeting was held between Mr. E. Mbana, the Chargé d'affaires of the Permanent Mission of Equatorial Guinea, the Special Rapporteur on Follow-up to Individual Complaints and the Special Rapporteur on Follow-up to Concluding Observations, and the Secretariat, on 30 October 2006, at Palais Wilson. The following is a note on information provided with respect to follow-up to individual complaints only. The State party was asked for information on follow-up to the following complaints: Primo Essono, 414/1990, Oló Bahamonde, Ndong et al., 468/1991 and Mic Abogo, 1152 and 1190/2003. The Rapporteur referred to the information provided by the State party's representative at the last follow-up meeting: that the author of case No. 414/1990 moved to Spain in the 1990s and has since died; and that the author of case No. 468/1991 left the country but carries out official functions for the government. He also referred to the information provided through newspaper reports that one of the authors of case No. 1152/1190/2003, Mr. Plácido Micó Abogo, was released on 2 August 2003. He requested this information in writing from the Government for the purposes of considering closing these cases. On a general note, the State party's representative stated that there had been a change of government about two months ago and that new people were now looking after human rights. There is a new Human Rights Vice-Minister, and the current Prime Minister was in fact the previous Human Rights Minister. He stated that the Mission is relatively new in Geneva (since January) and that they are still mainly looking after logistical issues. The Rapporteur requested a point of contact in the Human Rights Office in Malabo for the purposes of establishing an efficient flow of information between the Secretariat and the State party. Thus, all information with respect to individual complaints could be sent directly to the appropriate Ministry, as well as through the Permanent Mission in Geneva. The State party's representative stated that he would do so.

	As to individual complaints, the State party's representative stated that, to his knowledge, Mr. Ndong was now living in Spain and that he had a website which he used to criticize the government. He stated that Mr. Plácido Micó Abogo is now a Member of Parliament, and believes that the other authors of case No. 1152/1190/2003 were among 43 prisoners of conscience released by the President on 5 June 2006. He stated that he would forward the list of names as confirmation. The Rapporteur requested the State party to confirm all of the follow-up information associated with these cases to be submitted in writing, even by an email to the Secretariat for greater ease and expediency. On 30 October 2006, following the meeting the representative of the State party faxed the list of names of prisoners who had been released and among which he had thought included the abovementioned authors. None of the authors were included among the names.
State party	**GUYANA**
Case	Yassen and Thomas, 676/1996
Views adopted on	30 March 1998
Issues and violations found	Death penalty case - Unfair trial, prolonged pretrial detention, poor conditions of detention, ill-treatment, right to life - articles 6, 10, paragraph 1, and 14, paragraph 3 (b), (c) and (e), in respect of both authors; and of article 14, paragraph 3 (b) and (d), in respect of Mr. Abdool Yasseen.
Remedy recommended	An effective remedy ... this should entail their release.
Due date for State party response	3 September 1998
Date of reply	None
State party response	None
Author's response	On 30 May 2007, the authors' lawyers (Interights) called the OHCHR to inform it that they were again pursuing the follow-up in this case, in particular follow-up to Mr. Thomas' case as he remains under sentence of death and has been on death row since 1988. Mr. Yassen apparently died of natural causes in prison in 2002.

Further action taken	The Committee will recall that during the eighty-third session (29 March 2005) the Rapporteur met with the Deputy Permanent Representative of Guyana to the United Nations. The Rapporteur explained his mandate and provided the representative with copies of the Views adopted by the Committee in the following communications: 676/1996 (Yasseem and Thomas), 728/1996 (Sahadeo), 838/1998 (Hendriks), 811/1998 (Mulai) and 867/1999 (Smartt). The Views were also sent to the Permanent Mission of Guyana by e-mail to facilitate their transmittal to the capital. The Rapporteur expressed concern about the lack of information received from the State party regarding the implementation of the Committee's recommendations on these cases. The representative gave the Rapporteur assurances that he would inform his authorities in the capital about the Rapporteur's concerns. The Committee may wish to consider organizing a further meeting with the State party, to discuss all of the cases of violations found against it of which there are nine and to which the State party has continually failed to respond.
State party	**LIBYAN ARAB JAMAHIRIYA**
Case	El Ghar, 1107/2002
Views adopted on	29 March 2004
Issues and violations found	Refusal by the State party to issue the author with a passport - Article 12, paragraph 2.
Remedy recommended	The State party is under an obligation to ensure that the author has an effective remedy, including compensation. The Committee urges the State party to issue the author with a passport without further delay.
Due date for State party response	4 February 2005
Date of reply	23 August 2006
State party response	Following a request from the Secretariat on behalf of the Special Rapporteur on the issue of providing compensation to the author, the State party provided the following information. It contests the Committee's findings and reiterates its argument provided prior to consideration of the case by the Committee, that the author was never refused a passport and that all she had to do was to fill in a form at the consulate in Casablanca. Although she did go to the consulate on several occasions, the State party claims that she never filled in the forms and thus could not receive her passport. In its

	view, her claim appears to relate essentially to a request for compensation which she is not at liberty to receive not having been refused a passport in the first place.
Author's response	The Committee will recall, as set out in the 84th report, that by letter dated 23 June 2005, the author referred to the State party's failure to implement the Committee's Views. On 21 February 2006, she informed the Committee that after many meetings with the Libyan consulate in Morocco, in which she was accused, inter alia, of having committed treason against the State party by bringing her case before the Committee, it still does not appear likely that she will receive her passport. The author informed the Secretariat in October 2005 that the Libyan consulate in Casablanca still refused to issue her passport. In June 2006, she informed the Secretariat by phone that she had been promised her passport. On 7 July 2006, she informed the Secretariat that she had received her passport, but that she had not received any compensation. On 24 November 2006, the author responded to the State party's submission, in which she disputes its claim that she was never denied a passport. She claims that she filled in the requisite documents on more than one occasion, that she attended the consulate once or twice every two months but for years was constantly shuttled between the Consulate in Rabat and Casablanca where every attempt was made to prevent her receiving her passport. She claims that the refusal to grant her a passport for such a long time caused her moral, financial, and academic damage and that although she has received her passport now it is a passport for two rather than the usual five years.
State party	**PERU**
Case	Avellanal, 202/1986
Views adopted on	28 October 1998
Issues and violations found	No standing of wife in court procedure over property - articles 3, 14 paragraph 1, 26.
Remedy recommended	The Committee, accordingly, is 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 victim. In this connection, the Committee welcomes the State party's commitment, expressed in articles 39 and 40 of Law No. 23506, to co-operate with the Human Rights Committee, and to implement its recommendations.

Due date for State party response	12 June 1991
Date of reply	None
State party response	N/A
Author's response	On 31 August 2006, the author again informed the Committee that the State party had not implemented the Decision.
Case	Carranza Alegre, Marlem, 1126/2002
Views adopted on	28 October 2005
Issues and violations found	Arbitrary detention, torture and inhuman and degrading treatment, faceless judges - Articles 2, paragraph 1, 7, 9, 10, and 14.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy and appropriate compensation. In the light of the long period she has already spent in detention and the nature of the acts of which she stands accused, the State party should give serious consideration to terminating her deprivation of liberty, pending the outcome of the current proceedings. Such proceedings must comply with all the guarantees required by the Covenant.
Due date for State party response	6 February 2006
Date of State party response	25 May 2006
State party response	The Committee will recall that in the interim follow-up report of the eighty-seventh session the State party's response was set out. It informed the Committee that the author was acquitted by decision of the Supreme Court of 17 November 2005 and released. It noted that the "Consejo Nacional de Derechos Humanos" (National Human Rights Council) was currently examining the granting of compensation. By letter of 23 August and 15 September 2006, the State party informs the Committee that the amount of compensation is still under consideration.
Author's response	By letters dated 13 February and 8 May 2006 the author confirmed that on 17 November 2005 the Supreme Court decided in favour of her acquittal and that she has been released. She intends to contact the Ministry of Justice in connection with the Committee's recommendation that she should be provided with compensation.

	By letter of 30 June 2006, the author notes that 6 months have elapsed since the report issued by the "Consejo Nacional de Derechos Humanos" and that the State party has not yet fully complied with the Committee's views. She notes that she has not been offered the right to return to her job, nor has she been compensated. The Consejo Nacional de Derechos Humanos has not even heard her claims.
Case	K.N.L.H, 1153/2003
Views adopted on	24 October 2005
Issues and violations found	Abortion, right to a remedy, inhuman and degrading treatment and arbitrary interference in ones private life, protection of a minor - Articles 2, 7, 17, 24.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy, including compensation. The State party has an obligation to take steps to ensure that similar violations do not occur in the future.
Due date for State party response	9 February 2006
Date of State party response	7 March 2006
State party response	The Committee will recall that as set out in the Annual Report A/61/40, the State party had informed it of the publication of a Report by the National Human Rights Council (Consejo Nacional de Derechos Humanos), based on the K.N.L.H. case. The report proposed the amendment of articles 119 and 120 of the Peruvian Criminal Code or the enactment of a special law regulating therapeutic abortion. The National Human Rights Council had required the Ministry of Health to provide information as to whether the author had been compensated and granted an effective remedy. No such information was provided in the letters sent by the Health Ministry in reply to the National Human Rights Council. The Committee will also recall that during the consultations with the State party on 3 May 2006, Mr. José Burneo, Executive Secretary of the National Human Rights Council of Peru, said that the absence of a response was deliberate, as the question of abortion was extremely sensitive in the country. His Office was nevertheless thinking of drafting a bill allowing the interruption of pregnancy in cases of foetuses born anencephalic.

Author's response

By letter of 16 June 2006, the Centre for Reproductive Rights had contended that by failing to provide the complainant with an effective remedy, including compensation, it had failed to comply with the Committee's decision.

On 6 March 2007, the author informed the Committee that the new government has continued to question the Committee's views. On 1 December 2006, the author met with representatives of the Human Rights Council (Consejo Nacional de Derechos Humanos) who also spoke for the Ministry of Justice. In that meeting, the State party's representatives explained that the State was willing to comply with the Committee's view. However, the author considers that the government's proposed action, which would consist in the payment of $10,000 in compensation as well as the introduction of a proposal to amend legislation in order to decriminalize abortions in cases of anencephalic foetuses, to be insufficient. The author expresses dissatisfaction with the fact that compensation would reportedly be made only in relation to the violation of article 24 of the Covenant, as the State Party's representatives allegedly indicated that they considered that there had been no violation of other articles of the Covenant. The author refers to statements made by representatives from the State Party that allegedly questioned the existence of violations of article 2, 7 and 17 of the Covenant. Moreover, the author maintains that the proposed change in legislation presupposes that the Committee was mistaken in its analysis. The author contends that, in fact, such legislative change is unnecessary as therapeutic abortion already exists in Peru and should be interpreted in accordance with international standards to include cases where the foetus is anencephalic.

The author recalls that the Constitutional Court of Peru (Tribunal Constitucional Peruano) has considered that the Committee's views are definitive international judicial decisions that must be complied with and executed in accordance with article 40° of Law No. 23506 and article 101° of the Constitution.[2]

The author asks that the Committee request the State to recognize explicitly the existence of violations of article 2, 7 and 17 of the Covenant. The author also requests that a discussion on the concept of an effective remedy be initiated. To this end the author provided, in annex, a detailed proposal for reparations totalling $96,000

[2] Tribunal Constitucional Peruano, *En la acción de amparo por Rubén Toribio Muñoz Hermoza*, EXP.No. 012-95-AA/TC. The authors also refer to a decision by the same court in 105-2001-AC/TC.

	(the proposal includes $850 for payment of expenses such as the birth and baby's burial, $10.400 for psychological rehabilitation, $10,000 for diagnostic and treatment of physical consequences, $50,000,000 for moral damages and $25,000 for "life project" (lost opportunities). Finally, the author asks that a meeting be held with representatives of the State Party and the organizations representing the author so as to ensure that adequate measures are taken for the non-repetition of the violations denounced. The State Party should retract its proposal in which women seeking a therapeutic abortion must seek a judicial authorization.
State party	**PHILIPPINES**
Case	Wilson, 868/1999
Views adopted on	30 October 2003
Issues and violations found	Mandatory death penalty for rape after unfair trial - "most serious" crime. Compensation after acquittal - Articles 7, 9, paragraphs 1, 2, and 3, 10, paragraphs 1, and 2.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. In respect of the violations of article 9 the State party should compensate the author. As to the violations of articles 7 and 10 suffered while in detention, including subsequent to sentence of death, the Committee observes that the compensation provided by the State party under its domestic law was not directed at these violations, and that compensation due to the author should take due account both of the seriousness of the violations and the damage caused to the author. In this context, the Committee recalls the duty upon the State party to undertake a comprehensive and impartial investigation of the issues raised in the course of the author's detention, and to draw the appropriate penal and disciplinary consequences for the individuals found responsible. As to the imposition of immigration fees and visa exclusion, the Committee takes the view that in order to remedy the violations of the Covenant the State party should refund to the author the moneys claimed from him. All monetary compensation thus due to the author by the State party should be made available for payment to the author at the venue of his choice, be it within the State party's territory or abroad.
Due date for State party response	10 February 2004
Date of reply	17 July 2006 (It had previously replied on 12 May 2005 and 27 January 2006)

State party response

The Committee will recall that, as set out in its 84th report, the State party submitted, on 12 May 2005, that it was "disinclined" to accept the Committee's findings of facts, more particularly its assessment of evidence. It submitted that the findings rested on an incorrect appreciation of the facts and contested the finding that the compensation provided was inadequate. It submitted that the author failed to discharge the burden of proof; ex parte statements made by the complainant are not considered evidence and do not constitute sufficient proof of the facts alleged. An investigation conducted by the City Jail Warden of the Valenzuela City Jail, where the author was confined, disputed all allegations made by the author. The author had failed to provide specific acts of harassment to which he was supposedly subjected to while in prison and did not identify the prison guards who allegedly extorted money from him. As the author had already flown home while the communication was pending before the Committee he could not have feared for his security by naming those who had allegedly ill-treated him. It reiterated its submission that the author failed to exhaust domestic remedies. Finally, it considered that the compensation provided is adequate that the author had not yet sent an authorized representative to claim the cheques on his behalf and that by insisting that the State party make available to the complainant all monetary compensation due to him, "the Committee might have exceeded its competency and caused great injustice to the State party".

On 27 January 2006, the State party submitted that the Views were sent to the Department of Justice and the Department (DOJ) of Interior and Local Government (DILG) for appropriate action last 10 August 2005. DOJ exercises supervision over the Bureau of Immigration while DILG exercises supervision over city jails. An investigation was carried out in 2005 by the City Jail Warden of the Valenzuela City Jail where Mr. Wilson was confined. The investigation revealed the following: (1) The Valenzuela City Jail has no "cages" in which the author could have been confined upon his arrest; and (2) There is no record of a serious shooting incident of an inmate which supposedly occurred during the author's detention and which supposedly traumatised the author. According to the investigation results, the only incident on record was a non-fatal shooting on 17 June 1996 of an inmate who was shot by his jail guard when the former tried to escape from detention. Finally, it submits that the author failed to provide specific acts of harassment to which he was supposedly subjected while in prison and failed to identify the prison guards and officials who allegedly harassed and extorted money from him.

On 17 July 2006, following a request from the Committee, through the Special Rapporteur on Follow-up, the State party responded to

counsel's submission of 3 May 2006. It argues that the investigation was carried out impartially and that no evidence has been provided to demonstrate otherwise. The allegation is merely inferred from the fact that, the jail warden, as a public officer, exercises administrative control over his subordinates and the DILG is not an external accountability mechanism. It argues that sanctions under municipal law would have deterred both the jail warden and the DILG from not acting impartially. The State party contests that unreasonable delay in the progress of the investigation has been established. The author did not express his wish to take part in the investigation, to receive information on its progress to assist in ensuring the prosecution of the alleged perpetrators of torture. The State party argues that the author is obliged to present clear and convincing evidence with respect to the shooting incident and the alleged existence of the cage. Unless and until independent corroborating evidence are adduced the municipal authorities are not obliged to act upon such claims. It concludes that its investigation meets the Covenant standards of impartiality, promptness and thoroughness.

Author's response

On 9 February 2006, the author submitted that the procedure currently under consideration is that of follow-up and that therefore it is inappropriate to resubmit arguments on the merits. He requests information on the current status of follow-up in this case.

On 3 May 2006, the author's counsel responded to the State party's response of 27 January 2006. He submits that the State party's response is inappropriate as 1. It was limited to an investigation only and 2. The investigation conducted was not prompt, comprehensive and/or impartial. Neither the City of Jail Warden, which conducted the investigation nor the DILG which oversaw it, can be considered an external and therefore impartial mechanism. In addition, it is not possible to assess the promptness and effectiveness of the investigation as the authorities never informed the complainant about the investigation, including when it would take place and why the investigation was closed. Counsel points to treaty body jurisprudence as well as jurisprudence of the ECHR for the proposition that a complainant should be invited to take part in such an investigation and to receive information about its progress and outcome. As to the conduct of the investigation, Counsel submits that it is clear that the author's complaints were disregarded. The claim that the author failed to provide specific acts of harassment or to identify the persons who subjected him to harassment is an attempt to reduce the State party's duty to conduct a thorough investigation - it is precisely the purpose of such investigations to establish such facts. In any event, these claims are untrue and Counsel refers to the communication itself in which the author sets out in detail his complaints.

	Counsel highlights that failure of the State party to provide information about the compensation with regard to the breaches of articles 7, 9 and 10 as well as the refunding of the moneys claimed from the author as immigration fees and with respect to the guarantees of non-repetition. Counsel also highlights the author's concerns with the measures the State party should take to prevent similar violations in the future.
Committee's Decision	The Committee regards the State party's response as unsatisfactory and considers the dialogue ongoing.
State party	**POLAND**
Case	Fijalkowska, 1061/2002
Views adopted on	26 July 2005
Issues and violations found	Articles 9, paragraphs 1 and 4.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an adequate remedy, including compensation, and to make such legislative changes as are necessary to avoid similar violations in the future. The State party is under an obligation to avoid similar violations in the future.
Due date for State party response	27 October 2005
Date of reply	26 October 2006
State party response	The State party had replied on 31 August 2006 and stated that by letter dated 13 July 2006, the author was informed of a decision of the Ministry of Foreign Affairs to offer her 15,000 PLN ($5,022) in compensation. She responded in a letter of 17 July 2006, requesting 500,000 PLN. Despite, the Ministry's subsequent offer of 20,000 PLN ($6,696), the author reiterated her demand for 500,000 PLN ($167,408). The State party submitted that the author's refusal of the compensation rendered the implementation of the Views impossible at this stage. On 26 October 2006, the State party provided a copy of a letter from the author, dated 22 August 2006 in which she accepts the sum of 20,000 PLN ($6,696) as a remedy in this case.
Committee's Decision	The Committee considers that the remedy to be satisfactory and does not intend to consider this matter any further under the follow-up procedure.

State party	**PORTUGAL**
Case	Correia de Matos, 1123/2002
Views adopted on	28 March 2006
Issues and violations found	Right to defend oneself - Article 14, 3 (d).
Remedy recommended	The Committee considers that the author is entitled to an effective remedy under article 2, paragraph 3 (a), of the Covenant. The State party should amend its laws to ensure their conformity with article 14, paragraph 3 (d), of the Covenant.
Due date for State party response	4 July 2006
Date of reply	Had replied on 12 July 2006
State party response	The State party submitted that Portuguese laws assign great importance to guaranteeing an equitable procedural system, particularly in criminal procedures. It provided a detailed description of its legislation, its history and existing procedural guarantees, referring to the relevant provisions of the Constitution and the Code of Criminal Procedure, which establish that only a lawyer who is a full member of the bar can assist those accused in criminal procedures. The State party explained that in light of Portuguese law, as the author had been suspended from the bar and refused to appoint a lawyer to assist him, the judge in his case had no choice but to appoint one. Had he not done so, the procedure would have been declared null and void. The State party highlighted that under Portuguese law the accused has the right throughout the whole criminal procedure and independently of the arguments made by their legal counsel, to express themselves and to be heard, which is not to be confused with the right to defend oneself. The State party further submitted that the text of article 14, paragraph 3 (d) of the Covenant contains the word “or” which would seem to indicate that the right to defend oneself and the right to legal assistance of one’s choosing are alternative options. Additionally, the State party referred to the jurisprudence of the European Court of Human Rights on this issue.

	It concluded that its legislation is already in compliance with article 14, paragraph 3 (d), that it is therefore not necessary to amend it, and that it is not necessary to extend any new rights to the author in addition to those he has already exercised or to allow him to appeal a decision that has already been appealed in the domestic courts. It would make no sense to take such action, which is unrelated to the merits of the case, to establish whether Mr. Carlos Matos had insulted a judge.
Author's response	On 23 November 2006, the author commented that the State party in refusing to implement the Committee's Views displays (1) its lack of respect for the ICCPR and the OP, in particular article 2, paragraph 2 of the former and (2) a lack of respect for the author's civil rights and failure to comply with article 2, paragraph 3 of the ICCPR. He is of the view that he should be compensated by inter alia at least 500,000 euros as well as recognition that he should have the right to defend himself at any stage of a criminal procedure.
Committee's Decision	The Committee regrets the State party's refusal to accept the Committee's Views and considers the dialogue ongoing.
State party	**REPUBLIC OF KOREA**
Case	Hak-Cheol Shin, 926/2000
Views adopted on	16 March 2004
Issues and violations found	Freedom of expression - 19, paragraph 2.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation for his conviction, annulment of his conviction, and legal costs. In addition, as the State party has not shown that any infringement of the author's freedom of expression, as expressed through the painting, is justified, it should return the painting to him in its original condition, bearing any necessary expenses incurred thereby. The State party is under an obligation to avoid similar violations in the future.
Due date for State party response	21 June 2004
Date of reply	16 August 2006 (The State party had previously responded on 19 November 2004)

State party response	The Committee will recall that on 19 November 2004, the State party had stated that the author was granted a special amnesty by the Government of the State party on 15 August 2000 (See Annual Report A/60/40 (Vol. II)). Since he was convicted through legal proceedings, he was not eligible for compensation under the State Compensation Act. His painting could not be returned as it was lawfully confiscated through the Supreme Court's ruling. Taking into account legal limitations on the implementation of the Committee's Views, the Ministry of Justice is now considering the practices and procedures of other countries to give effect to the Views, with a view to introducing an effective implementation mechanism in the future. The Ministry of Justice sent the original text of the Views and its translated version in Korean to the Supreme Public Prosecutor's Office and requested that the law enforcement officials bear in mind these Views during their official activities. To prevent the recurrence of similar violations, the Government was actively pursuing the abolition or revision of the National Security Law. In the meanwhile, it ensured the Committee that it would continue to make the utmost efforts to minimize the possibility of arbitrary interpretation and application of the Law by law-enforcement officials. The Ministry has published the Views in Korean in the official Electronic Gazette. On 16 August 2006, the State party stated that in March 2005, the Ministry of Justice, having reviewed the implementation of the Views by other countries, published a reference book following a study and review of possible solutions to the problems. It concluded that the problem involves the enforcement of the Justice Ministry's ruling over the case and cannot be resolved by the decision of the Administration alone such as the Ministry of Justice. It is a matter requiring institutional reform at the advice of the judicature, the National Human Rights Commission civil experts, etc.
Author's response	Request for response sent to author on 6 September 2006 with a deadline of 6 November 2006 for comments.
Case	Keun-Tae Kim, 574/1999
Views adopted on	3 November 1998
Issues and violations found	Freedom of expression - Article 19.
Remedy recommended	Under article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy.

Due date for State party response	30 March 1999
Date of reply	16 August 2006 (The State party had previously responded on 16 February 2005)
State party response	The Committee will recall that on 16 February 2005, the State party submitted that since the author was found guilty of violating the National Security Act, he is not eligible for criminal compensation from the State under the terms of the Criminal Compensation Act unless he is acquitted of his criminal charges through a retrial. In addition, it stated that since the investigation and trial were done in accordance with law, and there is no evidence demonstrating that public officials inflicted damage on the author intentionally or negligently, he may not claim damages under the State Compensation Act. The author has not applied for compensation under the Act on Restoration of Honor and Compensation for the People Involved in the Democratization Movement, which provides compensation for persons killed or injured in the course of forwarding the democratization movement. However, the State party submitted that his honour was duly restored and he has been recognized as a person involved in the democratization movement. It states that he was granted amnesty on 15 August 1995 and thus is eligible for public elections. To prevent recurrence of similar violations, discussions are being held within the government and the National Assembly to amend or repeal some provisions of the National Security Act that require changes in order to reflect the recent reconciliation process in the inter-Korean relationship, and to prevent any possible violations of human rights. The investigation agencies and the judiciary have strictly limited the application of the National Security Act to situations which are absolutely necessary for maintaining the security of the State and protecting the survival and freedom of nationals. The Government published a translated version of the Views in Korean via the media, and also sent a copy to the Court. On 16 August 2006, the State party submitted that both proposals for amendments to or repeal of the National Security Act are under consideration at the National Assembly. Two draft bills supporting the repeal of the National Security Act were each submitted on 20 and 21 October 2004, and the one backing the Act's amendment was submitted on 14 April 2005, and is currently under consideration by the National Assembly's Legislation and Judiciary Committee.
Author's response	Request for response sent to author on 6 September 2006 with a deadline until 6 November 2006 for comments.

Case	Jong-Kyu Dohn, 518/1992
Views adopted on	19 July 1995
Issues and violations found	Freedom of expression - 19, paragraph 2.
Remedy recommended	The Committee is of the view that Mr. Sohn is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy, including appropriate compensation, for having been convicted for exercising his right to freedom of expression. The Committee further invites the State party to review article 13 (2) of the Labour Dispute Adjustment Act. The State party is under an obligation to ensure that similar violations do not occur in the future.
Due date for State party response	15 November 1995
Date of reply	16 August 2006 (16 February 2005)
State party response	The Committee will recall that on 16 February 2005, the State party submitted that since the author was found guilty of violating the Labour Dispute Adjustment Act, he was not eligible for criminal compensation from the State under the terms of the Criminal Compensation Act unless he was acquitted of criminal charges through a retrial. In addition, it states that the Supreme Court, found on 26 March 1999 that the State had no obligation to provide compensation to the author, under the State Compensation Act, with regard to the lawsuit which he had filed against the government based on the Committee's Views, as the Views are not legally binding and there is no evidence that public officials inflicted damage on the author intentionally or negligently in the course of the investigation or trial. The Act on Restoration of Honour and Compensation for the People Involved in the Democratization Movement, which provides compensation for persons killed or injured in the course of forwarding the democratization movement, is not applicable in the author's case as he was not injured. However, his honour was restored and he has been involved in the democratization movement. The State party states that he was granted a special pardon on 6 March 1993. To prevent recurrence of similar violations, the Trade Union and Labour Relations Adjustment Act, enacted in March 1997, repealed the provisions of the previous Labour Dispute Adjustment Act prohibiting third party intervention in labour disputes. Now under article 40 of the new Act, during collective bargaining or industrial action, a trade union may be supported by third parties such as a confederation of association organizations of which the trade union is a member or a person nominated by the trade union.

On 16 August 2006, the State party states that Clause 2 of article 13 of the Labour Dispute Adjustment Act (dealing with prohibiting third party involvement), the point of contention in 1991, was repealed following the legislation of the Trade Union and Labour Relations Adjustment Act on 31 December 1996. Now, cases dealing with the prohibition of third party involvement can receive legal support under article 40 of the Trade Union and Labour Relations Adjustment Act, if reported to the administration office. Article 40 (Support Labour Relations) of the Trade Union and Labour Relations Adjustment Act as currently in force provides:

(1) Trade Union and an employer may be supported by persons or organizations of the following subparagraphs with regard to collective bargaining (Amended on 20 February 1998):

(a) Industrial federations or a national confederation of which the trade union is a member;

(b) An employers association of which the employer is a member;

(c) A person who has been notified to the Administrative Authorities by the trade union or employer concerned to obtain support; or

(d) A person who is entitled to provide support under other relevant laws or regulations.

(2) Others except those who are stipulated in paragraph (1) shall not intervene in, manipulate, and instigate collective bargaining or industrial action.

Author's response	Sent to author on 6 September 2006 with a deadline until 6 November 2006 for comments.
Case	Yeo-Bum Yoon and Myung-Jin Choi, 1321/2004 and 1322/2004
Views adopted on	3 November 2006
Issues and violations found	Conscientious objection to enlistment in compulsory military service - Articles 18, paragraph 1.
Remedy recommended	An effective remedy, including compensation.
Due date for State party response	16 April 2007
Date of reply	March 2007 (no date)

State party response	The State party informs the Committee that on 8 January 2007 an outline of the Views was reported in the major Korean newspapers and on the principal broadcasting networks. The full text was translated and published in the Korean government's Official Gazette. In April 2006 (prior to consideration by the Committee) a joint committee called the "Alternative Service System Research Committee" was set up as a policy advisory body under the Ministry of National Defense. It is made up of members selected from the legal, religious, sporting, and artistic circles and from amongst concerned public authorities. Its mandate is to review the issues involving conscientious objection to military service and an alternative service system and between April 2006 and December 2006 meetings took place. By the end of March 2007 this Committee will release its results on the basis of which the State party will proceed with the follow-up of this case. As to the consideration of remedial measures for the authors in question, the State party informs the Committee that a task force relating to the implementation of individual communications was set up. It found that new legislation will have to be enacted by the National Assembly, for the purposes of reversing the final judgements against the authors. The enactment of such legislation is currently being discussed but will be difficult. The State party submits that it will strive to find a remedy to appropriately implement the Views through a comparative analysis of the merits of each remedial measure and studies of overseas cases.
State party	**RUSSIAN FEDERATION**
Case	Zheikov, 889/1999
Views adopted on	17 March 2006
Issues and violations found	Torture, inhuman and degrading treatment - article 7, read together with article 2.
Remedy recommended	An effective remedy, including completion of the investigation into the author's treatment, if still pending, as well as compensation.
Due date for State party response	3 July 2006
Date of reply	26 July 2006

State party response

The State party states that it transpires from the materials of the criminal case file opened by the Prosecutor's Office of Tula Region on 18 November 1996 under article 171 of the Criminal Procedure Code (CPC) that this case was investigated fully and impartially. Fact-finding carried out at the preliminary investigation stage did not find any evidence to corroborate the author's allegations of ill-treatment. The Prosecutor determined that the detaining duty officer had acted in compliance with article 12 and 13 of the Law governing the militia that allowed militia officers to apply physical force to detain persons that committed an administrative offence. It concluded that the author, who was then heavily intoxicated, was detained while committing an administrative offence, and had sought to use force against the duty officer. Article 23 of the same Law exempts militia officers from liability for applying physical force when it is proportionate.

On 11 December 2001, the Central Prosecutor's Office of Tula decided to terminate criminal prosecution of the officers of the Proletarskiy District Office of Internal Affairs of Tula in the absence of a finding of *corpus delicti* in their actions (article 171 of the CPC). On 16 May 2006, the deputy prosecutor of the Central Prosecutor's Office of reopened the investigation. Since the criminal prosecution of the militia officers was terminated, the actions of unidentified persons were deemed to fall within the scope of *corpus delicti* of article 109, part 1, of the Criminal Code (infliction of death by negligence). On 18 May 2006, the criminal case No. 052-0172-96 was closed for lapse of time on the basis of article 24, part 1, paragraph 3, of the CPC as the investigation could not identify the persons who were suppose to have subjected the author to torture.

As for the Committee's findings under articles 2, 7 and 10 of the Covenant, the State party submits that, none of these articles were violated with regard to Zheikov. The criminal proceedings were initiated upon his request, the conduct of the investigation was monitored by the Office of the General Prosecutor, the criminal case was reopened a few times upon his request and all Zheikov's complaints and appeals were considered on time. The State party concludes that, in accordance with article 2 of the Covenant, it ensured an effective remedy to Zheikov. It explains that it was impossible to identify a person against whom the proceedings should be initiated, since Zheikov gave contradictory evidence as to the injuries caused and identity of the culprits.

The State party further submits that the author had not exhausted all domestic remedies. (This information was not provided by the State party in its submission on admissibility and the merits). Reference is made to various articles of the Civil Procedure Code which could have been availed of by the author.

Author's response	On 29 May 2007, the author reiterated his claims made in his communication and contested the State party's follow-up response. He also submits that he had sent complaints to the International Protection Centre and to the Proletarskiy District Prosecutor Office of Tula prior to mailing his complaint to the Committee.
Committee's Decision	The Committee regrets the State party's refusal to accept the Committee's Views and considers the dialogue ongoing.
State party	**SWEDEN**
Case	Alzery, 1416/2005
Views adopted on	25 October 2006
Issues and violations found	Failure to ensure the capacity to investigate the criminal responsibility of all relevant officials, domestic and foreign, for conduct in a breach of article 7 and to bring the appropriate charges - article 7, read alone and in conjunction with article 2 and breach of its obligations under article 1 of the Optional Protocol.
Remedy recommended	An effective remedy, including compensation ... the Committee welcomes the institution of specialized independent migration courts with power to review decisions of expulsion such as occurred in the present case.
Due date for State party response	6 February 2007
Date of reply	14 March 2007
State party response	The State party informed the Committee that on 1 March 2007, the Government repealed its decision of 18 December 2001 and turned over Mr. Alzery's request for a residence permit in Sweden to the Swedish Migration Board to be examined under the new Aliens Act of 2005. Furthermore, the Government decided to turn over Mr. Alzery's request for compensation to the Office of the Chancellor of Justice. The Government has instructed the Chancellor of Justice to handle his request and to attempt to reach an agreement with Mr. Alzery. The Chancellor is authorized to go beyond what is provided for under the legislation on claims for damages.
Author's response	On 15 May 2007, the author responded that he welcomed the decision of the government to a large extent. However, it remains to be seen whether and how his right to reparation will be realised. The author's request for diplomatic assistance from the Swedish government to enable him to leave Egypt was turned down by the government. On 9 May 2007, the Migration Board rejected the author's request for a residence permit and rejected counsel's

request for an oral hearing. It based its decision on a statement by the security police which said that its evaluation of the author's so-called terrorist links remain the same today as in 2001. The Board did not take into account any events subsequent to his expulsion on 18 December 2001. The author will appeal this decision to the government. The case will also be evaluated by the Supreme Migration Court. The author requests the Committee to take no decision on the submissions provided in this case until the domestic procedures have terminated. In addition, he notes that the State party did not comment on the lack of a criminal investigation against foreign agents or the fact that the investigation by the Ombudsman in practice created immunity for the Swedish police officers involved in the author's rendition. According to the author, no investigations have been undertaken by the State party.

State party	**TAJIKISTAN**
Case	Kurbanov, 1208/2003
Views adopted on	16 March 2006
Issues and violations found	Torture, forced confession, unfair trial, arbitrary arrest and detention, not informed promptly of charges - Articles 7; 9, paragraphs 1, and 2; 14, paragraphs 1, and 3 (g).
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Kurbanov with an effective remedy, which should include a retrial with the guarantees enshrined in the Covenant or immediate release, as well as adequate reparation. The State party is also under an obligation to prevent similar violations in the future.
Due date for State party response	9 July 2006
Date of reply	11 July 2006
State party response	The State party affirms that its Ministry of Foreign Affairs did not receive two Notes Verbales from OHCHR (22 October 2003 and 22 November 2005), and thus was unaware of the registration of the case and had no possibility to submit a reply. The State party submits two letters, one from the Supreme Court and one from the Office of the Prosecutor General, and informs the Committee that both institutions examined the Committee's Views and gave their opinion to the Governmental Commission on the State party's compliance with its international human rights obligations.

(a) “Conclusions” of the President of the Supreme Court of Tajikistan in relation to the case.

On 29 June 2006, the President of the Supreme Court recalled the facts of and procedure in the case and contended that the author’s guilt was established on the basis of corroborating evidence, and his conviction fitted the crimes committed. His arrest, on 28 October 2001, as well as all subsequent criminal-procedure acts, was lawful. There were no major procedural violations during the preliminary investigation or during the court trial. He concludes that the Committee’s findings were thus not confirmed. He admits that on 6 January 2001, Kurbanov was arrested unlawfully, but that the officers responsible received disciplinary sanctions for this. He contends that the author’s affirmation that his son’s subsequent arrest was due to the fact that they were disciplined is groundless. His son was arrested in relation to a criminal case that was opened on 28 October 2001, with the sanction of the First Deputy Prosecutor-General.

(b) Letter from the Prosecutor General’s Office, dated 30 June 2006
The Prosecutor’s Office extensively reiterates the facts of the criminal case and confirms the author’s guilt. It affirms the author’s allegations of unlawful detention in the beginning of 2006, but submits that those responsible were disciplined (names of 5 responsible given). A criminal case against them was initiated on 9 November 2001, and an inquiry was conducted into the author’s allegations that during his unlawful detention he was tortured and forced to confess guilt and that his family was persecuted to force them to withdraw their complaints. The investigation concluded that these allegations were groundless. In particular, as to the alleged torture, a medical examination was conducted and no marks of torture were revealed on the author’s body. This investigation was therefore closed, on 30 November 2002.

On 28 November 2001, Kurbanov was arrested on suspicion of robbery, and the same day he was interrogated as a suspect, in his lawyer’s presence. He was placed in custody on 29 November 2001 (this decision was sanctioned by the First deputy Prosecutor General). All subsequent procedural acts were held in his lawyer’s presence, and in the lawyer’s presence he confessed his guilt. During his detention, he did not make any complaint about the use of unlawful methods of investigation against him. In court, Kurbanov retracted his confession. His new version was examined and evaluated, and his guilt was confirmed by corroborating evidence. The court concluded that this was a defence strategy, aimed at limiting his liability.

Author's response Sent to the author on 26 September 2006 with a deadline of 26 November 2006 for comments.

Further action taken A follow-up meeting was held between the Special Rapporteur, State party representatives (Ambassador Aslov, First Secretary Isomatov) and the secretariat on 28 March 2007.

On the question of execution of complainants *after* registration of complaints and dispatch of interim measures requests, the Ambassador responded that the cases in question related to the situation obtaining prior to pronouncement of a moratorium on executions. There had been no executions since the moratorium, and the current moratorium on executions applied to ALL death penalty cases (exact date of announcement and entry into effect of moratorium to be communicated to the Rapporteur as soon as possible). There have been many instances of commutations of death sentences in the last two years, and according to the ambassador, the process of drafting legislation that would abolish capital punishment is ongoing.

On the question relating to the disclosure of burial sites of executed prisoners, the Ambassador noted that work was still ongoing on a change to the relevant legislation. The Rapporteur conveyed the importance for the government to respond fully on ALL registered cases, and noted that insufficiency of responses would lead to the complainants' allegations being taken as true. His delegation replied that this concern would be forwarded to Dushanbe and to the Inter-Ministerial Committee responsible for the implementation of Tajikistan's international obligations, including cooperation with human rights bodies. The Rapporteur suggested sending a model of a comprehensive State party reply to the head of the inter-ministerial committee. The delegation noted, in reply, that the government was already cooperating with the human rights component of UNTOP and would cooperate with any other United Nations agency designated as focal point for human rights matters after UNTOP's departure. Future training courses on complaints procedures would also be welcomed by the government.

The ambassador promised to solicit more detailed information from the capital on specific implementation details on each of the eight Views against Tajikistan finding violations of the Covenant. In that context, earlier availability of the Russian translations of Views would be an advantage. The ambassador pledged cooperation with the Committee and the Rapporteur for follow-up, and indicated that the Government would be prepared to accept a follow-up visit from the Rapporteur.

Committee's Decision	The Committee regards the State party's submission as unsatisfactory and considers the dialogue ongoing.
Case	Boymurodov, 1042/2001
Views adopted on	20 October 2005
Issues and violations found	Torture, forced confession, incommunicado detention, right to counsel - Article 7, 9, paragraph 3, 14, paragraph 3 (b), and (g).
Remedy recommended	Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author's son is entitled to an appropriate remedy, including adequate compensation.
Due date for State party response	1 February 2006
Date of reply	14 April 2006
State party response	The State party submits two letters, one from the Supreme Court and one from the Office of the Prosecutor General, and informs the Committee that both institutions have examined the Committee's Views and gave their opinion, at the request of the Governmental Commission on the State party's compliance with its international human rights obligations. The State party provides the decision of the Supreme Court which examined the Views. It studied the materials from the criminal case and established that during the preliminary investigation and court expertise no gross violations occurred of criminal or procedural legislation of Tajikistan concerning the facts of his illegal detention and violation of right to defence, mentioned in article 9 and 14 paragraph 3 (b) of the Covenant. It submits that in a statement on 10 October 2000, the author said that at present time he was not in need of a defence lawyer. From 9 November 2000, defence lawyer Yatimova K. participated in the preliminary investigation and trial and defended Boimudov at court. Concerning the alleged violations of articles 7 and 14 paragraph 3 (g), the Supreme Court concluded the following: the facts as set out in the State party's response to the Views; that the case file contains a power of attorney with the name of the author's lawyer, who represented the author during the investigation and trial, dated 9 November 2000; that with respect to the allegation of torture, a criminal case was opened by the Supreme Court on 31 July 2001, and was sent to the Prosecutor General's office, which opened a criminal case. This was closed on 5 November 2001. It concluded that the author's conviction was lawful and well-founded, and his conviction and sentence fair.

	The letter from the Prosecutor General, made similar arguments to that of the Supreme Court. However, he also stated that the criminal case on the torture allegation referred to above was re-opened (it is assumed since the Views).
Author's response	State party's response was sent to the author on 26 September 2006 with a deadline of 26 November 2006 for comments.
Further action taken	See above for information on a follow-up meeting that took place in March 2007.
Case	Dovud and Sherali Nazriev, 1044/2002
Views adopted on	17 March 2006
Issues and violations found	Torture, forced confession, unlawful detention, no legal representation at initial stages of the investigation, no notification of execution or burial site - Articles 6; 7; 9, paragraph 1; 14, paragraphs 1, 3 (b), (d), and (g) and breach of the Optional Protocol.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mrs. Shukurova with an effective remedy, including appropriate compensation, and to disclose to her the burial site of her husband and her husband's brother. The State party is also under an obligation to prevent similar violations in the future.
Due date for State party response	2 July 2006
Date of reply	13 July 2006
State party response	The State party submits two letters, one from the Supreme Court and one from the Office of the Prosecutor General, and informs the Committee that both institutions have examined the Committee's Views and gave their opinion, at the request of the Governmental Commission on the State party's compliance with its international human rights obligations. (a) Letter of the Chairman of the Supreme Court of Tajikistan. The Chairman of the Supreme Court recalls *in extenso* the facts/procedure of the case. It submits information provided by the State party prior to consideration of the case, including the fact that their requests for Presidential pardon were denied in March 2002, and that the death sentences were carried out on 23 June 2002 (NB: the case was registered in January 2002). Thus, the executions took place when the judgment became executory and all domestic judicial remedies were exhausted.

The examination of the criminal case file showed that the Nazrievs' guilt was established by much corroborating evidence (an extensive list of that evidence is provided, for example witnesses' testimonies, material evidence, and several experts' conclusions that were examined and evaluated by the court). According to the Chairman of the Supreme Court, the author's allegations about the use of torture by the investigators to force the brothers to confess guilt are groundless and contradict the content of the criminal case file and the rest of the evidence. There is no record in the criminal case file about any requests or complaints in relation to the assigned lawyers, no request to change the lawyers, and no complaints or requests from Nazrievs' lawyers about the impossibility to meet with their clients.

The Chairman of the Supreme Court rejects as groundless the author's allegations that both brothers were subjected to torture during the preliminary investigation, and that the court ignored their statements in this regard. He notes that according to the criminal case file, neither during the preliminary investigation nor in court did the brothers or their representatives make any torture claims (it is noted that the court trial was public and held in presence of the accused, their representatives, relatives, and other individuals). In addition, the brothers "did not confess guilt either during the preliminary investigation or in court and their confessions" were not used as evidence when establishing their guilt. Notwithstanding, the court has requested from the Detention Centre of the Ministry of Security (where the brothers were kept) to provide their medical records, and according to a response of 18 April 2001, it transpired that both brothers have requested different medical care during their stay, in relation to the diseases of hypertonia, "acute respiratory virus infection", grippe, caries, depressive syndrome. The brothers were examined on several occasions by medical doctors and have been given appropriate medical care. No marks of torture or ill-treatment were revealed during these examinations, nor have they complained about torture/ill-treatment during the medical examinations.

Finally, in relation to the author's allegation that she was not informed either of the date of execution nor of the burial place of authors, the Chairman refers the Committee to its law on the Execution of Criminal Penalties. He states that when the Supreme Court learnt that the brothers' had been executed, it informed the relatives.

	(b) Letter dated 14 June 2006, signed by the Deputy Prosecutor General. The content of this letter is very much similar to the information received from the Supreme Court, as summarized above, with identical conclusions.
Author's response	State party's response was sent to the author on 26 September 2006 with a deadline of 26 November 2006 for comments.
Further action taken	See above for information on a follow-up meeting that took place in March 2007.
Committee's Decision	The Committee regards the State party's submission as unsatisfactory and considers the dialogue ongoing.
State party	**UZBEKISTAN**
Case	Bazarov, 959/2000
Views adopted on	14 July 2006
Issues and violations found	Re. the author, articles 9, paragraph 3; 14, paragraph 1, read together with article 6, and the rights of his parents, Mr. and Mrs. Bazarov, under article 7.
Remedy recommended	An effective remedy, including information on the location where their son is buried and effective reparation for the anguish suffered.
Due date for State party response	7 December 2006
Date of reply	29 January 2007
State party response	The State party informs the Committee that in light of its Views the Supreme Court reviewed the evidence several times in the case against the author, but no violations of the law of criminal procedure were found. It states that pursuant to articles 475, 497-2, 498 and 516 of the Code of Criminal Procedure of Uzbekistan, court decisions may be delivered only to the parties to proceedings, namely, the person convicted, the victim, the civil claimant, the civil respondent, the defence lawyer and the procurator. Accordingly, it is not in keeping with current Uzbek legislation to provide the Human Rights Committee with the text of the judgement issued by the criminal division of the Supreme Court on 24 December 1999 concerning Mr. Bazarov's case.

Further action taken	On 30 October 2006, a meeting was held between Mr. Obidov, from the Permanent Mission of Uzbekistan, the Special Rapporteur on Follow-up to Individual Complaints and the Secretariat on 30 October 2006, at Palais Wilson. It was noted by the Special Rapporteur that seven cases have been decided to date against the State party and that the Committee awaits a follow-up response in two of them Sultanova, case No. 915/2000 and Bazarov, case No. 959/2000. The follow-up response in the latter case is not due until 7 December 2006. The State party's representative stated that he would request information from his capital on the follow-up response in Sultanova. As to the State party's responses in Nazarov (911/2000), Arutyunyan (917/2000), Hudoyberganova (931/2000) the State party representative expressed his surprise and unhappiness with the fact that these responses have been categorised as "unsatisfactory" in the Annual Report, he would wish to have some guidance from the Committee on how cases are so categorised and highlighted the importance of keeping the dialogue open between the Committee and States parties which would be inhibited by such characterization. The Rapporteur responded that the categorization of these responses is currently being reviewed by the Committee and requested the State party to bear with it until the review was complete. He indicated that follow-up responses like those in the two cases under consideration in which the State party has provided a considered response should not be considered unsatisfactory so as to keep the dialogue between the Committee and the State party open.
Committee's Decision	The Committee regrets the State party's refusal to accept the Committee's Views and considers the dialogue ongoing.
Case	Alexander Kornetov, 1057/2002
Views adopted on	20 October 2006
Issues and violations found	Torture, death penalty and unfair trial - articles 7 and 14, paragraph 3 (g).
Remedy recommended	Consideration of a reduction of his sentence and compensation.
Due date for State party response	30 January 2006
Date of reply	16 February 2007

State party response	The State party commented on the Committee's Views. It recalls the facts of the case, including the fact that on 19 February 2002, the Supreme Court commuted the author's death sentence to 20 years of imprisonment. It points out that the author's allegation that the investigators had subjected him to an unlawful investigation had been examined by the court and were not confirmed. His charges were correctly assessed under national law and his punishment was proportional to the gravity of the crimes committed. There are no grounds to challenge, under supervisory proceedings, the courts' decisions or to further reduce his prison term. The State party then lists parts of its legislation in relation to compensation of damages, and affirms that the author may appeal to court with a request to be paid reparations for the damages he allegedly suffered during the preliminary investigation and during the court trial.
Further action taken	See above for information on a follow-up meeting that was held in October 2007.
Committee's Decision	The Committee regrets the State party's refusal to accept the Committee's Views and considers the dialogue ongoing.