



**United Nations**

# **Report of the Human Rights Committee**

## **Volume II**

**Ninety-first session  
(15 October-2 November 2007)**

**Ninety-second session  
(17 March-4 April 2008)**

**Ninety-third session  
(7-25 July 2008)**

**General Assembly  
Official Records  
Sixty-third session  
Supplement No. 40 (A/63/40)**



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### **Note**

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**Annex V**

**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. 1149/2002, *Donskov v. Russian Federation*  
(Views adopted on 17 July 2008, ninety-third session)\***

<i>Submitted by:</i>	Mr. Vladimir Donskov (not represented by counsel)
<i>Alleged victim:</i>	Mr. Vladimir Donskov
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	18 February 2002 (initial submission)
<i>Subject matter:</i>	Fair trial; right to defence.
<i>Procedural issues:</i>	Level of substantiation of claims
<i>Substantive issue:</i>	Fair trial; independent tribunal; defence guarantees
<i>Articles of the Covenant:</i>	2; 7; 9; 14; 26
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 17 July 2008,*

*Having concluded* its consideration of communication No. 1149/2002, submitted to the Human Rights Committee by Mr. Vladimir Donskov under the Optional Protocol to the International Covenant on Civil and Political Rights,

---

\* 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, 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 decision.

*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. Vladimir Donskov, a Russian national born in 1969. He claims to be a victim of a violation by the Russian Federation of his rights under articles 2; 7; 9; 14; and 26, of the International Covenant on Civil and Political Rights. He is not represented by counsel.

#### **The facts as submitted by the author**

2.1 The author worked as an assistant Prosecutor in the Military Prosecutor's Office of the Krasnorechensk garrison of Khabarovsk city. His work consisted, inter alia, in conducting verifications in different military units of the area. In January 1996, he conducted an investigation in an army unit and found that individuals were substituting food from army stocks. During the inquiry, he received threats that his life "would be destroyed"; however, he did not pay attention to them at the time.

2.2 A criminal case against the author was opened on 21 March 1996. On 12 April 1996, he was charged with bribery. According to him, the criminal case was framed to punish him for the investigations conducted. The indictment act he was presented with allegedly did not mention the name of the prosecutor who had approved it. The author agreed to cooperate with the investigation, but on 5 July 1996, he was threatened by the investigators. As a result, he decided to confess guilt. He was then placed in the detention centre of Khabarovsk. He challenged the lawfulness of his detention, but the courts declared, on three different occasions, that it was lawful.

2.3 The author claims that during the investigation, pieces of evidence in his favour were removed or substituted from his criminal case by investigators and that others were ignored or not recorded. His requests to have factual issues clarified were rejected. He was also unable to examine his file in its entirety prior to the trial.

2.4 On 26 June 1997, the Khabarovsk Military Court found him guilty of having received a bribe as well as for an attempted receipt of a bribe and sentenced him to seven years imprisonment. The author challenges his conviction, claims that the court had no territorial jurisdiction to try him and had failed in its duty of impartiality and fairness. Neither the investigators nor the court interrogated several witnesses whose testimonies could have been relevant; witnesses against him gave often contradictory depositions;<sup>1</sup> the grounds for his conviction remained unclear; the court's conclusions were not based on the evidence examined; the court did not explain why it accepted some evidence and rejected other. Overall procedure was not conducted in accordance with the law. He also claims that several witnesses who had testified against him had an interest in the case.

2.5 At the beginning of the trial, the author requested to have the proceedings audio recorded, but his request was denied. The trial transcript was not prepared within the prescribed three day period, but only four months later, and its content was incorrect.<sup>2</sup> A number of documents



contained in the case file prepared during the preliminary investigation were substituted or disappeared, which shows that his criminal case was fabricated. He requested to have his case examined by three professional judges, but this request was also rejected and the court was composed of one judge and two assistants (assessors).

2.6 According to the author, the court based its decision on the fact that documents in relation to the inquiry of the food scam had been discovered in his office. In fact, these documents only showed that he was indeed conducting an inquiry and his superior knew about it but made a false deposition in court. The author further challenges the method of calculation of his family's income and expenses, as well as the experts' evaluation of certain items seized in his house allegedly purchased with money obtained through bribes.

2.7 The author contends that the trial court unlawfully based its conclusions partly on his confessions during the preliminary investigation. The court judgment indicated that he had confessed guilt freely, but this was refuted by the fact that, prior to 5 July 1996, he had claimed to be innocent. He also challenges the court's conclusion that on 5 July 1996, he was not in a state of "psychological affect". In fact, an expert had concluded that during his interrogation on that date, he was in a state of psychological emotion.

2.8 On 8 July 1997, the author filed an appeal against his sentence with the Military Court of the Far East [Military] District (FED hereafter). On 16 December 1997, the Court confirmed his sentence. The author claims that he had requested the Court to be present when his appeal was examined, but the decision was taken in his absence.

2.9 The author further appealed without success to the Supreme Court of the Russian Federation. He claims that the Supreme Court examined his complaint superficially, in violation of the requirements of national and international law.

2.10 On an unspecified date, the author submitted an application to the European Court of Human Rights, on the same facts. On 31 March 2000, the Court rejected his application as inadmissible *ratione temporis*.

### **The complaint**

3. The author claims that he is a victim of violations by the Russian Federation of his rights under articles 2; 7; 9; 14; and 26, of the Covenant.

### **State party's observations**

4.1 On 26 June 2003, the State party stated that the author had been found guilty of having received a bribe and of attempted bribery. The bribe received amounted to 17,5 million roubles, and was obtained through an intermediary (Mr. Ponamoriov), on 6 January 1996, from the chief of the Fuel and Lubricant Service of the Military Unit No. 51 480, Mayor Nikitin, in order to conceal the stealing and unlawful selling of some 19,000 litres of gasoline from the army stock. Furthermore, at the end of January 1996, the author learnt about a scheme for a food scam from Military Unit 52 786. Again acting through Mr. Ponamoriov, he attempted to blackmail 1,000 US dollars from the Unit's Supply Chief, Mr. Nitaliev, in order not to open an official investigation.

4.2 Both the preliminary investigation and the court trial were conducted in a comprehensive and objective manner. On 12 January 2001, the Presidium of the FED Court acceded to the Court Deputy Chairperson's request to review the case under a supervisory procedure. The previous judgements were modified, and the author was finally sentenced to five years imprisonment.

4.3 The State party adds that because of the author's numerous complaints, the legality and the grounds for his conviction were further examined on three occasions by the Supreme Court (in supervisory proceedings), and he was given motivated answers by several judges, including by the Supreme Court's Deputy Chairman.

4.4 According to the State party, the author's allegations in the context of the present communication do not contain any convincing arguments that would put the lawfulness of his conviction in doubt. His claims about the incompleteness of the preliminary investigation and of the court proceedings, his guilt not being established, the shortcomings in the conduct of the criminal procedure, the bias of the court when assessing evidence, etc., were contained in his appeal. They were duly considered by the courts, including by the Supreme Court, and were rejected. The author was given motivated decisions to the effect that these allegations were groundless.

4.5 Contrary to the author's allegations, all facts in relation to his criminal activities were confirmed by the testimonies given under oath by several witnesses (Messrs Ponomarev, Nikitin, Nitaliev, Gusarin, Kosilov, Padalki, Beznosov, Galuzion, and Besedin). The witnesses' depositions were consistent and concordant. The author's guilt was also established through documentary and other kinds of evidence.

4.6 The author's allegation that the witnesses who testified against him had an interest in the case was not confirmed in light of the rest of the evidence. In addition to those testimonies, the court took into account the author's confessions given during the preliminary investigation, which corroborate both the witnesses' depositions and the rest of the evidence. The allegation according to which he was forced to confess guilt is groundless, as shown by the video record of the interrogations. Furthermore, according to the psychologist's conclusion, at the moment of interrogation and during his confrontation with Mr. Ponomarev (on 5, 6, and 8 July 1996), the author was not in a state of "psychological affect", and thus he was able to understand correctly the content of the investigation acts, was aware of the importance of his depositions, and could control his speech. No specific psychological particularities were revealed that could lead to the author's self-incrimination. The author's allegations that he was subjected to unlawful methods of investigation were not confirmed by the materials in the criminal case file.

4.7 According to the State party, the decision to open a criminal case against the author was lawful and grounded. After the receipt of a report from the Military Prosecutor of the Krasnorechensk garrison about the bribery, the Military Prosecutor of the FED ordered the opening of the case and designated the investigation team. After the conduct of the preliminary investigation acts, the author was temporarily suspended from his functions and was asked to sign a document that he would not leave the country. When it later became clear that he had committed a serious crime, he was arrested. According to the State party, all proceedings were conducted in conformity with the Law on the Prosecutor's Office and the Russian Constitution.

4.8 The criminal case file reveals that Mr. Nitaliev had refused to give a bribe to the author, and after a consultation with a lawyer, he reported the situation to his superiors. The Military

Prosecutor of the garrison, Mr. Besedin, testified that on 19 March 1996, he was visited by a representative of the special services, who informed him that the author had received bribes and had attempted to receive bribes. The same day, the prosecutor interrogated several individuals in this connection, and on 21 March 1996, he reported to the FED Military Prosecutor. The author's claim that his superior's deposition was false does not correspond to the material in the criminal case file, and the courts correctly retained it as evidence.

4.9 The witnesses Gusarin, Nikitin, and Grigoriev gave concordant and consistent depositions, later corroborated by other evidence. The fact that the individuals who handed over the bribe did not recall the exact date and amount does not cast any doubt on the veracity of their depositions.

4.10 The State party further affirms that the court made a correct assessment of the analysis of the Donskov family's income and expenses for the period 1995 - March 1996. The data revealed that the family's expenses exceeded the income by an amount more or less corresponding to the money received as a bribe. Even though the analysis was approximate, it was based on data collected during the investigation. In court, this analysis was assessed in conjunction with other elements, and was taken into account because it corroborated the rest of the evidence. For this reason, the court rejected the author's request to order a new expert's assessment of his income and expenses.

4.11 Contrary to his allegations, the author was allowed to examine the content of his criminal file. On 21 February 1997, he was informed of the end of the preliminary investigation, and he was provided with the materials of the entire file. By 4 March 1997, however, he had only examined 167 pages of the first volume and refused to continue with the examination, presenting requests that were not provided by law. Following this, on 13 March 1997, the investigator, with the authorization of a prosecutor, extended the deadline for his examination of the file to 28 April 1997. The author thus studied the case file. This was confirmed by his signatures on the back of the totality of the documents and was not refuted by the author in court. Therefore, his allegations on the contents of the file and his inability to study it are groundless. The author's indictment act was properly prepared and filed in the criminal case file. It was signed both by the investigator and the approving prosecutor. A copy of it was provided to the author.

4.12 Contrary to what is alleged by the author, his and the witnesses' depositions were transcribed correctly. The author's observations on the trial transcript were examined on 20 November 1997. Some of them were accepted and included in the transcript's final version.

4.13 The State party contends that the author's guilt was fully established. The sanction imposed corresponded to both the circumstances of the case and the author's personality. The trial court had territorial jurisdiction to try the author. Therefore, the circumstances, the author's allegations in that regard are unfounded.

#### **Author's comments on the State party's observations**

5.1 On 26 August 2003, the author reiterated his initial allegations. On 5 December 2003, he presented his comments on the State party's observations. He contends that the State party did not present persuasive arguments in refutation of his allegations, and did not comment on his allegations regarding the incompleteness of the preliminary and the court's investigation, the breach of criminal procedure rules, and the bias of the court.

5.2 He insists that several witnesses who testified against him knew each other and had previously committed illegal activities together. He recalls that in the context of the verification that he had conducted, he had received threats.

5.3 The author challenges the probative value of several of the pieces of evidence against him, such as the analysis of his family's income, records on search and seizure acts, etc. He clarifies that he confessed guilt because the investigators threatened him that his wife could be subjected to violence, and that he, as a prosecutor, could be mistreated in detention. He was assured that if he confessed, he would be immediately released. He reiterates that he was in a state of psychological anxiety during the interrogation of 5 July 1996. During the investigation, all his complaints to the higher instances were referred to the authorities he was complaining against.

5.4 He further claims that it was unnecessary to place him in pretrial detention, because he did not abscond. The State party's argument that he was detained when it transpired that he had committed a serious crime is groundless, because the charges against him remained unchanged since the opening of the criminal case.

5.5 The author further contends that he had asked the court to call as a witness the secret services agent who allegedly informed his superior about the bribery, but this request was rejected. He reiterates that his superior gave false depositions, as he was aware of the verifications he had conducted.<sup>3</sup>

5.6 The author challenges the State party's reference to the witness Mr. Kosilov, and explains that the latter was in fact responsible for the actions of both Messrs Nikitin and Gusarin, and as such had an interest in the case. On the State party's observation on the witnesses' failure to remember the exact amount of the money and the date of the payment, the author affirms that article 68 of the Criminal Procedure Code requires that "... the occurrence of the crime (time, place, method, and the rest of the circumstances on the crime's event" must be proved in criminal proceedings. This, however, was not done in his case.

5.7 As to the contention that he had received detailed replies to all of his requests, the author notes that in fact he had received only two positive replies. He notes that in accordance with article 131 of the Criminal Procedure Code (2001), an accused cannot be refused the right to call witnesses, or to have other investigation proceedings conducted, if this could have an importance for the criminal case.

5.8 The author contends that the State party's statement that the investigator Mr. Morozov was interrogated as a witness is groundless.

5.9 He further challenges the State party's reference to an investigation record in relation to Mr. Ponomarev's affirmation that some of the items seized in the author's house were bought with the money from the bribe. He claims that this witness was not present during the items' purchase. Furthermore, neither the record nor the items in question were examined in court, despite which they were listed as evidence in the Judgment. He adds that he had vainly requested the investigators to have the individuals who had sold him the items interrogated, and that he had acquired the items in question before the incriminated events, as he told the court.

5.10 On 21 February 1997, the author was presented only the first volume of his criminal case. Contrary to the procedural rules, the case file's contents were not indexed nor were the pages

numbered. He complained about this and refused to continue with the examination. The investigator then numbered the pages in his presence. The author was subsequently presented other volumes, again without list of contents and with disordered pages. According to him, the absence of page numbers shows the investigators' intention to modify the criminal case file later on. In order to prevent this, he asked to have the pages numbered by pen and not by pencil. In reply, he was given a deadline to acquaint himself with his criminal case. He complained to the General Prosecutor's Office, which transmitted his complaint to the Prosecutor of the FED, i.e. the organ against whose actions he was complaining. The FED Prosecutor's Office rejected his claim.

5.11 The author reaffirms that the copy of the indictment act he was presented with did not disclose the signature of the approving prosecutor, and did not properly reflect his defence arguments or the arguments against him.

5.12 The author further reiterates that his sentence did not reflect correctly his and the witnesses' depositions, and the trial transcript was incorrect and unduly delayed. His comments on the trial transcript were examined by the court on 20 November 1997 in his absence, and only two points were modified. He requested to be informed of the motives for the court's decision, but never received them.

5.13 Finally, the author reiterates that he was tried by an incompetent tribunal. Although the incriminated acts were allegedly committed in the Krasnorechensk garrison, under the jurisdiction of the Krasnorechensk Military Court, he was tried by the Khabarovsk Garrison's Military Court.

#### **State party's further observations on the merits**

6.1 On 25 June 2004, the State party presented additional observations and noted that the author's comments constitute again an evaluation of the evidence used by the courts in assessing his guilt. It notes in particular the author's claims that witnesses against him had an interest in the case, that not all the necessary evidence had been assessed, that his confessions were obtained unlawfully, and that his guilt was not established. It affirms that these allegations were examined and rejected by the first and second instance courts, as well as by the Supreme Court.

6.2 All the author's requests, including those to have additional witnesses called, were examined by the judges and were given a motivated reply. The alleged bias of the court is not corroborated by evidence. The author's allegations that he confessed guilt because of the threats received were examined by the court with the assistance of a psychologist and were declared groundless. The sentence was based on evidence examined in court in the presence of all parties.

6.3 The author's statement on the inadmissibility of the analysis of his family's income and expenses is incorrect; the documentary analysis corresponds to the criminal procedure requirements.

6.4 Contrary to the author's allegations, all elements of the crime were established: time, place, and method of occurrence, as well as the amount of the bribe and the circumstances of its payment, as reflected in the judgement.

6.5 The author's right to examine the content of his criminal case file at the end of the investigation was not breached. Article 201 of the Criminal Procedure Code then into force, did not require a list of the file contents and did not specify the means by which the numbering of documents should be made. The use of pencil was not unlawful, and did not show the investigators' intention to modify the case file content at a later stage. The fact that the author has refused to acquaint himself with the content of the file cannot be considered as constituting a breach of the procedure law. Such acquaintance is a right and not an obligation for an accused. The author has refused to examine his criminal case file under an invented pretext.

6.6 Contrary to the author's allegations, his indictment act was established in accordance with the criminal procedure requirements then into force, and this was confirmed both by the prosecutor who endorsed it, and by the courts. The absence of the visa of the prosecutor who had approved the indictment act on the copy presented to an accused does not constitute a criminal procedure violation.

6.7 The decision to transmit the author's case to the Khabarovsk garrison Military Court was taken in accordance with the Criminal Procedure Code then into force, as the crime was committed on the territory of Khabarovsk city.

#### **Author's further comments**

7.1 The author presented further comments on 30 September 2004. On the State party's observations that all his allegations were examined by the courts, he reiterates that the trial court did not examine the totality of the evidence listed in the indictment act, that several of his requests were rejected without justification, and that the appeal court examined his case in his absence.

7.2 The author refers to several interpretative decisions of the Supreme Court, inter alia, on the motivation of court's refusals to seek clarifications on issues relevant to the case, on the assessment of evidence, equality of arms, the strict respect of the regulations for an exhaustive, full, and objective assessment of the criminal case materials, on the preparation of trial transcripts, on the role of the defence in a criminal case, on inadmissibility of evidence collected in violation of the law, and on the rights of the accused. He contends that the Supreme Court's directives in such rulings are compulsory for all courts, but that some ignore them in practice.

7.3 The author contends that in the context of his criminal case, the authorities seized materials confirming the illegal activities of some witnesses who testified against him, but these materials later disappeared. The fact of the seizure is confirmed by a record contained in his the case file. Nevertheless, a letter from a prosecutor indicates that the documents in question were not received by the Prosecutor's Office.

7.4 The court did not verify his statement regarding the registration of the investigations he had conducted against Messrs Nikitin and Padalki. This demonstrates that the court failed in its duty of objectivity and impartiality.

#### **State party's additional observations in connection with the author's comments**

8.1 On 20 May 2005, the State party submitted additional information. It observes that further verifications permitted to establish that the author's allegations on the lawfulness of his

conviction, raised in his numerous complaints, were examined by the prosecutor's office and the courts and were found to be groundless. The author's allegations regarding the occurrence, during the preliminary investigation and in court, of numerous violations of criminal procedure and international law, are groundless. His reference to Supreme Court's rulings do not relate to specific actions of investigators or courts in his case.

8.2 The State party further observes that the author's arguments that he was innocent and slandered by several witnesses, and forced to confess guilt, were examined on numerous occasions by the courts and were not confirmed. The author's attempt to put in doubt the admissibility and the trustworthiness of certain of the evidence used in court for the establishment of his guilt is based on a random interpretation of the national criminal procedure law.

8.3 The calculation of the income and the expenses of the author's family was based on documentary evidence and was not in contradiction with the requirements of the Criminal Procedure Code. This calculation was examined in court and was found to be objective and trustworthy.

8.4 The author's allegations on the territorial incompetence of the court in his case amount also to a random interpretation of the national law. Given that he was a prosecutor in the Krasnorechensk garrison, his case could not be examined by the Military Court of that garrison, pursuant to the provisions of the Criminal Procedure Code. For this reason, and in accordance with the Criminal Procedure Code requirements, the Chairperson of the FED Court transmitted the case to the Khabarovsk Garrison Court.

8.5 The State party finally contends that the author's allegations that he was not present during the examination of his appeal is also to be considered groundless, as the law then in force (article 335 of the Criminal Procedure Code) did not provide for a compulsory presence of an accused when his/her appeal is considered.

## **Issues and proceedings before the Committee**

### **Consideration of admissibility**

9.1 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.

9.2 The Committee notes, as required by article 5, paragraph 2 (a) of the Optional Protocol, that the same matter was submitted to the European Court of Human Rights (application No. 54976/00), and declared inadmissible *ratione temporis* on 31 March 2000. Accordingly, the Committee considers that it is not bound by the limitation of the above mentioned provision. It also notes, as required by article 5, paragraph 2 (b) of the Optional Protocol, that it is uncontested that domestic remedies have been exhausted.

9.3 The Committee has noted that the author invokes a violation of article 7 of the Covenant, without presenting a full explanation on that matter. In the absence of any further information in this respect, the Committee considers that this part of the communication is inadmissible as insufficiently substantiated under article 2 of the Optional Protocol.

9.4 The author claims that his arrest was unlawful, which raises issues under article 9 of the Covenant. The State party has not specifically commented on this allegation, but has explained that the author was only arrested when it became clear that he was suspected of a serious crime. The Committee further notes that, as submitted by the author himself, the lawfulness of his arrest was verified by the courts and found to be lawful. In the circumstances, and in the absence of any other information in this connection, the Committee considers that this part of the communication is insufficiently substantiated for purposes of admissibility and is accordingly inadmissible, under article 2 of the Optional Protocol.

9.5 The Committee has noted the author's claims on the alleged bias and partiality of the court in his case. The State party has replied that the court trial was conducted in a comprehensive and objective manner, that the case was reviewed on numerous occasions, including by the Supreme Court. It also affirmed that the author's allegations on the bias of the court were considered by the courts and the author was given a motivated answer to the effect that they were groundless.<sup>4</sup> In the absence of any further information in this regard, the Committee considers that this part of the communication is inadmissible, as insufficiently substantiated under article 2 of the Optional Protocol.

9.6 The Committee has noted the author's allegations on the groundlessness and unlawfulness of his indictment act and sentence, on the manner they, and the trial transcript, were drafted, on the manner the case was handled by the investigators and by the courts; as well as on the trial court's territorial incompetence; on the investigators' and court's refusals to respond to some of his requests, including the manner in which his case file was organised and presented to him, and the obstacles to the exercise of his right to examine the file; the way the court accepted or rejected evidence and assessed the circumstances of the case in general; on the refusal to call some witnesses; on the unreliability of certain witnesses who testified against him; on the manner his income/expenses were assessed; etc. It notes that the State party has refuted these allegations as groundless. The Committee notes that 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.<sup>5</sup> In this case, the Committee considers that in the absence before it of any court records, trial transcript, or other pertinent information, which would make it possible to verify whether the trial in fact suffered from the defects alleged by the author, this part of the communication is inadmissible under article 2 of the Optional Protocol, as insufficiently substantiated.

9.7 The author has also invoked a violation of his rights under article 26 of the Covenant, without presenting further argumentation. In the absence of any other pertinent information in this respect, the Committee considers that this part of the communication is inadmissible under article 2 of the Optional Protocol, as insufficiently substantiated.

9.8 The Committee decides that the remaining part of the author's allegations relating to his inability to be present when his appeal was considered, raising issues under articles 2 and 14, paragraph 3 (d), of the Covenant have been sufficiently substantiated for purposes of admissibility.



## Consideration on the merits

10.1 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.

10.2 The author claims that his right to defence was violated because despite his request to be present, his appeal was examined in his absence by the appeal court. The State party replied that the Criminal Procedure Code then into force did not provide for the compulsory presence of an accused before the appeal instance. The Committee notes that the material before it does not permit it to conclude that in this case, the appeal court failed to duly examine all facts and evidence of the case, as well as the first instance judgment. In the absence of any further relevant information in this respect, the Committee considers that the facts as presented do not amount to a violation of the author's rights under article 14, paragraph 3 (d) of the Covenant.

10.3 In light of the above conclusion, the Committee does not find it necessary to examine separately the author's allegations under article 2 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of the rights under the Covenant invoked by 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 present report.]

## Notes

<sup>1</sup> The author affirms, in particular, that the witnesses who allegedly delivered the bribe could not remember the exact amount and the date of delivery.

<sup>2</sup> The author contends that the transcript did not reflect properly his requests, and sometimes the meaning of the record was contrary to what was in fact said in court. Some witnesses' depositions reproduced the information contained in the records of their interrogations during the preliminary investigation. The court proceedings were allegedly also not properly reflected.

<sup>3</sup> The author contends that the witness Mr. Padalki has testified in court that when he was giving written depositions, his superior, Mr. Besedin, had entered in the office and saw him there.

<sup>4</sup> See paragraphs 4.2-4.4 above.

<sup>5</sup> See, inter alia, communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, para. 6.2.

## APPENDIX

### **Individual opinion of Committee member Ms. Ruth Wedgwood**

The author - who is a Russian military lawyer convicted for taking bribes in the course of his official duties - has challenged the fairness of his criminal trial on a variety of points. The Committee has concluded that the pleadings as filed do not substantiate most of his claims of error.

But the Committee has properly noted that one issue is admissible, namely, the author's complaint that he was improperly excluded from the hearing of his appeal from the criminal conviction. (See Views of the Committee, paragraph 2.8.)

In answer to this claim, as the Committee notes, the State party simply argues that "the Criminal Procedure Code then in force did not provide for the compulsory presence of an accused before the appeal instance". (See Views of the Committee, paragraph 10.2.)

But this restatement of positive law does not address the question of "equality of arms". As the Committee has held on many occasions, the defence in a criminal proceeding must be afforded an adequate chance to make its case. A one-sided appellate argument, in which the procurator appears but the defendant and his counsel are excluded, would not seem to be consistent with the standard of equality of arms, and the requirements of article 14, paragraph 5 of the Covenant.

It is also of interest that the Criminal Procedure Code applicable at the time may itself guarantee both the defendant and even third parties a right to be present for an appeal. See Criminal Procedure Code of the Russian Federation, 15 February 1997, article 335, paragraph 1: "During review of a case on appeal, the procurator gives opinions about the legality and evidentiary basis of the adjudication. During the review of a case on appeal, the defendant may participate."

See also article 335, paragraph 2 of the Criminal Procedure Code: "A question about the participation of a defendant in a proceeding of review of a case on appeal is allowed by this court, and while appearing in this court proceeding, the defendant in every case is allowed to give explanations."

As to third party participation, article 335, paragraphs 3 and 4, also note that "During the review of the case on appeal, other parties as indicated in article 325 of the statute may participate", and that "Non-appearance of the above-mentioned persons who were duly notified about the date of the review does not bar review of the case."

In the opinion issued in the author's case on 16 December 1997, the Russian Military Court of the Far East District stated in the opening paragraphs that the court "heard the report of the colonel of justice and conclusions of the head of the department of military prosecutions of the Far East District". The State party has not claimed that this "report" was merely a submission on the papers. The appearance of a defendant and his counsel at an appellate hearing in which the State party also appears is important, because it permits both parties to answer questions that arise during the colloquy on an equal basis.

A military justice system may face exigencies that are different from those of a civilian court system. But there is no argument by the State party that they could not practicably produce the defendant during the hearing of his appeal, only that they didn't have to. That may have been Russia's national law, but it does not answer the question of what the Covenant demands.

*(Signed):* Ms. 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 present report.]

**B. Communication No. 1150/2002, *Uteev v. Uzbekistan*  
(Views adopted on 26 October 2007, ninety-first session)\***

<i>Submitted by:</i>	Ms. Roza Uteeva (not represented by counsel)
<i>Alleged victim:</i>	Mr. Azamat Uteev (the author's brother, deceased)
<i>State party:</i>	Uzbekistan
<i>Date of communication:</i>	7 January 2003 (initial submission)
<i>Subject matter:</i>	Imposition of death sentence after unfair trial with resort to torture during preliminary investigation
<i>Procedural issues:</i>	Evaluation of facts and evidence; substantiation of claim
<i>Substantive issue:</i>	Torture; unfair trial; arbitrary deprivation of life
<i>Articles of the Covenant:</i>	6; 7; 9; 10; 14; 16
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 26 October 2007,*

*Having concluded* its consideration of communication No. 1150/2003, submitted to the Human Rights Committee on behalf of Mr. Azamat Uteev 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:*

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

1.1 The author of the communication is Ms. Roza Uteeva, an Uzbek national of Kazakh origin. She submits the communication on behalf of her brother, Azamat Uteev, also an Uzbek national of Kazakh origin, born in 1981, who at the time of submission of the communication was awaiting execution in Tashkent, after being sentenced to death by the Supreme Court of the

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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. 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.

Republic of Karakalpakstan (Uzbekistan) on 28 June 2002. She claims that her brother is a victim of violations by Uzbekistan of his rights under article 6; article 7; article 9; article 10; article 14, paragraphs 1, 2, and 3; and article 16, of the Covenant. She is unrepresented.

1.2 When registering the communication on 7 January 2003, 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 brother's execution while his case was under examination. On 16 July 2003, the State party informed the Committee that Mr. Uteev's execution had already been carried out, without however providing the exact date of execution.

### **Factual background**

2.1 On 28 June 2002, Mr. Azamat Uteev was found guilty and sentenced to death by the Supreme Court of the Republic of Karakalpakstan (Uzbekistan), for having murdered with particular violence one Saira Matyakubova (a minor), and having robbed money, jewellery, and other items for a total of 670, 120 Uzbek sum from her parents' apartment, in the morning of 3 April 2002. After having committed the murder and the robbery, and in order to conceal his actions, he set fire to the apartment, posing a threat to the life of others, and causing damage to the victim's parents equal to 5,824,000 sum. On 6 August 2002, the judgment was reviewed by the appeal body of the Karakalpakstan Supreme Court, which confirmed the death sentence. On 26 November 2002, the Supreme Court of Uzbekistan also reviewed the case and confirmed the death sentence.

2.2 The author claims that her brother did not commit the murder of which he was convicted. He was beaten and tortured by investigators and thus forced to confess guilt. Furthermore, she claims that her brother's sentence was particularly severe and unfounded and that his punishment did not correspond with his personality. He was positively assessed by his neighbours and documents to this effect were submitted to the court.

2.3 The author refers to a ruling of the Supreme Court of Uzbekistan of 1996, according to which evidence obtained through unlawful methods is inadmissible. This was not respected in her brother's case. She claims that her numerous complaints to different institutions (Presidential administration, Ombudsman, General Prosecutor's Office, Supreme Court of Uzbekistan) about the irregularities committed by the investigators remained unanswered or were simply sent to the same service against whose actions she was complaining about.

2.4 The author contends that in court, her brother claimed that he was innocent and that he was initially interrogated as a witness in relation to the crimes but was later arrested. Officials from the District Unit of the Ministry of Internal Affairs and the Prosecutor's Office beat and tortured him, in the absence of a defence counsel. In describing the methods of torture used, he allegedly claimed that he was forced to wear a gas mask with obstructed air access and was thus prevented from breathing; he was also placed in salt water. According to the author, the court rejected her brother's claims, considering that they constituted a defence strategy to avoid criminal liability.

2.5 According to the author, the investigators and the court examined her brother's criminal case superficially and in a biased manner. In particular, the investigator did everything possible

to avoid the engagement of the criminal liability of one Rinat Mamutov (a former colleague of the father of the murdered Matyakubova), who, according to the author, had committed the murder.

2.6 The author claims that pursuant to article 23 of the Uzbek Criminal Procedure Code, it is not incumbent on the accused to prove his/her innocence, and any remaining doubts are to his/her benefit. The court, however, did not comply with these requirements in her brother's case. The sentence was based on indirect evidence collected by the investigators that could not be confirmed in court, whereas evidence that could establish Uteev's innocence was lost during the investigation. In particular, the author contends that the record in relation to the examination of the crime scene mentioned that Uteev had stabbed the victim several times with a knife. According to her, her brother's hair, hands, and clothes should have disclosed blood marks. However, no expert's examination of his hair, hands, or of the substance under his nails was ever carried out, although this was crucial in establishing his guilt.

### **The complaint**

3. The author claims that her brother is a victim of violations by Uzbekistan of his rights under article 6; article 7; article 9; article 10; article 14, paragraphs 1, 2, and 3; and article 16, of the Covenant.

### **State party's observations and absence of author's comments thereon**

4.1 The State party presented its observations on 16 July 2003 and 12 October 2005. It recalls that the alleged victim was sentenced to death by the Supreme Court of the Republic of Karakalpakstan on 28 June 2002, for robbery, premeditated murder, and deliberate destruction of property causing significant damages. On 6 August 2002, the appeal body of the Karakalpakstan Supreme Court confirmed the sentence. According to the State party, Mr. Uteev's guilt in committing the offences was proven, his illegal acts were duly classified under the law in force, and his punishment was determined after taking into account information on his personality and the public danger of the crimes he had committed. The State party states that the death sentence of the alleged victim has already been carried out, without however providing the exact date of the execution.

4.2 The author did not present comments on the State party's observations, in spite of three reminders.

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

5.1 When submitting her communication on 7 January 2003, the author informed the Committee that at that point, her brother was on death row. On 3 February 2003, she submitted a written authorization to act on behalf of Mr. Uteev that was signed by him, on 14 January 2003, i.e. subsequently to the transmittal to the State party of the Committee's request not to carry out the alleged victim's execution while his case is under consideration. On 16 July 2003, the State party informed the Committee that the alleged victim's execution had been carried out, without providing the date of execution. The Committee notes that it is uncontested that the execution in question took place despite the fact that the alleged victim's 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<sup>1</sup> 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.

5.2 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 brother 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.

5.3 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. Azamat Uteev, undermines the protection of Covenant rights through the Optional Protocol.<sup>2</sup>

## **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, 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.

6.3 The Committee has noted the author's claims that her brother's rights under articles 9 and 16 of the Covenant, have been violated. In the absence of any other pertinent information in this respect, this part of the communication is deemed inadmissible, as insufficiently substantiated for purposes of admissibility, under article 2 of the Optional Protocol.

6.4 The Committee has noted that the author's allegations about the manner in which the courts handled her brother's case and qualified his acts, may raise issues under article 14, paragraphs 1 and 2, of the Covenant. It observes, however, that 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.<sup>3</sup> In this

case, the Committee considers that in the absence in the case file of any court records, trial transcript, or other pertinent information, which would make it possible to verify whether the trial in fact suffered from the defects alleged by the author, this part of the communication is inadmissible under article 2 of the Optional Protocol as insufficiently substantiated.

6.5 The Committee considers that the author's remaining allegations, which appear to raise issues under article 6; article 7; article 10; 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**

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 has claimed that her brother was beaten and tortured by investigators to force him to confess guilt in the murder and other crimes. In court, he retracted his initial confessions made during the investigation, and explained that they were obtained under beatings and torture. The court rejected his claim as constituting a defence strategy aimed at avoiding criminal liability. These allegations were brought to the attention of the Supreme Court of Uzbekistan and were rejected. 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.<sup>4</sup> In this case, the State party has not specifically, by way of presenting the detailed consideration by the courts, or otherwise, refuted the author's allegations nor has it presented any particular information, in the context of the present communication, to demonstrate 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 brother's rights under article 7 and article 14, paragraph 3 (g), of the Covenant.

7.3 In light of the above finding, the Committee does not find it necessary to address separately the author's claim under article 10 of the Covenant.

7.4 The Committee recalls<sup>5</sup> 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, Mr. Uteev'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, 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 brother's rights under article 7 and article 14, paragraph 3 (g), read together with article 6, paragraph 2, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Ms. Uteeva 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 180 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 present report.]

### Notes

<sup>1</sup> See, inter alia, *Piandiong v. the Philippines*, communication No. 869/1999, Views adopted on 19 October 2000, paras. 5.1-5.4; *Shevkkhie Tulyaganova v. Uzbekistan*, communication No. 1041/2001, Views adopted on 20 July 2007, paras. 6.1-6.3; *Davlatbibi Shukurova v. Tajikistan*, communication No. 1044/2002, Views adopted on 17 March 2006, paras. 6.1-6.3.

<sup>2</sup> See, inter alia, *Davlatbibi Shukurova v. Tajikistan*, communication No. 1044/2002, Views adopted on 17 March 2006, paras. 6.1-6.3.

<sup>3</sup> See, inter alia, communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, para. 6.2.

<sup>4</sup> General comment No. 20 on article 7, (1992) [44], para. 14.

<sup>5</sup> See, for example, *Conroy Levy v. Jamaica*, communication No. 719/1996, and *Clarence Marshall v. Jamaica*, communication No. 730/1996.

**C. Communication No. 1186/2003, *Titiahonjo v. Cameroon*  
(Views adopted on 26 October 2007, ninety-first session)\***

<i>Submitted by:</i>	Dorothy Kakem Titiahonjo (represented by counsel, Mr. Albert W. Mukong)
<i>Alleged Victim:</i>	Mathew Titiahonjo (deceased) and Dorothy Kakem Titiahonjo
<i>State party:</i>	Cameroon
<i>Date of communication:</i>	31 July 2002 (initial submission)
<i>Subject matter:</i>	Arbitrary detention torture and death of member of allegedly secessionist organization
<i>Procedural issue:</i>	State party failure to cooperate
<i>Substantive issues:</i>	Arbitrary detention; arbitrary deprivation of life; cruel and inhuman treatment; freedom of opinion and association
<i>Articles of Covenant:</i>	2, paragraphs 3 (a) and 3 (b); 6 paragraph 1; 7; 9, paragraphs 1-4; 19; 22; 27
<i>Articles of Optional Protocol:</i>	1; 2; 3; 4; and 5, paragraphs 1 and 2 (a) and (b)

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

*Meeting on 26 October 2007,*

*Having concluded* its consideration of communication No. 1186/2003, submitted to the Human Rights Committee by Dorothy Kakem Titiahonjo, on behalf of herself and her deceased husband, Mathew Titiahonjo, 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 her counsel,

*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. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, 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 Dorothy Kakem Titiahonjo, wife of the alleged victim, Mathew Titiahonjo, a citizen of Cameroon born in 1953. She claims that her husband was the victim of violations by Cameroon of his rights under article 6 paragraph 1, article 7; article 9, paragraphs 1, 2, 3 and 4; article 19, paragraphs 1 and 2; article 22, paragraph 1; and article 27 of the International Covenant on Civil and Political Rights. While the author alleges a violation of article 3 (a) and (b), it transpires that she means article 2, paragraph 3 (a) and (b), of the Covenant, read in conjunction with the above articles. She also claims to be a victim herself of violation by Cameroon of article 7 of the Covenant. The Optional Protocol entered into force for Cameroon on 27 September 1984.

1.2 The communication was sent to the State party for comments on 2 June 2003. Reminders were sent on 30 October 2006 and 31 May 2007. On 11 July 2007, the State party indicated that a response would be forthcoming without delay. At the time of the adoption of the Views, the Committee had not received any response from the State party.

### **The facts as submitted by the author**

2.1 On 19 May 2000, at 5:30 a.m., while the author and Mr. Titiahonjo were sleeping, a group of police officers (“gendarmes”) broke into their house and began beating Mr. Titiahonjo with an iron rod.

2.2 The author herself was at the time in an advanced state of pregnancy; she was also mistreated by the officers. She was dragged out of bed and pushed into the gutter and also slapped. The police officers stated that they were looking for a gun. While they were in the house they took 300,000 Frs. that the family had saved in view of the forthcoming childbirth. No gun was found, but the officers promised to return.

2.3 On 21 May 2000, the same police officers including one Captain Togolo came in a car which stopped in front of the author’s house. They took Mr. Titiahonjo to the Gendarmerie cell. There, he was beaten and forced to sleep on the bare floor naked. He was beaten on the soles of his feet and on his head. As a result of his swollen feet, he could not stand up. The captain refused to give him any food and the author was not allowed to bring him any. Mr. Titiahonjo asked why he was arrested but he received no answer.

2.4 On several occasions in June 2000 she went to the police station to give her husband some food but she was “chased” away. On 24 June 2000 the author went to the police station and saw Captain Togolo beat her husband but she was not allowed to visit him. The gun that the officers were looking for was found in the street on or about 25 June 2000. Mr. Titiahonjo, however, continued to be held incommunicado and to be ill-treated. As an answer to the author’s question why Mr. Titiahonjo was still being beaten after they had found the gun, Captain Togolo replied that it was because the victim belonged to the Southern Cameroon National Council (SCNC), which he qualified as a “secessionist organization”.

2.5 On an unspecified date, after a complaint filed by the author, a prosecutor ordered the release of Mr. Titiahonjo, but Captain Togolo refused to comply. Following this incident the author was taken to hospital where she prematurely gave birth to twins. Mr. Titiahonjo was transferred to Bafoussam military prison. In Bafoussam, physical ill-treatment stopped but

Mr. Titiahonjo continued to suffer moral and psychological torture. Captain Togolo told him that he would never see the twins for he was going to be killed. He also had to provide for himself and live on his own supplies.

2.6 In Bafoussam prison, meningitis, cholera and cerebral malaria claimed the lives of 15 inmates between 10 and 15 September 2000. The cells were unventilated and were infested with bed bugs and mosquitoes.

2.7 In the morning of 14 September 2000 Mr. Titiahonjo complained of a stomach ache and asked for medication. However, the prison nurse could not enter his cell as no guard on duty had a key to the cell. Mr. Titiahonjo continued to call for help throughout the day, but when his cell was finally opened at 9 p.m. the same day, he was already dead. His remains were taken to the mortuary and he was buried in his home town, but no post mortem was allowed by the police officers who supervised his detention. The family requested an autopsy of the body but instead, the coffin was sealed and the request was denied; no one was permitted to see the body.

### **The complaint**

3.1 The author alleges a violation of article 2, paragraph 3 (a) and (b), of the Covenant, read together with articles 6 and 7 on the grounds that Cameroon does not provide any remedy for acts such as torture and subsequent death, as in the case of her husband.

3.2 She alleges a violation of article 6 of the Covenant, as her husband was arbitrarily deprived of his life while in custody.

3.3 She alleges a violation of article 7 of the Covenant on account of the treatment she and her husband were subjected to between 19 May and 14 September 2000, and during her husband's detention in the Gendarmerie cell and at Bafoussam military prison.

3.4 The author alleges a violation of article 9 paragraphs 1, 2, 3, and 4, as her husband was never served with an arrest warrant. Charges were never brought against him, and he was never tried. In addition, Captain Togolo disregarded the release order issued by the prosecutor.

3.5 The author alleges a violation of article 19 in that Captain Togolo maintained that Mr. Titiahonjo belonged to the SCNC, an allegedly "secessionist organization". There is no law that prohibits membership in the SCNC and for this same reason the author also alleges violations of articles 22 and 27, as the SCNC is a linguistic minority in the State party and suffers persecution on that account.

3.6 The author claims that because her husband's detention involved the Executive and the military, she could not sue or take action domestically, as required under article 5, paragraph 2 (b), of the Optional Protocol. To file a civil suit, she would have had to pay costs in addition to the 5 per cent deposit of the award claimed in a civil suit.

### **Absence of State party cooperation**

4. On 2 June 2003, 30 October 2006 and 31 May 2007, 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, in spite of a note from the State party dated 11 July 2007 to the effect that such information would be submitted forthwith. It 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.

## **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.

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 recalls that the author filed a complaint on behalf of her husband and that the State Prosecutor's order to release her husband was never implemented. In these circumstances, it could not be held against the author if she did not petition the courts again for the release of her husband or for the mistreatment she suffered from herself. In the absence of any pertinent information from the State party, the Committee concludes that it is not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

5.4 The author has claimed violations of articles 19, 22 and 27, on account of her husband's membership in the SCNC. The Committee considers that the author has not sufficiently substantiated, for purposes of admissibility, how her husband's rights under these provisions were violated by virtue of his detention. The Committee therefore declares them inadmissible under article 2 of the Optional Protocol.

5.5 The Committee finds the author's remaining claims of absence of effective remedies under article 2, paragraph 3 (a) and (b); of arbitrary deprivation of her husband's life under article 6; of violations of article 9, paragraphs 1 to 4 in her husband's case; and of violations of article 7 in the case of her husband and her own case, admissible.

### **Consideration of the merits**

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

6.2 The author contends that her husband's death in custody amounts to a violation of article 6 which requires a State party to protect the right to life of all persons within its territory and subject to its jurisdiction. In the present case, the author claims that the State party failed to

protect the right to life of her husband by (a) failing to allow a nurse access to his cell when he was clearly severely ill, and (b) condoning life-threatening conditions of detention at Bafoussam prison, especially the apparently unchecked propagation of life-threatening diseases. The State party has not refuted these allegations. In these circumstances, the Committee finds that the State party did not fulfil its obligation under article 6, paragraph 1, of the Covenant, to protect Mr. Titiahonjo's right to life.

6.3 The author claims that her husband's rights were violated under article 7 of the Covenant, because of (a) the general conditions of detention, (b) the beatings he was subjected to, (c) the deprivation of both food and clothing in detention at the Gendarmerie cell and at Bafoussam prison, and (d) the death threats he received and the incommunicado detention he suffered both in the Gendarmerie cell and at Bafoussam prison. The State party has not contested these allegations, and the author has provided a detailed account of the treatment and beatings her husband was subjected to. In the circumstances, the Committee concludes that Mr. Titiahonjo was subjected to cruel, inhuman and degrading treatment, in violation of article 7 of the Covenant.

6.4 The author also claims violation of article 7 on her own behalf. She was in an advanced state of pregnancy and she alleges that she suffered from the treatment she and her husband were subjected to. She was mistreated by the police and pushed into the gutter and slapped when they arrested Mr. Titiahonjo on the 19 May 2000. She was not allowed to visit her husband and was "chased" away when she visited the police station to give him food. The Committee finds that in the absence of any challenge to her claim by the State party, due weight must be given to the author's allegation. The Committee furthermore understands the anguish caused to the author by the uncertainty concerning her husband's fate and continued imprisonment. The Committee concludes that under the circumstances she too is a victim of a violation of article 7 of the Covenant.

6.5 With regard to the claim under article 9, paragraph 1, it transpires from the file that no warrant was ever issued for Mr. Titiahonjo's arrest or detention. On 25 June 2000, Captain Togolo informed the author that her husband was kept in prison purely because he was a member of the SCNC. There is no indication that he was charged with a criminal offense at any time. In the absence of any relevant State party information, the Committee considers that Mr. Titiahonjo's deprivation of liberty was arbitrary and in violation of article 9, paragraph 1.

6.6 The author claims violations of article 9, paragraphs 2, 3 and 4. Nothing suggest that Mr. Titiahonjo was ever informed of the reasons for his arrest, that he was ever brought before a judge or judicial officer, or that he ever was afforded the opportunity to challenge the lawfulness of his arrest or detention. Again, in the absence of relevant State party information on these claims, the Committee considers that Mr. Titiahonjo's detention between 21 May and 14 September 2000 amounted to a violation of article 9, paragraphs 2, 3 and 4, 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 opinion that the facts before it reveal violations by Cameroon of article 6 paragraph 1, article 7 article 9, paragraphs 1, 2, 3 and 4 of the Covenant and articles 6 and 7 read together with article 2, paragraph 3 of the Covenant on account of Mr. Titiahonjo and violation of article 7 in regard to the author herself.

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, including compensation and institution of criminal proceedings against all those responsible for the treatment of Mr. Titiahonjo upon arrest and in detention and his subsequent death, as well as against those responsible for the violation of article 7 suffered by the author herself. The State party is under an obligation to prevent similar violations 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 180 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 in Arabic, Chinese and Russian as part of the present report.]

**D. Communication No. 1205/2003, *Yakupova v. Uzbekistan*  
(Views adopted on 3 April 2008, ninety-second session)\***

<i>Submitted by:</i>	Ms. Zinaida Yakupova (not represented by counsel)
<i>Alleged victim:</i>	The author's husband, Mr. Zholmurza Bauetdinov
<i>State party:</i>	Uzbekistan
<i>Date of communication:</i>	8 October 2003 (initial submission)
<i>Subject matter:</i>	Imposition of death penalty after unfair trial and on basis of confession obtained under torture in another country.
<i>Procedural issue:</i>	Lack of substantiation of claim.
<i>Substantive issues:</i>	Torture, cruel, inhuman or degrading treatment or punishment; right to life; right to seek pardon or commutation; right to be presumed innocent; right not to be compelled to testify against oneself or to confess guilt.
<i>Articles of the Covenant:</i>	6; 7; 14, paragraphs 2 and 3 (g)
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 3 April 2008,*

*Having concluded* its consideration of communication No. 1205/2003, submitted to the Human Rights Committee on behalf of Zholmurza Bauetdinov 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. 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**

1.1 The author of the communication is Ms. Zinaida Yakupova, an Uzbek national born in 1969. She submits the communication on behalf of her husband, Zholmurza Bauetdinov, an Uzbek national born in 1960, who at the time of submission of the communication was detained in investigation ward No. 9 in Nukus, Karakalpakstan region (Uzbekistan), awaiting execution following a death sentence imposed on him by the Supreme Court of Karakalpakstan on 15 July 2003. She claims that her husband is a victim of violations by Uzbekistan<sup>1</sup> of his rights under article 6; article 7 and article 14, paragraph 3 (g) of the Covenant. In her comments on the State party's observations, the author added claims related to article 14, paragraph 2, of the Covenant. She is not represented.

1.2 Under rule 92 (old rule 86) of its rules of procedure, the Committee, acting through its Special Rapporteur for new communications and interim measures, requested the State party, on 9 October 2003, not to carry out the execution of the author's husband, so as to enable the Committee to examine her complaint. By note of 30 October 2003, the State party informed the Committee that it acceded to the request for interim measures. On 28 March 2008, the State party forwarded information that on 29 January 2008, the Supreme Court of Uzbekistan had commuted Mr. Bauetdinov's death sentence to life imprisonment.

### **Factual background**

2.1 During the night of 2 to 3 December 2001, six members of the Sarmanov family, including the head of the family, Iskander Sarmanov, were murdered in their home in Almaty, Kazakhstan. Their savings were stolen and Sarmanov's 13 year old daughter was raped in front of her 10 year old sister, before being killed. Sarmanov's younger daughter survived the attack but sustained serious bodily injuries.

2.2 On 6 June 2002, the author's husband, a classmate of Sarmanov who stayed with the Sarmanov family in Almaty in November-December 2001, was arrested at the house of another friend in Nukus (Uzbekistan), by officers of the Criminal Investigation Department, on suspicion of murdering the Sarmanov family. Mr. Bauetdinov was kept in Uzbek custody before being involuntarily transferred, on an unspecified date, to Kazakhstan,<sup>2</sup> where a pretrial investigation on his case was conducted for two months. In its course, he was forced to testify against himself by investigators of the Kazakh Main Police Department. During the time he spent in Kazakhstan, he was subjected to physical violence, which included being hung upside-down for up to six hours, being awoken at night by three to four masked individuals and being beaten up by them until losing consciousness. Each time he lost consciousness, he was administered an injection by a doctor to awaken him. He was deprived of food and water. Unable to withstand the torture, Mr. Bauetdinov admitted to have murdered the Sarmanov family. In December 2002, he was returned to Nukus (Uzbekistan). On an unspecified date, he was charged in Uzbekistan with attempted premeditated murder under aggravating circumstances (article 25 and article 97, part 2, of the Criminal Code), premeditated murder under aggravating circumstances (article 97, part 2), robbery committed with infliction of serious bodily harm (article 164, part 3) and rape of a minor person under the age of 14 (article 118, part 4). He was brought to the Prosecutor's Office, where his criminal case file was translated into the Karakalpak language and transmitted to the court.

2.3 During the proceedings in the first instance court in Uzbekistan, i.e. the Supreme Court of Karakalpakstan, Mr. Bauetdinov complained about having been forced to admit guilt under torture during the pretrial investigation in Kazakhstan. He requested the court to exclude his self-incriminating testimony as evidence. The author submits that the court disregarded her husband's request, in violation of article 7 and article 14, paragraph 3 (g), of the Covenant. On 15 July 2003, the court sentenced him to death for having committed crimes under articles 25; 97, part 2; 164, part 3, and 118, part 4, of the Uzbek Criminal Code. The author claims, without giving further details, that her husband's death penalty sentence was handed down in violation of article 6 of the Covenant.

2.4 From the judgment of 15 July 2003, it transpires that:

(a) In court, Mr. Bauetdinov testified that his classmate Sarmanov was a dentist and that he was buying stolen gold from dealers, from which he produced dental prostheses. Sarmanov owed money to these dealers, who, during the night of 3 September 2001, came to claim the debt and inflicted bodily harm on members of the Sarmanov family. At the end of November 2001, Mr. Bauetdinov tried to settle the issue with the dealers peacefully, on behalf of Sarmanov; but he was told not to interfere. A week later, he and Sarmanov run into one of the dealers in the market. Sarmanov and the dealer started to argue and were shortly joined by the other dealers. At some point, Mr. Bauetdinov was hit on his head by pliers and knocked down. When he got up, he was stabbed twice in his thighs. Having witnessed this, Sarmanov promised to pay his debts.

(b) On 1 December 2001, Sarmanov asked Mr. Bauetdinov for help in moving to a new house. On the night of 2 December 2001, someone knocked at the door. Mr. Bauetdinov opened the door and saw one of the dealers, who insisted on speaking to Sarmanov. Sarmanov was upset by the intrusion. Mr. Bauetdinov tried to settle the issue of the debt peacefully, but this did not help. Sarmanov asked the author's husband not to worry and to go to bed. He went to bed but could not fall asleep because of the noise. He dressed up and went for a walk. At some point he entered a nearby house that was under construction and saw from there two other dealers entering the house through a basement window, and all three escaping with a bag 40 minutes later.

(c) Mr. Bauetdinov then discovered that the members of the Sarmanov family were either dead or fatally wounded. He took his bag and ran away. He did not report the crime to the police because he feared that due to his previous criminal record, he would be suspected of the crime. He travelled to Chimkent (Kazakhstan), where he was told by a friend that he was wanted by the police and that his photos were shown on national television and published in newspapers. On 1 June 2002, he visited a friend in his home town of Nukus (Uzbekistan). This friend reported him to the militia, and Mr. Bauetdinov was apprehended four days later.

(d) During the pretrial investigation, Mr. Bauetdinov confessed guilt in the presence of his lawyer and that of the First Deputy of Almaty City Prosecutor's Office. On 26 September 2002, in the presence of his lawyer and other witnesses, Mr. Bauetdinov explained when, how and where he murdered the victims and showed the exact location on the simulation video. This testimony was documented in a protocol. Volume 1, pages 289-290, of his criminal case file contains the conclusion of the forensic medical examination No. 205-D, which certified that no injuries could be identified on the body of Mr. Bauetdinov. The latter examination was requested by the ruling of the investigator of the Almaty City Department of Internal Affairs.

(e) Mr. Bauetdinov gave conflicting testimony, by sometimes arguing that he admitted guilt in response to a promise that he would be returned to Uzbekistan, while at other times claiming that he was forced to confess under torture.

2.5 On an unspecified date, Mr. Bauetdinov's death sentence of 15 July 2003 was appealed to the Judicial College for criminal cases of the Supreme Court of Karakalpakstan with the request, under article 6, paragraph 4, of the Covenant, to commute the death sentence. On 26 August 2003, the appeal was denied on the grounds that the author's husband, who had been previously convicted four times, had committed another particularly serious crime.

### **The complaint**

3. The author claims that the State party violated her husband's rights under article 6; article 7 and article 14, paragraph 3 (g), of the Covenant.

### **State party's admissibility and merits observations**

4.1 On 30 October 2003, the State party states that, on 15 July 2003, the author's husband was found guilty of premeditated murder of six members of the Sarmanov family, the rape of a minor person under the age of 14, the attempted premeditated murder of Sarmanov's younger daughter and of robbery. This sentence was confirmed by the Judicial College for criminal cases of the Supreme Court of Karakalpakstan on 26 August 2003.

4.2 The State party submits that guilt of the author's husband was proven beyond reasonable doubt by the case file materials; his actions were correctly qualified legally. While imposing the punishment, the court took into account public danger and severe consequences of the crime committed by Mr. Bauetdinov.

### **Author's comments on State party's observations**

5.1 On 23 May 2007, the author adds that out of all the provisions of the Criminal Code under which her husband was sentenced, the death penalty is provided for as punishment only under article 92, part 2. The latter provision, however, also contains alternative punishment, in form of 15 to 20 years of imprisonment. On an unspecified date, a motion for a supplementary investigation in the case was filed with the Presidential Administration. This motion was denied by the Supreme Court of Uzbekistan on 13 November 2006.

5.2 The author reiterates her claim that during the pretrial investigation in Kazakhstan, her husband was subjected to torture. She now submits that despite continuous beatings, he refused to give any testimony and to sign any self-incriminating documents. Reportedly, when the investigators realised that he would not concede, they 'left him alone'. She submits that while in Kazakhstan, her husband's *ex-officio* lawyer was present only during one single interrogation session and, along with the investigator, put pressure on him to confess guilt. At all stages of the court proceedings in Uzbekistan, the author's husband was duly represented by a lawyer.

5.3 The author advances a new claim of violation by the State party of her husband's rights under article 14, paragraph 2, of the Covenant. Firstly, his guilt was established, inter alia, on the simple fact that two out of thirteen fingerprints collected at the crime scene matched those of her husband. She submits that the fingerprints in question were found on the sugar bowls and could

have been left by him during his stay with the Sarmanov family in November-December 2001. Secondly, according to an expert opinion of 21 November 2002, it could not be established whether sperm found in the vagina of Sarmanov's elder daughter was that of her husband. Reportedly, this latter fact was not interpreted by the court in her husband's favour. Thirdly, his guilt was predicated, inter alia, on the testimonies of Sarmanov's minor daughter who survived the attempt on her life. However, she was emotionally unstable and provided conflicting testimony. Fourthly, the court disregarded statements of three other witnesses who testified that the Sarmanov family had previously been attacked by masked people during the night of 3 September 2001. Lastly, the court did not take into account her husband's testimony on what had happened during the night of 2 to 3 December 2001 that he gave at the trial by the first instance court.

## **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 has not contested that domestic remedies have been exhausted in the present communication.

6.3 In relation to the alleged violation of article 7 of the Covenant by the State party, the Committee notes that the author does not claim that her husband was subjected to torture on the territory of Uzbekistan and/or by the Uzbek law enforcement officers. According to her, Mr. Bauetdinov was subjected to torture on the territory of Kazakhstan and by the Kazakh law enforcement officers. The Committee recalls that States parties are under an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by article 7 of the Covenant, in the country to which removal is to be effected.<sup>3</sup> In this regard, the Committee notes that the author did not advance any claim that, at the time of her husband's involuntary transfer from Uzbekistan, there were substantial grounds for believing that, as a necessary and foreseeable consequence of the transfer to Kazakhstan, there was a real risk that he would be subjected to treatment prohibited by article 7.<sup>4</sup> In these circumstances, the Committee considers that the claim under article 7 of the Covenant against the State party has been insufficiently substantiated, for purposes of admissibility, and finds it inadmissible under article 2 of the Optional Protocol.

6.4 With regard to the claim under article 14, paragraph 2, in that the State party's courts erred in the evaluation of facts and evidence in the case, the Committee recalls that the evaluation of facts and evidence and interpretation of domestic legislation is in principle for the courts of States parties, unless the evaluation and interpretation were clearly arbitrary or amounted to a denial of justice.<sup>5</sup> The author has not adduced pertinent information or submitted relevant documentation to allow the Committee to assess whether the court proceedings of the author's husband suffered from such defects, and the Committee thus considers that this part of the communication is also inadmissible under article 2 of the Optional Protocol.

6.5 The Committee observes that the author's claim under article 6 of the Covenant is closely linked to the claim under article 14, paragraph 3 (g), with regard to the use of evidence obtained under torture in Kazakhstan by the Uzbek courts. It considers them to be sufficiently substantiated, for purposes of admissibility, and, accordingly, declares the remaining claims 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 Committee notes the author's claim that the State party's courts disregarded her husband's claims of his having been tortured in Kazakhstan and determined his guilt on the basis of evidence obtained under torture. The Committee observes, however, that according to the judgment of 15 July 2003, a copy of which was provided by the author herself, the Supreme Court of Kazakhstan did examine the conclusion of Kazakh forensic medical examination No. 205-D, which certified that no injuries had been identified on the body of the author's husband. The Committee further notes that in her comments of 23 May 2007, the author changed the description of the facts from her initial submission, by stating that despite continuous beatings, her husband refused to give any testimony and to sign any documents. In addition, according to the judgment of the Supreme Court of Karakalpakstan, her husband gave conflicting testimony in court, claiming at some stages of the proceedings that he admitted guilt against a promise to be returned to Uzbekistan, while at other times he stated that he was forced to do so under torture. In this regard, the Committee 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 and interpretation were clearly arbitrary or amounted to a denial of justice.<sup>6</sup> The Committee observes that conflicting information has been provided by the author and by the State party as to (a) whether the author's husband was subjected to torture in Kazakhstan, and (b) whether he was sentenced to death by the State party's courts on the basis of self-incriminating testimony. The Committee is unable to conclude, on the basis of the material made available to it, that the State party did not take the necessary steps to ensure that the right of the author's husband not to be compelled to testify against himself or to confess guilt was respected. It therefore considers that the facts before it do not reveal a violation of article 14, paragraph 3 (g) of the Covenant.

7.3 As to the author's claim under article 6 of the Covenant, the Committee notes that her husband was sentenced to death for having committed a particularly serious crime, that is classified as such under the laws of the State party, by the judgment of the Supreme Court of Karakalpakstan, and that this death sentence was subsequently confirmed by a higher court. The Committee also notes that, on an unspecified date, a motion for a supplementary investigation in the case was filed with the Presidential Administration and that this motion was denied by the Supreme Court of Uzbekistan on 13 November 2006. In this light and absent any finding of violation of article 14 in the present case, the Committee concludes that the facts before it do not reveal a violation of article 6 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 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 present report.]

### Notes

<sup>1</sup> The Optional Protocol entered into force for the State party on 28 December 1995.

<sup>2</sup> In fact, it appears that Mr. Bauetdinov had committed a rape in Uzbekistan in November 2001, before escaping to Kazakhstan. At the time of his transfer to Kazakhstan, he was imprisoned in Uzbekistan, for the crime of the rape in question. He was transferred to Kazakhstan, pursuant to the provisions of the Commonwealth of Independent States' Legal Aid Convention (Minsk Convention 1993) in order to be investigated there for the crimes he committed in Kazakhstan in December 2001. After the completion of the investigation in question, he was brought back to Uzbekistan.

<sup>3</sup> General comment No. 31[80], 29 March 2004, para. 12.

<sup>4</sup> See, *T. v. Australia*, communication No. 706/1996, Views adopted on 4 November 1997, paras. 8.1 and 8.2.; *A.R.J. v. Australia*, communication No. 692/1996, Views adopted on 28 July 1997, para. 6.9.

<sup>5</sup> See, inter alia, *Errol Simms v. Jamaica*, communication No. 541/1993, Inadmissibility decision of 3 April 1995, para. 6.3.

<sup>6</sup> Ibid.

**E. Communication No. 1209/2003, *Rakhmatov v. Tajikistan*  
Communication No. 1231/2003, *Safarovs v. Tajikistan*  
Communication No. 1241/2004, *Mukhammadiev v. Tajikistan*  
(Views adopted on 1 April 2008, ninety-second session)\***

<i>Submitted by:</i>	Mrs. Bakhrinisso Sharifova (1209/2003), Saidali Safarov (1231/2003), Kholmurod Burkhonov (1241/2004) (not represented by counsel)
<i>Alleged victims:</i>	Messrs. Ekubdzhon Rakhmatov (Bakhrinisso Sharifova's son), Alisher and Bobonyoz Safarov and Farkhod Salimov (Saidali Safarov's sons and nephew, respectively), Shakhobiddin Mukhammadiev (Kholmurod Burkhonov's son)
<i>State party:</i>	Tajikistan
<i>Date of communications:</i>	30 April 2003 (initial submissions)
<i>Subject matter:</i>	Arbitrary detention and subsequent unfair trial.
<i>Procedural issues:</i>	Non-substantiation of claims; non-exhaustion of domestic remedies.
<i>Substantive issues:</i>	Torture, cruel, inhuman or degrading treatment or punishment; arbitrary detention; right to humane treatment and respect for dignity; fair hearing; impartial tribunal; right to adequate time and facilities for the preparation of the defence; right to examine witnesses; separation of accused juveniles from adults.
<i>Articles of the Covenant:</i>	7; 9, paragraphs 1 and 2; 10; 14, paragraphs 1, 3 (b), (d), (e), and (g)
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 1 April 2008,*

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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 Chanut, 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 and Mr. Ivan Shearer.

*Having concluded* its consideration of communications Nos. 1209/2003, 1231/2003 and 1241/2004, submitted to the Human Rights Committee on behalf of Messrs. Ekubdzhon Rakhmatov, Alisher Safarov, Bobonyoz Safarov, Farkhod Salimov and Shakhobiddin Mukhammadiev under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the authors of the communications, and the State party,

*Adopts the following:*

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

1. The first author is Ms. Bakhrinisso Sharifova, a Tajik national born in 1956, who submits the communication on behalf of her son, Mr. Ekubdzhon Rakhmatov, also a Tajik national born in 1985. The second author is Mr. Saidali Safarov, a Tajik national born in 1946, who submits the communication on behalf of his sons, Messrs. Alisher and Bobonyoz Safarov, both Tajik citizens born in 1978 and 1973, respectively; as well as his nephew, Mr. Farkhod Salimov, a Tajik national born in 1982. The third author is Mr. Kholmurod Burkhonov, a Tajik national born in 1942, who submits the communication on behalf of his son, Mr. Shakhobiddin Mukhammadiev, also Tajik born in 1984. At the time of submission of the communications, all five victims were serving their sentences in colony No. 7 in Dushanbe, Tajikistan. The authors claim violations by Tajikistan of the alleged victims' rights under article 7; article 9, paragraphs 1 and 2; article 10; article 14, paragraphs 1, 3 (b), 3 (d), 3 (e) and 3 (g), of the International Covenant on Civil and Political Rights. Although the first and third authors do not invoke it specifically, their communications appear to raise issues under article 14, paragraph 4, in respect of Messrs Ekubdzhon Rakhmatov and Skahobiddin Mukhammadiev. The authors are unrepresented. The Optional Protocol entered into force for the State party on 4 April 1999.

#### **The facts as presented by the authors**

2.1 During the night of 5 to 6 August 2001, the house of one Mr. Isoev was burgled in Notepad, Gasser district of Tajikistan. Six individuals were arrested (*задержаны*) in August 2001 and June 2002 on the suspicion of having committed the burglary, including the alleged victims. They were sentenced as co-defendants by the Judicial Chamber for Criminal Cases of the Supreme Court on 25 November 2002 to different prison terms.

#### **Case of Mr. Ekubdzhon Rakhmatov**

2.2 Mr. Rakhmatov was arrested by militia officers on 8 August 2001. The arrest protocol was only drawn up on 11 August 2001. On an unspecified date, he was charged with burglary committed with use of weapons, ammunition or explosives, under article 249, part 4 (c) of the Criminal Code. During his pretrial investigation he was allegedly subjected to torture for the purpose of extracting a confession. The first author claims that her son was kicked, beaten with truncheons, handcuffed and hung from the ceiling, beaten on his kidneys and tortured with electric current. For three days he was deprived of food, parcels sent by his family were not transmitted to him and relatives were denied access to him. The officers who tortured him included district militia officers, officers of the Criminal Investigation Department and an investigator of the Department of Internal Affairs, Gissar district. The names of eight officers



implicated in the torture are on file. Mr. Rakhmatov was told that if he did not confess, his parents would face ‘serious problems’. Subsequently, on an unspecified date, his father was charged with “hooliganism” and sentenced. The first author states that, unable to withstand the beatings and psychological pressure, her son confessed to the charges against him. On an unspecified date, her son was beaten up by Mr. Isoev in the investigator’s presence and his face was scratched by one of the district militia officers. Investigators, however, subsequently claimed that Mr. Rakhmatov’s face was scratched by Mr. Isoev’s wife in self-defence during the burglary. This argument was subsequently used by the prosecution as a proof of positive identification of Mr. Rakhmatov by Mr. Isoev’s wife as one of the burglars during the identification parade.

2.3 According to the first author, the investigators had planned the verification of her son’s confession at the crime scene in advance. Some days before the actual verification, her son was brought to the crime scene, where it was explained to him where he should stand, what to say. He was shown to individuals who later identified him during an identification parade.

2.4 The first author states that, at the time of his arrest, her son was a minor, and that, according to article 51 of the Criminal Procedure Code (CPC), the authorities were required to provide him with a lawyer from the moment of his arrest. In reality, he only was given a lawyer on 14 August 2001. Further, the first author submits that, where a minor is charged together with adults, article 141 of the CPC requires that the criminal investigation into the activities of the minor should be separated from those of the adults at pretrial investigation stage whenever possible. This was not done in Mr. Rakhmatov’s case. Contrary to article 150 of the Criminal Procedure Code, his interrogation and other investigative actions were carried out in the absence of lawyer.

2.5 The first trial of Mr. Rakhmatov by the Judicial Chamber for Criminal Cases of the Supreme Court took place from 13 March to 26 April 2002. The first author claims that her son’s trial was not fair and that the court was partial. Thus:

(a) The first author’s son retracted his confessions obtained under torture during the pretrial investigation in court and claimed to be innocent. He affirmed that when the crime was committed he had an alibi that could be confirmed by numerous witnesses. The testimonies of Mr. Rakhmatov and of witnesses appearing on his behalf were ignored.

(b) Several witnesses against Mr. Rakhmatov made contradictory depositions.

(c) The prosecution exercised pressure on the witnesses and the presiding judge limited the lawyer’s possibility to ask questions.

(d) The court did not objectively examine the circumstances of the crime - such as the nature of the crime committed or the existence of a causal link between the criminal acts and their consequences.

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

2.6 In the course of the first trial, another defendant facing another charge, one Mr. Rasulov, was examined in court in the case of Mr. Isoev’s house burglary. On 26 April 2002, the judge

referred the latter case back to the General Prosecutor for further investigation and elimination of inconsistencies. On 15 July 2002, Mr. Rasulov wrote a letter to the Chairperson of the Supreme Court, in which he confessed to having burgled Mr. Isoev's house, expressed readiness to identify Mr. Isoev's stolen belongings and Mr. Isoev's family, and requested the Chairperson to take this information into account in the case of the other individuals who were wrongly accused of having committed this crime. Mr. Rasulov's testimony, however, was ignored as unreliable during the second trial which took place from 3 September to 25 November 2002.

2.7 From the judgment of the Judicial Chamber for Criminal Cases of the Supreme Court of 25 November 2002, it becomes clear that the Judicial Chamber examined the victims' statements to the effect that their confessions had been obtained under torture during pretrial investigation and concluded that they were not trustworthy. The Court considered them as an attempt to avoid responsibility and punishment for the crime committed. The judgment notes that testimonies of a number of district militia officers, officers of the Criminal Investigation Department and an investigator of the Department of Internal Affairs, Gissar district, were examined in court. Specifically, the prosecutor and deputy prosecutor of the Gissar district testified that Messrs. Rakhmatov, Alisher Safarov and Salimov's parents filed a complaint with the prosecutor's office, alleging that during the pretrial investigation their sons were forced to confess to having committed the burglary of Mr. Isoev's house under torture. These allegations were reportedly investigated by an independent expert from Dushanbe, who interrogated the alleged victims and ordered their medical examination. This revealed some bruises on Alisher Safarov's left shoulder that reportedly preceded his arrest; no other injuries on any of the alleged victims were identified. Since all victims confirmed that they had confessed guilt voluntarily, an investigation of the parents' complaint was terminated and they were sent an official reply on the matter.

2.8 On 25 November 2002, the Judicial Chamber for Criminal Cases of the Supreme Court sentenced Mr. Rakhmatov to 7 years' imprisonment. A cassation appeal to the Judicial Chamber for Criminal Cases of the Supreme Court was dismissed on 25 February 2003.

2.9 The first author notes that the investigator of the Department of Internal Affairs of the Gissar district, who was implicated in her son's torture, was later indicted for taking bribes in the context of this same case. The criminal charges against him, however, were later dropped and he was transferred to another district.

### **Cases of Messrs. Alisher Safarov and Bobonyoz Safarov**

2.10 On 9 August 2001, Mr. Alisher Safarov was arrested at his family's home by militia officers and brought to the Department of Internal Affairs (Gissar district). The arrest protocol was only drawn up on 11 August 2001. He was subjected to the physical torture as described in paragraph 2.2 above, and also threatened with creating 'serious problems' for his parents if he did not confess to the allegations against him. These threats, however, did not materialise. Furthermore, officers of the Department of Internal Affairs, Gissar district, were aware that Mr. Alisher Safarov suffers from the night blindness since childhood, and were deliberately interrogating him at night. Unable to withstand the beatings and psychological pressure, he confessed to the charges against him.

2.11 When the case was sent back to the prosecutor for further investigation (see paragraph 2.6 above), the second author's elder son, Mr. Bobonyoz Safarov, was arrested during the night of

5 to 6 June 2002. The second author claims that the arrest took place without an arrest warrant issued by the prosecutor, and that his son was held in detention in the Department of Internal Affairs for 15 days and tortured with a view to extracting a confession, before being transferred to the Investigation Detention Centre.

2.12 The remaining facts of Messrs. Alisher and Bobonyoz Safarov's case presented by the second author are identical to those described in paragraphs 2.3, 2.5-2.7 and 2.14. On 25 November 2002, the Judicial Chamber for Criminal Cases of the Supreme Court sentenced them to 10 years' imprisonment, with confiscation of property. A cassation appeal to the Judicial Chamber for Criminal Cases of the Supreme Court was dismissed on 25 February 2003.

#### **Case of Mr. Farkhod Salimov**

2.13 On 8 August 2001, Mr. Salimov was arrested at his family's home by militia officers and brought to the Department of Internal Affairs, Gissar district. The arrest protocol was only drawn up on 11 August 2001. He was subjected to physical torture as described in paragraph 2.2 above, and also threatened with creating 'serious problems' for his parents if he did not confess to the allegations against him. These threats, however, did not materialise. Unable to withstand the beatings and psychological pressure, he confessed to the charges against him. The remaining facts of the case presented by the second author are identical to those described in paragraphs 2.3, 2.5-2.7 and 2.14. On 25 November 2002, the Judicial Chamber for Criminal Cases of the Supreme Court sentenced Mr. Salimov to 10 years' imprisonment, with confiscation of property. A cassation appeal to the Judicial Chamber for Criminal Cases of the Supreme Court was dismissed on 25 February 2003.

#### **Case of Mr. Shakhobiddin Mukhammadiev**

2.14 On 7 August 2001, Mr. Mukhammadiev, a relative of Mr. Isoev and a minor at that time, was arrested at his grandfather's home by the district militia officer accompanied by Mr. Isoev. The arrest protocol was only drawn up on 11 August 2001. He was subjected to torture as described in paragraph 2.2 above and, unable to withstand the beatings and psychological pressure, he confessed to the charges against him. His confession and testimonies were drawn up on his behalf by militia officers and by the investigator of the Department of Internal Affairs, Gissar district, and only shown to Mr. Mukhammadiev for him to sign. On a few occasions, he was forced to sign blank pages of paper that were later filled in by the investigator. On 17 August 2001, while being interrogated by the prosecutor and deputy prosecutor of the Gissar district at pretrial investigation, he stated that he had not committed the crime in question and that his confession was obtained under duress. This statement was ignored by the prosecutor and deputy prosecutor, and no forensic medical examination was carried out. Moreover, the same day, Mr. Mukhammadiev was allegedly pressured by the investigator to withhold the statement he had given to the prosecutor. On 18 August 2001, unable to withstand the pressure, he withdrew the statement. The rest of the facts of Mr. Mukhammadiev's case presented by the third author are identical to those described in paragraphs 2.3-2.7 above. On 25 November 2002, the Judicial Chamber for Criminal Cases of the Supreme Court sentenced Mr. Mukhammadiev to 7 years' imprisonment. A cassation appeal to the Judicial Chamber for Criminal Cases of the Supreme Court was dismissed on 25 February 2003.

## **The complaint**

3.1 All authors claim that in violation of articles 7 and 14, paragraph 3 (g), the alleged victims were beaten, tortured, and put under psychological pressure and thus forced to confess guilt.

3.2 The alleged victims' rights under article 9, paragraphs 1 and 2, were reportedly violated, because they were arrested unlawfully and were not charged for long periods of time after their arrest.

3.3 They claim that in violation of article 10, conditions of detention during the early stages of the alleged victims' confinement were inadequate. In order to exercise psychological pressure on the alleged victims, the latter were threatened that their parents would be tortured. For three days, they were deprived of food, parcels sent by their families were not transmitted to them and relatives were denied access to them. The food received during the later stages of detention was monotonous and inadequate.

3.4 The authors claim that the alleged victims' rights under article 14, paragraph 1, were violated because the trial court was partial. Article 14, paragraph 3 (e), was violated as the testimonies of the witnesses on their behalf were rejected under the simple pretext that they were false.

3.5 They also claim that the alleged victims' rights under article 14, paragraphs 3 (b) and (d), were violated without specifying, however, what exact actions or omissions by the State party's authorities they considered to have been in contravention of these Covenant provisions.

3.6 Although the first and third authors do not invoke it specifically, their communications appear to raise issues under article 14, paragraph 4, in respect of Messrs Ekubdzhon Rakhmatov and Skahobiddin Mukhammadiev.

## **State party's failure to cooperate**

4. By Notes Verbales of 28 October 2003 (Rakhmatov), 2 December 2003 (Safarovs, Salimov), 20 January 2004 (Mukhammadiev), 18 November 2005 (Rakhmatov), 21 November 2005 (Safarovs, Salimov, Mukhammadiev) and 7 September 2006 (Rakhmatov, Safarovs, Salimov, Mukhammadiev), the State party was requested to submit to the Committee information on the admissibility and merits of the communications. 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 admissibility or the substance of the authors' 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 authors' allegations, to the extent that these have been properly substantiated.<sup>1</sup>

## **Issues and proceedings before the Committee**

### **Consideration of admissibility**

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

5.2 The Committee notes that the same matter is not being examined under any other international procedure, in line with the requirements of article 5, paragraph 2 (a), of the Optional Protocol.

5.3 The second author claims that in violation of article 7; article 10; and article 14, paragraph 3 (g), his elder son, Mr. Bobonyoz Safarov, was beaten, tortured, put under psychological pressure in order to obtain a confession, as well as detained in inadequate conditions. The second author, however, has not provided any details or supporting documents in substantiation of these claims. It remains unclear whether these allegations were ever raised in court in relation to this particular victim. In the circumstances, the Committee considers that this part of the communication is unsubstantiated, for purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.

5.4 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 long periods of time without being charged. The Committee notes, however, that the material before it does not allow it to establish the exact circumstances of their arrest, or the exact dates on which they were charged. It also remains unclear whether these allegations were ever raised before the domestic courts. In these circumstances, the Committee considers that this part of the communications is unsubstantiated, for purposes of admissibility, and therefore inadmissible under article 2 of the Optional Protocol.

5.5 The authors further claim that the alleged victims' rights under article 14, paragraph 3 (b) and (d), were violated. The State party has not commented on these allegations. The Committee notes, however, that the second author has failed to provide any detailed information or documents in support of this claim in relation to Messrs. Alisher Safarov, Bobonyoz Safarov and Salimov, and that it also remains unclear whether the allegations in question were ever drawn to the attention of the State party's courts in relation to Messrs. Rakhmatov and Mukhammadiev. In these circumstances, the Committee considers that this part of the communication is unsubstantiated, for purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.

5.6 The authors also claim that contrary to article 14, paragraph 3 (e), the court heard the testimonies of witnesses on the alleged victims' behalf and then simply ignored them. The State party has not commented on this claim. The Committee notes however, that the material available to it does not permit to conclude that the court indeed failed to evaluate the testimonies in question or to assess them. In the circumstances, and in the absence of any other pertinent information in this regard, the Committee considers this part of the communication inadmissible as unsubstantiated under article 2 of the Optional Protocol.

5.7 The Committee considers that the remaining part of the authors' allegations, raising issues under article 7; article 14, paragraph 3 (g); article 10; and article 14, paragraph 1, in relation to Messrs Ekubdzhon Rakhmatov, Alisher Safarov, Farkhod Salimov and Shakhobiddin Mukhammadiev, the second author's allegations raising issues under article 14, paragraph 1, in relation to Mr. Bobonyoz Safarov, as well as the first and third authors' allegations raising issues under article 14, paragraph 4 (in relation to Messrs Ekubdzhon Rakhmatov and Skahobiddin Mukhammadiev) 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 communications 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.

6.2 The authors claim that the alleged victims were beaten and tortured by district militia officers, officers of the Criminal Investigation Department and an investigator of the Department of Internal Affairs, Gissar district, to make them confess their guilt, contrary to article 7 and article 14, paragraph 3 (g), of the Covenant. In the absence of any explanation 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.<sup>2</sup> In this respect, the Committee notes the authors' detailed description of the treatment to which their relatives were subjected (paragraphs 2.2, 2.8, and 2.12 above), except in relation to one alleged victim, Mr. Bobonyoz Safarov (paragraphs 2.11 and 5.3 above). They have also identified the alleged perpetrators of these acts. The material before the Committee also reveals that the allegations of torture were brought to the attention of the Prosecutor's Office of the Gissar district and that they were raised in court. The Committee considers that in these circumstances, the State party has failed to demonstrate that its authorities adequately addressed the torture allegations advanced by the authors.

6.3 Furthermore, on the claim of a violation of the alleged victims' rights under article 14, paragraph 3 (g), in that they were forced to sign a confession, the Committee must consider the principles that underlie this guarantee. It recalls its previous jurisprudence that the wording, in article 14, paragraph 3 (g), that no one shall "be compelled to testify against himself or confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological coercion by the investigating authorities on the accused with a view to obtaining a confession of guilt.<sup>3</sup> The Committee recalls that in cases of forced confessions, the burden is on the State to prove that statements made by the accused have been given of their own free will.<sup>4</sup> In the circumstances, the Committee concludes that the facts before it disclose a violation of article 7, read together with article 14, paragraph 3 (g), of the Covenant (except in relation to Mr. Bobonyoz Safarov).

6.4 The authors claim that the conditions of detention during the early stages of the alleged victims' confinement were inadequate. They point out that, in order to exercise psychological pressure on the victims, the latter were threatened that their parents would be harmed, should they do not confess guilt. In addition, they were deprived of food for three days and parcels sent by their families were not transmitted to them and relatives were denied access to them. Finally, the food provided to the victims during the later stages of detention was monotonous and inadequate. The State party has not commented on these allegations, and in the circumstances, due weight must be given to the authors' allegations. The Committee, therefore, concludes that the facts before it amount to a violation by the State party of the alleged victims' rights under article 10 of the Covenant (except in relation to Mr. Bobonyoz Safarov).

6.5 The authors claim a violation of article 14, paragraph 1, as the trial did not meet the requirements of fairness and that the court was biased (see paragraphs 2.5-2.7, and 2.12-2.14 above). The Committee observes that 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.<sup>5</sup> It further notes, however, that in the present case, the State party has not presented any information to refute the authors' allegations and to demonstrate that the alleged victims' trial did in fact not suffer from any such defects. Accordingly, the Committee concludes that in the circumstances of the present case, the facts as submitted amount to a violation by the State party of the alleged victims' rights under article 14, paragraph 1, of the Covenant.

6.6 The first and third authors have also claimed, in relation to their respective sons Messrs. Ekubdzhon Rakhmatov and Skahobiddin Mukhammadiev, that at the time of arrest, both alleged victims were minors, but did not benefit from the special guarantees prescribed for criminal investigation of juveniles; the State party has not commented on these allegations. These allegations raise issues under article 14, paragraph 4, of the Covenant. The Committee recalls<sup>6</sup> that juveniles are to enjoy at least the same guarantees and protection as those accorded to adults under article 14 of the Covenant. In addition, juveniles need special protection in criminal proceedings. They should, in particular, be informed directly of the charges against them and, if appropriate, through their parents or legal guardians, be provided with appropriate assistance in the preparation and presentation of their defence. In the present case, Messrs Ekubdzhon Rakhmatov and Skahobiddin Mukhammadiev were arrested without access to a defence lawyer. In the circumstances, and in the absence of any other pertinent information, the Committee concludes that Messrs Ekubdzhon Rakhmatov's and Skakhobiddin Mukhammadiev's rights under article 14, paragraph 4, of the Covenant have been violated.

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 the rights of Messrs Ekubdzhon Rakhmatov, Alisher Safarov, Farkhod Salimov and Shakhobiddin Mukhammadiev under article 7, read together with article 14, paragraph 3 (g); article 10; and article 14, paragraph 1; a violation of the rights of Mr. Bobonyoz Safarov under article 14, paragraph 1 only; and a violation the rights of Messrs Ekubdzhon Rakhmatov's and Skakhobiddin Mukhammadiev under article 14, paragraph 4, of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Messrs Ekubdzhon Rakhmatov, Alisher and Bobonyoz Safarov, Farkhod Salimov and Shakhobiddin Mukhammadiev with an effective remedy, to include such forms of reparation as early release and compensation. The State party is also under an obligation 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, 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 180 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 present report.]

## Notes

<sup>1</sup> See, e.g., communication No. 1208/2003, *Kurbonov v. Tajikistan*, Views adopted on 16 March 2006, paragraph 4.

<sup>2</sup> See, e.g., communication No. 781/1997, *Aliiev v. Ukraine*, Views adopted on 7 August 2003, para. 7.2.

<sup>3</sup> Communication No. 330/1988, *Berry v. Jamaica*, Views adopted on 4 July 1994, paragraph 11.7, communication No. 1033/2001, *Singarasa v. Sri Lanka*, Views adopted on 21 July 2004, paragraph 7.4, and communication No. 912/2000, *Deolall v. Guyana*, Views adopted on 1 November 2004, paragraph 5.1.

<sup>4</sup> See general comment No. 32 (2007), paragraph 49.

<sup>5</sup> See, inter alia, communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, paragraph 6.2.

<sup>6</sup> See the Committee's general comment No. 32 (2007).



**F. Communication No. 1223/2003, *Tsarjov v. Estonia*  
(Views adopted on 26 October 2007, ninety-first session)\***

<i>Submitted by:</i>	Vjatseslav Tsarjov (not represented by counsel)
<i>Alleged victims:</i>	The author
<i>State party:</i>	Estonia
<i>Date of communication:</i>	14 August 2003 (initial submission)
<i>Subject matter:</i>	Arbitrary refusal of permanent residence permit and resulting inability to travel abroad and to take part in the conduct of public affairs.
<i>Procedural issues:</i>	Abuse of the right of submission; non-exhaustion of domestic remedies.
<i>Substantive issues:</i>	Equality before the law; prohibited discrimination; right to liberty of movement; right to leave any country, including his own; right to take part in the conduct of public affairs.
<i>Articles of the Covenant:</i>	2, paragraph 1; 12, paragraphs 2 and 4; 25; 26
<i>Articles of the Optional Protocol:</i>	5, paragraph 2 (b); 3

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

*Meeting on 26 October 2007,*

*Having concluded* its consideration of communication No. 1223/2003, submitted to the Human Rights Committee by Vjatseslav Tsarjov 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, Ms. Christine Chanet, Mr. Yuji Iwasawa, 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.

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

1. The author of the communication is Vjatseslav Tsarjov, who claims to be stateless, born in the Russian Soviet Federative Socialist Republic on 7 December 1948 and currently residing in Estonia. He claims to be a victim of violations by Estonia of his rights under article 12, paragraphs 2 and 4; article 25; and article 26, read together with article 2, paragraph 1, of the International Covenant on Civil and Political Rights.<sup>1</sup> He is unrepresented.

### Factual background

2.1 Since 1956 the author has lived, studied and worked in Estonia. From October 1975 until August 1978 he had served as an operative worker in the National Security Committee (KGB) of the then Estonian Soviet Socialist Republic (ESSR). Then, until June 1981 he studied at the Higher School of the Soviet Union KGB in Moscow. From August 1981 until April 1986 he served as a senior operative worker in the KGB of the Buryatia ASSR in the Russian Soviet Federative Socialist Republic. From April 1986 until December 1991, he served as a senior operative worker at the KGB of the ESSR. In 1971, the author was given the rank of a lieutenant. The author was a citizen of the Union of Soviet Socialist Republics (USSR or Soviet Union) until 1991 and was a bearer of the uniform USSR passport until 12 July 1996. After that date, he never applied for the citizenship of another country. Until 1996, he had legal grounds for permanent residency in Estonia (*propiska*). In 1995, he was forced by the authorities to apply for an official residence permit and, on 17 June 1995, he filed his application.

2.2 On 31 December 1996, the Government by its Order No. 1024 (Order No. 1024), in accordance with article 12, section 5 of the Aliens Act, granted the author a temporary residence permit valid until 31 December 1998. On 14 September 1998, the author applied for a permanent residence permit on the basis of the Government Regulation No. 137 “On the conditions and procedure for applying for a permanent residence permit” of 16 June 1998 (Regulation No. 137). On 5 November 1998, the Citizenship and Migration Board (Board) refused to grant a permanent residence permit to the author. The Board in its decision referred to the temporary residence permit granted to the author earlier. The Board based its decision on clauses 1 and 36 of the Government Regulation No. 368 “The procedure for the grant, extension and revocation of residence and work permits for foreigners” of 7 December 1995 (Regulation No. 368).

2.3 On 4 December 1998, the author appealed the Board’s decision to the Tallinn Administrative Court, maintaining that he had applied for a residence permit for the first time before 12 July 1995. According to article 20, section 1 of the Aliens Act, an alien who applied for a residence permit before 12 July 1995 and who had a residence permit and who was not among the aliens specified in article 12, section 4 of the Aliens Act, retained the rights and duties provided for in earlier legislation of the Republic of Estonia. The author relied in his complaint on the Regulation No. 137 and claimed that he does not belong to the group of aliens listed in article 12, section 4 of the Aliens Act, and that article 12, section 5 of the Aliens Act, was a wrong legal basis for the Order No. 1024.

2.4 On 18 January 1999 and on 19 February 1999, the Tallinn Administrative Court heard the case. In court, the author disputed the data presented in his questionnaire annexed to the request for permanent residence permit. According to him, the Soviet Union became a foreign country after 20 August 1991 (after Estonia re-gained independence) and he worked in the KGB before the Soviet Union was declared to be a foreign state. He maintained that he has the right to apply

for a permanent residence permit on the basis of article 20, section 1 of the Aliens Act, as he had applied for a residence permit before 12 July 1995. In Court, the Board contested the complaint and asked that it be denied. The Board explained that it issued a temporary residence permit to the author as an exception under article 12, section 5 of the Aliens Act. It took into account that he had served in an intelligence or security service of a foreign state and he was among the foreigners listed in article 12, section 4 of the Aliens Act, who cannot get a residence permit.

2.5 Tallinn Administrative Court by its judgment of 22 February 1999 granted the author's complaint and declared the Board's decision unlawful on procedural grounds. The Court stated that the Board refused to issue a permanent residence permit to the author by making a reference to the legal basis in clauses 1 and 36 of the Regulation No. 368, whereas his application had to be reviewed on the basis of the Regulation No. 137, which establishes a procedure for aliens who had requested a temporary residence permit before 12 July 1995 and who were granted such a permit and who are not among the aliens listed in article 12, section 4 of the Aliens Act. Since the Board reviewed the author's request for a permanent residence permit on the basis of a wrong legal act, the Court instructed the Board to review this case and make a new decision.

2.6 The Court agreed with the author's claim that provisions of article 20, section 1 of the Aliens Act, had to be applied with regard to him. He had applied for a residence permit before 12 July 1995 and he had been granted the permit. As the author disputed his classification among aliens listed in article 12, section 4 of the Aliens Act, in reviewing his application for a permanent residence permit a legal assessment had to be made whether his employment as a senior operative staff of the KGB of the ESSR from 1986 until December 1991 could be considered as being employed by an intelligence or security service of a foreign state. In accordance with the new version of the implementing provision article 20, section 1 of the Aliens Act, the author's application for a permanent residence permit could not be based on the provisions of article 12, section 3 of the Aliens Act. Until 30 September 1999, the relevant section of the Act read as follows:

“§ 12. Bases for issue of residence permits

[...] (3) A permanent residence permit may be issued to an alien who has resided in Estonia on the basis of a temporary residence permit for at least three years within the last five years and who has a residence and employment in Estonia or other legal income for subsistence in Estonia, unless otherwise provided by this Act. A permanent residence permit shall not be issued to an alien who has received a residence permit in Estonia pursuant to clause (1) 1) or 2) of this section or to an alien who has received a residence permit as an exception pursuant to subsection (5) of this section.”

2.7 The Board filed an appeal to the Tallinn Court of Appeal. On 12 April 1999 the Tallinn Court of Appeal annulled the decision of Tallinn Administrative Court of 22 February 1999 and granted the Board's appeal. The Tallinn Court of Appeal found that the court of first instance had wrongly applied norms of substantive law. It found that the author belonged to one of the classes of aliens listed in article 12, section 4 of the Aliens Act, and therefore he was not subject to the application of article 20, section 1 of the Aliens Act, and the Regulation No. 137. The Court noted that the Aliens Act does not specify the type of employment, when, and in which bodies that are considered as being employed by intelligence and security services of foreign countries. The Act “For the Procedure for Registration and Disclosure of Persons who Have Served in or

Co-operated with Intelligence or Counter-intelligence Organisations of Security Organisations or Military Forces of States which Have Occupied Estonia” (Act on Registration and Disclosure), passed on 6 February 1995 defines the security and intelligence bodies of states that have occupied Estonia and defines the notion of persons who have been in the service of such bodies. In accordance with article 2, section 2 of the Act, the security and intelligence organisations of states that have occupied Estonia are the security organisations and intelligence and counter-intelligence organisations of the military forces of the Soviet Union, or bodies subordinate to them; according to subsection 6 of the above section, this includes also the KGB of the Soviet Union. According to article 3, section 2 of the Act, an alien who was in the service of the security or intelligence body in the period between 17 June 1940 until 31 December 1991 and who lives on the territory under the jurisdiction of the Republic of Estonia is considered to be a person employed by the security or intelligence organizations.

2.8 On the basis of the above Act and in the light of the meaning of the Aliens Act, the Court found that the author’s employment with the KGB of the ESSR and in the KGB of Buryatia ASSR, which he himself has confirmed in the questionnaire for his residence permit application, should be interpreted as being employed by an intelligence or security service of a foreign country within the meaning of article 12, section 4, clause 5 of the Aliens Act.<sup>2</sup> The Court noted that with the agreement concluded between the Prime Minister of the Republic of Estonia, Chairman of the KGB of the Soviet Union and Chairman of the Estonian National Security Committee on 4 September 1991, the Government of the Republic of Estonia undertook to guarantee social and political rights to workers of the KGB of the ESSR in accordance with generally recognised international rules and the legislation of Estonia. However, the agreement does not lend itself to interpretation that making of restrictions in issuing residence permits to aliens on the basis of article 12, section 4 of the Aliens Act would be in contradiction to the agreement.

2.9 In the light of the above, the Tallinn Court of Appeal found that although the author applied for a residence permit on 17 June 1995 and, as an exception, he was granted a temporary residence permit, he did not have the right to apply for a residence permit on the basis of article 20, section 1 of the Aliens Act, and his application for a permanent residence permit could not be dealt with on the basis of the Regulation No. 137, as he belonged to the aliens listed in article 12, section 4 of the Aliens Act. The Court decided that in accordance with article 12, section 3 of the Aliens Act, a permanent residence permit may be issued to an alien who has resided in Estonia on the basis of a temporary residence permit for at least three years within the last five years and who has residence and employment in Estonia or other legal income for subsistence in Estonia, unless otherwise provided by the Aliens Act. A permanent residence permit shall not be issued to an alien who has received a residence permit in Estonia as an exception pursuant to article 12, section 5 of the Aliens Act. The author received a residence permit as an exception for two years by the Order No. 1024 on the basis of article 12, section 5 of the Aliens Act. Therefore, the Court concluded that the Board had justifiably refused to grant a permanent residence permit to the author. Since the Regulation No. 137 did not apply to him, the Board had correctly reviewed his application for a permanent residence permit on the basis of Regulation No. 368.

2.10 On 10 May 1999, the author appealed in cassation the judgement of the Tallinn Court of Appeal to the Supreme Court. He claimed that the lower court had wrongly applied the law. His service in the KGB of the ESSR could not be considered as an employment in the foreign intelligence or security service and his inclusion in the list of persons specified in article 12,

section 4 of the Aliens Act, violated articles 23 and 29 of the Estonian Constitution. Service within the borders of the former USSR could not be regarded as service abroad and one could not be convicted for employment in the security service. The author submitted that although there is not a subjective right to be granted a permanent residence permit, the refusal of a permanent residence permit should be well reasoned. The reasons for refusing to give a residence permit should be in accordance with the Constitution and may not violate the person's rights, for example, the right to equal treatment. As a result, he concluded that he was discriminated against on the basis of origin, contrary to article 26 of the Covenant, as he was denied a permanent residence permit for being a former employee of the foreign intelligence and security service. Leave to appeal to the Supreme Court was refused on 16 June 1999 on the ground that the appeal in cassation was manifestly ill-founded.

### **The complaint**

3.1 The author claims that the refusal to grant him a permanent residence permit violates his rights under articles 12, paragraphs 2 and 4, of the Covenant, as the period of validity of his temporary residence permit is too short to allow him to obtain a travel visa for certain countries. The travel document for a stateless person is an alien's passport. According to article 27 (1) of the Identity Documents Act, the alien's passport is issued if the person has a valid residence permit.<sup>3</sup> Under article 28 of the same Act, the validity of an alien's passport cannot exceed the period of validity of the residence permit issued to the alien.<sup>4</sup> As the author's last residence permit was issued for two years, so was the validity of his alien's passport. If he wishes to travel to another country for a longer period of time, he might have problems to obtain an entry visa. Besides, if he wishes to travel for a longer period and does not manage to extend his residence permit beforehand, he might be refused re-entry to Estonia, as he would then have no legal basis for staying there.

3.2 The author further claims that the refusal to grant him a permanent residence permit violates his right to vote and to be elected under article 25, insofar as this right is vested only upon Estonian citizens or persons who are Estonian permanent residents. Article 60 (2) of the Estonian Constitution and article 4 (1) of the Parliament Election Act provide that every Estonian citizen entitled to vote who has attained 21 years of age may be a candidate for the Parliament. The author is deprived of the right to be elected in local elections, as he is not a citizen of Estonia or the European Union or to vote in local elections, as he does not have permanent residence permit. Under article 156 of the Estonian Constitution, all persons who have reached the age of eighteen years and who reside permanently on the territory of that local government unit shall have the right to vote in the election of the local government council.

3.3 Finally, the author argues that he is a victim of discrimination on the grounds of ethnic and social origin and his association with a relevant status, namely the former military personnel of the former Soviet Union, contrary to article 26 read together with article 2, paragraph 1, of the Covenant. He contends that article 12, section 4, clause 7, of the Estonian Aliens Act<sup>5</sup> is discriminatory as it restricts the issuance or the extension of a residence permit to an alien if he or she served as a member of the armed forces of a foreign state. The relevant provision of the Act states:

“§ 12. Basis for issue of residence permits

[...] (4) A residence permit shall not be issued to or extended for an alien if:

[...] (7) he or she has served as a professional member of the armed forces of a foreign state or has been assigned to the reserve forces thereof or has retired therefrom; [...]"

3.4 Under section 5 of the same article, as an exception, temporary residence permits may be issued to aliens listed, inter alia, under section 4, clause 7 of the Aliens Act, and such residence permits may be extended. At the same time, according to article 12, section 7, of the Act, the restriction of, inter alia, article 12, section 4, clause 7, does not extend 'to the citizens of the member states of the European Union or NATO'. The author claims that the law amounts to discrimination as it presumes that all foreigners, except citizens of EU and NATO member states, who have served in the armed forces pose a threat to Estonian national security, regardless of the individual features of the particular service in question. He argues that there is no proof either of any threat posed generally by military retirees, nor of any threat posed by himself. He also contends that the "threat" must be proven, for example, by an executory court sentence. He clarifies that he did not apply for Estonian citizenship; the permanent residence permit he applied for would have given him a more stable status in the only State in which he has reasons to stay.

### **The State party's observations on admissibility and the merits**

4.1 By submissions of 1 June 2004, the State party contested both the admissibility and the merits of the communication. On admissibility, it argues that the communication should be considered an abuse of the right of communication. It further argues that the author has failed to exhaust domestic remedies. On the merits, the State party argues that the facts disclose no violation of the Covenant.

4.2 For the State party, the author did not explain why his communication was submitted to the Committee more than four years after the final national judicial decision. Although the Optional Protocol does not set any time limits for the submission of a written communication, it is up to the Committee to decide whether a substantial delay in submitting a communication does consist of an abuse of the right of submission,<sup>6</sup> as prescribed by article 3 of the Optional Protocol. Estonia acceded to the Covenant and the Optional Protocol in 1991. Article 3 of the Constitution states that generally recognized principles and rules of international law are an inseparable part of the Estonian legal system, and article 123 states that if laws or other legislation of Estonia are in conflict with international treaties ratified by the parliament, the provisions of the international treaty shall apply. The State party submits that the author should have known these principles. Any remedy that an individual seeks to pursue requires that the individual takes steps in order to bring his/her case before the relevant body within a reasonable time.

4.3 The author did not submit a request to the administrative court, seeking a constitutional review of the constitutionality of the Aliens Act. The State party refers to a decision of 5 March 2001 where the Constitutional Review Chamber, on reference from the administrative court, declared provisions of the Aliens Act, pursuant to which the applicant had been refused a residence permit, to be unconstitutional. The State party also observes that the Supreme Court does exercise its power to strike down domestic legislation inconsistent with international human rights treaties. It adds that, as equality before the law and protection against discrimination are protected both by the Constitution and the Covenant, a constitutional challenge would have afforded the author an available and effective remedy. In light of the Supreme Court's recent case law, the State party considers that such an application would have had a reasonable prospect of success and should have been pursued.

4.4 The author also did not pursue recourse to the Legal Chancellor to verify the non-conformity of the impugned law with the Constitution or Covenant. The Legal Chancellor may propose a review of legislation considered unconstitutional, or, failing legislative action, can make a reference to this effect to the Supreme Court. The Supreme Court has “in most cases” accepted such a reference. Accordingly, if the author considered himself incapable of lodging a constitutional challenge, he could have applied to the Legal Chancellor to take such a step.

4.5 The State party notes that the right to be granted a permanent residence permit and the ancillary rights are not guaranteed by the Covenant. Under international law, every state can decide on the entry to and stay of foreigners in the country, including the question of issuing residence permits. Estonian authorities have discretion to regulate these questions by national legislation. The restrictions on granting permanent residence permits are necessary for reasons of guaranteeing national security and public order. The State party refers to the Committee’s decision in *V.M. R.B. v. Canada*,<sup>7</sup> where the Committee observed that it could not test a sovereign State’s evaluation of an alien’s security rating. Accordingly, the State party argues that the refusal to grant a permanent residence permit to the author does not interfere with any of his Covenant rights.

4.6 On the merits of the article 26 claim, the State party invokes the Committee’s established jurisprudence that not all differences in treatment are discriminatory; and that differences that are justified on a reasonable and objective basis are consistent with article 26. Differences in result arising from the uniform application of laws do not per se constitute prohibited discrimination.<sup>8</sup> According to the Aliens Act, as a general rule, a residence permit is not granted to a person who served in the intelligence or security services of a foreign country; as an exception, they can be granted a temporary residence permit with the permission of the Government. The author was granted temporary residence permit on exceptional grounds and he was refused permanent residence permit in accordance with the provisions of the domestic law, as he had served in the intelligence and security service of a foreign state.

4.7 The State party argues that the restriction on granting a permanent residence permit is necessary for reasons of national security and public order. It is also necessary in a democratic society for the protection of state sovereignty and is proportional to the aim set out in the law. In refusing to grant the author a permanent residence permit, the Board justified its order in a reasoned fashion, which reasons, in the State party’s view, were relevant and sufficient. In adopting the law in question, it was also taken into account that in certain conditions former members of the armed forces might endanger Estonian sovereignty from within. This particularly applies to persons who were assigned to the reserve, as they are familiar with Estonian circumstances and can be called to service in a foreign country’s forces.

4.8 The State party maintains that the author was not treated unequally compared to other persons who served in the intelligence service of a foreign country, as the law does not allow granting permanent residence permit to such persons. With regard to the author’s claim that article 12, section 5 of the Aliens Act, does not apply to citizens of the European Union and NATO, the State party recalls that the author’s request was refused in 1998, but that the provision the author invokes entered into force only on 1 October 1999. The State party thus argues that the reasons to refuse the residence permit to the author were based on considerations of national security, not on any circumstance relating to the author’s social origin. The refusal, made according to law, was not arbitrary and had no negative consequences for the author.

4.9 According to the State party, the ancillary rights, which the author claims also to have been denied, are closely connected with the main issue at stake - the right to be granted a residence permit. They should be assessed as a whole. In any event, the State party argues, the alleged violations of article 12 are now moot, as the author was granted a temporary residence permit for a period of five years and was issued an aliens passport. An alien's passport is a travel document and its holder can cross the borders, although for entering some countries it is necessary to obtain a visa. Any complaint related to requirements for the issuance of such visas by foreign governments cannot be directed against the Estonian Government.

4.10 The author's claim that he might lose the right to enter Estonia if he stays abroad for longer periods is without substance. It would be possible to ask for a prolongation of the residence permit and issue an alien's passport from the Board in writing. According to articles 42 and 44 of the Act on Consular Affairs, Estonian consulates can deliver an alien's passport and issue residence permits. The author could apply for an alien's passport or a residence permit from outside Estonia.

4.11 As to the claim that the author is denied the right to vote and to be elected, the State party recalls that the right to vote of aliens with a residence permit is not a right contained in the provisions of article 25, which guarantees these rights only to citizens of a state.

4.12 The State party notes that in addition to the temporary residence permit issued to the author on 31 December 1996 with the validity until 31 December 1998, he has been issued further temporary residence permits for the following periods of time: from 5 October 1999 to 1 February 2000, from 11 May 2000 to 31 December 2000, from 1 January 2001 to 31 December 2001, from 1 January 2002 to 31 December 2003 and from 1 January 2004 to 31 December 2008.

### **The author's comments on the State party's observations**

5.1 On 20 and 30 July 2004, the author commented on the State party's observations. He recalls that he has lived in Estonia since the age of eight, was a USSR citizen until 1991 and benefited from permanent registration (*propiska*) in Estonia until 1996. Until 31 December 1996, when the Order was adopted, he was not considered to be a threat to Estonian national security. Former employees of the KGB of the ESSR, whose parents held Estonian citizenship until 1940, obtained Estonian citizenship after independence, despite falling into the same category of being a threat to Estonian national security as the author.

5.2 The author further submits that the Act on Registration and Disclosure applied by the State party (paragraph 2.7 above) is contrary to article 23, part 1 of the Constitution, which states that no one may be found guilty of an act, if that act did not constitute a crime under a law which was in effect when the act was committed. The author's employment by the KGB between 1975 and 1991 did not constitute at that time either work in special services of a foreign state, or amounted to cooperation with the special services of an occupying state.

5.3 The author adds that the different periods of validity of his temporary residence permits - between four months and five years - prove that the State party's argument about national security is unfounded. The State party failed to demonstrate how and under which criteria the assessment of the author's threat to Estonian national security justified such significant discrepancy in the length of the permits' validity. The author also challenges the State party's



argument that ‘in certain conditions former members of the armed forces might endanger Estonian statehood from within’ and ‘can be called to service in a foreign country’s forces’, as in his case, both the USSR and ESSR ceased to exist, while Buryatia ASSR could hardly pose a threat to the Estonia’s state interests.

5.4 The author quotes at length from a 1991 agreement between Estonia and the Russian Federation on the status of military bases and bilateral relations in support of his claim that this treaty did not exclude former KGB servicemen from the provisions of article 3, allowing the USSR citizens to freely choose between the Russian and Estonian citizenship. The author adds that his initial intention was to apply for Estonian citizenship after living in Estonia with a permanent residence permit for five years. However, as one of 175,000 stateless persons who are long-term residents of Estonia the author cannot obtain Estonian citizenship, since he belongs to a special group of the so-called former military personnel of the USSR.

5.5 The author denies that his case is an abuse of the right to submit a communication, since the Estonian Supreme Court did not inform him about further possibilities of redress after refusing his leave to appeal on 16 June 1999.

5.6 On the argument that he did not initiate constitutional review proceedings to challenge the constitutionality of the Aliens Act, the author submits that under article 6 of the Law on Constitutional Review Procedure (in force until 1 July 2002), only the President of Estonia, the Legal Chancellor and the courts could initiate the constitutional review procedure. Contrary to the State party’s claim, he unsuccessfully tried to raise the issue of unconstitutionality of the Aliens Act and its incompatibility with article 26 of the Covenant in the domestic courts.

5.7 As to the possibility of approaching the Legal Chancellor, the author observes that according to article 22 (2) of the Law on the Legal Chancellor, the Chancellor must reject applications if the subject matter is, or has been, the subject of judicial proceedings. Given the limited effectiveness of the Legal Chancellor’s competences, the author opted for judicial review of the Board’s decision.

5.8 On 6, 12, 15 and 21 June 2007, the author submitted further comments on the State party’s observations. In addition to reiterating his earlier claims, the author states that he was involved in other court proceedings in Estonia from 2004 to 2006, and that his complaint related to the latter proceedings was registered by the European Court of Human Rights in 2007. Moreover, in October 2006, he was granted a status of a ‘long-term resident-EU’ by the Board on the basis of his request submitted on 10 July 2006.<sup>9</sup> A holder of this status does not need a work permit in Estonia; however, even this status does not give him the grounds to become a naturalised Estonian citizen due to the restrictions imposed by the Order No. 1024.

## **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 notes the State party's argument that the communication amounts to an abuse of the right of submission, given the excessive delay between the submission of the complaint and the adjudication of the issue by the domestic courts. As regards the supposedly excessive delay in submitting the complaint, the Committee points out that the Optional Protocol sets no deadline for submitting communications, that the amount of time that elapsed before submission, other than in exceptional cases, does not in itself constitute an abuse of the right to submit a communication.<sup>10</sup> In the circumstances of this particular case, the Committee does not find that a delay of 4 years between exhaustion of domestic remedies and presentation of the communication to the Committee amounts to an abuse of the right of submission.

6.4 On the requirement of exhaustion of domestic remedies in relation to the alleged violation of articles 12, paragraphs 2 and 4, and article 25, the Committee recalls that the author did not raise these issues before the domestic courts. It further recalls that an author is required to at least raise the substance of his or her claims in the domestic courts before submitting them to the Committee. As the author failed first to raise the alleged violations of his rights in the domestic courts, the Committee considers that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.5 As to the State party's contention that the claim under article 26 is likewise inadmissible, as a constitutional review could have been initiated, the Committee observes that the author has consistently argued, up to the level of the Supreme Court, that the rejection of a permanent residence permit on the grounds of social origin, as a former employee of a foreign intelligence and security service, violated the equality guarantee of the Estonian Constitution and article 26 of the Covenant. In light of the courts' rejection of these arguments, the Committee considers that the State party has not shown how such a remedy would have a reasonable prospect of success. This claim, therefore, is not inadmissible for failure to exhaust domestic remedies.

6.6 As to the State party's other arguments, the Committee notes that the author has not advanced any claim to a free-standing right to a permanent residence permit, but rather that he claims that the refusal to grant a permanent residence permit to him on the grounds of social origin as a former employee of a foreign intelligence and security service violates his right to non-discrimination and equality before the law. This claim falls within the scope of article 2, paragraph 1, read together with article 26, and is, in the Committee's view, 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 under article 5, paragraph 1, of the Optional Protocol.

7.2 The author claims that article 12, section 4, clause 7,<sup>11</sup> of the Estonian Aliens Act violates article 2, paragraph 1, read together with article 26 of the Covenant, so far as it restricts the issuance or the extension of a residence permit to an alien if he or she served as a professional member of the armed forces of a foreign state. At the same time, under article 12, section 7, of

the Act, this restriction does not extend to citizens of EU or NATO member states. The author claims that the law is discriminatory as it presumes that all foreigners, except citizens of EU and NATO member states, who served in the armed forces pose a threat to Estonian national security, regardless of the individual features of the particular service or training in question. With regard to the latter, the Committee takes note of the State party's argument that while the author's request was refused in 1998, article 12, section 7, invoked by the author, only entered into force on 1 October 1999.

7.3 The Committee further observes that the State party invokes national security grounds as a justification for the refusal to grant a permanent residence permit to the author. The Committee refers to its jurisprudence that an individual may be deprived of his right to equality before the law if a provision of law is applied to him or her in arbitrary fashion, such that an application of law to an individual's detriment is not based on reasonable and objective grounds.<sup>12</sup> It also recalls its jurisprudence established in *Borzov v. Estonia*,<sup>13</sup> that considerations related to national security may serve a legitimate aim in the exercise of a State party's sovereignty in the granting of citizenship or, as in the present case, of a permanent residence permit. It recalls that the invocation of national security on the part of a State party does not, ipso facto, remove an issue wholly from the Committee's scrutiny and recognizes that its own role in reviewing the existence and relevance of such considerations will depend on the circumstances of the case.<sup>14</sup>

7.4 Whereas article 19, article 21 and article 22 of the Covenant establish a criterion of necessity in respect of restrictions based on national security, the criteria applicable under article 26 and article 2, paragraph 1, are more general in nature, requiring reasonable and objective justification and a legitimate aim for distinctions that relate to an individual's characteristics enumerated in article 26, including "other status". The Committee observes that enactment of the Aliens Act and, in particular, a blanket prohibition of the issue of a permanent residence permit to the 'former members of the armed forces' of a foreign state cannot be examined outside the historical context, that is, the historical relationship between the State party and the USSR. The Committee is of the view that although the above-mentioned blanket prohibition per se constitutes differentiated treatment, in the circumstances of the present case, the reasonableness of such differentiated treatment would depend on the basis for national security arguments invoked by the State party.

7.5 The State party has argued that legislation does not violate article 26 of the Covenant if the grounds of distinction contained therein are justifiable on objective and reasonable grounds. In the present case, it concluded that granting permanent residence permit to the author would raise national security issues on account of his former employment in the KGB. The Committee notes that neither the Covenant nor international law in general spell out specific criteria for the granting of residence permits, and that the author had a right to have the denial of his application for permanent residence reviewed by the State party's courts.

7.6 The Committee notes that the category of people excluded by the State party's legislation from being able to benefit from permanent residence permits is closely linked to the considerations of national security. Furthermore, where such justification for differentiated treatment is persuasive, it is unnecessary that the application of the legislation be additionally justified in the circumstances of an individual case. The decision in *Borzov*,<sup>15</sup> decided on the basis of a different legislation, is consistent with the view that distinctions made in the legislation itself, where justifiable on reasonable and objective grounds, do not require additional justification on these grounds in their application to an individual. Consequently,

the Committee does not, in the circumstances of the present case, conclude that there was a violation of article 26, read together with article 2, paragraph 1, 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 do not disclose a violation of article 26, read together with article 2, paragraph 1, of the Covenant.

[Adopted 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 present report.]

### Notes

<sup>1</sup> The Optional Protocol entered into force for the State party on 21 January 1992.

<sup>2</sup> Article 12, section 4, clause 5 of the Aliens Act, referred to in the judgment of the Tallinn Court of Appeal of 12 April 1999 does not have an equivalent in the current version of the Act and read as follows:

“§ 12. Bases for issue of residence permits

[...] (4) A residence permit shall not be issued to an alien if:

[...] (5) he or she has been or is employed by an intelligence or security service of a foreign state;”

<sup>3</sup> Article 27 (1) provides:

§ 27. Basis for issue of alien’s passport

(1) An alien’s passport shall, on the basis of a personal application, be issued to an alien who holds a valid residence permit in Estonia if it is proved that the alien does not hold a travel document issued by a foreign state and that it is not possible for him or her to obtain a travel document issued by a foreign state. [...]

<sup>4</sup> Article 28 provides:

§ 28. Period of validity of alien’s passport

An alien’s passport shall be issued with a period of validity of up to ten years, but the period of validity shall not exceed the period of validity of the residence permit issued to the alien.

(17.05.2000 entered into force 01.08.2000 - RT I 2000, 40, 254)

<sup>5</sup> The author challenges before the Committee article 12, section 4, clause 7, of the Aliens Article - “he or she has served as a professional member of the armed forces of a foreign state or has been assigned to the reserve forces thereof or has retired therefrom”, although the State party

considers that he falls under the provision of article 12, section 4, clause 5, of the Aliens Act valid at the time of the consideration of the author's application for a permanent residence permit - "he or she has been or is employed by an intelligence or security service of a foreign state". There was no equivalent of the latter provision in the Aliens Act at the time of submission of the communication.

<sup>6</sup> Reference is made to *Gobin v. Mauritius*, communication No. 787/1997, decision on inadmissibility adopted on 16 July 2001.

<sup>7</sup> *V.M. R.B. v. Canada*, communication No. 236/1987, decision on inadmissibility adopted on 18 July 1988.

<sup>8</sup> Reference is made to *F.H. Zwaan-de Vries v. the Netherlands*, communication No. 182/1984; *Hendrika S. Vos v. the Netherlands*, communication No. 218/1986; *A. Järvinen v. Finland*, communication No. 295/1988).

<sup>9</sup> As of 1 June 2006, an alien holding a permanent residence permit issued by the Estonian authorities shall automatically be deemed as an alien holding the 'long-term resident - EU' status. It seems that the author was granted this status on an exceptional basis, as he never had a permanent residence permit issued by the Estonian authorities.

<sup>10</sup> See, *Gobin v. Mauritius*, note 6 above, and *Fillacier v. France*, communication No. 1434/2005, Views adopted on 28 April 2006, para. 4.3.

<sup>11</sup> See note 5 above.

<sup>12</sup> *Kavanagh v. Ireland (No. 1)*, communication No. 819/1998, Views adopted on 4 April 2001, and *Borzov v. Estonia*, communication No. 1136/2002, Views adopted on 26 July 2004.

<sup>13</sup> Ibid.

<sup>14</sup> *V.M. R.B. v. Canada*, (see note 7 above) and *Borzov v. Estonia*, (see note 12 above).

<sup>15</sup> See note 12 above.

**G. Communication No. 1306/2004, *Haraldsson and Sveinsson v. Iceland*  
(Views adopted on 24 October 2007, ninety-first session)\***

<i>Submitted by:</i>	Erlingur Sveinn Haraldsson and Örn Snævar Sveinsson (represented by Mr. Ludvik Emil Kaaber)
<i>Alleged victim:</i>	The authors
<i>State party:</i>	Iceland
<i>Date of communication:</i>	15 September 2003 (initial submission)
<i>Subject matter:</i>	Compatibility of fisheries management system with non-discrimination principle
<i>Procedural issues:</i>	Notion of <i>victim</i> ; exhaustion of domestic remedies; compatibility with the provisions of the Covenant
<i>Substantive issue:</i>	Discrimination
<i>Article of the Covenant:</i>	Article 26
<i>Articles of the Optional Protocol:</i>	1 and 5, paragraph 2 (b)

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

*Meeting on 24 October 2007,*

*Having concluded* its consideration of communication No. 1306/2004, submitted to the Human Rights Committee on behalf of Erlingur Sveinn Haraldsson and Örn Snævar Sveinsson, 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,

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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 Chanut, 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.

Four dissenting opinions signed by Committee members, Ms. Elisabeth Palm, Mr. Ivan Shearer, Ms. Iulia Antoanella Motoc, Sir Nigel Rodley, Mr. Yuji Iwasawa and Ms. Ruth Wedgwood are appended to the present document.

*Adopts the following:*

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

1.1 The authors of the communication are Mr. Erlingur Sveinn Haraldsson and Mr. Örn Snævar Sveinsson, both Icelandic citizens. They claim to be victims of a violation of article 26 of the International Covenant on Civil and Political Rights by Iceland.<sup>1</sup> The authors are represented by Mr. Ludvik Emil Kaaber.

1.2 The authors have been professional fishers since boyhood. Their complaints relate to the Icelandic fisheries management system and its consequences for them. The fisheries management system, which was created by legislation, applies to all fishers in Iceland.

#### **The relevant legislation**

2.1 Counsel and the State party refer to the *Kristjánsson case*<sup>2</sup> and their explanations provided in relation to that case, on the fisheries management system in Iceland. During the 1970s the capacity of Iceland's fishing fleet was surpassing the yield of its fishing banks and measures became necessary to safeguard Iceland's main natural resource. After several unsuccessful attempts to restrict the pursuit of particular species and to make fishing by certain types of gear or by type of vessel subject to licence, a fisheries management system was adopted by Act 82/1983, initially enacted for one year. It was based on the allocation of catch quotas to individual vessels on the basis of their catch performance, generally referred to as "the quota system". The allocation of quotas had been employed to a considerable extent since the 1960s with regard to catches of lobster, shrimp, shellfish, capelin and herring, for which a quota system was established already in 1975.

2.2 In application of the Act, regulation No. 44/1984 (on the management of demersal fishing) provided that operators of ships engaged in fishing of demersal species during the period from 1 November 1980 to 31 October 1983 would be eligible for fishing licences. The ships were entitled to fishing quotas based on their catch performance during the reference period. Further regulations continued to build on the principles so established and these principles were transferred into statute legislation with Act No. 97/1985, which stated that no one could catch the following species without a permit: demersal fish, shrimp, lobster, shellfish, herring and capelin. The main rule was that fishing permits were to be restricted to those vessels that had received permits the previous fishing year. Accordingly, the decommissioning of a vessel already in the fleet was a prerequisite for the granting of a fishing permit to a new vessel. With the enactment of the Fisheries Management Act No. 38/1990 (hereafter referred to as the Act), with subsequent amendments, the catch quota system was established on a permanent basis.

2.3 The first article of the Act states that the fishing banks around Iceland are common property of the Icelandic nation and that the issue of quotas does not give rise to rights of private ownership or irrevocable domination of the fishing banks by individuals. Under article 3 of the Act, the Minister of Fisheries shall issue a regulation determining the total allowable catch (TAC) to be caught for a designated period or season from the individual exploitable marine stocks in Icelandic waters for which it is deemed necessary to limit the catch. Harvest rights provided for by the Act are calculated on the basis of this amount and each vessel is allocated a specific share of the TAC for the species, the so-called quota share. Under article 4 (1) of the Act, no one may pursue commercial fishing in Icelandic waters without having a general fishing

permit. Article 4 (2) allows the Minister to issue regulations requiring special fishing permits for catches of certain species or made with certain type of gear or from certain types of vessels, or in particular areas. Article 7 (1) provides that fishing of those species of living marine resources which are not subject to limits of TAC as provided for in article 3 is open to all vessels with a commercial fishing permit. Article 7 (2) establishes that harvest rights for the species of which the total catch is limited shall be allocated to individual vessels. When quota shares are determined for species that have not been previously subject to TAC, they are based on the catch performance for the last three fishing periods. When quota shares are set for species that have been subject to restricted fishing, they are based on the allocation in previous years. Under article 11 (6) of the Act, the quota share of a vessel may be transferred wholly or in part and merged with the quota share of another vessel, provided that the transfer does not result in the harvest rights of the receiving vessel becoming obviously in excess of its fishing capacity. If those parties who are permanently entitled to a quota share do not exercise their right in a satisfactory manner, this may result in their forfeiting the right permanently. The Fisheries Management Act also imposes restrictions on the size of the quota share that individuals and legal persons may own. The Act finally sets penalties for violations of the Act, ranging from fines of ISK 400 000 to imprisonment of up to six years.

2.4 The State party provides some statistics to illustrate that the fisheries sector constitutes a major component of the Icelandic economy. It points out that all changes in the management system may have immense effects on the economic well-being of the country. In the past few years, there has been intense public discussion and political argument about the right manner to build the fisheries management system in the most efficient way for the interests of both the nation as a whole, and those who are employed in the fisheries industry. Icelandic courts have examined the fisheries management system in the light of the constitutional principles of equality before the law (article 65 of the Constitution) and of freedom of occupation (article 75 of the Constitution), in particular in two cases.

2.5 In December 1998, the Supreme Court of Iceland delivered its judgement in the case of *Valdimar Jóhannesson v. the Icelandic State* (the *Valdimar* case), stating that the restrictions on freedom of employment involved in article 5 of the Fisheries Management Act were not compatible with the principle of equality under article 65 of the Constitution. It considered that article 5 of the Act imposed excluding restrictions in advance against individual persons' ability to make fishing their employment. It reasoned that under the restrictions in force at that time, fishing permits were granted only to certain vessels that had been in the fishing fleet during a particular period, or new vessels that replaced them, and that these restrictions were unconstitutional. However it did not adopt a position on article 7 (2), regarding the restrictions on access by the holders of fishing permits to the fish stocks. Parliament then adopted Act No. 1/1999 which substantially relaxed the conditions for obtaining commercial fishing permits. With the adoption of this act, the decommissioning of a vessel already in the fleet was no longer a prerequisite for the granting of a fishing permit to a new vessel. Instead, general conditions were set for the issuance of fishing permits to all vessels.

2.6 The other relevant judgment of the Supreme Court, dated 6 April 2000, relates to the case of the *Directorate of Public Prosecutions v. Björn Kristjánsson, Svavar Gudnason and Hyrnó Ltd* (the *Vatneyri* case). With regard to article 7 of the Act, the Supreme Court found that restrictions on individuals' freedom to engage in commercial fishing were compatible with articles 65 and 75 of the Constitution, because they were based on objective considerations. In particular, the Court noted that the arrangement of making catch entitlements permanent and



assignable is supported by the consideration that this makes it possible for operators to plan their activities in the long term, and to increase or decrease their catch entitlements in individual species as may suit them.

2.7 After the *Valdimar* case, a committee was appointed to revise the fisheries management legislation. Amendments corresponding to its recommendations were introduced by Act No. 85/2002. According to this Act, a fee, known as a “catch fee”, should be charged for the use of the fishing grounds. The fee is based on the economic performance of the fishing industry. It consists of a fixed part based on the State’s costs for managing fisheries, and a variable part reflecting the economic performance of the industry. In the State party’s opinion, this legislative amendment shows that the Icelandic legislature is constantly examining what are the best means to achieve the goal of managing fishing in the most efficient way in view of the interests of the nation as a whole.

2.8 The authors state that in practice, and notwithstanding section 1 of the Act, (providing that the fishing banks around Iceland are a common property of the Icelandic nation and that allocation of catch entitlements does not endow individual parties with a right of ownership of such entitlements,) fishing quotas are treated as a personal property of those to whom they were distributed free of charge during the reference period. Other persons, such as the authors, must therefore purchase or lease a right to fish from the beneficiaries of the arrangement, or from others who have, in turn, purchased such a right from them. The authors consider that Iceland’s most important economic resource has therefore been donated to a privileged group. The money paid for access to the fishing banks does not revert to the owner of the resource - the Icelandic nation - but to the private parties personally.

### **Factual background**

3.1 During the reference period, the authors worked as captain and boatswain. In 1998, they established a private company, Fagrimúli ehf, together with a third man, and purchased the fishing vessel *Sveinn Sveinsson*, which had a general fishing permit. The company was the registered owner of the ship. During the fishing year 1997-1998, when the ship was purchased, various harvest rights (catch entitlements) were transferred, but no specific quota share was associated with the ship. At the beginning of the fishing year 2001-2002, the *Sveinn Sveinsson* was allocated harvest rights for the first time for the species ling, tusk and monkfish, which amounted to very small harvest rights. The authors claim to have repeatedly applied for catch entitlements on various grounds, but unsuccessfully. In particular, the Fisheries Agency stated that there was no legal authorisation for providing them with a quota. As a result, they had to lease all catch entitlements from others, at exorbitant prices, and eventually faced bankruptcy.

3.2 They decided to denounce the system, and on 9 September 2001, they wrote to the Ministry of Fisheries, declaring that they intended to catch fish without catch entitlements, in order to obtain a judicial decision on the issue and to determine whether they would be able to continue their occupation without paying exorbitant amounts of money to others. In its reply of 14 September 2001, the Ministry of Fisheries drew the authors’ attention to the fact that under the penalty provisions of the Fisheries Management Act, No. 38/1990, and the Treatment of Exploitable Marine Stocks Act, No. 57/1996, catches made in excess of fishing permits were punishable by fines or up to six years’ imprisonment, as well as the deprivation of fishing permits.

3.3 On 10, 11, 13, 19, 20 and 21 September 2001, the first author, as managing director, board member of Fagrimúli ehf, owner of the company operating the *Sveinn Sveinsson* and captain of that ship, and the second author, as chairman of the board of that company, sent the ship to fish, and landed, without the necessary catch entitlements, a catch of a total of 5,292 kg of gutted cod, 289 kg of gutted haddock, 4 kg of gutted catfish and 606 kg of gutted plaice. Their only purpose in doing this was to be reported, so that their case could be heard in court. On 20 September, the Fisheries Agency received a report that the *Sveinn Sveinsson* had landed a catch at Patreksfjörður on that day.

3.4 As a consequence, the Fisheries Agency filed charges against the authors with the commissioner of police at Patreksfjörður for violations of the Treatment of Exploitable Marine Stocks Act, No. 57/1996, the Fisheries Management Act, No. 38/1990, and the Fishing in Iceland Fisheries Jurisdiction Act, No. 79/1997. On 4 March 2002, the National Commissioner of Police brought a criminal action against the authors before the West Fjords District Court. The authors confessed the acts they were accused of, but challenged the constitutional validity of the penal provisions that the indictment relied on. On 2 August 2002, with reference to the precedent of the Supreme Court judgment of 6 April 2000 in the *Vatneyri case*, the District Court convicted the authors and sentenced them to a fine of ISK 1,000,000<sup>3</sup> each or three months imprisonment, and to payment of costs. On appeal, the Supreme Court, on 20 March 2003, upheld the judgment of the District Court.

3.5 On 14 May 2003, the authors' company was declared bankrupt. Their ship was sold on auction for a fraction of the price the authors had paid for it four years earlier. Their bank then requested the forced sale of the company's shore facilities and of their homes. One of the authors was able to conclude an instalment agreement with the bank and started working as an officer on board a vessel used for industrial purposes. The other author lost his home, moved from his home community and started working as a mason. At the time of submission of the communication, he was unable to pay his debts.

## **The complaint**

4.1 The authors claim to be victims of a violation of article 26 of the Covenant, because they are lawfully obliged to pay money to a privileged group of fellow citizens, in order to be allowed to pursue the occupation of their choice. The authors request, in accordance with the principles of freedom of employment and equality, an opportunity to pursue the occupation of their choice without having to surmount barriers placed in advance, which constitute privileges for others.

4.2 The authors claim compensation for the losses endured as a result of the fisheries management system.

## **The State party's observations**

5.1 On 29 October 2004, the State party challenged the admissibility of the communication on three grounds: non-substantiation of the authors' claim that they are *victims* of a violation of article 26, non-exhaustion of domestic remedies, and the communication's incompatibility with the provisions of the Covenant.

5.2 The State party argues that the authors have not shown how article 26 of the Covenant is applicable to their case, or how the principle of equality has been violated against them as

individuals. They have not demonstrated that they were treated worse, or were discriminated against, as compared with other persons in a comparable position; or that any distinction made between them and other persons was based on irrelevant considerations. They merely make a general assertion that the Icelandic fisheries management system violates the principle of equality in article 26.

5.3 The State party notes that the authors have worked many years at sea, one of them as captain and the other as marine engineer. They worked as employees on ships whose catch performance was not of direct benefit to them, but to their employers, who, unlike the authors, had invested in ships and equipment in order to run fishing operations. One of the main reasons for the introduction of the Fisheries Management Act, No. 38/1990, was that it would create acceptable operating conditions for those who had invested in fisheries operations, instead of their being subject to same catch restrictions as other persons who had not made such investments. The authors have not demonstrated how they were discriminated against when they were refused a quota, or whether other vessel captains or seamen in the same position received quota allocations. In addition they did not make any attempt to have these refusals reversed by the courts on the ground that they constituted discrimination in violation of article 65 of the Constitution or article 26 of the Covenant.

5.4 When they invested in the purchase of the *Sveinn Sveinsson* in 1998, the authors were aware of the system. They bought the ship without a quota, with the intention to rent it on the quota exchange, as a basis for their fishing operations. As a result of the increased demand of quotas on the market, the prices of quotas rose, which changed the economic basis for the authors' fishing operations. After they fished without a quota, they were tried and sentenced, as would have happened to any other person under the same circumstances. The State party concludes that the communication should be declared inadmissible *ratione personae* under article 1 of the Optional Protocol, as the authors have not sufficiently substantiated their claims that they are victims of a violation of the Covenant.

5.5 The State party argues that the authors failed to exhaust all available domestic remedies, because they did not make any attempts to have their refusal of a quota reversed by the courts. They could have referred these administrative decisions to the courts with a demand that they be set aside. The State party indicates that this was done in the *Valdimar* case, where an individual who had been refused a fishing permit demanded the annulment of an administrative decision. His demand was accepted by the courts, which demonstrates that this is an effective remedy. The State party concludes that the communication should be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

5.6 Finally, the State party argues that the case hinges on whether the restriction in the authors' freedom of employment is excessive, as they consider that the prices of certain commercial catch quotas are unacceptable and constitute an obstacle to their right to choose freely their occupation. The State party points out that freedom of employment is not protected per se by the International Covenant on Civil and Political Rights and that in the absence of specific arguments showing that the restrictions of his freedom of employment were discriminatory the communication would be inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

5.7 The State party also provides observations on the merits of the communication. It argues that no unlawful discrimination was made between the author and those to whom harvest rights

were allocated. What was involved was a justifiable differentiation: the aim of the differentiation was lawful and based on reasonable and objective grounds, prescribed in law and showing proportionality between the means employed and the aim. The State party explains that public interest demands that restrictions be imposed on the freedom of individuals to engage in commercial fishing in order to prevent over-fishing. Restrictions aimed at this goal are prescribed by the detailed fisheries legislation. The State party further argues that the allocation of a limited resource cannot take place without some sort of discrimination and states that the legislature employed a pragmatic method in allocating the permits. The State party rejects the authors' view that the principle of equality protected by article 26 of the Covenant is to be interpreted in such a way as to entail a duty to allocate a share of limited resources to all citizens who are or have been employed as seamen or captains. Such an arrangement would violate the principle of equality with regards to the group of individuals who have, through extensive investment in vessel operations and the development of commercial enterprises, tied their fishing competence, assets and livelihood to the fisheries sector.

5.8 The State party emphasizes that the arrangement by which harvest rights are permanent and transferable is based mainly on the consideration that this enables individuals to plan their activities in the long term and to increase or reduce their harvest rights to particular species as best suits them, which leads to the profitable utilisation of the fish stocks for the national economy. The State party maintains that the permanent and transferable nature of the harvest rights leads to economic efficiency and is the best method of achieving the economic and biological goals that are the aims of the fisheries management. Finally, the State party points out that the third sentence of article 1 of the Fisheries Management Act states clearly that the allocation of harvest rights endows the parties neither with the right to ownership nor with irrevocable jurisdiction over harvest rights. Harvest rights are therefore permanent only in the sense that they can only be abolished or amended by an act of law.

5.9 The State party concludes that the differentiation that results from the fisheries management system is based on objective and relevant criteria and is aimed at achieving lawful goals that are set forth in law. In imposing restrictions on the freedom of employment, the principle of equality has been observed and the authors have not sufficiently substantiated their claim that they are victims of unlawful discrimination in violation of article 26 of the Covenant.

### **Authors' comments**

6.1 On 28 December 2004, the authors commented on the State party's admissibility observations. On the State party's first argument, that the authors are not *victims* of a violation of the Covenant, the authors point out that they do not claim to have been treated unlawfully under domestic law, but under the Covenant. The authors maintain that the State party's action to close the fishing banks to persons not engaged in fishing during the "reference period" involved, in reality, a donation of the use of the fishing banks to the persons who were so engaged, and, as matters subsequently evolved, a donation of a personal right to demand payments from other citizens for fishing in the ocean around Iceland. These rights have the nature of property in practice. The authors' complaint relate to this action of donation, and the situation the authors have been placed in, as a result of it. They reiterate that they are brought up and trained as fishermen, have the cultural background of fishermen, and want to be fishermen. They must, if they are to pursue the occupation of their choice, surmount barriers that are not placed in the way of their fellow privileged citizens. They therefore maintain that they are victims of a violation of article 26 of the Covenant. That all Icelanders, except a particular group of citizens, share their

situation, and that they would also be criminally indicted if not accepting this arrangement, is irrelevant. The authors acknowledge that most other Icelanders would be faced with the same obstacles as them. But they consider that their situation should not be compared to other persons in their position, but to the group the members of which have been donated a privilege, and are entitled to monetary payments from any outsiders, like the authors, who want to work in the same field as the group members.

6.2 The authors recall that unlike Mr. Kristjánsson, whose case was declared inadmissible by the Committee, the authors were the owners of the enterprise operating the vessel they used. They had a direct, personal and immediate interest in being allowed to pursue the occupation of their choice, and they repeatedly applied for a quota.

6.3 The authors point out that at the time they decided to fish in violation of the enforced rules, the Icelandic society was divided in disputes and debates on the nature of the fisheries management system. The opinion held by the public and many politicians was that the Icelandic fisheries management system could not be upheld much longer, and that the use of the fishing banks should as soon as possible be admitted to every citizen fulfilling general requirements.

6.4 On the State party's argument that the authors have not exhausted domestic remedies, the authors note that constitutional provisions are superior to other sources of law. The incompatibility of a criminal provision with the Constitution is therefore a valid defence under Icelandic criminal law, and a finding of guilt affirms the constitutional validity of a criminal provision. It was for this reason that two out of seven Supreme Court judges wanted to acquit Mr. Kristjánsson in the *Vatneyri case*. The authors were sentenced with reference to that case. They emphasise that the matter they complain of to the Committee is the law of Iceland.

6.5 The authors refer to the State party's argument that they did not challenge their denials of a fishing quota in domestic courts, as Mr. Jóhannesson did in the *Valdimar case*, and therefore failed to exhaust domestic remedies. They note that it is for the legislature to lay down rules governing fisheries management, for the administrative authorities to administer those rules in practice, and for the courts to resolve disputes relating to the interpretation or implementation of those rules. They further note that, as was pointed out by the State party, the *Valdimar* judgment did not relate to the question of the donation of quotas to a privileged group and the subsequent requirement that others should pay them for a share of their gift. In the *Vatneyri case*, the Supreme Court declared the fisheries management system constitutionally valid. Under those rules, the authors could not be allocated quotas, as they did not fulfil the requirements.

6.6 As to the State party's contention that the complaint is incompatible with the provisions of the Covenant, the authors concede that measures to prevent over-fishing by means of catch-limits are a necessary element in the protection and rational utilisation of fish stocks, and that public interest demands that restrictions be imposed on the freedom of individuals to engage in commercial fishing. They can accept the assertion that the right of employment can only be conferred to a limited group. They maintain however, that such restrictions must be of general nature, and that all citizens fulfilling the relevant general requirements must have equal chances to enter the limited group. In their opinion, the requirement of having been donated a permanent personal quota, or having purchased or leased such a quota, is not a valid requirement.

## Committee's admissibility decision

7.1 During its eighty-seventh session, on 5 July 2006, the Committee examined the admissibility of the communication. It noted that the State party had challenged the admissibility of the communication on the ground that the authors were not *victims* of a violation of the Covenant. The authors claimed to be victims of a violation of article 26 of the Covenant, because they were lawfully obliged to pay money to a privileged group of fellow citizens, in order to be allowed to pursue the occupation of their choice. The Committee noted the State party's argument that the authors were treated in the same manner as anyone in their position, i.e. fishermen having not acquired a quota during the reference period. However, the authors did in fact claim to have been treated differently in comparison with those who acquired a quota during the reference period. The Committee noted that the only difference between the authors, who owned the company which owned and operated the vessel *Sveinn Sveinsson* and who were denied a quota, and the fishermen who were actually granted a quota, was the period in which they were engaged in fishing. The Committee observed that the reference period requirement had since become a permanent one. This was confirmed by the fact that the authors had repeatedly applied for a quota, and that all requests had been denied. In these circumstances, the Committee considered that the authors were directly affected by the fisheries management system in the State party, and that they had a personal interest in the consideration of the case.

7.2 The Committee noted the State party's contention that the authors had not exhausted domestic remedies because they did not attempt to have their refusal of a quota reversed by the Icelandic courts. It considered the State party's reference to the *Valdimar case*, aimed at illustrating that the authors had an available and effective remedy. In that judgment, the Supreme Court found that:

“Although temporary measures of this kind to avert the collapse of fish stocks may have been justifiable, providing permanently by law for the discrimination ensuing from the rule contained in Section 5 of Act No. 38/1990 on the issue of fishing entitlements cannot be regarded as logically necessary. The respondent [the State party] has not demonstrated that other means cannot be employed for attaining the lawful objective of protecting the fish stocks around Iceland.”

The Court considered that Section 5 of Act No. 38/1990 was in conflict with the principle of equality. However, it concluded that:

“The Ministry of fisheries cannot be regarded as having lawfully denied the appellant's application for a general and special fishing licence on the grounds on which that denial was based. The Ministry's denial will therefore be invalidated. On the other hand a stand will not be taken in this case with respect to the question whether the Ministry was in this situation obliged to grant the appellant his petition, as the action is only brought for invalidation of the Ministry's decision, and not for a recognition of a right of the appellant to receive any particular catch entitlements.”

The Committee had not been informed whether the appellant in that case had later been allocated a quota, as a result of the Supreme Court annulling the administrative decision that denied him a quota. It considered that this example alone could not be used to demonstrate that the authors had an effective remedy.

7.3 The Committee further observed that the constitutional validity of the fisheries management system was subsequently affirmed by the Supreme Court, in the *Vatneyri case*, which was referred to as a precedent in the examination of the authors' case by the District Court and the Supreme Court. In these circumstances, and keeping in mind that the authors did not fulfil the legal and administrative requirements to be allocated a quota, the Committee found it difficult to conceive that the Supreme Court would have ruled in favour of the authors had they tried to appeal the administrative denials of a quota. The Committee therefore considered that the remedy referred to by the State party was not an effective one, for the purposes of article 5, paragraph 2 (b) of the Optional Protocol.

7.4 Finally, the Committee observed that the authors had repeatedly applied for a quota, and that all requests had been denied, because they did not fulfil the requirement for being allocated one, namely to have been active in the fishing industry between 1 November 1980 and 31 October 1983. In the Committee's opinion, the authors had no possibility of obtaining a quota from the State party, because, having attributed all available quotas in the beginning of the 1980's, and having made the then beneficiaries of the quotas permanent quota owners, the State party had in fact no more quotas to allocate. The Committee concluded that the authors had therefore no effective remedy to contest their denial of a quota, and that it was not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

7.5 As regards the State party's argument that the authors' complaint fell outside the scope of the Covenant, the Committee considered that the facts raised issues closely connected with the merits, and that these matters were more appropriately examined at the same time as the substance of the authors' complaint under article 26 of the Covenant. On 5 July 2006, the Committee declared the communication admissible.

### **State party's merits observations**

8.1 On 19 January 2007, the State party submitted its observations on the merits of the communication. It recalls the wording of articles 65,<sup>4</sup> and 75, paragraph 1,<sup>5</sup> of the Constitution, respectively relating to equality before the law and freedom of employment. With respect to the fisheries legislation, the State party points out that a uniform Individual Transferable Quotas (ITQ) system was introduced in 1991 by the Fisheries Management Act, No. 38/1990. Prior to this, many different fisheries management systems other than the ITQs were tried out, including: overall catch quotas, fishery access licenses, fishing effort restrictions, and investment controls and vessel buy-back programmes. However, the experience with these various systems led to the adoption of the ITQ system in all fisheries.

8.2 The State party provides an update of the amendments in the fisheries management legislation. In 2006, the Fisheries Management Act was reissued *in toto* as Act No. 116/2006, replacing the earlier Act No. 38/1990. The main provisions applying to the authors' case remain unchanged in substance.

8.3 On the merits, the State party claims that the authors have not provided substantiated arguments related to their claim under article 26 of the Covenant; rather, they have only claimed in general terms that an unlawful discrimination took place as they were not granted a quota share by the authorities in the same way as those fishing operators who received such harvesting rights according to Act No. 38/1990 based on their previous catch experience.

8.4 The State party considers that the restriction of the authors' employment did not constitute a violation of article 26. No unlawful discrimination was made between the authors and those to whom quota shares were allocated under article 7 of Act No. 38/1990. The differentiation between the authors who belonged to a large group of Icelandic seamen and the operators of fishing vessels was justifiable. The State party refers to the standards set by Icelandic courts and the European Court of Human Rights to assess whether a differentiation is justifiable. First, the aim of the differentiation was lawful and based on objective and reasonable grounds. Secondly, it was prescribed by law. Thirdly, no excessive discrimination was practised against the authors when weighed against the overall objective of the fisheries legislation. The State party refers to the Committee's jurisprudence<sup>6</sup> that not every distinction amounts to discrimination and that objective and reasonable differentiations are permitted. It argues that in the case of the authors, all conditions were fulfilled for the differentiation not to amount to a violation of article 26.

8.5 With reference to the aim of the differentiation, the State party observes that important evident public interests are tied to the protection and economical utilisation of fish stocks. The State party has underwritten international legal obligations to ensure the rational utilisation of these resources, in particular under the United Nations Convention on the Law of the Sea. The danger of over-fishing in Iceland is real and imminent, due to advancement in fishing technology, higher catch yields and a growing fishing fleet. A collapse of fish stocks would have disastrous consequences on the Icelandic nation, for which fishing has been a fundamental occupation since the earliest times. Measures to prevent over-fishing by means of catch limits are a necessary element in the protection and rational utilisation of fish-stocks. Therefore, public interest demands that restrictions be imposed on the freedom of individuals to engage in commercial fishing. Such restrictions are prescribed in law in detailed fisheries legislation. The State party raises the question of how the limited resources of the nation's fish-stock were to be divided and considers that it was impossible to allocate equal shares to all citizens.

8.6 The State party argues that there are reasonable and objective grounds for the decision of the Icelandic legislature to restrict and control fish catches by means of a quota system in which harvesting rights are allocated on the basis of the previous catch experience of the fishing vessels rather than by other fisheries management methods. Reference is made to the Supreme Court judgement in the *Valdimar* case:

“The arrangement of making catch entitlements permanent and assignable is also supported by the consideration that this makes it possible for operators to plan their activities in the long term, and to increase or decrease their catch entitlements in individual species as may suit them at any particular time. In this respect, the Act is based on the assessment that the economic benefits leading from the permanent nature of catch entitlements and the possibilities for assignment of catch entitlements and quotas will lead to gainful utilisation of the fish stocks for the benefit of the national economy.”

8.7 The State party refers to Act No. 85/2002, by which a special catch fee was imposed on vessel operators for their right of access to fishing areas, this being calculated to take account of the economic performance of fisheries. The catch fee has the same effects as a special tax imposed on vessel operators. This demonstrates that the legislature is constantly examining the best way of achieving the aim of efficiently controlling fishing and in the best interests of



Iceland. The Parliament always further revises fisheries management arrangements and the right to makes catches. It can also make this right subject to conditions or choose a better method of serving the public interest.

8.8 The State party notes that the comparison of various fisheries management systems in Iceland and abroad and the research findings of scientists in marine biology and economics have unequivocally concluded that a quota system such as the Icelandic one is the best method of achieving the economic and biological goals of modern fisheries management systems. Reference is made to a report entitled “On Fisheries and Fisheries Management in Iceland - A background report”.<sup>7</sup> This report outlines the basic features and advantages of the ITQ system, and the experience of the system in other countries. The State party also recalls the report of OECD “Towards Sustainable Fisheries: Economic Aspects of the Management of Living Marine Resources”.

8.9 The State party points out that the objective and reasonable grounds that existed when the ITQ system was introduced still exist. If all Icelandic citizens, on the basis of equality before the law, had an equal entitlement to begin fishing operations and to have catch quotas allocated to them for this purpose, then the basis for Iceland’s fisheries management system would collapse. Such a situation would undermine the system stability. The quota rights that were originally allocated on the basis of catch performance have since to a large extent passed into other ownership. Those who have subsequently acquired quotas have either bought them at their full market value or hired them. They do not constitute a “privileged group”. They have accepted the rules applying in Iceland’s fisheries management system. If these entitlements were suddenly reduced or removed from their owners, to be equally distributed among all those who are interested in starting fishing operations, this would constitute a gross encroachment on the rights of those who have invested in these entitlements and have a legitimate expectation that they can continue to exercise them.

8.10 The State party demonstrates that the consequences of laws and regulations were not excessive for the authors and thus did not violate the principle of proportionality, in accordance with article 26 of the Covenant. The State party considers the authors’ situation at two points in time: (a) at the time the Fisheries and Management Act No. 38/1990 was passed and harvest rights were initially allocated, and (b) at the time their request for a catch quota was rejected, as they did not fulfil the requirements of the Act.

8.11 First, on 1 January 1991, when the Fisheries Management Act took effect, both authors were employed at sea on the same vessel, as captain and boatswain. They were in the same position as thousands of other vessel officers who had not invested any capital in the fishing vessels on which they based their livelihood. However, the catch performance history of the vessels on which they worked resulted in the vessels’ receiving a quota share under the new fisheries management system. The new system did not alter anything in the context of the authors’ employment as a vessel captain and boatswain. They were able to pursue their careers, and there were no excessive consequences for them. They did not have to discontinue the occupation for which they were educationally and culturally equipped, as claimed by them.

8.12 The State party rejects that article 26 of the Covenant prevented the authorities preparing the new legislation from making any distinction between persons who were the owners of fishing vessels (referred to by the authors as a “privileged group”) and other persons who worked in the

fishing industry. It denies that harvest rights should have been allocated to them all equally. There was a fundamental difference between the owners of the fishing vessel on which the authors worked and the seamen who worked on the ship.

8.13 The State party therefore considers that the distinction which was drawn between the authors and the owners of fishing vessels when the Act was introduced cannot be considered to constitute unlawful discrimination under article 26.

8.14 Secondly, the State party considers the situation when the authors decided to become vessel operators and purchased a fishing vessel with limited catch entitlements. Their intentions, when they purchased the ship, were impracticable, partly because of the substantial reductions of certain endangered fish stocks. These reductions in the total catch were applied equally to all fishing vessels that held quota shares in the relevant species, and resulted in a temporary price increase in the market price of catch quotas for these species. The authorities' decision not to award the authors a quota was foreseeable. The loss of property and income was the consequence of their own decision to stop working in their previous employment as wage-earners in the fishing industry and to operate a vessel-operating company based on weak and risky premises. It was clear what legal conditions applied to those intending to start fishing-vessel operations at the time.

8.15 The State party argues that if the Committee accepts that, on the basis of their purchase of a fishing ship in 1998, the authors were entitled to have a quota allocated to them and to begin fishing operations, then it must also be accepted that at least all those persons who worked as vessel captains or crew members also had an equal right to start fishing operations and to have a quota share allocated to them. The consequences of the system are not more serious for the authors than for thousands of other seamen in Iceland who may wish to purchase fishing vessels and start fishing operations. The State party denies that it is justified for vessel operators to deliberately make unlawful catches of fish to protest against what they consider to be an unjust fishing management system. It is evident that those who break the law will be prosecuted. By doing so, they do not acquire the status of "victims" of unlawful discrimination.

8.16 Finally, the State party argues that if it were now decided to distribute equal fishing quotas to all persons who work at sea or who are interested in purchasing and operating fishing vessel, this would result in serious consequences for those parties that are currently active in the fishing industry and have invested in such rights. Such a decision would have consequences for the interest that society as a whole has to preserve the stability of the fishing industry. With greater demand for shares in the fish stocks (a limited resource) and an obligation on the Government to allocate equal shares to all fishermen, the stability of these entitlements would be uncertain. The result would be that investments in fishing vessels would become unprofitable, the industry as a whole would run into difficulties and there would be a return to the situation which was in place before the current arrangements took effect.

8.17 The State party argues that none of the authors' alleged financial losses can be attributed to the fisheries management system, but rather to their own decision to buy a fishing vessel without a quota share, knowing the legal requirements and foreseeable consequences of that situation.

## **Authors' comments**

9.1 On 23 March 2007, the authors commented on the State party's merits observations. They argue that the State party has persistently upheld the policy adopted following the *Valdimar* judgment, disregarding every opportunity to institute a fisheries management system conforming to fundamental human rights principles. While the State party argues that the "vast majority" of the catch entitlements established by the system have now been sold, the authors agree that "many persons have become millionaires by selling their gift". However, many persons and companies remain in possession of their gift, either leasing it to others or using it for themselves. No accounts or records of the sales have been kept. The authors claim that the State party has succeeded in persuading innocent persons to purchase unlawfully acquired valuables. They argue, however, that purchase of illegally obtained valuables does not give rise to a right of ownership.

9.2 The authors claim that human rights are not subject to statutes of limitation and can not be set aside by prescription. They indicate that they are not claiming a share in a privilege. They insist, on the contrary, that limitations to fishing must be imposed subject to generally applicable conditions. They maintain that it is illegal in every normal domestic legal system, to restrict ocean fishing permanently to a circumscribed group that has been granted such a right gratis, and to oblige others to purchase a share in the privileges of its members by payments to their personal benefit.

9.3 The authors argue that the equality principle prohibits discrimination on the grounds stated in article 26 of the Covenant, which include "status". For the purposes of these provisions, "discrimination" means treating a person less favourably than others on the basis of such grounds. If some persons are granted a privilege which is denied to others, a "status" is created, not only the status of the privileged, but also the status of the non-privileged. An alleged violator of article 26 cannot logically invoke as a defence that all persons who do not enjoy the privilege have the same status.

9.4 On the State party's argument that no discrimination under article 26 took place, the authors agree that the aim of the differentiation, i.e. the preservation and protection of natural resources, was lawful. However, they recall that the method which was used to pursue this aim was the distribution of the entire TAC among operators active during a certain period. The decision was then taken to make the TAC shares a private, assignable property. The effect was the institution of privilege in the recipients' favour at the expense of the civil rights of others. As a result, only the recipients could engage in fishing. All others, including the authors, must purchase from them a portion of their donated TAC share if they also want to engage in fishing. The authors argue that the legitimacy of preservation and protection is irrelevant because of the effect of the measure.

9.5 The authors consider that the institution of the privilege lacks a legal basis because of its unconstitutionality. They add that discrimination is never justified and that the meaning of the term "discrimination" is the failure of the State to apply advantageous rules to all, or the application of disadvantageous rules only to some.

9.6 With respect to the State party's claim that it was necessary to respect the right to employment of persons active in the fisheries sector, the authors question the impartiality of this argument. They argue that with the advent and entrenchment of the fisheries management

system, the idea has settled that employment, or the right to continue in the employment one is active in, is in fact property, protected as such by article 72 of the Icelandic Constitution. The argument was invented subsequently to provide a justification of the fisheries management system, by declaring that the beneficiaries of the limitation of the fishing banks must have their constitutional rights protected.

9.7 The authors recall that the Icelandic fisheries management system came into being by evolution, followed by a decision to make it permanent. The reason why it was tolerated at first was that individuals and companies who had invested in vessels and equipment had to be given a chance to recover their investment. The authors refer to *Valdimar* case, in which it was stated that:

“Although temporary measures of this kind to avert the collapse of fish stocks may have been justifiable, which question is not at issue, providing permanently by law for the discrimination ensuing from [ ... ] the issue of fishing entitlements can not be regarded as logically necessary.”

9.8 The authors point out that the obligation of devising a fisheries management system that does not violate international human rights is the task of the Icelandic government, not of the authors. What they claim is an opportunity to pursue the occupation of their choice under the same conditions as those that apply to others. It is for the Icelandic Government or legislature to decide how this requirement is to be fulfilled.

9.9 On the State party’s fear that “clearly the basis for Iceland’s fisheries management system would collapse”, the authors argue that the fear of the collapse of the system of donated privilege is what has kept that system alive. A dismal outcome in this respect would to some degree be offset by reintroduction of legal principles and improved respect for law afterwards.

9.10 With respect to the State party’s contention that the fisheries management system did not affect the authors, because they were able to continue to pursue their careers as they had done all their working lives, the authors invoke the principle of equality of opportunity: the possibility for persons of any rank or stature to rise in social standing and wealth by work of any kind has been Iceland’s strength until now.

9.11 The authors consider that in an environment challenged as unlawful, domestically or internationally, a person’s attempts to accommodate his/her activities to that environment should not be taken as recognition of its legality, or as a waiver of his/her right to denounce that environment as unlawful. The authors refer to the provision of paragraph 1 of the Act, recognizing the “common property of the nation”. Persons speaking for the Icelandic Government in public have increasingly taken the stand that this provision is meaningless. Such a statement insinuates that the provision was included in the Act for purposes of deception. In addition, the authors acted as they did because they felt a strong injustice.

9.12 The authors emphasize that their claim is not to have a quota share allocated to them by the authorities, but to be able to pursue the occupation of their choice on the same terms as others. It is not their task to say exactly how this requirement is to be fulfilled.

9.13 The authors explain that cod is, and always has been, by far the most common species of ocean catch in the waters around Iceland, and the species always yielding by far the highest export value. It is so widely distributed, and so common, that it generally accompanies any other ocean catches. A catch of any other species normally includes between 5 and 15 per cent of cod. Cod catches accompanying any other catch make it necessary for a fisherman to have a cod quota, even if he only intends to catch something else. To catch other species for which they had a quota, the authors would have had to receive or purchase a cod quota to cover the cod that was certain to be caught additionally. Since they had not been given any cod quota, they had to acquire it by lease or purchase.

9.14 The *Sveinn Sveinsson*, the authors' ship, was 24 gross tons in size. They wanted to make their careers in the operation of fishing vessels of about that size, or if anything much larger, that is, modern, ocean-going fishing ships. That is what they worked with, and that is what they trained for. The institution of the quota system in 1984 automatically encompassed all persons owning boats 10 gross tons and larger, but boats smaller than this limit were not brought under the system at once. This happened gradually, in various stages. By Act No. 97/1985, all fishing by net with boats less than 10 tons in size was brought under effort restrictions. By Act No. 8/1988, the limit set at 10 tons was reduced to 6 tons. Finally, Act No. 38/1990 provided for a continuation of the system instituted, for all boats larger than 6 tons. Even if it is correct that the process was only completed in 2004, this changes nothing as regards the authors' complaints.

9.15 On the protection of the right to freedom of employment, the authors argue that the purpose of article 75 of the Constitution is to keep employment open to all, subject to generally applicable requirements. Its purpose is not to protect the interests of people already employed. On the contrary, its purpose is to prevent interest groups from monopolising occupations or preventing others from entering them.

9.16 Counsel concludes that control of ocean fishing by means of individual ownership of catch entitlements is sensible. It is therefore vital, if such a system is instituted, to institute it lawfully, without any violation of constitutional principles and international human rights instruments. This can not lawfully be done by representatives of the public limiting the use of the fishing banks to a particular group and turning the privileges of its members into their personal property to be sold or leased by them to the remainder of the population.

### **Consideration of the merits**

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

10.2 The main issue before the Committee is whether the authors, who are lawfully obliged to pay money to fellow citizens in order to acquire quotas necessary for exercising commercial fishing of certain fish species and thus to have access to such fish stocks that are the common property of the Icelandic nation,<sup>8</sup> are victims of discrimination in violation of article 26 of the Covenant. The Committee recalls its jurisprudence that under article 26, States parties are bound, in their legislative, judicial and executive action, to ensure that everyone is treated equally and without discrimination based on any ground such as race, colour, sex, language, religion,

political or other opinion, national or social origin, property, birth or other status. It reiterates that discrimination should not only be understood to imply exclusions and restrictions but also preferences based on any such grounds if they have the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of rights and freedoms.<sup>9</sup> It recalls 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.<sup>10</sup>

10.3 The Committee firstly notes that the authors' claim is based on the differentiation between groups of fishers. The first group received for free a quota share because they engaged in fishing of quota-affected species during the period between 1 November 1980 and 31 October 1983. Members of this group are not only entitled to use these quotas themselves but can sell or lease them to others. The second group of fishers must buy or rent a quota share from the first group if they wish to fish quota affected species for the simple reason that they were not owning and operating fishing vessels during this reference period. The Committee concludes that such distinction is based on grounds equivalent to those of property.

10.4 While the Committee finds that the aim of this distinction adopted by the State party, namely the protection of its fish stocks which constitute a limited resource, is a legitimate one, it must determine whether the distinction is based on reasonable and objective criteria. The Committee notes that every quota system introduced to regulate access to limited resources privileges, to some extent, the holders of such quotas and disadvantages others without necessarily being discriminatory. At the same time, it notes the specificities of the present case: On the one hand, the first Article of the Fisheries Management Act No 38/1990 states that the fishing banks around Iceland are common property of the Icelandic nation. On the other hand, the distinction based on the activity during the reference period which initially, as a temporary measure, may have been a reasonable and objective criterion, became not only permanent with the adoption of the Act but transformed original rights to use and exploit a public property into individual property: Allocated quotas no longer used by their original holders can be sold or leased at market prices instead of reverting to the State for allocation to new quota holders in accordance with fair and equitable criteria. The State party has not shown that this particular design and modalities of implementation of the quota system meets the requirement of reasonableness. While not required to address the compatibility of quota systems for the use of limited resources with the Covenant as such, the Committee concludes that, in the particular circumstances of the present case, the property entitlement privilege accorded permanently to the original quota owners, to the detriment of the authors, is not based on reasonable grounds.

11. 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 Covenant.

12. 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 adequate compensation and review of its fisheries management system.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognised 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 recognised 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 180 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 present report.]

### Notes

<sup>1</sup> The International Covenant on Civil and Political Rights and the Optional Protocol entered into force for Iceland on 22 November 1979.

<sup>2</sup> See communication No. 951/2000, *Kristjánsson v. Iceland*, declared inadmissible on 16 July 2003.

<sup>3</sup> Approximately US\$ 13,600.

<sup>4</sup> “All persons shall be equal before the law and shall enjoy human rights irrespective of their sex, religion, opinion, national origin, race, colour, property, birth or other status. (...)”

<sup>5</sup> “All persons shall be free to engage in the employment of their choice. This freedom may nevertheless be restricted by law, providing that the public interest so demands.”

<sup>6</sup> The State party refers to communication No. 182/1984, *Zwaan de Vries v. the Netherlands*, Views adopted on 9 April 1987.

<sup>7</sup> The report is enclosed in the State party's observations.

<sup>8</sup> Formulation of Article 1 Act 38/1990.

<sup>9</sup> General comment No. 18 (1989) on non-discrimination, para. 7.

<sup>10</sup> See communications No. 1314/2004, *O'Neill and Quinn v. Ireland*, Views adopted on 24 July 2006; No. 1238/2004, *Jongenburger-Veerman v. The Netherlands*, Views adopted on 1 November 2005; No. 983/2001 *Love et al. v. Australia*, Views adopted on 25 March 2003.

## APPENDIX

### **Dissenting opinion by Committee members Ms. Elisabeth Palm, Mr. Ivan Shearer and Ms. Iulia Antoanella Motoc**

As the majority of the Committee has found, there is a differentiation between the group of fishers who received without payment a quota share and the other group of fishers who must buy or rent a quota share from the first group if they wish to fish quota affected species. We agree with the majority that the aim of this distinction, namely the protection of Island's fish stocks which constitute a limited resource, is a legitimate one. It rests to be decided if the distinction is based on reasonable and objective criteria.

In that respect we note that the Supreme Court in its judgment in 1998 in the *Valdimar* case considered that the economic benefits leading from the permanent nature of catch entitlements and possibilities for assignment of catch entitlements and quotas will lead to gainful utilization of the fish stocks for the benefit of the national economy. Moreover in the *Vatneyri* case, of April 2000 the Supreme Court found that the restrictions on an individual's freedom to engage in commercial fishing was compatible with Iceland's constitution as they were based on objective considerations. In particular the Court noted that the arrangement of making catch entitlements permanent and assignable is supported by the consideration that this makes it possible for operators to plan their activities in the long term, and to increase or decrease their catch entitlements in individual species as may suit them.

It is also noteworthy that notwithstanding that particular boats benefit from quota entitlements they must, according to Act No. 85/2002, still pay a special catch fee for their right to access to fishing areas, this being calculated to take account of the economic performance of fisheries. According to the State party the catch fee has the same effect as a special tax imposed on vessel operators. In the State party's opinion a change of the fisheries management system would entail serious consequences for those who have bought quota shares from the initial quota holders and risk jeopardizing the stability of the fishing industry. According to the State party it would also have consequences for the State as a whole which has a legitimate interest in preserving the stability of the fishing industry. After several unsuccessful attempts to regulate the fisheries management, the current system was put into place and it has proved its economic efficiency and sustainability.

Taking into account all the factors mentioned above and the advantages which the current system offers for the fishing management in Iceland, notably the need to have a stable and robust system, as well as the disadvantages of the system for the authors i.e. the restrictions on the author's freedom to engage in commercial fishing we find that the State party has carried out a careful balance, through its legislative and judicial processes, between the general interest and



the interest of the individual fishers. Moreover we find that the distinction between the two groups of fishers is based on objective ground and is proportionate to the legitimate aim pursued. It follows that there has been no violation of article 26 in the present case.

*(Signed)*: Ms. Elisabeth Palm

*(Signed)*: Mr. Ivan Shearer

*(Signed)*: Ms. Iulia Antoanella Motoc

[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 present report.]

### **Dissenting opinion by Committee member Sir Nigel Rodley**

I generally agree with the dissent of Mr. Iwasawa and with the joint dissent of Ms. Palm and Mr. Shearer. While I am sympathetic to the sense of unfairness that the authors must feel at the creation of a privileged class entitled to exploit a precious resource that is associated with their livelihood and at their exclusion of access to that resource, I cannot conclude that the State party has violated the Covenant in respect of the authors.

The State party has drawn attention to evidence supporting its contention that its ITQ system was the most economically effective (see para. 8.8) and, as such, reasonable and proportionate. These are practical arguments that the authors fail adequately to engage with in the reply (see para. 9.8). It was essential that they confront this issue, especially in the light of the difficulties for a non-expert international body itself to master the issues at stake and the deference to the State party's argument that is consequently required.

Also, the Committee's Views seem to be affected, perhaps decisively, by the contextual factor that the fisheries are the common property of the Icelandic nation. It is not clear to me how the same facts in another country not having adopted the 'common property' doctrine could then justify the Committee's arriving at a different conclusion.

*(Signed):* Sir Nigel Rodley

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### **Dissenting opinion by Committee member Mr. Yuji Iwasawa**

According to the constant jurisprudence of this Committee, not every distinction constitutes discrimination in violation of article 26 of the Covenant; specifically, a distinction can be justified on reasonable and objective grounds in pursuit of an aim that is legitimate under the Covenant.

The Views of the majority of the Committee do not question that the State party was pursuing a legitimate aim in adopting a fisheries management system in order to safeguard its limited natural resource, but found that the quota system introduced by the State party was not justified on “reasonable” grounds and accordingly in breach of article 26 of the Covenant. I write separately to express my disagreement with that conclusion.

Article 26 of the Covenant lists a series of specific grounds such as race, colour, sex and the like upon which discrimination is prohibited and which warrant particularly careful scrutiny. It is certainly not an exhaustive list as is made clear by the phrase “such as” and the amorphous ground of “other status”, but it is important to note that this case involves none of the explicitly-listed grounds of prohibited discrimination. Moreover, the right affected by the quota system is a right to pursue the economic activity of one’s choice and goes to none of the civil and political rights which form the basis of a democratic society such as a freedom of expression or a right to vote. States should be allowed wider discretion in devising regulatory policies in economic areas than in cases in which they restrict, for instance, a freedom of expression or a right to vote. The Committee should be mindful of the limits of its own expertise in reviewing economic policies which had been formed carefully through democratic processes. The Committee should take these factors fully into account in evaluating whether a distinction can be justified on “reasonable” grounds.

“Property” is one of the prohibited grounds of discrimination, and the majority seems to assume that this case involves discrimination based on “property”, stating - rather unclearly - that the distinction is based on “grounds equivalent to those of property”. A quota system introduced by the State party in 1983, and made permanent in 1990, comprised an allocation of catch quotas to individual vessels on the basis of their catch performance during the reference period between 1 November 1980 and 31 October 1983. The distinction made on the basis of the catch performance of individual vessels during the reference period is, in my view, not a distinction based on “property”, but rather an objective distinction based on the economic activities of a person undertaken during a specified period of time.

The capacity of Iceland’s fishing fleet was surpassing the yield of its fishing banks and measures became necessary to safeguard its limited natural resource. The State party has argued - quite properly - that the public interest demands that restrictions be imposed on the freedom of individuals to engage in commercial fishing in order to prevent over-fishing, as many other State parties to the Covenant have done. The establishment of permanent and transferable harvest rights was seen as necessary in the State party’s circumstances to guarantee stability for those who have invested in fishing operations and to make it possible for them to plan their activities in the long term. In 2002, the scheme was modified so as to impose a special catch fee for vessel operators for their rights of access to fishing areas. The State party has explained that the catch fee has the same effect as a special tax imposed on vessel operators. The current system has proved its economic efficiency and sustainability. The State party has argued that if the

system were to be changed at this juncture, this would result in serious consequences for those parties that are currently active in the fishing industry and have invested in fishing operations, and possibly jeopardize the stability of the fishing industry.

While fishers who had invested in fisheries operations and were owners of fishing vessels during the reference period were given a quota, other fishers are prevented from commercial fishing without purchasing or leasing a quota from holders of a quota and suffer corresponding disadvantages. However, a fishing management system must of necessity contain restrictions on the freedom of individuals to engage in commercial fishing in order to achieve its intended purpose. In view of the advantages offered by the current system, I am unable to find that the disadvantages resulting for the authors - the restrictions on their right to pursue the economic activity of their choice to the extent they desire - are disproportionate. For these reasons, I am unable to share the conclusion of the majority that the distinction made by the State party on the basis of the catch performance of individual vessels during the reference period was “unreasonable” and in breach of article 26.

*(Signed):* Mr. Yuji Iwasawa

[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 present report.]

**Dissenting opinion by Committee member Ms. Ruth Wedgwood**

I concur in the careful elucidation of the facts of this case, as set forth by my colleagues Elisabeth Palm and Ivan Shearer. The State party has provided an extended explanation of why Icelandic authorities concluded that a system of fishing quotas based upon historic catch would be the most feasible method for regulating and protecting Icelandic fisheries.

At the same time, I agree with my colleague Yuji Iwasawa on an important point of principle - namely, the Human Rights Committee has a distinctly limited scope of review in economic regulatory matters pleaded under article 26.

The alleged discrimination here was between fishermen operating at an earlier or later date. There is no suggestion that the distinction among fishermen was based on ethnicity, religion, gender, or political affiliation, or any other characteristic identified in article 26 or otherwise protected by the Covenant. The grandfathering of prior industry participation remains a common practice among various States - including in the award of taxi medallions, agricultural subsidy allotments, and telecommunications spectra. Free entry into new economic sectors may be desirable, but the International Covenant on Civil and Political Rights was not a manifesto for economic deregulation. To effectively protect the important rights that fall within the aegis of the Covenant, the Committee also must remain true to the *limits* of its competence, both legal and practical.

(Signed): Ms. 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 present report.]

**H. Communication No. 1310/2004, *Babkin v. Russian Federation*  
(Views adopted on 3 April 2008, ninety-second session)\***

<i>Submitted by:</i>	Mr. Konstantin Babkin (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	5 January 2004 (initial submission)
<i>Decision on admissibility:</i>	6 July 2006
<i>Subject matter:</i>	Arbitrary arrest of a Russian citizen
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Right to liberty of person; right not to be subjected to arbitrary arrest; right to a fair hearing by impartial tribunal; right to adequate time and facilities for the preparation of defence; <i>ne bis in idem</i>
<i>Articles of the Covenant:</i>	9; 14, paragraphs 1, 3 (b) and 7
<i>Article of the Optional Protocol:</i>	2

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

*Meeting* on 3 April 2008,

*Having concluded* its consideration of communication No. 1310/2004, submitted to the Human Rights Committee by Mr. Konstantin Babkin 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. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, 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 Mr. Konstantin Babkin, a Russian citizen born in 1957, who is currently imprisoned in the Russian Federation. He claims to be a victim of violations by the Russian Federation<sup>1</sup> of article 9, and of article 14, paragraphs 1, 3 (b) and 7, of the International Covenant on Civil and Political Rights. He is unrepresented.

1.2 During its eighty-seventh session, on 6 July 2006, the Committee considered the admissibility of the communication, and declared the author's allegations under article 9; article 14 paragraphs 1, 3 (b), and 7 of the Covenant admissible.

### The facts as presented by the author

2.1 On 23 May 1999, at around 1 p.m. the author was arrested (*задержан*) by one Rakhmanin, an employee of the State Traffic Safety Inspectorate, on the basis of information received from the duty officer of the Department of Internal Affairs. He was handed over to officers of the Dmitrov Department of Internal Affairs, including one Tsvetkov, head of the criminal police. Contrary to the requirements of article 141, part 1 and article 122 of the Criminal Procedure Code then in force,<sup>2</sup> the arrest protocol (*протокол задержания*) was only drawn up the next day, and not by the person who effectively arrested the author. According to the protocol, prepared by one Solyanov, an investigator, at 8.35 a.m. on 24 May 1999, the author was arrested on the basis of "other information allowing the suspicion that a person committed a crime (acknowledgement of responsibility (*чистосердечное признание*))". The Criminal Procedure Code then in force did not contain "acknowledgement of responsibility" as a ground for detention, while article 111 of the Criminal Procedure Code required preparation of a "protocol of confession of one's guilt (*протокол явки с повинной*)". No such protocol was in the case file. During the hearing of 29 January 2001, Solyanov stated that a constraint measure (*мера пресечения*) for the author was determined in conformity with article 122 of the Criminal Procedure Code, after he wrote down his acknowledgement of responsibility. The author was allegedly forced to sign the acknowledgement of responsibility. Also, contrary to provisions of the Criminal Procedure Code, he was not informed before the first interrogation what crime he was suspected of having committed,<sup>3</sup> and the first page of the first interrogation protocol was not signed by him.<sup>4</sup> In addition, he was not informed by the prosecutor or investigator of his rights and of the legal consequences of confessing his guilt.<sup>5</sup>

2.2 The author invokes article 122, part 2, of the Criminal Procedure Code, according to which a person can be arrested on the basis of "[...] other information allowing the suspicion that a person committed a crime, only if this person (1) attempted to escape, (2) does not have a permanent place of residence, (3) or the identity of the suspect is not established". On 29 January 2001, Solyanov testified that Babkin did not attempt to escape, that his identity was established, that he was not caught *in flagranti* and that there were no witnesses. Since none of the legal grounds listed in article 122, part 2, of the Criminal Procedure Code, nor an arrest warrant issued by the prosecutor or a judge, existed at the moment of the author's arrest on 23 May 1999, he claims that his arrest was arbitrary.

2.3 On 27 May 1999, the author was charged with three counts of murder under article 105, part 2, of the Criminal Code;<sup>6</sup> illegal acquisition of firearms<sup>7</sup> (article 222, part 1) and forgery of documents (article 327). On 28 December 1999, a jury of the Moscow Regional Court acquitted

him of the murder charge, as it considered that the defendant's participation in the crimes could not be proven, and of the firearms charge, for lack of a *corpus delicti*. The Court, however, found him guilty of forgery, and he was sentenced to 2 years' imprisonment.

2.4 On 23 December 1999, the author testified in court that he witnessed all three victims being murdered but that he did not kill any of them. He was a driver of one of the victims who had been involved in an illegal vodka business. On an unspecified date, the author negotiated a deal between vodka buyers and sellers but it appeared afterwards that the vodka bottles in question contained water. Buyers and sellers started pressuring the author and the first victim to reimburse them. On 17 February 1998, he saw the first victim being shot in the head by two people who appeared to be acting on behalf of vodka sellers and who demanded reimbursement. The author survived by jumping out of the moving car. The second and the third victims were killed by the same people on 30 June 1998 and on 4 September 1998, respectively. Had the author reported these crimes to the authorities, his children would have been killed in reprisal. The individuals in question contacted him twice after the last murder and asked him to endorse responsibility for the first victim's murder, as otherwise the author's family would be liquidated. Allegedly, the last conversation with these individuals took place in the investigator's office. In court, the author gave a detailed description of the perpetrators.

2.5 On an unspecified date, the relatives of the three murder victims appealed the verdict on cassation to the Supreme Court. On 13 April 2000, the Judicial Chamber for Criminal Cases of the Supreme Court upheld the conviction of forgery and quashed the acquittals, on the ground that on one day of the trial two victims - both relatives of the murder victims - were not present in court. It found that, contrary to article 253 of the Criminal Procedure Code, the judge continued the proceedings in their absence. The Supreme Court ordered a retrial of the author on the murder and firearms charges, but with a different composition of the Moscow Regional Court.

2.6 For the author, the Juridical Chamber of the Supreme Court had no basis in law to order a retrial, as article 253 of the Criminal Procedure Code only requires the judge to consider whether proceedings should continue in the absence of the victims, which the trial judge did.<sup>8</sup> The victims knew that the court would be sitting on the day in question and did not inform the court in advance of their absence. Their absence had no bearing on the trial or the verdict, as they had already testified, and they subsequently offered no new testimony. The author submits the trial transcripts of 10, 23 and 27 December 1999 in substantiation of his claims. He adds that the acquittals could only be revoked in circumstances that affected the outcome of these verdicts and which are listed in article 341<sup>9</sup> of the Criminal Procedure Code. In his situation, this was not the case.

2.7 On 5 February 2001, the author was convicted by a different jury in the Moscow Regional Court on two of the three murder charges, and the firearms offence, and was sentenced to 23 years' imprisonment. During the retrial, he was again charged with forgery of documents, a charge on which he had already been convicted on 28 December 1999. The jury again found the author guilty of forgery but after the jury verdict had been handed down, the presiding judge issued a decision on 2 February 2001, removing the forgery charge on statute of limitation grounds. During the retrial, the author's lawyer submitted a motion to exclude, as inadmissible, evidence obtained during the period of the author's allegedly unlawful detention from 23 to 27 May 1999.<sup>10</sup> This motion was rejected by the presiding judge.



2.8 The author's appeal in cassation to the Supreme Court was dismissed on 5 June 2001. His appeal was considered by the same judge who had participated in the decision of the Judicial Chamber of the Supreme Court of 13 April 2000 quashing the acquittal. The author moved for this judge to be removed from the cassation panel but the motion was rejected. According to the Resolution of the Supreme Court No. 4 of 1974 and No. 8 of 1975, the court composition is unlawful when a case is tried by the same judge who previously participated in the trial of the case on cassation. Article 59<sup>11</sup> of the Criminal Procedure Code prevents a judge from considering a case if there are other circumstances giving rise to the belief that this judge has a personal, direct or indirect interest in the outcome of the case. The author submits that this is the case in his situation: by upholding his complaint, the judge would have had to admit that the decision of 13 April 2000 in which he participated had been illegal.

2.9 The author states that he was not advised of the date of consideration of his cassation appeal, despite his request to be so informed. This meant that he could not prepare the appeal properly and hire a lawyer. Consequently, no lawyer appeared at the appeal on his behalf.

2.10 Two further appeals from the author to the Supreme Court, requesting the initiation of the supervisory review procedure (*надзор*), were dismissed on 3 December 2002 and 31 March 2003, respectively.

### **The complaint**

3.1 The author claims that the State party violated article 9 of the Covenant by arbitrarily detaining him on 23 May 1999.

3.2 The author submits that article 14, paragraph 1, was violated, as the same judge who participated in the decision of the Judicial Chamber of the Supreme Court of 13 April 2000 which quashed his acquittal, was one of three members of the Supreme Court panel that considered cassation appeal. Further, the jury which heard his case on 5 February 2001 was prejudiced, as it was asked to consider evidence obtained during the author's unlawful detention from 23 to 27 May 1999, and because it examined the forgery charge, for which he had been already convicted.

3.3 He claims that he is the victim of a violation of article 14, paragraph 1, read together with paragraph 7, because the Judicial Chamber of the Supreme Court which quashed his acquittal did not base its decision on the correct legal provisions. The courts demonstrated unfairness by allowing the relatives of the murder victims to appeal against his acquittal on the basis that they had not attended one day of the trial, without requiring them to show how they had been adversely affected by this.

3.4 Article 14, paragraph 3 (b), is said to have been violated, as the author was not advised of the date of consideration of his cassation appeal (paragraph 2.9 above).

3.5 The author's right not to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of the State party is said to have been violated, contrary to article 14, paragraph 7.

## **State party's observations on admissibility and merits**

4.1 On 24 December 2004, the State party confirmed that on 5 February 2001, the Moscow Regional Court sentenced the author to 23 years' imprisonment on charges of murder and acquisition of firearms under articles 105, part 2, and article 222, part 1, of the Criminal Code. The sentence was upheld by the Judicial Chamber for Criminal Cases of the Supreme Court on 5 June 2001.

4.2 As to the author's claim under article 9, the State party submitted that according to information in the case file, the criminal case on the basis of which the author was sentenced was opened on 21 May 1998. It included counts of murder under article 105, part 1 of the Criminal Procedure Code, and was later merged with other counts. According to the arrest protocol, the basis for the author's arrest on 24 May 1999 was "other information allowing the suspicion that a person committed a crime". He was detained because he could have absconded. It transpired from the protocol that the author's rights and duties were explained to him, and that he did not object to his arrest. There was no information that the author was detained earlier than the date indicated above. Under article 122, part 3, of the Criminal Procedure Code, the inquiry body must inform the prosecutor of the arrest of any person suspected of having committed a crime within 24 hours. The prosecutor had 48 hours to either order placement into custody or release the suspect. The acting prosecutor of the Dmitrov City Prosecutor Office of the Moscow Region was informed of the author's arrest on 24 May 1999 and issued an order for his custody on 27 May 1999. He based his decision on the gravity of the crimes committed by the author and the possibility of absconding. The author's arrest thus complied with the legal requirements.

4.3 With regard to the author's claim that the overturning of his acquittal on the basis of the victim's appeal was not based on law, the State party confirmed that on 28 December 1999, a jury in the Moscow Regional Court acquitted him of the charges under article 105, part 2, and article 222, part 1, of the Criminal Code but found him guilty of forgery. On 13 April 2000, the Judicial Chamber of the Supreme Court quashed the acquittal and ordered a retrial. The basis for this decision was a substantial violation of the procedure legislation, as the court had not examined the reasons for the victims' absence at the hearing and had deprived them of the possibility to take part in the proceedings. Article 465 of the Criminal Procedure Code allows the superior court to quash or change court decisions on the ground of substantial violation of criminal procedure law. Article 345 of the Criminal Procedure Code stipulates that violations are "substantial" if they deprive or limit the rights of the parties to a case, or prevented the court in another way fully to consider the case. Article 253 of the Criminal Procedure Code provides that in the case of a victim's absence, the court shall decide whether to continue with the proceedings or to postpone them. The decision depends on whether it is possible, in the absence of a victim, fully to examine the case and to protect the victim's rights. For unknown reasons, two victims did not appear in court on 27 December 1999. The court considered whether proceedings should continue in their absence. It then proceeded with the pleadings without asking the parties about the possibility to complete the court inquest in the absence of the victims, thus violating their rights. The author's reference to article 341 of the Criminal Procedure Code was mistaken, as it provides for the possibility of quashing the acquittal at first instance only if there was either: (a) a protest from the prosecutor, (b) a complaint by the victims, or (c) a complaint by the acquitted person. In the present case complaints were made by all the victims, in addition to the prosecutor's protest.

4.4 The State party rejected the author's claim that article 60 of the Criminal Procedure Code was violated because the same judge who participated in the decision of the Judicial Chamber of 13 April 2000 quashing his acquittal sat on the Supreme Court panel which considered the author's cassation appeal. Article 59 of the Criminal Procedure Code lists the circumstances which preclude a judge from considering a case, and article 60 prohibits a judge from considering the same case twice. Under part 3 of article 60, a judge who participated in the trial of a case at second instance cannot participate in the trial of the same case at first or review instances, nor in the retrial of a case at second instance, after the decision in which this judge participated has been annulled. The file revealed that the decision of 13 April 2000, in which the judge in question participated, had not been annulled. Therefore, his participation in the consideration of the author's cassation appeal after the re-trial had been lawful.

4.5 The State party rejected the allegation that the author had not been informed of the date of consideration of his cassation appeal. The case file revealed that on 31 May 2001, the author had been informed of the date of the upcoming consideration of his cassation appeal by letter of the Supreme Court addressed to the head of the detention facility, where the author was then held in custody. He was requested to ensure the author's participation in the consideration of his appeal by video link. The author participated in the hearing and moved for the judge to be removed (paragraph 2.8 above). According to the State party, the author could have requested the postponement of the hearing and to be given time to hire a lawyer. Moreover, he could have hired a lawyer after he filed his cassation appeal. Thus, the author had been fully aware of his rights but had failed to avail himself of them.

4.6 On the claim that the author was tried twice for the same offence, the State party confirmed that the author's conviction of 28 December 1999 of forgery had been overturned and that this charge was re-examined during the retrial. The jury questionnaire included two questions related to the forgery charge, and the verdict included a paragraph finding the author guilty on this count. The State party recalled that the court did not sentence the author twice for this crime, since on 2 February 2001, the judge had removed the forgery charge on statute of limitation grounds.

#### **Author's comments**

5.1 On 1 March 2005, the author contended that the State party deliberately referred to part 3 of article 122 of the Criminal Procedure Code to justify its actions and omitted any reference to parts 1 and 2 of the same article which would prove the arbitrariness of the author's arrest. He reiterated that he was forced to sign a confession which later was used to justify his placement in custody. He further rejected the State party's statement that there was no information in the file that he was detained earlier than the time indicated in the arrest protocol. In addition to the evidence presented by the author in his initial complaint, he referred to the jury verdict of the Moscow Regional Court of 28 December 1999 in support of the claim that he had been detained on 23 May 1999.

5.2 Regarding the claim that the quashing of his acquittal was unfounded, the author referred to the Compilation of Plenum Decisions on Criminal Cases, according to which violations of procedure laws are "substantial" if they prevented the court from fully examining a case. In his case, the victims' absence during one court hearing had not adversely affected the proceedings.

5.3 On the claim under article 14, paragraph 1, the author rejected the State party's reference to article 60, part 3 of the Criminal Procedure Code in justification of its actions. A law that allows consideration of a complaint against a judge by that very judge is contrary to common sense and to article 59, part 3, of the same Code.

5.4 As to the State party's argument that the author was informed of the date of consideration of his cassation appeal on 31 May 2001, the author submitted that he did not receive the letter referred to by the State party. He dismissed as irrelevant the State party's reference to the possibility of hiring a lawyer, given that his right to defence had already been violated by the State party.

5.5 On 27 September 2005, the author submitted a carbon copy of the arrest protocol (*копешок к протоколу о задержании*) of 24 May 1999, which has the same number and is prepared at the same time as a protocol. By comparing this carbon copy and the arrest protocol, it may be concluded that the latter was tampered with after it was prepared. The author stated that "acknowledgement of responsibility" was listed in the initial protocol as the only ground for arrest, whereas during the trial it appeared that the protocol listed an additional ground - a possibility that he could abscond. The author reiterated that the date of his actual arrest and its arbitrariness were corroborated by numerous witness statements, including that of investigator Solyanov. He referred to Solyanov's statement during the hearing of 29 January 2001, where he had admitted that "acknowledgement of responsibility" was not a permissible ground of arrest. The author added that the investigation failed to prove that there were reasons to believe that he would abscond: he had resided in the same place between 17 February 1998, the date when the first crime attributed to him had been committed, and 23 May 1999, the date of arrest. He reiterated that the issue of legality of quashing of his acquittal was related to his claim under article 14, paragraph 7, since he could be tried twice on the murder and firearms charges only if his acquittal on these charges was quashed lawfully.

#### **Further submissions from the parties**

6.1 On 23 November 2005, the State party reiterated that according to the arrest protocol, the author was detained on 24 May 1999. According to the trial transcripts of 9 December 1999 and 15 January 2001, the author confirmed in court that he had been taken into custody on 24 May 1999. The sentence of 28 December 1999 and 5 February 2001 had been calculated to run from 24 May 1999. This date was challenged by the author in his cassation complaint on the basis of the witness statement given on 20 December 1999 by Rakhmanin. The State party claimed that during the trial Rakhmanin did not mention the exact date of arrest but had rather stated that the author and his passengers had been arrested as suspects of having committed a crime. During the preliminary investigation the same witness had stated that at around 9 p.m. on 23 May 1999 he had received information that the author had not stopped his car upon the militia's request. Some time later he had stopped and searched the author's car, finding a truncheon and a pen-knife. After being stopped, the author had produced a driving licence issued in the name of one Buzin.<sup>12</sup> Rakhmanin then called for the militia to transfer the author and his passengers to the Dmitrov Department of Internal Affairs.

6.2 On the allegation that the author was tried twice on the forgery charge, the State party added that on 29 July 2005 the Deputy General Prosecutor of the Russian Federation has initiated a review procedure before the Judicial Chamber for Criminal Cases of the Supreme Court, requesting the rescission of the decision of 2 February 2001, since the author had been

tried twice and found guilty of the offence under article 327 of the Criminal Code. On 2 August 2005, the Supreme Court dismissed the request based on article 405 of the Criminal Procedure Code, which prohibits the revision of court decisions which would aggravate the situation of a convicted or acquitted person once a case has been closed. On 11 May 2005, the Constitutional Court held article 405 of the Criminal Procedure Code to be unconstitutional and introduced an interim measure, allowing, inter alia, the revision of court decisions on the closure of criminal cases by a review procedure initiated by the prosecutor within a year of the decision becoming executory. In this regard, the State party noted that the author's sentence of 5 February 2001 was appealed and became executory more than four years earlier, while the decision of 2 February 2001 was not appealed by either the author or his lawyer and became executory.<sup>13</sup>

7. On 25 December 2005, the author drew the Committee's attention to the discrepancy in the date of his actual arrest in the State party's observations of 1 March and 23 November 2005. He argued that Rakhmanin's testimony during the trial should prevail over the statements allegedly given by him during the preliminary investigation, because Rakhmanin explained in court that the protocol of interrogation attached to the file was different from the one that he saw at the preliminary investigation. According to Rakhmanin, he gave exactly the same statement as the one before the court, and he did not know how different statements appeared in the file. As to the State party's claim that the author did not object to the initial arrest protocol of 24 May 1999, it was noted that he feared negative consequences at that time. On cassation and in his request for supervisory review he had challenged the legality of his arrest, as soon as corroborating evidence became available to him.

8. On 24 May 2006, the State party added that on an unspecified date, the Deputy Chairman of the Supreme Court concurred with the decision of 2 August 2005, dismissing the request of the Deputy General Prosecutor of the Russian Federation. On 31 October 2005, the Deputy General Prosecutor initiated another review procedure before the Supreme Court.

9. On 15 May 2006, the author transmitted a copy of the decision of the Judicial Chamber for Criminal Cases of the Supreme Court (dated 20 April 2006), which found that during the retrial, the trial court mistakenly examined the author's case on all charges and mistakenly requested the jury to decide also on his guilt in relation to the forgery charge. The Judicial Chamber of the Supreme Court concluded that the author was punished twice for the same offence and rescinded the decision of 2 February 2001. This decision did not mention possible repercussions on the author's conviction by the same jury on the murder and firearms charges.

#### **Committee's admissibility decision**

10. On 6 July 2006, during its 87th session, the Committee considered the admissibility of the communication. The Committee noted the author's allegations of violations of article 9, and of article 14, paragraphs 1, 3 (b) and 7 of the Covenant and detailed information adduced by the author in support of his claims. The Committee further noted that the State party had also submitted specific information refuting the author's allegations without, however, providing copies of the trial transcripts corroborating the State party's arguments. The Committee concluded that the communication was admissible in so far as the author's claims under article 9; article 14 paragraphs 1, 3 (b) and 7 were sufficiently substantiated. The State party was requested to provide copies of the trial transcripts (a) of the Moscow Regional Court that acquitted the

author of the murder and firearms charges on 28 December 1999; and (b) of the Judicial Chamber for Criminal Cases of the Supreme Court that quashed the acquittal on 13 April 2000.

### **State party's further observations on the merits**

11.1 On 24 November 2006, the State party transmitted a copy of the trial transcript of the Moscow Regional Court and explained that its criminal procedure law did not envisage the preparation of a trial transcript during the examination of a case by the second instance court.

11.2 The State party for the first time acknowledges that, as established during court proceedings, Rakhmanin had stopped a car driven by the author after he had received information at around 9 p.m. on 23 May 1999 that the driver of the car in question had not complied with the militia's request. It insists, however that the author was arrested by the investigator of the Dmitrov City Prosecutor Office only after he had made a statement in which he had admitted having murdered three persons. The author was interrogated as a suspect and testified about the circumstances and the manner in which he murdered three persons. A crime scene inspection was carried out with the author's participation the same day and three corpses were uncovered in the places indicated by him. On 26 May 1999, he participated in another inspection of the murder scene. He was placed into custody on 27 May 1999 and charged under article 222, part 1, and article 105, part 2, of the Criminal Code on 31 May 1999. The State party affirms that all investigative actions with the author's participation were carried out after his arrest and that they complied with criminal procedure law and were correctly qualified by the court as admissible evidence. His arrest under article 122 of the Criminal Procedure Code and subsequent placement in custody under article 90 of the same Code were lawful.

11.3 The State party rejects the author's claim that the participation of the same judge in the consideration of the author's cassation appeal on 5 June 2001 violated criminal procedure law.

### **Author's comments**

12.1 On 7 June 2007, the author submits that irrespective of the terminology used by the State party, he was deprived of his liberty at the moment when his car was stopped by Rakhmanin. Subsequently, he was handcuffed and escorted by officers of the Department of Internal Affairs to the Dimitrov Department of Internal Affairs, where he was kept the whole night and interrogated.

12.2 The author submits that the State party mistakenly characterized the circumstances of his actual arrest and tried to portray his arrest by the officer of the State Traffic Safety Inspectorate as "accidental" and linked to the ordinary violation of traffic regulations. It is claimed by the State party that he was formally detained only after he was taken to the Department of Internal Affairs, where he "suddenly" confessed to three murders. The author refers to the trial transcript of the Moscow Regional Court of 20 December 1999 in support of his own description of the facts. Rakhmanin testified in court that day that he stopped the author's car at around 1-2 p.m. He searched the car and found a driving licence issued in the name of Babkin. He confirmed that the author did not violate any traffic regulations, and that the only ground for his arrest was information received from the duty officer of the Department of Internal Affairs. He handed over the author to officers of the Dmitrov Department of Internal Affairs; no protocol was prepared. The author argues that since he was arrested by Rakhmanin as a suspect, article 122 of the Criminal Procedure Code required the preparation of an arrest protocol by him.

## **Consideration of the merits**

13.1 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.

13.2 The Committee has noted the author's claim that he was arbitrarily arrested on 23 May 1999, as at that time no permissible legal grounds for his arrest under the Criminal Procedure Code existed. It further notes that this claim was brought before the State party's courts and was rejected by them. The Committee notes the repeated discrepancies in the State party's explanations on this matter (paragraphs 4.2, 6.1 and 11.2 above), and the fact that in its latest merits observations the State party acknowledges that the author's car was stopped by an officer of the State Traffic Safety Inspectorate on 23 May 1999, and that the author was subsequently taken to the Dimitrov Department of Internal Affairs. This date differs from that contained in the arrest protocol and the interrogation protocol. The exact circumstances of the author's arrest and interrogation protocols remain obscure despite the voluminous pleadings by both parties. The Committee recalls its jurisprudence that it is generally 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.<sup>14</sup> In the circumstances of the present case, and in absence of any other pertinent information by the parties in this respect, the Committee is unable to conclude that the State party has violated the author's rights under article 9 of the Covenant.

13.3 The Committee has noted the author's claim that his rights under article 14, paragraph 1, were violated as the same judge who participated in the decision of 13 April 2000 which quashed the acquittal was one of three members of the Supreme Court panel that subsequently considered the author's cassation appeal. In this regard, the Committee gives due consideration to the State party's explanation of its criminal procedure which distinguishes between circumstances that preclude a judge from considering a case and those which prohibit the judge from considering the same case twice. The Committee notes that in the present case the subject matter of the author's cassation appeal should have related only to his second retrial by the jury, and not to the decision of the Judicial Chamber of the Supreme Court of 13 April 2000 quashing his acquittal. Therefore, the Committee considers that the author's cassation appeal *de jure* does not affect the decision of 13 April 2000 quashing his acquittal and, therefore, participation of the same judge in the latter decision and in the consideration of the author's cassation appeal does not raise issues of the impartiality of the court within the meaning of article 14, paragraph 1, of the Covenant.

13.4 On the claim of a violation of the author's rights under article 14, paragraph 3 (b), in that he was not informed of the date of consideration of his cassation appeal, the Committee recalls that the guarantee provided for in this provision is to have adequate time and facilities for the preparation of one's defence and to communicate with counsel of one's own choosing. The Committee notes the State party's explanation that its criminal procedure allows for a motion for postponement of the hearing and the granting of time to hire a lawyer, and that the author failed to avail himself of these rights. Even though the author dismisses the State party's argument as irrelevant, the Committee considers that although not effectively informing him of the date of consideration of his cassation appeal, the State party did not deprive him of the right to apply for the postponement of the hearing. In these circumstances, the Committee considers that there is no basis for a finding of a violation of article 14, paragraph 3 (b).

13.5 The author has claimed that he is the victim of a violation of his rights under article 14, paragraph 1, read together with article 14, paragraph 7, because the Judicial Chamber for Criminal Cases of the Supreme Court that quashed his acquittal did not base its decision on law. The Committee notes in this regard that the requirement of being in “accordance with the law and penal procedure of each country” defines the term “finally” and not “convicted or acquitted”. It further notes that the author’s acquittal was overturned by the Judicial Chamber of the Supreme Court on the basis of the victims’ cassation appeal, i.e., before his acquittal became final. Article 14, paragraph 7, however, is only violated if a person is tried again for an offence for which he already was finally acquitted, which does not appear to have been the case here. Therefore, the Committee finds that this part of the author’s communication do not disclose a violation of article 14, paragraph 1, read together with article 14, paragraph 7.

13.6 As to the author’s claim that, contrary to article 14, paragraph 7, he was tried and punished twice on the forgery charge, the Committee notes that the Supreme Court by its decision of 20 April 2006 determined that the author was indeed punished twice for an offence for which he had already been finally convicted. Therefore, the Committee also concludes that the State party has violated article 14, paragraph 7, of the Covenant. This violation of article 14, paragraph 7, is compounded in the present case by reason of its effects on the possibility of a fair trial. The author had not appealed against his conviction for forgery. By having that charge brought against him again, in combination with the more serious charges, the jury was exposed to potentially prejudicial material having no relevance to the charges which the author was properly facing, contrary to article 14, paragraph 1. Therefore, the Committee considers that the violation of article 14, paragraph 7, was only partly remedied by rescinding the decision of 2 February 2001 on 20 April 2006.

14. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 1, read in conjunction with article 14, paragraph 7, of the Covenant.

15. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with such appropriate forms of remedy as compensation and a retrial in relation to the author’s murder charges. The State party is also under an obligation to prevent similar violations in the future.

16. 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 180 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 present report.]



## Notes

<sup>1</sup> The Optional Protocol entered into force for the Russian Federation on 1 January 1992.

<sup>2</sup> Reference is made to the version of the 1960 Criminal Procedure Code that was in force before the adoption of a new Criminal Procedure Code on 18 December 2001.

<sup>3</sup> Article 123, part 2 of the Criminal Procedure Code.

<sup>4</sup> Article 123, part 1 and article 151, part 5 of the Criminal Procedure Code.

<sup>5</sup> Article 58 of the Criminal Procedure Code and article 61 of the Criminal Code.

<sup>6</sup> Reference is made to the Criminal Code as in force in 1999. The Code has since been amended.

<sup>7</sup> The full charge is illegal acquisition, storage, carrying and transportation of firearms and ammunition.

<sup>8</sup> Relevant excerpt from the trial transcript dated 27 December 1999 and available on file reads:

“A victim Churkin, counsel Fedotov and defendant have nothing to add to the court inquest.

An issue of whether it is possible to complete the court inquest is open for discussion.

Participants in the proceedings do not have any objections.

The presiding judge decided to terminate the court inquest taking into account the opinions of the sides. The court proceeds to the pleadings.”

<sup>9</sup> Article 341 “Revocation of the sentence of acquittal” of the then Criminal Procedure Code read:

“The sentence of acquittal of the court of first instance or of the sentence (decision) of the appeals instance may be revoked on cassation only on the basis of a protest submitted the prosecutor, or of a complaint submitted the private prosecutor, the victim, or of a complaint submitted by the acquitted person.”

<sup>10</sup> Article 69, part 3 of the Criminal Procedure Code and article 50 of the Constitution.

<sup>11</sup> Article 59 “Circumstances, precluding a judge from participating in the proceedings in a criminal case” of the then Criminal Procedure Code read:

The judge cannot take part in the proceedings in a criminal case, if he:

(1) Is the victim, civil claimant, civil defendant or witness in the given criminal case, as well as if he has participated in the proceedings in this case as an expert, specialist, interpreter,

inquirer, investigator, prosecutor, counsel for the defence or legal representative of the accused, representative of the victim, of the civil claimant or of the civil defendant;

(2) Is a relative of the victim, civil claimant, civil defendant or their representatives, a relative of the accused or his legal representative, a relative of the prosecutor, counsel for the defence, investigator or inquirer;

(3) If there exist the other circumstances giving rise to the belief that the judge is personally, whether directly or indirectly, interested in the outcome of the given criminal case [...].

<sup>12</sup> On 27 May 1999, the author was charged with forgery of documents under article 327 of the Criminal Code.

<sup>13</sup> See para. 2.7 above.

<sup>14</sup> See communication No. 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision adopted on 3 April 1995, para. 6.2.

**I. Communication No. 1351/2005, *Hens Serena v. Spain*  
Communication No. 1352/2005, *Corujo Rodríguez v. Spain*  
(Views adopted on 25 March 2008, ninety-second session)\***

<i>Submitted by:</i>	Luis Hens Serena (represented by Ms. Pilar García González) and Juan Ramón Corujo Rodríguez (represented by Ms. Elena Crespo Palomo)
<i>Alleged victim:</i>	The authors
<i>State party:</i>	Spain
<i>Date of communications:</i>	24 May 2004 (initial communication)
<i>Date of admissibility decision:</i>	8 March 2006
<i>Subject matter:</i>	Conviction by the highest ordinary court
<i>Procedural issues:</i>	Exhaustion of domestic remedies; insufficient substantiation
<i>Substantive issues:</i>	Right to the review of the conviction and sentence by a higher tribunal according to law; right to an impartial tribunal; right to be tried without undue delay; non-retroactive application of criminal law
<i>Articles of the Covenant:</i>	14 (1), 14 (3) (c), 14 (5) and 15 (1)
<i>Article of the Optional Protocol:</i>	2 and 5 (2) (b)

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

*Meeting on 25 March 2008,*

*Having concluded* its consideration of communications Nos. 1351/2005 and 1352/2005 submitted on behalf of Luis Hens Serena and Juan Ramón Corujo Rodríguez 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, Ms. Christine Chanut, 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 and Mr. Ivan Shearer.

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

1.1 The author of communication No. 1351/2005 is Luis Hens Serena, a Spanish national, born in 1957. The author of communication No. 1352/2005 is Juan Ramón Corujo Rodríguez, a Spanish national, also born in 1957. Both communications were submitted to the Committee on 24 May 2004 and concern the same facts. The authors claim to be victims of violations by Spain of article 14, paragraphs 1, 3 (c) and 5, and article 15, paragraph 1, of the Covenant. The Optional Protocol came into force for the State party on 25 April 1985. The authors are represented by counsel Pilar García González and Elena Crespo Palomo, respectively.

1.2 On 28 April 2005, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, granted the State party's request for the admissibility of the communications to be considered separately from the merits.

1.3 Under rule 94 of its rules of procedure, the Committee has decided to consider the two communications together since they refer to the same facts and complaints and put forward the same arguments. The Committee declared the communication admissible at its eighty-second session.

### **Factual background**

2.1 On 29 July 1998, the Plenary of the Second Chamber of the Supreme Court sentenced the authors to five years' imprisonment and eight years' general disqualification for the offence of illegal detention. The sentence established that on 4 December 1982 the police detained Mr. Segundo Marey Samper in the south of France and took him to a cabin in Cantabria, Spain, where he remained until he was freed on 14 December of that year. The detention was the result of an error by the security forces, who were endeavouring to capture a member of Euskadi Ta Askatasuna (ETA) whom they could exchange for Spanish police officers abducted in France. The authors helped to guard the captive while he remained in the cabin.

2.2 The authors say that because a former Minister of the Interior and former member of parliament was involved, the case was heard in sole instance by the Supreme Court; this meant that they were unable to lodge an appeal to have their conviction and sentence reviewed by a higher court. Proceedings were initiated in January 1988 before central court of investigation No. 5 in connection with a number of acts committed by the so-called Anti-Terrorist Liberation Groups (GAL). On 23 March 1988, several citizens submitted a complaint against two suspects and any other person who appeared to be part of the GAL. The incidents cited included the abduction of Mr. Marey Samper. On 14 March 1989, the National High Court decided that this abduction would be investigated by central court of investigation No. 5. On 16 December 1994, two suspects convicted in 1991 of other offences confessed to taking part in Mr. Marey's abduction and implicated four other people. The authors of the communication made statements and became involved in the proceedings in April 1995. On 17 July 1995, they acknowledged their involvement in the incident. In October 1995 the investigation was transferred to an investigating magistrate at the Supreme Court when evidence emerged that a member of parliament had also been involved. According to the Spanish Constitution, offences attributable to members of parliament must be tried by the Supreme Court. The investigation was concluded on 4 April 1997, when the case was sent to the Criminal Chamber of the Supreme Court for the oral proceedings.

2.3 The authors say that some days before the Supreme Court judgement was drafted and communicated to the parties, the judges of the Criminal Chamber of the Supreme Court leaked information about the deliberations on the convictions and sentences to the press. On 23 July 1998, the newspaper *El País* reported that the Court had concluded its deliberations and decided to convict the accused, but the judgement would not be announced for a week since the reporting judge had to draft it and submit it to the Court. The article gave the names of some of the accused and the sentences handed down. It stated that the information came from “legal and judicial” sources and that “the outcome of the vote [was] irreversible”.

2.4 On 24 July 1998, *El País* published the order in which the judges had voted on each point and the names of the judges who had voted for and against for each of the offences the accused were convicted of (abduction, illegal detention and embezzlement). On 25 July 1998, the press reported that the President of the Supreme Court had ordered an investigation, which included the 11 members of the Criminal Chamber, to find out who was responsible for leaking the information.

2.5 On 26 July 1998, *El País* reported that the President of the Court had questioned the 11 magistrates. According to the article, “sources in the Second Chamber” had admitted the possibility that the 13-year sentences could be modified if the Court considered that there had been concurrent offences, either arising from a single act or with one offence arising out of another. According to the report, the Court had not discussed this possibility but were it to do so, those of the accused who would have received heavier sentences would benefit but those less deeply involved, including the authors, would not be affected. On 28 July 1998, the press announced that the reporting judge was to submit the draft judgement to the Court that day, and that the judges would continue discussing what penalties to impose. On 30 July, *El País* reported the judgement: two of the accused were sentenced to 10 years in prison, another three, to 9 years and 6 months; one was given 7 years, two were given 5 years and 6 months, the authors, 5 years and another accused, 2 years and 4 months.

2.6 The authors state that the proceedings in which they were convicted began on 23 March 1988, when an investigation into the members of the Anti-Terrorist Liberation Groups was launched, while the Supreme Court rendered judgement on 29 July 1998, 10 years later. The Constitutional Court’s judgement on the remedy of *amparo* was handed down on 17 March 2001, nearly 13 years after the start of the investigation. In the authors’ view, the proceedings were unreasonably prolonged.

2.7 In the opinion of the authors, their conviction was contrary to law because they had been obeying superior orders and this, under the Criminal Code in force at the time, exonerated them from responsibility. They further contend that criminal liability was time-barred because when proceedings against them began, more than 10 years had passed since the incident had occurred (December 1983). The Supreme Court considered that the 10-year prescription period had been interrupted by the submission in March 1988 of a criminal complaint against any individual who might in the course of the investigation prove to have participated in the activities of the GAL. In the opinion of the authors, this interpretation of the interruption of the prescription period was not in keeping with the Criminal Code, which stipulates that interruption takes effect when there is an investigation into the offender. According to the authors, this happened only in February 1995, 11 years after the incident, when for the first time they were identified and cited as defendants.

2.8 With regard to the authors' argument that they had acted in accordance with their duty and were following superior orders, the Supreme Court decided that exoneration from criminal liability on grounds of superior orders did not apply to them. It considered that such exoneration only applied in the case of lawful orders, and holding the victim for nine days in inhuman conditions was manifestly not lawful.

2.9 The Supreme Court dwelt at length on the authors' argument about the prescription period. According to article 132 of the Criminal Code, the prescription period begins on the day an offence is committed and is interrupted "when proceedings are opened against the offender". Up to 1991, the Supreme Court's case law held that the interruption took effect when an investigation was initiated to establish an offence and identify the perpetrators. Beginning in 1992, however, this position shifted, the Court now holding that, for proceedings to be understood to be directed against the offender, he or she must be individually identified in some form or other. In the case of the authors, the Supreme Court ruled that the predominant view since 1992 applied only to offences committed by one or a few persons, not to offences committed by a group. The Court concluded that the prescription period had been interrupted in March 1988, when a criminal complaint was filed, not in 1995 when a first statement was taken from the authors.

2.10 The authors filed for *amparo* with the Constitutional Court, alleging a violation of the right to a second hearing, the right to be tried by an independent and impartial tribunal and the principle of legality in criminal proceedings. On 17 March 2001, the Constitutional Court rejected the application, finding that the fact that the authors had been tried by the Supreme Court as required by article 71.3 of the Constitution because one of the defendants was a member of parliament did not infringe their right to a fair trial. It found that other European countries had adopted similar solutions and referred to article 2, paragraph 2, of Protocol No. 7 to the European Convention on Human Rights and the European Commission on Human Rights decision of 18 December 1980 in *Tanassi and others*. With regard to the Supreme Court's alleged lack of impartiality, the Constitutional Court found that it had not been demonstrated that the press reports had influenced the verdict or made the Court less impartial. As to the interruption of the prescription period, the Constitutional Court found that the Supreme Court's interpretation was neither arbitrary nor novel, and was based on reasonable grounds.

2.11 Three individuals who were convicted along with the authors filed a complaint with the European Court of Human Rights, claiming violations of the principle of legality in criminal proceedings, the right to an impartial tribunal and the right to a second hearing. On 30 November 2004, the Court decided that the claim of a violation of the right to a second hearing was clearly unfounded and thus inadmissible, and ordered the remaining allegations to be made known to the State party. The Court considered that, in respect of the Supreme Court judgement, the complainants had filed for *amparo* with the Constitutional Court and thereby availed themselves of a remedy before the highest domestic court.<sup>1</sup>

## **Complaint**

3.1 The authors contend that there was a violation of article 14, paragraph 5, of the Covenant, since, having been convicted by the highest ordinary court, they did not have the right to a review of the conviction and sentence by a higher court. They state that one of the Constitutional Court judges in explaining his vote found that there had been a violation of article 14, paragraph 5, of the Covenant.

3.2 They contend that there was a violation of article 14, paragraph 1, of the Covenant, because they were not tried by an independent and impartial tribunal, as a result of the information leaked to the press on the content and likely outcome of the deliberations. In the authors' view, the fact that one or more of the judges involved in sentencing were responsible for the leak affected the court's independence and impartiality and, since the information published gave rise to a national public debate, the court's objectivity was impaired and this influenced the penalty handed down. They say that article 233 of the Organization of the Judiciary Act states that the deliberations of the courts are secret, as are the results of the judges' voting.

3.3 They state that there was a violation of their right to be tried without undue delay (art. 14, para. 3 (c)) since more than 10 years had passed between the start of the investigation and the date on which they were pronounced guilty, and nearly 13 years between the start of the investigation and the date on which the Constitutional Court ruled on the remedy of *amparo*. They regard the delay of 13 years as excessive in itself and not the fault of the accused or their counsel.

3.4 The authors allege a violation of article 15, paragraph 1, of the Covenant, because the Supreme Court did not recognize the prescription of the offence of unlawful detention, although the period provided for in criminal legislation had expired. According to the authors, the Supreme Court applied a broad interpretation that was not in accordance with the principles of legality and prior definition of criminal offences under article 15 of the Covenant.

#### **State party's observations on admissibility**

4.1 The State party claimed that the communications were inadmissible because the authors submitted them in May 2004, more than three years after the Constitutional Court ruled on their remedy of *amparo* on 17 March 2001. The State party considered that the delay in submitting the communications was significant, constituting an abuse of the right to submit communications. In the State party's view, although neither the Covenant nor the Optional Protocol establishes a specific period within which communications must be submitted, they allow a significant delay to be deemed an abuse of the right to submit communications under article 2 of the Optional Protocol.

4.2 With regard to the alleged violation of article 14, paragraph 5, of the Covenant, the State party said that the authors had not raised that complaint before the domestic courts, only before the Committee six years after being convicted. It explained that the authors had been able to apply for and in fact had obtained a review of their conviction since their case had been considered by the Constitutional Court under the remedy of *amparo*. It added that 4 of the 10 persons convicted in the same case as the authors had applied to the European Court of Human Rights alleging a violation of the right to a second hearing, and that the Court had rejected the complaints on the grounds that the right to a second hearing, although not expressly embodied in the European Convention on Human Rights, had been observed in the authors' case by means of the remedy of *amparo* lodged with and disposed of by the Constitutional Court.

4.3 With regard to the authors' complaint concerning article 14, paragraph 1, of the Covenant, the State party contended that the authors had not demonstrated that there had been a leak of information attributable to the court that had tried them or that, had there been such a leak, it would have affected the impartiality of the court. It pointed out that the authors had simply stated that a newspaper had published information on certain judicial processes and had jumped to the

conclusion that the information had been leaked by one or more judges of the sentencing court and that that had affected the penalty imposed, but they had failed to substantiate their statements with any evidence.<sup>2</sup>

4.4 The State party maintained that the alleged leaks had no bearing whatsoever on the impartiality of the Court. It stated that the 23 July 1998 issue of *El País* did not refer, as the authors claim, to a leak regarding the deliberations and voting of the judges in the Chamber of the Supreme Court that convicted them, but reported the outcome of the deliberations and voting and said that the decision “is irreversible and this is why *El País* is reporting the result”. For the State party, the fact that the information published in the press was no different from the information given in the judgement showed that the complaint was unfounded and confirmed that the advance publication had had no effect at all on the judgement or on the Court’s impartiality. The State party quoted a paragraph of the Constitutional Court judgement stating that “the thrust of the report that appeared in the media the effect of which would be to give out information on part of the deliberations and on the verdict before the parties had been notified cannot lead to the conclusion either that the verdict was amended on the basis of that information, or that a ‘parallel trial’ ensued that could have diminished the impartiality of the sentencing court, since the oral proceedings had been completed and all the evidence produced, and indeed a final decision on the convictions had been reached”. The State party concluded that not only was there no evidence of the Court’s alleged bias, it was also unlikely that it had been influenced at all.

4.5 The State party claimed that the authors’ complaint of undue delays had never been raised before the domestic courts, including the Constitutional Court. It added that, according to the European Court of Human Rights, in determining whether there has been undue delay, the starting point should be the moment at which the investigation or the criminal proceedings have a substantial effect on the suspect, and in the authors’ case the proceedings had taken three years from the date on which their statements had been taken (January 1995) to the date of the judgement convicting them (29 July 1998); in its view that period could not be considered excessive given the specific circumstances of the case.

4.6 The State party claimed that the authors’ complaint concerning article 15, paragraph 1, of the Covenant was inadmissible for lack of substantiation. It contended that the offence of which the authors had been convicted and the penalty imposed had been provided for in criminal law before the offence had been committed. It also argued that the authors’ interpretation of prescription was tantamount to giving lawbreakers the right to evade punishment, since even if the authorities were investigating an offence, the fact that a suspect had not been named would allow the suspect to benefit from prescription. The State party maintained that prescription applied when an offence was not followed up and went unpunished for some time, but was not applicable if the authorities had been diligent in investigating an offence. It could not be made contingent on a suspect’s ability to hide. From the moment action was taken against someone who might be guilty, the prescription period was interrupted. In the authors’ case, the prescription period had been interrupted when a group of citizens had lodged a complaint in 1988. The Supreme Court’s interpretation had been that, in offences committed by a group, the prescription period was interrupted when the investigation targeted the group, even if individual perpetrators were not identified.



## **Authors' comments**

5.1 In their comments of 8 July 2005, the authors argued that in the absence of a specific time period for the submission of communications, the passage of time alone could not render their communications inadmissible.

5.2 The authors argued that a simple perusal of their *amparo* application showed that they had in fact claimed a violation of the right to a second hearing before the Constitutional Court. They added that the remedy of *amparo* did not permit a full review of the applicant's conviction and sentence, but was limited to formal or legal aspects of the judgement, and therefore did not comply with article 14, paragraph 5.

5.3 The authors maintained that there had indeed been a leak, and it had taken place before the judgement had been drafted; that, they maintained, lent credence to the notion that the court had been influenced by public opinion and was therefore biased.

5.4 The authors repeated their view that the starting date for calculating undue delay was that of the submission of the complaint on 23 March 1988, and that more than 10 years had elapsed between then and the date of the Supreme Court judgement of 27 July 1998, while 13 years had elapsed between the submission of the complaint and the Constitutional Court ruling of 17 March 2001. Consequently, the time taken over the proceedings had been excessive, regardless of their complexity.

5.5 The authors maintained that the State party's claims about prescription related to the merits of the communication, not its admissibility.

## **Committee's decision on admissibility**

6. On 8 March 2006, at its eighty-sixth session, the Committee found the complaints under articles 14, paragraph 1, and 15, paragraph 1, of the Covenant inadmissible under article 2 of the Optional Protocol as they had not been sufficiently substantiated. The Committee also found the complaints under article 14, paragraph 3 (c), of the Covenant inadmissible under article 5, paragraph 2 (b), of the Optional Protocol as the authors had raised no such complaint in the domestic courts. The Committee found the communications admissible in respect of the complaints under article 14, paragraph 5, of the Covenant.

## **State party's observations on the merits of the communications**

7.1 On 15 September 2006, the State party submitted its comments on the merits of the communications. The State party denies any violation of article 14, paragraph 5, of the Covenant and refers to the Constitutional Court ruling of 17 March 2001 on the authors' application for *amparo*. That ruling recalls that the purpose of the privileged jurisdiction for members of parliament and the Senate is to safeguard the independence of both legislature and judiciary, a purpose that is legitimate and of enormous importance. In addition, the nature and characteristics of the offences being prosecuted were such that, in order to ensure the proper administration of criminal justice, all the defendants had to be tried together, and the Supreme Court was therefore competent to try all concerned. The State party also argues that the fact that the authors were tried in the Criminal Chamber of the Supreme Court is in itself a guarantee.

7.2 As to article 14, paragraph 5, of the Covenant, the State party argues that “no objections were made by other States parties, and no questions raised by the Human Rights Committee”, in respect of the reservations entered by other States parties to the application of this article. Lastly, the State party again points out that, in the European Court of Human Rights, 4 of the 10 co-defendants claimed a violation of the right to a second hearing but the Court declared these complaints inadmissible on the grounds that applications for *amparo* had been lodged with the Constitutional Court.<sup>3</sup>

### **Comments by the authors**

8.1 On 12 December 2006 the authors wrote that, since they are citizens who are not covered by special jurisdiction, the Supreme Court’s competence to try the offences they were charged with needs qualifying. They further argue that, even if there are certain guarantees associated with trial by the Criminal Chamber of the Supreme Court, that does not affect everyone’s right to have their sentence reviewed by a higher court.

8.2 As regards the right to review in *amparo*, the authors state that *amparo* does not permit a full review of the conviction and sentence, review being limited to the formal and legal aspects of the sentence, which means it does not meet the requirements of article 14, paragraph 5, of the Covenant. The authors cite the Committee’s case law.<sup>4</sup>

8.3 On the matter of reservations to article 14, paragraph 5, of the Covenant, the authors point out that the State party did not enter any reservations to that provision. They argue that to institute a review of the sentences handed down by the Criminal Chamber of the Supreme Court would have very little impact on the State party. They also state that, according to the Committee’s case law,<sup>5</sup> the phrase “according to law” in article 14, paragraph 5, does not mean that the very existence of a right to review should be left to the discretion of States parties. Lastly, the authors repeat that their trial in the Supreme Court at sole instance constituted an effective, real and irreparable violation of the right to a second hearing in criminal proceedings.

### **Consideration on the merits**

9.1 The Human Rights Committee has considered the present communications in the light of all the information made available to it by the parties, in accordance with the provisions of article 5, paragraph 1, of the Protocol.

9.2 The Committee recalls that the authors were tried by the highest court because one of the co-defendants in the abduction of Mr. Marey Samper was the Minister of the Interior, so that, under criminal procedural law, the case should be tried by the Criminal Chamber of the Supreme Court. The Committee takes note of the State party’s argument to the effect that the authors’ conviction by the highest court is compatible with the Covenant and that the ultimate aim - of safeguarding the independence of the judicial and legislative branches - is a legitimate one. However, article 14, paragraph 5, of the Covenant states that a person convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

9.3 The Committee points out that the expression “according to law” is not intended to mean that the very existence of a right to review, which is recognized in the Covenant, is left to the discretion of States parties. The State party’s legislation may well provide that certain

individuals, by virtue of their position, should be tried in a higher court than would normally be the case, but that cannot in itself detract from the accused's right to have their conviction and sentence reviewed by a higher court. The Committee further notes that the remedy of *amparo* may not be considered an appropriate remedy within the meaning of article 14, paragraph 5, of the Covenant. The Committee therefore finds a violation of article 14, paragraph 5, of the Covenant.<sup>6</sup>

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 disclose a violation of article 14, paragraph 5, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the authors with appropriate redress, including compensation, and to take the necessary measures to ensure that similar violations do not occur in the future.

12. In becoming a party to the Optional Protocol, Spain recognized the competence of the Committee to determine whether or not 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 enforceable remedy in the event that a violation has been established. The Committee wishes to receive from the State party, within 180 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.

[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 present report.]

### Notes

<sup>1</sup> European Court of Human Rights, judgement of 30 November 2004, complaints Nos. 74182/01, *Francisco Saiz Oceja v. Spain*; 74186/01, *Julio Hierro Maset v. Spain*; and 74191/01, *Miguel Planchuela Herrera Sánchez v. Spain*.

<sup>2</sup> The State party cites the judgement of the European Court of Human Rights of 26 October 1984 in the case of *De Cubber v. Belgium*, and the judgement of 1 October 1982 in the case of *Piersack v. Belgium*.

<sup>3</sup> See note 1 above.

<sup>4</sup> Communications Nos. 701/1997, *Gómez Vázquez v. Spain*, Views of 20 July 2000; and 1101/2002, *Alba Cabriada v. Spain*, Views of 1 November 2004.

<sup>5</sup> Communication No. 1211/2003, *Oliveró Capellades v. Spain*, Views of 11 July 2006.

<sup>6</sup> See communication Nos. 1073/2002, *Terrón v. Spain*, Views of 5 November 2004, para. 7.4, and *Oliveró Capellades v. Spain* (note 5 above), para. 7.

**J. Communication No. 1360/2005, *Oubiña Piñeiro v. Spain*  
(Views adopted on 3 April 2008, ninety-second session)\***

<i>Submitted by:</i>	Mr. Laureano Oubiña Piñeiro (represented by counsel, Mr. Fernando Joaquín Ruiz-Jiménez Aguilar)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	30 April 2003 (initial submission)
<i>Decision on admissibility:</i>	7 March 2007
<i>Subject matter:</i>	Review of conviction and sentence in cassation.
<i>Procedural issues:</i>	Exhaustion of domestic remedies; insufficient substantiation of the alleged violations
<i>Substantive issues:</i>	Right to have a sentence and conviction reviewed by a higher court
<i>Article of the Covenant:</i>	14, paragraph 5
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 3 April 2008,*

*Having concluded* its consideration of communication No. 1360/2005, submitted on behalf of Laureano Oubiña Piñeiro 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. 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 Sánchez-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 30 April 2003, is Laureano Oubiña Piñeiro, a Spanish national born in 1946. He claims to be the 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, Fernando Joaquín Ruiz-Jiménez Aguilar.

### **Factual background**

2.1 On 28 February 1997, the court of Arenys de Mar opened an investigation into three persons suspected of drug trafficking. These three suspects were arrested on 21 June 1997. A number of kilos of hashish were found in the lorry in which the suspects were travelling and were impounded, along with their mobile phones.

2.2 The investigation was then assigned to the Senior Judge at the National High Court. On 7 January 1999, this court, at the prosecutor's request, opened an investigation into the author. The prosecutor based the request on a report by the telephone company Telefónica regarding calls made and received on the impounded mobile phones in June 1997. One of the calls was made to the telephone belonging to Ramón Lago, the author's father-in-law.

2.3 According to the author, the telephone records were illegally obtained, since the internal memories of the mobile telephones were tampered with by third parties and it was not possible to establish who had obtained the records or under whose authorization, casting doubt on the veracity of their content. The records were included in the investigation without the court registrar having certified who had handed them over and whether or not they were the originals. The prosecutor did not request an expert report on the origins of the records or on the manner in which they had been obtained. As proof that the records were false, the author points out that all the calls listed lasted for one minute and that one of the records listed a call made both from and to the telephone belonging to Ramón Lago.

2.4 The author maintains that the prosecutor fabricated the contents of the telephone conversations made from his father-in-law's telephone, accusing the author of having had conversations about transporting and supplying the impounded drugs.

2.5 The author claims that, during the oral proceedings, the other defendants did not implicate him in the events, the defendant denied his involvement, and the prosecution witnesses did not mention him. The prosecutor proposed a public reading of the telephone records, but the author's lawyer objected, questioning the validity of the evidence because of the alleged irregularities in the way it had been obtained, the manner in which it had been included in the investigation and the absence of an expert report. The court accepted the objection to a public reading of the records, and they were incorporated by reference, without being subjected to public scrutiny or challenged. The author maintains that there was no proof of his use of his father-in-law's telephone, the identities of the persons who used that telephone, or the content of their conversations.

2.6 The National High Court concluded that the author was a member of a gang involved in selling hashish; that on 19 June 1997 he had made a telephone call to confirm the supply of drugs for transport; that on 20 June 1997 he had made another telephone call to a co-defendant to

confirm that the latter had the trafficked drugs in his possession; that on 21 June 1997 he had again telephoned this co-defendant to discuss transporting the drugs; and that his father-in-law's telephone had been frequently used for calls between the author and the other defendants.

2.7 On 4 October 1999, the National High Court found the author guilty of an offence against public health and sentenced him to four years and four months' imprisonment and a fine of 2.4 billion pesetas (approximately 14.5 million euros).

2.8 On 28 January 2000, the author lodged an appeal in cassation with the Supreme Court, in which his sole complaint was that his right to be presumed innocent had been violated. He alleged that the lower court did not have sufficient evidence to conclude that he had committed the offence. He argued that there should be a suitable correlation or concordance between the evidence and the consequences, in order to rule out any arbitrariness in the court's conclusions. The author maintains that cassation has a limited scope, as the Supreme Court has consistently ruled that the appraisal of evidence and the presumption of innocence are separate issues.

2.9 The Supreme Court upheld the National High Court's sentence in its ruling of 5 July 2001. The author states that the Supreme Court concluded that the National High Court's arguments were based on its direct apprehension of the evidence, i.e., it was the judges' own perception that formed the basis of their evaluation and their determination of credibility, and that was not a matter for the remedy of cassation since it was a question of fact that the Supreme Court could not deal with owing to the "very procedure of the appeal".

2.10 On 27 July 2001, the author submitted an application for *amparo* to the Constitutional Court, again alleging a violation of his right to the presumption of innocence. The Constitutional Court rejected this appeal in its ruling of 28 October 2002.

### **Complaint**

3.1 The author alleges that his right to have his conviction and sentence reviewed by a higher court was violated. He maintains that the Supreme Court considered only whether the law had been correctly applied, basing its finding on the facts established in the lower court ruling.

3.2 The author maintains that the legislation of the State party provides for the review of sentences by a higher court in the case of minor offences and ordinary offences. However, for serious offences, the only appeal possible is cassation, with its restricted scope under the criminal procedure legislation. An appeal in cassation may be based only on an infringement of constitutional provisions or the erroneous application of substantive rules of law, on the basis of the facts declared proven in the sentence. Facts are corrected only in exceptional cases. The aim of cassation is to check the application of the law by the courts and to harmonize legal precedents. To achieve this, the Judiciary Organization Act introduced the further aim of ensuring compliance with constitutional guarantees. Cassation does not provide for a review of the facts, guilt, classification of the offence or the sentence. The Supreme Court has stated that ruling on the credibility of the evidence produced in the lower court does not fall within its remit. The author cites the Committee's concluding observations on the periodic report of Spain (CCPR/C/79/Add.61) and the Committee's Views in the case of *Gómez Vázquez v. Spain* (communication No. 701/1996, Views adopted on 20 July 2000). He also cites the declaration

made by the Criminal Division of the Supreme Court, meeting in plenary on 13 September 2000 after learning of the Committee's Views in the *Gómez Vázquez* case, asserting that cassation complies with article 14, paragraph 5, of the Covenant.

3.3 The author maintains that, in his case, the Supreme Court ruling did not review the lower court's appraisal of the evidence, which consisted of mere suspicions against him without sufficient proof of his involvement.

#### **State party's observations on the admissibility of the communication**

4.1 In its note verbale dated 19 April 2005, the State party questioned the admissibility of the communication, alleging that domestic remedies had not been exhausted as required by article 5, paragraph 2 (b), of the Optional Protocol, given that the author did not include the argument of the violation of his right to have his conviction reviewed in his *amparo* application to the Constitutional Court.

4.2 The State party added that an *amparo* application to the Constitutional Court was now materially effective in matters such as the one analysed in this communication, coming as it did after the Committee issued its Views in *Gómez Vázquez v. Spain* (communication No. 701/1996), and the Court was therefore aware of the arguments therein. An appeal to the Constitutional Court would thus not be futile.

4.3 The State party considered that the communication was clearly without merit under article 3 of the Optional Protocol, since the National High Court's ruling was reviewed by the Supreme Court and even by a third instance, the Constitutional Court. The right to a second hearing did not include the right for the matter to be resolved in accordance with the complainant's wishes. Consequently, the State party considered that the communication constituted an abuse of the right to bring complaints before the Committee.

#### **Author's comments**

5.1 On 12 July 2005, the author replied to the State party's observations, saying that, before bringing the matter before the Committee, he had exhausted domestic remedies with his appeal in cassation to the Supreme Court against the National High Court ruling of 4 October 1999 and his *amparo* application to the Constitutional Court against the Supreme Court ruling of 5 July 2001. The author dismissed the arguments concerning the Constitutional Court's awareness of the Committee's Views in *Gómez Vázquez v. Spain*, since the Court had declared his 100-page appeal inadmissible in a two-page ruling drafted in general and formal terms, without considering the reported violations on the merits. He added that the Human Rights Commission of the Spanish Bar Association had made a presentation to the United Nations Economic and Social Council in which it had called for pending procedural reforms to be implemented so that in Spain all persons would be entitled to have their sentence and conviction reviewed by a higher court.

5.2 The author stated that the Committee itself considered it unnecessary to exhaust extraordinary remedies before the Constitutional Court prior to submitting a communication under the Optional Protocol.<sup>1</sup>

### **Additional comments by the State party on admissibility and on the merits**

6.1 In a note dated 8 August 2005, the State party added that, contrary to the author's statement, the Constitutional Court, in rulings such as that of 3 April 2002, expressly referred to the Committee's Views in the case of *Gómez Vázquez v. Spain* (communication No. 701/1996) and consequently accepted the appeal and ruled on the merits. The author blamed his own mistake in failing to submit his argument concerning the violation of his right to have his conviction reviewed using the mechanisms available to him in the national legal system and subsequently submitting a complaint about the Constitutional Court's ruling to the Committee. The State party requested that the communication should be declared inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol.

6.2 Additionally, the State party maintained that the communication was without merit as the author has enjoyed the right to a second hearing and even a third one, as the National High Court ruling was reviewed by both the Supreme Court and the Constitutional Court.

6.3 The State party took the view that, in this particular case, the conviction was reviewed by the Supreme Court, which ruled on all the issues raised by the author in his appeal, including those referring to factual and evidentiary aspects. While the author based his appeal on the violation of his right to be presumed innocent, on the grounds that the lower court had not proved the causal link between the proven acts and the author, the Supreme Court reviewed the circumstances that permitted a link to be established between the defendant and the offence, in such a manner that it was proven that there was a variety of concordant pieces of evidence concerning a time period that coincided exactly with the time the offence was committed, which were listed in the judgement and which corresponded to the circumstances of the case.

6.4 The State party was of the view that the circumstances of the current case were similar to those addressed in the Committee's Views on *Parra Corral v. Spain* (communication No. 1356/2005), and that the same decision should be made.

### **Additional comments by the author**

7. On 14 October 2005, the author submitted additional observations in which he stated that it was the Supreme Court itself that dismissed any question of reviewing the appraisal of the evidence and acts declared proven, citing passages from the ruling of 5 July 2001.

### **Committee's decision on admissibility**

8. On 7 March 2007, at its eighty-ninth session, the Committee decided that the communication was admissible since domestic remedies had been exhausted and the complaint under article 14, paragraph 5, had been sufficiently substantiated.

### **State party's additional observations on the merits**

9.1 On 17 October 2007 the State party reiterated its argument that the Committee had on many occasions recognized that the remedy of cassation in a criminal case was sufficient to meet the requirements of article 14, paragraph 5, of the Covenant. It emphasized that, in the case in question, the Supreme Court had analysed and fully responded to the sole ground for cassation cited by the author, extensively examining the facts on which the conviction at first instance had



been based. In the light of that examination, the Court had concluded that “the frequency of the telephone contacts, the supply of the telephones to the principals by the complainant himself and, above all, the payment of the telephone charges by a person connected with him, as well as the fact that one of the principals knew that those telephones came from a Galician contact with whom participation in the affair had been discussed, go to make up a set of circumstances that permit a link to be established between the defendant and the offence in a manner which is not at variance with the principles governing circumstantial evidence, since the evidence is varied and also concordant, concerns a time period that coincides exactly with the time the offence was committed, is listed in the judgement and corresponds to the circumstances of the case”.

9.2 The State party added that the author had not specified how he wished the conviction and sentence to be revised, so that analysis of the adequacy of the judgement in cassation must focus exclusively on the internal consistency of the judgement, and on the description and opinion of the appeal set out in the judgement itself.

#### **Additional comments by the author**

10.1 On 11 January 2008, the author contended that, although in some cases the Committee had rejected certain appeals based on the lack of review in cassation, in other cases it had held that article 14, paragraph 5, of the Covenant had been breached.

10.2 The author pointed out that the Supreme Court conducts a review in cassation of judgements handed down in sole instance by the Provincial or National High Courts on grounds which are limited to infringements of constitutional provisions or the erroneous and improper application of substantive rules of criminal law, on the basis of the facts declared proven in those judgements. He also pointed out that the Supreme Court itself had acknowledged that only the legislature had the power to bring the remedy of cassation into line with article 14, paragraph 5, of the Covenant. Despite the Committee’s requests to the State party to rectify its failure to comply with the Covenant, Spain had not modified its legislation in that direction to date and did not appear to have any plans to do so. It was thus ignoring the Committee’s request and its international obligations.

10.3 In the case in question, the author holds that the Supreme Court has not made any substantive changes in its case law which would make cassation a genuine second instance in criminal matters and enable the slightest review and modification of the facts declared to be proven by the lower court. The author quotes part of the judgement in question, in which the Supreme Court points out that “there is abundant case law in this Court which has established in a general manner that statements by persons documented in the proceedings in the form of testimony, reports or other types of statement cannot be cited as indicating an error in the interpretation of documentary evidence. At the same time the case law has highlighted the fact that in the context of article 849.2 of the Criminal Procedure Act, the only documents to be considered are those whose probative value is binding for the trial court, and the Court has repeatedly stated that the documents cited by the complainant lack such probative value ... Consequently, the issue is extraneous to the purpose of the remedy of cassation, since technically it is only a question of fact that this Court cannot deal with owing to the very procedure of the appeal”.

### **Committee's consideration on the merits**

11.1 The Committee has examined the substance of the present communication in the light of all the information furnished by the parties.

11.2 The Committee notes the author's allegation that the evidence for the prosecution was not reviewed in cassation by the Supreme Court. It further notes the State party's observations to the effect that the Court fully reviewed the National High Court ruling. The Committee observes that the Supreme Court's ruling of 5 July 2001 shows that the Court reviewed the National High Court's appraisal of the evidence. Consequently, the Committee cannot conclude that the author has been denied the right to have his conviction and sentence reviewed by a higher court in accordance with article 14, paragraph 5, of the Covenant.

12. In the light of the above, 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 present report.]

### **Note**

<sup>1</sup> The author cites the Views of the Committee on communications Nos. 493/1992, 526/1993, 864/1999, 986/2001, 1006/2001, 1007/2001, 1073/2002 and 1001/2002.

**K. Communication No. 1373/2005, *Dissanakye v. Sri Lanka*  
(Views adopted on 22 July 2008, ninety-third session)\***

<i>Submitted by:</i>	Dissanakye, Mudiyansele Sumanaweera Banda (represented by counsel, Mr. Nihal Jayawickrama)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Sri Lanka
<i>Date of communication:</i>	3 March 2005 (initial submission)
<i>Subject matter:</i>	Detention of author following contempt of court proceedings
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Arbitrary detention, unfair trial, no right to appeal; cruel inhuman and degrading treatment; forced or compulsory labour, not criminal offence under law; freedom of expression; right to vote and be elected; discrimination
<i>Articles of the Covenant:</i>	7; 8, paragraph 3 (b); 9, paragraph 1; 14, paragraphs 1, 2, 3 (a), (e) and (g), and 5; 15, paragraph 1; 19, paragraph 3; 25 (b); and 26
<i>Article of the Optional Protocol:</i>	2

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

*Meeting* on 22 July 2008,

*Having concluded* its consideration of communication No. 1373/2005, submitted to the Human Rights Committee on behalf of Dissanayake, Mudiyansele Sumanaweera Banda 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,

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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, 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.

*Adopts the following:*

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

1.1 The author of the communication is Mr. D.M. Dissanayake, a Sri Lankan citizen, residing in Sri Lanka. He claims to be a victim of violations by the State party of article 7; article 8, paragraph 3 (b); article 9, paragraph 1; article 14, paragraphs 1, 2, 3 (a), (e) and (g), and 5; article 15, paragraph 1; article 19, paragraph 3; article 25; and article 26 of the International Covenant on Civil and Political Rights. He is represented by counsel, Mr. Nihal Jayawickrama.

1.2 The author requested interim measures on the basis that he would suffer irreparable damage if required to serve his entire sentence of two years of rigorous imprisonment. He suggested that interim measures might include a request that the author be granted “respite from the execution of the sentence of hard labour”. On 17 March 2005, the Special Rapporteur denied his request for interim measures on the ground that working in a print shop did not appear to come within the terms of article 8, paragraph 3 (b).

**The facts as submitted by the author**

2.1 In February 1989, the author, a member of the Sri Lankan Freedom Party (SLFP), was elected to parliament. In 1994 and October 2000, he was re-elected and appointed Cabinet Minister in the Peoples Alliance (PA), the Government of Prime Minister (later President) Chandrika Kumaratunge, which was a coalition of the SLFP with several smaller parties. In 2001, differences of opinion arose within the government on a number of political issues. On 9 October 2001, the author and seven other members of the SLFP joined the opposition, the United National Party (UNP). On 5 December 2001, at the general election, the author was elected to Parliament on the National List of the UNP, which formed a coalition government. As the PA was now in the minority in Parliament, the President Kumaratunge, who remained leader of that party, was compelled to appoint the leader of the UNP (comprising the UNP and the Ceylon Workers Congress (CWC)), Ranil Wickremasinghe as Prime Minister. The President, appointed the Cabinet proposed by the new Prime Minister, and the author was appointed Minister of Agriculture.

2.2 According to the author, the peculiar structure of government made good governance difficult. In 2003, the President referred to the Chief Justice for an opinion on questions relating to the exercise of defence powers between the President and the Minister of Defence. On 5 November 2003, a news release from the Presidential Secretariat announced the opinion of the Supreme Court, to the effect that “the plenary executive power including the defence of Sri Lanka is vested and reposed with the President”, and that “the said power vested in the President relating to the defence of Sri Lanka under the Constitution includes the control of the armed forces as commander-in-chief of the forces”. On 7 February 2004, the President dissolved Parliament and set a date for the next general election. Following this election on 2 April 2004, the United Peoples Freedom Alliance (UPFA) (which comprised of the SLFP and the JVP) led by the President formed a minority government in Parliament. The author, who had stood for the first time as a member of the UNP, was re-elected.

2.3 On 3 November 2003, pursuant to the President’s request to the Chief Justice for an opinion on the exercise of defence powers between the President and the Minister of Defence, the author gave a speech during a public meeting in which he was reported in the press as saying

that he and like-minded members of Parliament “*would not accept any shameful decision the Court gives*”. He was charged under article 105 (3) of the Constitution with contempt of court.<sup>1</sup> He was served a “Rule”,<sup>2</sup> dated 7 April 2004, requiring him to show “why he should not be punished under article 105(3) of the Constitution” for the offence of contempt of the Supreme Court. He was tried before the Supreme Court on 7 May and 14 September 2004. The Chief Justice presided over the case, despite the author’s objection.<sup>3</sup>

2.4 On 7 May 2004, at the author’s first appearance in court, the Rule was read out and the Chief Justice asked him whether he had made the speech attributed to him therein. On the second occasion, his counsel was asked whether he admitted to having made portions of the speech, which on the previous occasion he had denied or stated he did not recall having made. The Chief Justice then requested officials of the television station to play back the recording of what was called a “copy of the original”. On the author’s instructions, counsel informed the court that for the purpose of the proceedings, he would admit having made the entire statement attributed to him. At this point, the Chief Justice declared that all that was left were questions of a legal nature, namely, whether the statement admitted by him amounted to contempt of court; and if so, how the court should deal with it.

2.5 The author states that no witnesses were called to give evidence. Neither the persons who made the original complaint nor the person/s who allegedly recorded the speech were called as witnesses or were submitted for cross-examination. The original video tape was not produced in evidence. The procedure was inquisitorial in nature and contrary to the provisions of section 101 of the Evidence Ordinance which requires that, “[w]hoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist”, and article 13 (5) of the Constitution which states that “every person shall be presumed innocent until he is proved guilty”.

2.6 On 7 December 2004, the Court found the author guilty of contempt of court and sentenced him to two years of “rigorous imprisonment”. The author had no right of appeal from the Supreme Court. The judgement refers to a charge of contempt against the author in 2000 for which he was given a warning and admonition by the Supreme Court, but was not convicted. In the judgement, the Chief Justice commented adversely on the author’s conduct, due to his failure to admit at the outset that he had made the full statement in question and stated that he had displayed “a lack of candour”. The author began serving his sentence on the same day in the Welikade Prison and was assigned to work in its printing room. According to the author, the Supreme Court did not have the power to sentence him to hard labour under Sri Lankan law. According to section 2 of the Interpretation Ordinance, which applies to the Constitution, “(x) rigorous imprisonment, “simple imprisonment”, and “imprisonment of either imprisonment description” shall have the same meaning as in the Penal Code, and “imprisonment” shall mean simple imprisonment.<sup>4</sup> Shortly after the author’s committal to prison, he was disqualified from being an elector and Member of Parliament pursuant to article 66 (d) of the Constitution. Such a disqualification continues for a period of seven years commencing from the date on which the prisoner has served his prison sentence; in the author’s case for a period of nine years in all.

2.7 According to the author, the composition of the Supreme Court which heard his case, and included the Chief Justice, was neither impartial nor independent. He argues that the Chief Justice is a personal friend of the President, and that she appointed him as Chief Justice, superseding five more senior judges: he had only been a judge for four months. He refers to a statement made by the former Special Rapporteur on the Independence of Judges and Lawyers,

upon the appointment of the Chief Justice, in which he expressed his concern at the haste of his appointment, particularly in light of the fact that there were at that time two petitions on charges of corruption pending against him. According to the author, every “politically sensitive” case in which the former President, her Government or party appear to have an interest, including the author’s case, has been listed before the Chief Justice, sitting more often than not with the same group of judges of the Supreme Court, many of whom had served under him when he was the Attorney-General. The author states that he is unable to cite a judgement of the Chief Justice in a “politically sensitive” case which was favourable to the author’s party (UNP). In addition, he states that a parliamentary motion calling for his removal, which was submitted to the Speaker by the UNP in November 2003, was signed by the author. The Chief Justice was aware of this motion and of the author’s co-signature.

2.8 According to the author, the charges against him were politically motivated. He states that the Chief Justice was biased against him. In this regard, he refers to the fact that on 10 March 2004, at a crucial stage in the general election, the Chief Justice informed the press that the judges of the Supreme Court were examining a speech made by the author with a view to charging him for contempt. He reminded the press that this was not the first occasion the Supreme Court would be considering such a charge against the author. On 16 March 2004, a newspaper stated that the author had been charged with contempt. According to the author, the Rule was not issued by the Supreme Court until 7 April, after the election, and the Chief Justice took no steps to contradict these reports. In July 2004, the author submits that newspaper reports alleged that the Chief Justice had been caught in a compromising position with a woman in a car park. The Chief Justice publicly dismissed the allegation, stating that it was part of a campaign to “discredit him and was related to certain cases pending before the Court”. The author states that this was a clear reference to him, as his case was the only politically sensitive case pending before the Supreme Court at that time.

### **The complaint**

3.1 The author claims that his sentence was disproportionate to his alleged offence, and refers to other decisions of the Supreme Court dealing with defamation in which lighter penalties were handed down for more serious contempt.<sup>5</sup> He submits that a sentence of two years rigorous imprisonment imposed upon him, being the first reported instance in over a hundred years when the Supreme Court imposed a sentence of such excessive length and rigour, is a grossly disproportionate sentence, and amounts to cruel, inhuman and degrading punishment, in violation of article 7.

3.2 The author claims that, as he was required to perform hard labour in prison in pursuance of a sentence which the court was not competent in law to impose (see para. 2.6 above), he was required to perform forced or compulsory labour in violation of article 8, paragraph 3, of the Covenant. He claims a violation of article 14, paragraph 1, by reason of the Chief Justice’s involvement in his case who, he claims, was neither impartial nor independent.

3.3 The author claims a violation of article 14, paragraph 2, as he was not presumed innocent and the burden of proof was placed on him rather than the prosecution. He refers to the facts set out in paragraph 2.4 and 2.5 above. He submits that while trial by summary procedure may be permissible where the alleged contempt has been committed “in the face of the court”, it is wholly inappropriate where the charge is based, not on the judge’s observations, but on a petition submitted by a individual in respect of an alleged offence which had taken place several months

previously, to which the petitioner was not a party, with which he or she was not concerned, and of which no member of the court had any knowledge until the petition was received. Where such an offence is tried summarily, the burden of proof is imposed on the accused to establish that the alleged act was not committed by him.<sup>6</sup>

3.4 The author claims a violation of article 14, paragraph 3 (a), as he was not informed of the nature and cause of charges against him. The Rule which was served upon him did not refer to any particular sentence or sentences of his statement (of around 20 sentences in all), which was/were suppose to have amounted to contempt of court. The Rule did not indicate the specific nature of the contempt with which he was charged and he was not informed in court either of its specific nature. He claims a violation of article 14, paragraph 3 (e), as no witnesses were called to testify against him, and no witnesses were tendered for cross-examination by counsel appearing for the author. He claims a violation of article 14, paragraph 3 (g), due to the manner in which he was questioned by the Chief Justice on the contents of the speech he was alleged to have made, the coercion which he was subjected to by the Chief Justice, and the adverse inferences which the Chief Justice drew from his reluctance to provide evidence against himself (paragraphs 2.4 and 2.6 above).

3.5 The author claims that because he was tried at first instance in the Supreme Court, rather than the High Court, he had no right to appeal against his conviction and sentence, in violation of his rights under article 14, paragraph 5. He argues that if there had been an appellate tribunal competent to review the judgement, there were serious misdirections of law and fact upon which he would have based an appeal. He sets out these misdirections in detail.

3.6 The author claims a violation of article 15, paragraph 1, as he was convicted of a criminal offence which did not constitute a criminal offence under law, and was sentenced to two years rigorous imprisonment when no finite sentence is prescribed by law. He invokes article 105 (3) of the Constitution, upon which he was convicted for the offence of contempt of court. He refers to the article itself which he argues does not create the offence of “contempt”, nor defines the term, nor sets out what acts or omissions would constitute it. It merely declares that among the powers of the Supreme Court is the, “power to punish for contempt of itself, whether committed in the court or elsewhere”. He also argues that with reference to United Kingdom jurisprudence, it would appear that the type of contempt he was punished with was that of “scandalising the court”, which is not an act declared to be an offence under any law of the State party. In addition, he argues that in light of the fact that article 111C (2) of the Constitution has prescribed punishment of up to one year imprisonment for the substantive offence of interference with the judiciary, it would be irrational to suggest that the words “the power to punish for contempt with imprisonment or fine”, means that the court’s powers to impose a prison sentence is unlimited.

3.7 The author claims that his right to freedom of expression under article 19 has been violated, as the restrictions imposed on his right to freedom of expression through the application of the contempt of court offence in this instance did not satisfy the “necessity” requirement in article 19, paragraph 3. According to the author, the portion of his speech relating to the President’s request was political in nature, related to a subject which was topical, and was couched in language that was appropriate to the occasion. He claims that his expulsion from Parliament, his exclusion for a period of nine years from participating in the conduct of public affairs, and particularly from performing his functions as National Organiser of the principal parliamentary opposition party in a year in which a presidential election is due to be held, and his

disqualification for a period of nine years from voting or standing for election was grossly disproportionate, and not justifiable by reference to reasonable and objective criteria, thus violating his rights under article 25.

3.8 Finally, the author claims a violation of article 26, for failure of the Supreme Court to apply the law equally or to provide equal protection of the law without discrimination. He argues that the Supreme Court failed to take any action against either the Independent Television Network or the Sri Lankan Rupavahini Corporation, both of which had broadcast his speech.

### **The State party's submission on admissibility and merits**

4.1 On 14 October 2005, the State party contested the author's claims. On the facts, it states that the Supreme Court, in addition to its original and appellate jurisdiction, has a consultative jurisdiction whereby the President may obtain the opinion of the Court on a question of law or fact which has arisen or is likely to arise and is of public importance. It submits that at the time of making the statement in question the author was a Cabinet Minister and not a civilian, which added to the impact of the statement. It highlights the previous charge of contempt against the author, when he admitted stating that, "they will close down Parliament and if necessary close down courts to pass this Constitution" and "if State judges do not agree with the implementation of the Constitution they could go home". The author was a senior Cabinet Minister when he had made these statements. In light of his apology and the fact that he had no previous criminal record, he was not convicted. In the current case, the Supreme Court specifically stated in its judgement that as its earlier leniency had had no impact on the author's behaviour, a "deterrent punishment of two years rigorous imprisonment" was appropriate. Considering these elements, the State party submits that the cases cited by the author are irrelevant and the sentence cannot be considered disproportionate. For these reasons, the State party did not violate article 7.

4.2 As to the allegation under article 8, paragraph 3, and the author's claim that according to the provisions of the Interpretation of Statutes Ordinance the word "imprisonment" denotes only "simple imprisonment", the State party submits that this Ordinance cannot be used to interpret the Constitution but only Acts of Parliament. The Constitution may only be interpreted by the Supreme Court, which has interpreted "imprisonment" to mean either "rigorous" or "simple imprisonment". It also notes that article 8, paragraph 3 (a), should be read with article 8, paragraph 3 (b), which states that the former paragraph should not be held to preclude the performance of hard labour.

4.3 As to the claims under article 14, paragraph 1, the State party denies the allegations against the Chief Justice and states that it will refrain from commenting on statements made against him which are unsubstantiated. A judgement of the Supreme Court may only be handed down by a panel of at least three judges. In this case, it consisted of five judges who rendered a unanimous finding on guilt and sentence. The author was represented by senior counsel and the hearing was in public. He admitted having made the statement, and it was left to the Supreme Court to consider whether the statement was contemptuous in whole or in part. The author had used the Sinhalese word "balu" in his statement to describe the Judges of the Supreme Court; a word which means dog/s and is thus extremely derogatory.

4.4 As to the claims of a violation of article 14, paragraphs 2, 3 (e) and (g), the State party submits that the author's admission that he had made the statement in question meant that these provisions were not violated. Had the author refuted having made the statement, the onus would



then have been on the prosecution to prove that such statement was in fact made. As to paragraph 3 (e), having admitted making the statement, there was no necessity for the prosecution to hear evidence of witnesses to prove that the statement had indeed been made. As to paragraph 3 (g), the author's admission could not be construed as having to testify against himself or to confess guilt. The author and his counsel, having examined the evidence available took a considered decision to admit the entire statement.

4.5 As to article 14, paragraph 3 (a), the State party submits that the author was served with a document containing the relevant material long before the commencement of the proceedings. He was served with the charges beforehand and the statement was read out in open court in a language he understood. He was represented and neither the author nor counsel indicated that they failed to understand the nature of the charge. Counsel was given the opportunity to view a video clip of the author making the statement in question and to advise the author prior to admitting that he made the statement.

4.6 The State party denies that neither article 15, paragraph 1, nor article 14, paragraph 5, were violated. It confirms that the Supreme Court decision could not have been reviewed. Under article 105 (3) of the Constitution it is vested with the power, as a superior court of record, to punish for contempt of itself whether committed within the court or elsewhere. It is clear under this article that contempt whether committed within the court itself or elsewhere is an offence. If it were not so then the power given to the Supreme Court would be futile. Any other interpretation would be unrealistic and unreasonable. Further, it submits that contempt could be considered criminal, according to "the general principles of law recognized by the community of nations (article 15, paragraph 2)."

4.7 On the article 19 claim, the State party submits that a restriction preventing incidents of contempt of court is a reasonable restriction, which is necessary to preserve the respect and reputation of the court, as well as to preserve public order and morals. Chapter iii of the Sri Lankan Constitution provides that the exercise of the right to freedom of expression is subjected to restrictions as may be prescribed by law which includes contempt of court. article 89 (d) of the Constitution, "disqualifies a person who is or had during the period of seven years immediately preceding completed serving a sentence of imprisonment (by whatever name) for a term not less than six months after conviction by any court for an offence punishable with imprisonment for a term not less than two years..." The State party argues that preventing a person convicted of such a crime from being an elector or elected as a Member of Parliament could not be construed as an unreasonable restriction for the purposes of article 25 of the Covenant.

4.8 As to article 26, the State party submits that the contention that the television stations and the person who made the contentious statement be considered as equal is untenable. In addition, the author had already been warned and admonished for a previous charge of contempt of court, and thus cannot expect to be treated equally to a person who is brought before a court for the first time.

4.9 The State party submits that it has no control over the decisions of a competent court, nor can it give directions with regard to future judgements of a court. Upon signing the Optional Protocol, it was never intended to concede the competence of the Committee to express views on a judgement given by a competent court in Sri Lanka. It denies that there was any political or personal bias of the Chief justice towards the author.

## **Author's comments on State party's submission**

5. On 9 November 2005, the author reiterated his claims and submits that the State party did not respond to many of his arguments. With regard to its arguments on article 8, paragraph 3, he submits that the Interpretation Ordinance explicitly states that it applies to the Constitution and the fact that the Supreme Court is vested with the power to interpret the Constitution does not mean that in exercising that power it can ignore the explicit provisions of the Ordinance. As to the claim that the context of the statement in question was to refer to judges of the Supreme Court as “dogs”, the author refers the Committee to the translation of the words in question by the Supreme Court itself as “disgraceful decision”. At no stage during the proceedings did the Attorney-General or the Court itself claim that the author had referred to the Judges of the Supreme Court as “dogs”. With respect to the State party's reference to article 15, paragraph 2, of the Covenant, the author submits that this provision was intended as a confirmation of the principles applied by the war crimes tribunals established after the Second World War.

## **Author's supplementary comments**

6.1 On 31 March 2008, on instructions from the Special Rapporteur on new communications, the Secretariat requested the author to confirm whether a claim of article 9, paragraph 1, was implicit in his complaint, and to provide it with information on his release. On 6 April 2008, the author confirms that a claim of a violation of article 9, paragraph 1, is implicit in each of the violations claimed in his initial submission. He refers to the Committee's Views in *Fernando v. Sri Lanka*,<sup>7</sup> which were adopted three weeks after the present communication was submitted to the Committee, and in which the Committee found a violation of article 9, paragraph 1, for the arbitrary deprivation of liberty of the author by an act of the judiciary. The author also refers to the criteria by which the Working Group on Arbitrary Detention determines whether a deprivation of liberty is arbitrary - “when the complete or partial infringement of international standards relating to a fair trial is of such gravity as to confer on the deprivation of liberty, of whatever kind, an arbitrary character”, and “when such detention is the result of judicial proceedings consequent upon, or a sentence arising from, the exercise by an individual of the right to freedom of opinion and expression guaranteed by article 19 of the Covenant”.

6.2 The author submits that, on 15 February 2006, the President remitted the remainder of his sentence and he was released from prison, about six to eight weeks ahead of the day on which he would ordinarily have been entitled to be released. About two or three weeks before his release, the Speaker of Parliament ruled that the author had forfeited his seat in Parliament to which he had been elected for a six-year term in April 2004, because he had absented himself from parliament for a continuous period of three months. The President did not grant a pardon (which he could have done under paragraph 2 of article 34 of the Constitution) which would have removed the disqualification to vote or seek election, which the author is subject to for seven years from the completion of his prison sentence, i.e. until April 2013.

## **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. 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.

7.2 As to the claims of violations of articles 7, 8, paragraph 3 (b), 15, paragraph 1, and 26, of the Covenant, the Committee is of the view that these claims have not been substantiated, for purposes of admissibility, and that they are therefore inadmissible under article 2 of the Optional Protocol.

7.3 As to the remaining claims of violations of the provisions of article 14; article 9, paragraph 1; article 19; and article 25(b), the Committee considers these claims are sufficiently substantiated and finds no other bar to their admissibility.

### **Consideration of the merits**

8.1 The Human Rights Committee has considered the present communication in 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 recalls its observation, in previous jurisprudence,<sup>8</sup> that courts notably in Common Law jurisdictions have traditionally exercised authority to maintain order and dignity in court proceedings by the exercise of a summary power to impose penalties for “contempt of court.” In this jurisprudence, the Committee also observed that the imposition of a draconian penalty without adequate explanation and without independent procedural safeguards falls within the prohibition of “arbitrary” deprivation of liberty, within the meaning of article 9, paragraph 1, of the Covenant. The fact that an act constituting a violation of article 9, paragraph 1, is committed by the judicial branch of government cannot prevent the engagement of the responsibility of the State party as a whole.

8.3 In the current case, the author was sentenced to two years rigorous imprisonment for having stated at a public meeting that he would not accept any “disgraceful decision” of the Supreme Court, in relation to a pending opinion on the exercise of defence powers between the President and the Minister of Defence. As argued by the State party, and confirmed on a review of the judgement itself, it would appear that the word “disgraceful” was considered by the Court as a “mild” translation of the word uttered. The State party refers to the Supreme Court’s argument that the sentence was “deterrent” in nature, given the fact that the author had previously been charged with contempt but had not been convicted because of his apology. It would thus appear that the severity of the author’s sentence was based on *two* contempt charges, of one of which he had not been convicted. In addition, the Committee notes that the State party has provided no explanation of why summary proceedings were necessary in this case, particularly in light of the fact that the incident leading to the charge had not been made in the “face of the court”. The Committee finds that neither the Court nor the State party has provided any reasoned explanation as to why such a severe and summary penalty was warranted, in the exercise of the Court’s power to maintain orderly proceedings, if indeed the provision of an advisory opinion can constitute proceedings to which any summary contempt of court ought to be applicable. Thus, it concludes that the author’s detention was arbitrary, in violation of article 9, paragraph 1.

8.4 The Committee concludes that the State party has violated article 19 of the Covenant, as the sentence imposed upon the author was disproportionate to any legitimate aim under article 19, paragraph 3.

8.5 As to the claim of a violation of article 25 (b), due to the prohibition on the author from voting or from being elected for seven years after his release from prison, the Committee recalls 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. It also recalls that “if a conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence”.<sup>9</sup> While noting that the restrictions in question are established by law, the Committee notes that, except for the assertion that the restrictions are reasonable, the State party has provided no argument as to how the restrictions on the author’s right to vote or stand for office are proportionate to the offence and sentence. Given that these restrictions rely on the author’s conviction and sentence, which the Committee has found to be arbitrary in violation of article 9, paragraph 1, as well as the fact that the State party has failed to adduce any justifications about the reasonableness and/or proportionality of these restrictions, the Committee concludes that the prohibition on the author’s right to be elected or to vote for a period of seven years after conviction and completion of sentence, are unreasonable and thus amount to a violation of article 25(b) of the Covenant.

8.6 In light of the finding of violations of articles 9, paragraph 1, 19, and 25 (b) in this case, the Committee need not consider whether provisions of article 14 may have any application to the exercise of the power of criminal contempt.

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 State party has violated article 9, paragraph 1; article 19; and article 25 (b), 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 with an adequate remedy, including compensation and the restoration of his right to vote and to be elected, and to make such changes to the law and practice, as are necessary to avoid similar violations in the future. The State party is under an obligation to avoid similar 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 ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 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 English text being the original version.  
Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

## Notes

<sup>1</sup> According to Article 105 (3), “The Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each be a superior court of record and shall have all the powers of such court including the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit.”

<sup>2</sup> The author provides no further details on the definition of a “Rule”.

<sup>3</sup> According to the author, his lawyer met with the Chief Justice in his chambers prior to the hearing informing him that he objected to his participation in the hearing and asking him to recuse himself. The Chief Justice refused to do so.

<sup>4</sup> The Penal Code of Sri Lanka (s. 30) states that imprisonment is of two descriptions: rigorous, that is, with hard labour; and simple. The Supreme Court purported to act under article 105 (3) of the Constitution which refers to “imprisonment or fine”.

<sup>5</sup> According to the information provided, the only other time the Supreme Court issued a sentence of “rigorous imprisonment” was in the case of Fernando, where the convict was sentenced to one year of rigorous imprisonment. This communication no. 1189/2003 was considered by the Committee, on 31 March 2005, and it found a violation of article 9, para. 1, for arbitrary deprivation of liberty.

<sup>6</sup> In support of his view, the author refers to a judgement of the Constitutional Court of South Africa, in the case of *State v. Mamabolo* [2002] 1 LRC 32.

<sup>7</sup> Communication No. 1189/2003, Views adopted on 31 March 2005.

<sup>8</sup> Ibid.

<sup>9</sup> 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), para. 14.

**L. Communication No. 1376/2005, *Bandaranayake v. Sri Lanka*  
(Views adopted on 24 July 2008, ninety-third session)\***

<i>Submitted by:</i>	Mr. Soratha Bandaranayake (represented by counsel, Mr. S.R.K. Hewamanna)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Sri Lanka
<i>Date of communication:</i>	21 January 2005 (initial submission)
<i>Subject matter:</i>	Dismissal of judge
<i>Procedural issues:</i>	None
<i>Substantive issues:</i>	Unfair hearing; access to public service; inequality
<i>Articles of the Covenant:</i>	14, paragraph 1, 25 (c), and 26
<i>Articles of the Optional Protocol:</i>	2 and 3

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

*Meeting on 24 July 2008,*

*Having concluded* its consideration of communication No. 1376/2005, submitted to the Human Rights Committee on behalf of Mr. Soratha Bandaranayake 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 is Mr. Soratha Bandaranayake, a Sri Lankan citizen, born on 30 January 1957. He claims to be a victim of violations by the State party of article 14; article 25 (c); and article 26 of the International Covenant on Civil and Political Rights. The author is represented by counsel, Mr. S.R.K. Hewamanna.

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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. Ahmed Tawfik Khalil, Ms. Zonke Zanele Majodina, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

## **The facts as presented by the author**

2.1 The author was appointed District Judge of Negombo with effect from 1 April 1998, after serving for 10 years as a Magistrate. On 17 October 1998, while driving to a religious ceremony in the company of a Tamil Hindu friend, the author and his friend were stopped at a checkpoint and abused by the police. As the policeman did not recognize him, the author presented his identity card. The author subsequently brought the matter to the attention of the officer-in-charge of the Kirulapone police station. On 26 October 1998, under the orders of the officer-in-charge, the police officer in question visited the author in his chambers at the District Court and apologized.

2.2 Following this incident, the author was summoned over the phone to appear before the Judicial Service Commission (JSC) on 18 November 1998 and, without any reference to any particular complaint, was questioned on whether he had claimed to be a High Court Judge at a police checkpoint at Kirulapona. It subsequently transpired that a complaint was dispatched by the local High Court Judge on 20 November 1998, two days after the author had been questioned by the JSC, which, the author claims, is evidence of a conspiracy against him. Under article 114 of the Constitution, the appointment, transfer and discipline of judicial officers is vested in the JSC. Under article 112, the Chief Justice is the Chairman of the JSC. It is also composed of two other judges of the Supreme Court.

2.3 By JSC order of 24 November 1998, the author was sent on compulsory leave without disclosing the nature of the complaint or the complainant. On 1 April 1999, he was served with a disciplinary charge sheet by the JSC, in which it was alleged that, during an altercation with a police officer at a checkpoint, he had “impersonated” a High Court judge, thereby receiving preferential treatment, and subsequently admonished the police officer in question. He was charged with interfering with the performance of the police officer’s duties, making a false statement and of having exceeded his authority.<sup>1</sup> He was requested to put his version of events in writing, which he did by letter of 7 July 1999, refuting the charges. Between 13 September 1999 and 21 March 2000, a Committee of Inquiry appointed by the JSC, consisting of a Supreme Court Judge, the President of the Court of Appeal and an Appeal Court Judge, investigated the matter. The author was represented by counsel.

2.4 The author highlights what he considers to have been irregularities in the conduct of the Committee of Inquiry:

- The inquiry did not make documents relevant to the author’s defence available at the hearing, including documents from the proceedings held on 18 November 1998, and refused counsel’s request to have the Secretary of the JSC testify and produce the documents in question
- The members were not appointed by law
- Legally inadmissible evidence of witnesses to prove charges was relied upon
- The affidavits of police officers had not been made under oath or affirmation in accordance with law

- Evidence relied upon to find the author guilty was unsubstantiated, including an undated complaint by the High Court Judge in question, which bore no official stamp
- The author was questioned extensively on his past conduct in an alleged attempt to incriminate him and he was not given an opportunity to demonstrate that he had been exonerated for past misconduct and subsequently promoted
- There was no opportunity to cross-examine the chief police witness
- The inquiry overlooked the fact that the material witness (the police officer in question) had been remanded as a suspect to murder and a drug offence
- The author was deprived of his right to summon important witnesses, including the officer-in-charge of the police station at the time of the alleged incident
- The inquiry relied on evidence that was not adduced during the inquiry but came from the interview held by the JSC on 18 November 1998, in particular a document which was alleged to have been an admission by the author, but was not produced during the inquiry and not made available to the author
- Objections made by counsel in respect of the absence of a complaint or of official entries made by the police officers were neither recorded (as required by the rules and regulations of the Police Department) nor was any ruling made in respect of such objections
- The inquiry did not take into account the fact that the High Court Judge in question habitually makes complaints against junior judges
- When the High Court judge in question informed the Committee that in view of the tainted witnesses he no longer believed that the alleged incident had taken place, the inquiry refused to terminate the proceedings
- An application made by author's counsel to address the inquiry on the question of whether a prima facie case had been established was denied
- The inquiry insisted that the author should give evidence in his own defence as failure to do so would result in disastrous consequences, thus denying him his right to remain silent contrary to article 12 (1) of the Constitution

2.5 On 12 June 2000, the author was advised that the Committee of Inquiry had found him guilty of the charges in question. No reasons were given for the finding. The letter directed him to appear before the JSC to decide on "consequential steps", and stated that he was entitled to have counsel present. In advance of the JSC meeting, the author repeatedly applied for access to the investigation file, including certified copies of the proceedings and the reasons for the Committee of Inquiry's findings. He did not receive any reply. On 31 July 2000, the author appeared before the JSC with counsel. Counsel submitted that there was no basis upon which the author could be found guilty. The Chief Justice, who chaired the hearing, indicated that even if the JSC ignored the findings of the Committee of Inquiry, he was inclined to find the petitioner guilty on other grounds, namely on his past record. When pointing out to the Chief Justice that



he had been exonerated with respect to past incidents he was told to “shut up”. The Chief Justice advised the author that he should agree to retirement and directed him to consider the same and give his consent in writing, which the author refused. A request from counsel to make further submissions was denied. On 7 November 2000, the author was notified of his dismissal from office by the JSC. On 15 November 2000, the author sent a letter of appeal to the JSC but did not receive a reply.

2.6 Subsequently, the author filed a complaint with the Sri Lankan Human Rights Commission. On 18 June 2001, the Commission requested the author to make submissions on whether it had jurisdiction to hear complaints against the JSC. On 8 April 2003, the author filed an application in the Court of Appeal to quash the order for his dismissal and to order his reinstatement in service. On 17 July 2003, a “junior judge” of the Court of Appeal dismissed the application on the basis that the author had failed to establish malice on the part of the Chief Justice.<sup>2</sup> According to the author, the judge who decided this case had previously worked under the Chief Justice and implies that the latter influenced him in making his decision to dismiss the case. A request for special leave to appeal this decision remains pending in the Supreme Court. According to the author, it is the Chief Justice who has failed to list this case for hearing.

2.7 The author filed a fundamental rights application with the Supreme Court for which leave to appeal was refused by a majority decision on 6 September 2004. According to the author, under the Chief Justice’s direction the application was listed before him, despite his involvement in the case before the JSC and objection from counsel. Although he was not one of the judges who presided over this case, the author claims that the Chief Justice had the motion listed before him so that he could select those judges he could easily influence to consider the case, thereby ensuring a dismissal.

2.8 According to the author, the Chief Justice is not well disposed towards him due to several incidents during the Chief Justice’s tenure as Attorney-General which resulted in personal animosity between them. The author provides examples of cases in which judicial misconduct was sanctioned more lightly than in his case.

### **The complaint**

3.1 The author claims that he did not receive a fair hearing in relation to the charges against him, in violation of his rights under articles 14, paragraph 1, and 25 (c). His dismissal was mainly due to the animosity that the Chief Justice had towards him, who influenced the other members of the JSC. In addition, he refers to the irregularities of the disciplinary proceedings commencing with his address to the JSC on 18 November 1998, throughout the inquiry proceedings (see paragraph 2.4), and leading to his dismissal. In addition, he claims that the charges were trivial and even if they had been proven, none of them fall within the ambit of “improper conduct”, as defined in Volume II of the Establishments Code, which deals with the disciplinary control of public officers.<sup>3</sup> His dismissal, he claims, was a disproportionate punishment.

3.2 He claims that he was discriminated against in violation of article 26, as other judges who were found to have been guilty of charges by the Committee of Inquiry were not dismissed from service but received lighter penalties. In addition, he claims he was treated unequally before the law, as incidents for which he was cleared and a single incident in which he was reprimanded,

were taken into account by the Committee of Inquiry, in justifying the decision to dismiss him. He claims that the decision to dismiss him was not based on the purported inquiry into the High Court Judge's complaint.

3.3 The author also claims a violation of article 2, paragraph 3, as he was deprived of an effective remedy in as much as the National Human Rights Commission and the Supreme Court refused to grant him leave to proceed with respect to his fundamental rights application.

3.4 The author seeks relief including a declaration on the violation of his rights, reinstatement and compensation.

#### **State party's submission on admissibility and merits**

4.1 By submission of 7 October 2005, the State party submits that the author has failed to establish a prima facie case of a violation of any of his rights under the Covenant and that the allegations against the Chief Justice are unsubstantiated. Under the Constitution, the Chief Justice Chairs the JSC but that it is also composed of two other judges of the Supreme Court. Thus, the Chief Justice does not decide alone. On the facts, it states that in 1988, the author became a judicial officer. On 10 January 1997, he was placed on compulsory leave and reinstated on 9 October 1997. On 23 November 1998, he was placed on compulsory leave again and dismissed on 7 November 2000. In the dismissal letter from the JSC, of 7 November 2000, several incidents of misconduct and of conduct unbecoming of a judicial officer were referred to.

4.2 During his career, the author has had his probation extended, was transferred for disciplinary reasons, reprimanded, "interdicted", and placed on compulsory leave prior to his final dismissal. The State party attaches information on the complaints made against the author throughout his career. It explains that all the matters referred to are matters which took place before the current Chief Justice took office, and thus, the claim that the author was singled out for discriminatory treatment by the Chief Justice due to personal animosity is unfounded. In addition, the author's career record makes it clear that he is unsuitable to hold office and that the decision to dismiss him was justified.

4.3 The State party submits that the Committee is not competent to sit on appeal to consider the merits of the Committee of Inquiry. It was conducted in a fair manner, the author was present and represented by counsel, and the decision was fair and reasonable under the circumstances. As to the discrimination claim, the State party submits that the author's case is not comparable to the other cases cited by the author in light of the cases of misconduct against him. Thus, this claim is not made out. As to the claim that he should have been presumed innocent until proven guilty, the State party argues that this concept arises in criminal trials only. In any event, there is no evidence that the author's case was prejudged.

#### **Author's comments on the State party's submission**

5.1 On 15 January 2006, the author responded to the State party's submission. He reiterates his claims and highlights the State party's failure to deny or respond to any of his allegations made. He submits that it tries to divert the deliberation of the Committee with reference to past incidents in his career, which had been dealt with in the past and which are not relevant to the inquiry under issue. In addition, the State party allegedly misrepresented, suppressed and

distorted the author's past conduct, in an attempt to prejudice him and give a tainted picture of his judicial career. By reviving these incidents the author believes that he is being penalized twice for incidents which have long been put to rest.

5.2 The author contests the State party's argument/s about the Committee's inability to grant the relief sought by him, on the argument that the Committee lacks jurisdiction, is not competent to interpret the State party's Constitution and grant relief thereon. He argues that these arguments do not provide a legal basis for rejecting his communication and refusing the relief sought. He notes that the State party has still not provided the proceedings or findings of the inquiry on the basis of which he was dismissed. He also points out that as is evidenced from the Supreme Court judgement of 6 September 2004, one of the three judges dissented from the decision taken by the Committee of Inquiry on this ground. He admits that all the incidents referred to by the State party prior to the incident in question had taken place when the current Chief Justice was Attorney General. However, he claims that the Chief Justice's animosity towards him is demonstrated by the fact that he took into account past incidents, to dismiss him from service.

5.3 With respect to the past incidents of misconduct cited by the State party, the author contests the allegation that the Supreme Court found him to have violated the fundamental rights of the person in question. He submits that he was not even a respondent to the proceedings in question and quotes from the judgement which states that "although learned counsel for the petitioner did submit that the learned magistrate had acted "mechanically" and complied with the proposal made by the police, there is insufficient evidence adduced before us to arrive at such a conclusion". However, the judgement went on to direct that a copy of the judgement be submitted to the JSC for such action as it may deem to be appropriate. This issue was one of seven in a charge sheet served on the author, for which he was subsequently exonerated.

5.4 The author denies that he was ever "interdicted" and, in the only incident in which he was transferred, the High Court judge who conducted the preliminary inquiry exonerated him of all allegations against him and recommended that he be reinstated in his prior post. As to the extension of his probationary period, the author argues that this was done in "curious circumstances". As to his compulsory leave from 10 July 1997, he submits that several charges in the charge sheet related to orders made by other judicial officers and, when this as pointed out, the JSC ordered that the compulsory leave be withdrawn and that the author be paid his salary increments. Within a year he was given his promotion to a higher grade. The author admits that he was reprimanded by the JSC in an interview on 28 July 1991. However, according to the Establishment Code, this is only a minor punishment and should not have affected his career adversely. Furthermore, there had been no warning placed on record that any future lapse would entail dismissal.

## **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 With regard to the question of exhaustion of domestic remedies, while noting that neither the author nor the State party provided information on the outcome of the author's application

for leave to appeal the decision of the Court of Appeal to the Supreme Court (paragraph 2.6 above), the Committee notes that the State party has not argued that the communication is inadmissible on this ground. It therefore considers that it is not precluded from considering the communication by the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.3 With respect to the claim of a violation of article 26 of the Covenant, the Committee notes that insufficient information has been provided on comparable cases, to demonstrate that the author's dismissal amounted to discrimination or unequal treatment under this provision. As noted by the State party and as is evident from the material provided by the author, none of the circumstances of the judges referred to by him would appear to compare to the author's situation. Thus, the Committee finds that the author has failed to substantiate sufficiently, for purposes of admissibility, any claim of a potential violation of article 26, and this claim is inadmissible under article 2 of the Optional Protocol.

6.4 The Committee notes that article 25 (c) of the Covenant confers a right of access, on general terms of equality, to public service, and recalls that the right of equal access to public service includes the right not to be arbitrarily dismissed from public service.<sup>4</sup> For this reason, the Committee considers that the claim under article 25 is admissible and should be considered on the merits.

6.5 As to whether the author's remaining claims fall within the purview of article 14, paragraph 1 of the Covenant, the Committee recalls that the concept of a "suit at law" under article 14, paragraph 1, is based on the nature of the right in question, rather than on the status of one of the parties.<sup>5</sup> It also recalls that the imposition of disciplinary measures imposed on 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.<sup>6</sup> The same jurisprudence of the Committee goes on to provide that, while a decision on a disciplinary dismissal does not need to be taken by a court or tribunal, whenever a judicial body is entrusted with the task of holding a disciplinary enquiry and 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. The Committee refers to its general comment on article 14,<sup>7</sup> which defines the notion of a "tribunal" in this article, and considers that the JSC, to the extent that it is "established by law, is independent of the executive and legislative" is a tribunal within the meaning of article 14, paragraph 1, of the Covenant. The Committee therefore considers that the proceedings before the JSC and subsequent appeals through the courts constitute a determination of the author's rights and obligations in a suit at law within the meaning of article 14, paragraph 1, of the Covenant.

6.6 The Committee observes, however, that the alleged arbitrary nature of the dismissal relates to a large extent to the evaluation of facts and evidence in the course of proceedings before the JSC and the Court of Appeal. The Committee recalls its jurisprudence and notes that it is generally 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 proceedings or the evaluation of facts and evidence or interpretation of legislation was manifestly arbitrary or amounted to a denial of justice.<sup>8</sup> The Committee notes that the Court of Appeal reviewed the JSC's decision to dismiss the author. The

issues arising from this review which have been sufficiently substantiated, for purposes of admissibility, relate to the failure of the JSC to provide the author with copies of the proceedings from the hearing on 18 November 1998, and the findings and reasoning behind the decision of the Committee of Inquiry on the basis of which the author was dismissed. Accordingly, the Committee considers that, these claims raise issues under articles 14, paragraph 1 and 25 (c) of the Covenant; they have been sufficiently substantiated and should be considered on the merits. The Committee considers the remaining claims inadmissible under article 2 of the Optional Protocol, as they have not been substantiated for purposes of admissibility.

### **Consideration of merits**

7.1 The Committee observes that article 25 (c) of the Covenant confers a right to access, on general terms of equality, to public service, and recalls its jurisprudence that, to ensure access on general terms of equality, not only the criteria but also the “procedures for appointment, promotion, suspension and dismissal must be objective and reasonable”.<sup>9</sup> A procedure is not objective or reasonable if it does not respect the requirements of basic procedural fairness. The Committee also considers that the right of equal access to public service includes the right not to be arbitrarily dismissed from public service.<sup>10</sup> The Committee notes the author’s claim that the procedure leading to his dismissal was neither objective nor reasonable. Despite numerous requests, he did not receive a copy of the proceedings from his first hearing before the JSC on 18 November 1998; this is confirmed in the Supreme Court decision of 6 September 2004, and is not contested by the State party. Nor did he receive the findings of the Committee of Inquiry, on the basis of which he was dismissed by the JSC. The decision of the Court of Appeal confirms that these documents were never provided to him, in accordance with the express provision of Rule 18 of the JSC rules.

7.2 According to Rule 18 of the JSC rules, “[C]opies of reports or reasons for findings relating to the inquiry or of confidential office orders or minutes, will not, however, be issued.” The Committee notes that there is no justification in the JSC rules themselves nor any explanations offered by the courts or the State party, for the failure to provide judicial officers with the reasoning for the findings of the Committee of Inquiry against them. It also notes that the only reasoning provided to the author for his dismissal was set out in the dismissal letter of 7 November 2000, in which the JSC invoked the Committee of Inquiry’s finding that he had been found guilty of the charges against him, without any explanation. The JSC also took cognizance of incidents of alleged past misconduct, for which the author had already been exonerated. It is relevant to note that the State party itself has not provided a copy of the Committee of Inquiry’s findings. The Committee finds that the JSC’s failure to provide the author with all of the documentation necessary to ensure that he had a fair hearing, in particular its failure to inform him of the reasoning behind the Committee of Inquiry’s guilty verdict, on the basis of which he was ultimately dismissed, in their combination, amounts to a dismissal procedure which did not respect the requirements of basic procedural fairness and thus was unreasonable and arbitrary. For these reasons, the Committee finds that the conduct of the dismissal procedure was conducted neither objectively nor reasonably and it failed to respect the author’s right of access, on general terms of equality, to public service in his country. Consequently, there has been a violation of article 25 (c) of the Covenant.

7.3 The Committee recalls its general comment on article 14,<sup>11</sup> that a dismissal of a judge in violation of article 25 (c) of the Covenant, may amount to a violation of this guarantee, read in conjunction with article 14, paragraph 1 providing for the independence of the judiciary. As set

out in the same general comment, the Committee recalls that “judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law.” For the reasons set out in paragraph 7.2 above, the dismissal procedure did not respect the requirements of basic procedural fairness and failed to ensure that the author benefited from the necessary guarantees to which he was entitled in his capacity as a judge, thus constituting an attack on the independence of the judiciary. For this reason the Committee concludes that the author’s rights under article 25 (c) in conjunction with article 14, paragraph 1, have 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 article 25 (c), in conjunction with 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, including, appropriate compensation.

10. Bearing in mind that, by becoming a party to the Optional Protocol, Sri Lanka 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 180 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 present report.]

### Notes

<sup>1</sup> The charges were the following: “(1) You having stated that you were the High Court Judge of Negombo prevented the said vehicle and passengers travelling in it being checked by the said officers, thereby wilfully obstructing and or interfering with the performance of duties of the officer in charge of the said barrier. (2) You made a false statement to Ranjith the RSI of Police who was in charge of the said barrier that you were the High Court Judge of Negombo and interfered and/or obstructed the said officer from performing his duties and thereby acted in a manner to cause injury to the reputation and office of Mr. Gamini A. L. Abeyratne, the High Court Judge of Negombo. (3) During the period between 17.10.98 and 25.10.98, you abused your office by informing the RSI Ranjith to appear in District Judge’s Chambers in Negombo on 26.10.98 and warned him to be courteous to public when attending to the duties on Public Highway and thereby acted in excess of your authority as District Judge.

<sup>2</sup> The judgement refers inter alia to Rule 18 of the JSC, which states that “Copies of reports or reasons for findings relating to the inquiry or of confidential office orders or minutes, will not, however be issued.

<sup>3</sup> The Establishment Code reads as follows: “Improper conduct not connected with official duties relates to such matters as habitual drunkenness, use of narcotic drugs, disorderly behaviour, in public places, immorality of a type that becomes a public scandal or any other act which brings the public service or the office he holds into disrepute.”

<sup>4</sup> *Stalla Costa v. Uruguay*, Case no. 198/1985, Views adopted on 9 July 1987.

<sup>5</sup> *Y.L. v. Canada*, Case No. 112/1981, Decision adopted on 8 April 1986, *Robert Casanovas v. France*, Case No. 441/1990, Views adopted on 19 July 1994.

<sup>6</sup> *Perterer v. Austria*, Case No. 1015/2001, Views adopted on 20 July 2004.

<sup>7</sup> Human Rights Committee general comment No. 32 (2007) Right to equality before courts and tribunals and to a fair trial (art. 14), para. 18.

<sup>8</sup> *Simms v. Jamaica*, Case No. 541/1993, Decision of 3 April 1995.<sup>9</sup> *Rubén Santiago Hinostroza Solís v. Peru*, Case No. 1016/2001, Views adopted on 27 March 2006.

<sup>10</sup> *Stalla Costa v. Uruguay*, (see note 4 above).

<sup>11</sup> Human Rights Committee general comment No. 32 (2007) Right to equality before courts and tribunals and to a fair trial (art. 14), para. 64.

**M. Communication No. 1385/2005, *Manuel v. New Zealand*  
(Views adopted on 18 October 2007, ninety-first session)\***

<i>Submitted by:</i>	Benjamin Manuel (represented by counsel, Mr. Tony Ellis)
<i>Alleged victim:</i>	The author
<i>State party:</i>	New Zealand
<i>Date of communication:</i>	6 April 2005 (initial submission)
<i>Subject matter:</i>	Recall of prisoner to continue serving life sentence for murder following release on parole and engagement in violent conduct
<i>Substantive issues:</i>	Arbitrary detention
<i>Procedural issues:</i>	Exhaustion of domestic remedies - substantiation, for purposes of admissibility - victim status
<i>Articles of the Covenant:</i>	7, 9, paragraphs 1, 2, 3 and 4; 10, paragraphs 1 and 3; 14, paragraphs 1, 2, 3 (a) and (b), and 7; 15; and 26
<i>Articles of the Optional Protocol:</i>	1, 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 18 October 2007,

*Having concluded* its consideration of communication No. 1385/2005, submitted to the Human Rights Committee on behalf of Benjamin Manuel 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, 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 Benjamin Manuel, a New Zealand national born in 1967. He claims to be victim of violations by New Zealand of his rights under article 7; article 9, paragraphs 1, 2, 3 and 4; article 10, paragraphs 1 and 3; article 14, paragraphs 1, 2, 3 (a) and (b), and 7; article 15; and article 26 of the Covenant. He is represented by counsel, Mr. Tony Ellis.

### **Factual background**

2.1 In July 1984, the author was convicted of murder and sentenced to life imprisonment. On 18 January 1993, he was conditionally released on parole. While on parole he engaged in a variety of further offences for which he was convicted and sentenced as follows: in February 1993, he was convicted for driving with excess blood alcohol, fined \$500 and disqualified for six months; in March 1993, he was convicted of a breach of parole conditions for failure to report and sentenced to 150 hours community service; in May 1994, he was convicted for receipt of stolen property and fined \$200; in October 1995, he was convicted of disorderly behaviour, intentional damage and threatening language, and fined \$400; in November 1995, he was convicted of dangerous driving (reversing a car over his sister), driving with excess breath alcohol and disorderly behaviour, and sentenced to four months imprisonment. He was also charged with male assault on a female, but was acquitted following his recall.

2.2 On 29 January 1996, the author was released from custody after completing the term of imprisonment imposed in November 1995. The same day, the Chief Executive of the Department of Corrections applied to the Parole Board under s.107I of the Criminal Justice Act (“the Act”) for the author’s recall to prison.<sup>1</sup> The grounds advanced were that the author had been convicted of a number of offences for which he had been given two cumulative sentences of two months imprisonment; that he was on bail charged with a further offence of assault on a female; and that it was in the interest of public safety that he remain in custody given this offending and his deteriorating behaviour in general. The Chief Executive also requested an interim order for recall under s.107J of the Act<sup>2</sup> on the basis that he posed an immediate risk to the safety of the public.

2.3 On 31 January 1996, the Chairperson of the Parole Board, a justice of the High Court, ordered the author’s interim recall under s.107J of the Act, pending a Board hearing scheduled for 29 February 1996. On 1 February 1996, the author voluntarily surrendered to police and was arrested under the interim warrant. On 13 February 1996, he consented in writing to adjournment of the Board hearing of the recall application until 19 March 1996, which took place on that day accordingly. The author was represented by counsel, whom he had consulted by telephone before the hearing date and whom he met in person twenty minutes prior to the hearing.

2.4 The Board, comprising a justice of the High Court and four other members, issued in writing a final recall order, finding that (a) the author’s breach of conditions of parole, (b) his commission of further offences while on parole, and (c) his conduct indicating likely further offending if he remained on parole had been established to the necessary standard (balance of probabilities). More widely, the Board found that there were reasonable grounds to conclude that he posed a risk to the safety of the public. After reviewing the convictions, reports made by Community Corrections, the author’s difficulties with anger management and alcohol, and the views of the supervising probation officer, the Board considered action necessary to forestall future offending and made final the interim recall order. The Board supported consideration by

the Corrections Department of a temporary release from custody under the Penal Institutions Act to undertake a residential alcohol treatment programme. Accordingly, on 19 March 1996, a warrant was issued under s.107L of the Act for the author's return to prison, where he has remained since. He did not appeal to the High Court against the making of an order for recall, as he was entitled to do under s.107M of the Act.

2.5 From 9 December 1996 until the present, the Board reviewed the case every 6 to 12 months, declining to order outright release but making a variety of remedial recommendations at various stages (such as temporary release to attend a residential programme, three days leave to undertake an alcohol abuse programme, temporary leave to undertake a violence prevention programme, placement in an anti-violence unit, placement in Maori focus unit, placement in self-care unit and work parole, and temporary release). In custody and on remedial programmes, the author repeatedly engaged in inappropriate conduct.<sup>3</sup> The author did not apply at any time for judicial review, nor did he utilise the statutory right introduced in July 2002 to request reconsideration by a differently constituted Parole Board of any of the post-recall Parole Board decisions.

2.6 On 30 March 2004, the author applied for summary release under the urgent procedure set out in the Habeas Corpus Act. He argued that the recall had been unlawful, as the provisions of the Criminal Justice Act had not been read together with the prohibition of disproportionately severe punishment, contained in s.9 of the New Zealand Bill of Rights Act. Secondly, he argued that the Parole Board had no jurisdiction to hold a hearing for final recall, as the interim recall order was unlawful. Specifically, there was no record of an order except a reference to an order in the warrant itself, and further the application for an interim order could not be made *ex parte*. He also argued that he had not validly consented to the short adjournment of the final hearing, which was accordingly unlawful. Finally, he argued that the interim and final recall orders were unlawful because the Parole Board, the Corrections Department and the Police all failed to ensure that he was advised of his rights to legal advice and to habeas corpus, and he was not brought speedily before a court.

2.7 On 2 April 2004, the High Court denied the application. On the argument that recall was disproportionate to his actual conduct, the High Court held that that statutory scheme did not limit recall to circumstances where the likely future offending involved serious violence or risk to life and limb. In any event, the Court held that having regard to the facts of the conduct (his reversing, in drunken state, a vehicle over his sister after a dispute, knocking her unconscious, and his assault on his mother), his problems with anger management and alcohol, and the apparently escalating risk of offending, it was open to the Parole Board to conclude that he posed a serious risk of harm to others.

2.8 On the argument that unlawfulness of the interim order voided the final order pursuant to which the author remained detained, the Court noted that if the interim order was unlawful he could be entitled to damages for the short period from 1 February 1996 to 19 March 1996 that imprisonment occurred pursuant to it; under the statutory scheme, however, there was no link between the two orders other than one of timing - where an interim order is made, a final order must be made no less than two weeks before and no more than four thereafter, unless by consent of the parties. On the argument of bias arising from the Chairperson who made the interim order also being on the Board making the final order, the Court found the statutory scheme clear on this point and no legal difficulty involved.

2.9 On the point that at the time he was arrested pursuant to the interim recall, he was not advised at the point of detention of the reason therefore and also of his right to counsel, in breach of sections 23 (1) (a) and (b) of the New Zealand Bill of Rights Act,<sup>4</sup> the Court found that there was no evidence that the author had been given a copy of the s.107J (4) notice, and further that that notice did not address the right to legal advice in respect of the interim detention but only with respect to the Board hearing. While the breach of the rights in section 23 could give rise to an application for damages or exclusion of evidence, in the habeas corpus proceedings before the Court it did not make the detention unlawful. In any event, nothing turned on the delay in advice of his right and no attempt was made to extract evidence. On the issue of the *ex parte* nature of the interim order, the Court found this was clearly contemplated by the statutory scheme and did not give rise to difficulty. Finally, on the technical point that the interim warrant was not accompanied by an interim order in a separate document, the Court found the warrant, in the prescribed form, to be sufficient evidence of an order.

2.10 On 15 June 2005, the Court of Appeal refused the author's appeal. The Court held that in the urgent, summary procedure set out in the Habeas Corpus Act, in general presentation of a regular warrant such as that in issue would be a decisive answer; attacks, such as those advanced in this case, on administrative law grounds to decisions lying upstream of apparently regular warrants should be challenged in the more appropriate forum of judicial review proceedings. That said, the Court addressed the merits of the arguments presented and upheld the High Court's dismissal of the arguments put by the author.

2.11 On 3 August 2005, the Supreme Court refused leave to further appeal. A second application for writ of habeas corpus on 4 August 2005 was withdrawn two days later. On 27 November 2006, the Parole Board concluded that the author had maintained excellent progress towards release and granted release on standard conditions, and special conditions lasting two years.

### **The complaint**

3.1 The author raises complaints under four broad sets of issues: the interim recall order of 1 February 1996, the final recall order of 19 March 1996, the author's continued detention and the capacity of challenging his detention.

3.2 As to the interim order, the author argues that the facts disclose violations of article 9, paragraphs 1, 2, 3 and 4; article 10, paragraph 1; article 14, paragraphs 1, 2 and 3 (a); article 15 and article 26. Specifically, he argues that the interim recall order was made without notice to him (arts. 9 (1); 10 (1); 14 (1); 15 and 26); that upon his detention under the order he was neither notified of his rights to counsel or to writ of habeas corpus (art. 9 (4)), nor of reasons for his detention (arts. 9 (2) and 14 (3) (a)); that the recall warrant was arbitrary and/or unlawful as issued without a separately documented interim recall order (art. 9 (1)); that, once detained under the order, the Parole Board hearing set for 29 February 1996 was adjourned to 19 March 1996 and he was therefore not promptly brought before a judicial officer; nor was he entitled to take proceedings before any court, judicial or quasi-judicial body (art. 9 (3) and/or (4)); and that he was not permitted to challenge his detention (art. 9 (4)).

3.3 As to the final recall order, the author argues that the facts disclose violations of article 7; article 9, paragraph 1; article 10, paragraphs 1 and 3; article 14, paragraph 7; and article 15. Specifically, he argues that the recall decision was in breach of domestic law and his detention

pursuant to it was therefore arbitrary (art. 9 (1)). He also argues that detention pursuant to the decision to recall him to continue serving his sentence was arbitrary because the decision was based on breach of parole conditions, commission of further violent offences while on parole and likelihood of commission of further offences. The likelihood of further offending, however, does not amount to “compelling reasons” for continued detention as described in *Rameka v. New Zealand*;<sup>5</sup> is an insufficient ground for recall according to *Stafford v. United Kingdom*;<sup>6</sup> is impermissibly vague and covers offences insufficiently serious to warrant recall from parole. The author also argues that the detention was arbitrary as the Parole Board was neither independent nor impartial as (a) the interim decision to recall was made by a member of the Parole Board, the Chairperson, who was on the Board that then made the final decision; (b) the Chairperson was also a sitting judge; (c) the Parole Board’s procedures were inconsistent with those of a Court; and (d) the Parole Board’s offices are in the same building as the legal section of the Department of Corrections, a department also providing administrative support to the Parole Board. For the same reasons, the Parole Board breached his fair trial rights under article 14, paragraph 1.

3.4 The author goes on to argue, with respect to the final recall order, that the decision amounted to disproportionately severe treatment, in violation of articles 7 and 10, paragraph 1. It was also inconsistent with the right to be brought before a court following arrest or detention on a criminal charge under article 9, paragraph 3, on account of the infirmities described in the Parole Board’s independence. It further failed to assist his reintegration into society, contrary to article 10, paragraph 3. The author did not have sufficient opportunity to instruct counsel, and did not enjoy a presumption of innocence protected by article 14, paragraph 2. The recall decision also breaches the right against double jeopardy, contrary to article 14, paragraph 7, and/or retrospective application of the law, protected by article 15. Finally, the recall decision breached article 26, because it applied a test of whether the author posed a sufficient risk to public safety to warrant recall and/or because certain issues raised by him could not be determined by summary application under the Habeas Corpus Act.

3.5 In terms of his ongoing detention after the recall decision, the author goes on to argue that the detention breaches article 9, paragraph 1; and article 10, paragraphs 3 and 4. The Parole Board decisions after recall breach article 9, paragraph 1, as they were not on a basis of “compelling reasons” or other understandable basis. The results and conclusions of the 1998 Psychological Service Report produced to the Board were flawed, and the consequential detention was therefore arbitrary and unlawful. The author further argues that he has been denied the opportunity to be placed in self-care and has had no proper remedial plan, in breach of article 10, paragraph 3. Lastly, he alleges that he was moved from minimum to high-medium security upon issuance of his application for habeas corpus.

3.6 The author contends that the extent of means to challenge his detention violates article 9, paragraph 4; and article 26. The availability of judicial review does not satisfy the review required by article 9, paragraph 4, as (a) the remedy granted by the court on judicial review is discretionary, rather than mandatory as in the habeas corpus context, (b) judicial review does not go to the merits of detention, within the meaning of the European Court’s decision in *Weeks v. United Kingdom*,<sup>7</sup> (c) an application for judicial review requires a \$400 court fee, whereas a habeas corpus application is free; (d) judicial review is said to be slower than habeas corpus. The availability of judicial review, and not of habeas corpus, for certain grounds raised by the author is discriminatory against prison inmates, in additional breach of article 26. Lastly, the habeas

corpus procedure is urgent and summary, and does not provide for pretrial discovery of evidential material held by opposing parties, said to be required by article 9, paragraph 4.

### **State party's submissions on admissibility and merits**

4.1 By submissions of 7 November 2005, the State party disputes the admissibility and merits of the entire communication. The State party argues, as a general matter, that the author is detained under a sentence of imprisonment following his recall from conditional release. His initial recall to prison was made on the basis that he was eligible for recall and posed an immediate risk to the safety of others. The final recall decision was made following an oral hearing of the Parole Board, at which the author appeared and was legally represented. His continuing detention has been reviewed by the Parole Board every 6 to 12 months (up to his release on conditions in November 2006) on the basis of constantly updated information on his conduct and psychological state, as well as submissions by his legal representatives. Both the Board and the Corrections Department have made substantial efforts to provide the author with rehabilitative programmes. The State party observes that apart from an application for summary release under the Habeas Corpus Act, the author has not challenged any decision under which he was detained, in particular, reconsideration or judicial review of the successive decisions of the Parole Board under which the detention continues.

### **Issues around the interim recall**

4.2 On the bundle of claims around the interim order, the State party argues with respect to the claim under article 10, paragraph 1, that this provision is not engaged simply by fact of detention but imposition of unacceptable hardship.<sup>8</sup> The claim that he is discriminatorily denied fair trial rights available to persons charged with criminal offences is nowhere detailed and is in any event justified by the distinction between determinations of a criminal charge and determination of eligibility for parole. These claims are therefore inadmissible for insufficient substantiation.

4.3 On the merits of the claims on the interim issue, the State party stresses that the interim and final decisions, as confirmed by the courts, are factually and legally distinct, on the basis of different criteria, and therefore any infirmity in the former does not affect the validity of the latter, which was the basis for detention from 19 March 1996 onwards. On the issue of the *ex parte* nature of the interim order, the State party notes that there are good reasons for dealing within interim recall applications on this basis, as a parolee whose conduct has given rise to sufficient concern to warrant a recall application is likely to go into hiding if served with an application for recall. A recall order does not impose a new sentence, but revokes conditional release and requires a person to continue to serve an existing sentence, on the basis that the person is considered to pose a sufficiently serious risk to others. The recalled individual's interests are protected by the provision of counsel and the holding of a hearing at short order. On the issue of the absence of a separately documented recall order alongside the warrant, the statute does not so require, and the domestic courts so confirmed.

4.4 On the issue as to whether he was advised of the reason for detention upon arrest under the interim warrant, the State party notes that the author voluntarily surrendered to police the day after the warrant was issued and was thus clearly aware of the reasons for his arrest; it refers to the Committee's Views in *Stephens v. Jamaica*<sup>9</sup> to the effect that where an individual

surrendered to police, fully aware of the reasons for detention, no breach of article 9, paragraph 2, was shown. Nor does article 14, paragraph 3, apply to the interim (or final) recall order, as there is not a determination of a criminal charge, but a recall of a parolee to prison to continue serving sentence.

4.5 As to the claims of access to review of detention under interim recall, the State party argues that it is only where an individual is arrested “on a criminal charge” that it has an obligation under article 9, paragraph 3, to bring her before a court. As the author was not arrested or detained on a criminal charge, the applicable provision is article 9, paragraph 4, concerning the right to contest before a court the lawfulness of detention. In this respect, on 19 March 1996 the author appeared before the Parole Board, legally aided by counsel to whom he had access prior to hearing. He had access to judicial review in court at all times, even though he only sought to exercise that right in March 2004. The Committee has confirmed that this right is engaged, not ex officio by the State, but by the instigation of the author or his representatives.<sup>10</sup>

4.6 On the right to apply for habeas corpus, the State party disputes that the right under article 9, paragraph 4, also contains a concomitant right to be informed of that right. The author has had, and continues to have, access to the right to seek habeas corpus at all stages. The State party also argues that there is no entitlement under this article of the Covenant for a person to be advised of the right to instruct a lawyer; in this respect, section 23 (1) (b) of the New Zealand Bill of Rights Act goes further than article 9 of the Covenant. In any event, the State party does not accept that the author was not notified of his right to instruct a lawyer when arrested on the interim warrant, but argues that it has not had the opportunity to test this in court because of the way in which the author mounted his legal challenge.

4.7 On the right to a fair trial, the State party argues that an application that, if granted, requires the recall of a paroled prison inmate to continue serving a sentence of imprisonment does not amount to a charge for a criminal offence, implicating article 14. The jurisprudence of the European Court of Human Rights has repeatedly held that such applications involve a resumption of sentence, rather than a new charge.<sup>11</sup> In any case, while the author did not have a hearing at the interim stage (as this process is determined without a hearing), he did have a right to a fair hearing before the full Parole Board, an independent, impartial tribunal, at the final recall stage, where he attended and was represented.

### **Issues around the final recall**

4.8 As a matter of admissibility, the State party notes that the author did not exercise his right of appeal to the High Court against the final order under s.107M of the Act, under which the Court determines whether the order ought to have been made and, if not, whether it is overturned and the prisoner released. Nor has he sought judicial review (offering also interim relief) in the High Court of the Board’s final recall decision. Nor has he exercised his right to apply to the Parole Board for reconsideration of his continued detention (under s.97(3) of the Act) or for review of decision (under the subsequent Parole Act, which also provides for application to the High Court in the event the Board postpones release, as has also occurred in this case.)

4.9 The State party argues that all of the issues raised by the author, bar the single issue of alleged discrimination under article 26, were amenable to review under one or more of these remedies and are accordingly inadmissible for failure to exhaust domestic remedies. Specifically, there are claims of breach of the Criminal Justice Act, reliance on assessments of reoffending,

insufficient severity of offending while on parole, apparent or actual partiality of the Board and disproportionality of recall could have been raised on appeal under s.107M of the Act. The claims of breach of the Criminal Justice Act, reliance on assessments of reoffending, disproportionality of recall, apparent or actual Parole Board bias, failure to consider rehabilitation, breach of presumption of innocence and double jeopardy could be raised in judicial review. The claims of incorrect assessment of risk, insufficient severity of offending and the disproportionality of recall could have been put to the Board on application for reconsideration. Presumption of innocence, double jeopardy and retrospectivity could also, in a sufficiently straightforward case, be dealt with under the urgent habeas corpus procedure.

4.10 The State party also argues that three claims are inadmissible, for want of sufficient substantiation: (a) that the author's detention goes beyond the fact of detention to unacceptable hardship, raising issues under articles 7 and 10, paragraph 1; (b) that a proper remedial plan is absent, raising an issue under article 10, paragraph 3; this cannot be reconciled with the fact that the Department of Corrections and the Parole Board have provided him with repeated rehabilitative courses, the full benefit of which the author has denied himself through using drugs in prison and failing to cooperate with courses, including abscondment from course facilities; and (c) that discrimination is raised in the risk assessment on an application for recall not being proved to beyond reasonable doubt and in the limits of the habeas corpus procedure.

4.11 As to the merits, the State party argues that detention pursuant to final recall was not arbitrary as the author had breached parole conditions, committed further violent offences while on parole and his conduct indicated sufficient risk that he would reoffend; the Parole Board concluded he posed a risk to the safety of the public and his recall was accordingly justified.

4.12 The State party rejects that its action was inconsistent with the Committee's Views in *Rameka*, where the Committee found that preventive detention had to be justified by compelling reasons, regularly reviewed by an independent body. The State party notes that, in contrast to *Rameka*, that the author is serving a punitive sentence of life imprisonment, from which he was paroled and recalled. The assessment of risk was made at the point of recall, rather than only at sentencing, and has been continually reviewed since recall. The independence of the Parole Board to carry out such reviews was accepted by the Committee in *Rameka*. The author did not appeal or seek review of the Parole Board's decisions, but the High Court, on hearing the habeas corpus application, specifically found as a matter of fact that it was open to the Parole Board to conclude that the author posed a serious risk of harm to others. This finding was not challenged in the Court of Appeal.

4.13 The State party also disputes that the author's recall was inconsistent with the judgment of the European Court in *Stafford*, where the applicant's recall from parole to continue a sentence of life imprisonment was found to be arbitrary on the basis of no causal link between the original sentence for murder and the possible commission of other non-violent offences. The State party notes that unlike *Stafford*, the author was recalled on the basis of violent offences and a risk of further violence. Instead, to the extent the European Court's approach is appropriate for the Committee, the case more resembles *Spence v. United Kingdom*,<sup>12</sup> where relatively minor instances of violence and factors indicating a risk to public safety precluded a finding of arbitrariness.

4.14 On the contention that the risk assessment was overly vague or reflected too low a level of risk, the State party refers to the unchallenged assessments of risk by the Parole Board and High Court, and notes that the basis of detention, including the level of penalties and conditions of release, is an area where States parties have wide latitude. It is within their competence to regard criminal offending by parolees within the term of their sentences as a factor, among others, that may warrant recall.

4.15 On the contentions that the Parole Board's final decision was not impartial as the Chairperson made the interim order and sat on the Board making the final order, the State party notes that the two decisions were legally wholly distinct: the first found an immediate risk to the safety of others, while the second was a much wider enquiry, including the submissions of the author and his counsel. On the argument that the participation of a sitting judge called the impartiality of other Board members into question, the State party refers to varying State practice ensuring actual independence. Apart from the author's failure to raise this issue in the domestic courts, which have never addressed the issue, the State party argues that within its constitutional system the appointment of a High Court judge to the Parole Board compromises the independence of neither. On the claim that the Department of Corrections' provision of administrative support to the Parole Board compromises its impartiality, the State party submits that the support provided is entirely practical in nature and, under no reasonable assessment, could it provide a tenable basis for concern. On the final argument that the Board does not follow the procedures of a criminal court, the State party notes that it is a specialist tribunal with more flexibility, often advantageous to inmates, whose fairness is subject to judicial review.

4.16 On the claim under article 9, paragraph 3, the State party argues that this provision is not engaged by the parole decision of the Parole Board, as it concerned conditional release from sentence rather than a new charge of offence.

4.17 On the claim that the author's written consent to adjournment of the Parole Board hearing was vitiated by lack of access to legal advice, which made the adjourned hearing a legal nullity and detention further to it in breach of article 9, paragraph 1, the State party notes that both the High Court and Court of Appeal found no suggestion his consent was not freely given or properly informed. The Court of Appeal also noted the issue could be further pursued in judicial review proceedings, more apt than the summary habeas corpus procedure to test disputed allegations of fact, but the author did not do so. Accordingly, the written consent and adjournment should be accepted at face value.

4.18 On the argument going to presumption of innocence, the State party refers to the jurisprudence of the European Court that recall to continue a term of imprisonment is the resumption of an existing sentence rather than imposition of a new sentence. On the presumption issue deriving from the fact that the Parole Board's final recall decision was based, in part, on the fact that at that point he was awaiting trial on a charge of male assault on a female (on which he was later acquitted), the State party argues that the Board was not considering his guilt or otherwise on this charge. Instead, it found that his conduct had met the statutory criteria (s.107I (6) (a), (b) and (c) of the Act), including a sufficient risk of further offending. The Board noted that there was an outstanding charge for trial but did not express any view on his criminal responsibility.

4.19 As to the double jeopardy and retrospectivity issues posed by the final recall, the State party notes the European Court views that a new sentence is not implicated. There was no



increase in penalty, as the author's detention was within the term of sentence. Neither did his release mean that he had finished the sentence, or, within the *Rameka* sense, the punitive component thereof. On access to counsel, the State party, while accepting that the author did not see counsel until the day of the hearing, understands that there was earlier telephone contact. It was also open to him to seek an adjournment if he felt disadvantaged, which he did not do.

### **Issues around continuing detention**

4.20 As to admissibility, the State party notes that each of the Parole Board's decisions was open to reconsideration or judicial review, which has never been pursued. The communication also alleges factual aspects not placed before the courts. With one exception (a specific complaint of methodological error in a 1998 psychological assessment, which has not been raised in court), there is no substantiation at all on why these decisions were incorrect and arbitrary, and these claims are therefore inadmissible. The claim under article 10, paragraph 3, is again similarly inadmissible.

4.21 On the merits, the State party notes that since the 1996 final recall order, at least annual reviews - and sometimes more frequently - have taken place by the Parole Board. On each case, release has been declined following, as the record makes clear, careful consideration; at the same time, the Board has made recommendations aimed at assisting the author to address the factors putting him at risk of further offending. These have generally been pursued, but the author has frequently frustrated rehabilitative programmes by disobeying programme rules and other misconduct, including an attempted escape.

4.22 The State party notes that the most recent review (at the time of its submissions) took place on 13 September 2005. The author's counsel sought an adjournment in order that he could run a properly defended hearing in respect of the author's application. The Board noted that there had been a number of adjournments for counsel to obtain expert advice on risk assessment, and was concerned that the matter be dealt with as soon as possible. It granted adjournment on the basis that there would be a hearing as soon as counsel was ready, noting that his release would require a careful release plan and careful and sustained management, which should be the focus of the hearing. The Board's decision would again be subject to reconsideration by a differently constituted Board or review in the High Court. As to the alleged methodological error in the 1998 psychological assessment which would have allegedly resulted in a lower assessment of risk of re-offending (resisted by the State party), the State party notes that this complex factual and methodological matter was not put to the domestic courts.

4.23 On the argument that he was moved from minimum to medium-high security placement on commencement of the summary habeas corpus proceedings, the State party observes that he was, with his knowledge, placed in a higher security area of the prison over a weekend in order to permit better supervision at a time of increased volatility; his privileges and programmes were not, as far as practically possible, reduced as a result. The State party notes that there is no allegation that placement was undertaken to sanction him or for other improper purpose.

### **Right to challenge continued detention**

4.24 The State party rejects the author's contention that the Court of Appeal's decision in the habeas corpus proceedings violated his rights under articles 9, paragraph 4, and 26 of the Covenant. The State party clarifies that habeas corpus proceedings are available to all detained

persons, including inmates. On the argument that judicial review remedies are insufficient in terms of article 9, paragraph 4, as they are discretionary, the State party notes the Court of Appeal's statement that it was inconceivable that a judge would refuse relief on discretionary grounds to a person illegally detained. On the argument that the NZ\$ 400 filing fee presents a barrier to the availability of judicial review as a remedy, the State party notes that there is provision in the High Court regulations for waiver and postponement of payment pending decision on waiver; there is no suggestion in this case of any deterrent effect or that a waiver would not have been granted. The State party also rejects the contention that judicial review proceedings are slower than habeas corpus applications, noting domestic jurisprudence that a hearing for interim relief (on judicial review) can be arranged as speedily as a habeas corpus application.

4.25 As to the requirements of article 9, paragraph 4, the State party notes that in *Rameka* the Committee explicitly accepted that the Parole Board's regular review of continued detention fulfilled that obligation. In terms of the argument that judicial review is "not wide enough", in the sense of the judgment of the European Court in *Weeks*, to satisfy the European equivalent of article 9, paragraph 4, the State party notes that *Weeks* arose from a parole system under which the Parole Board (unlike the present case) did not have mandatory powers, and (unlike the present case) afforded limited participation rights for the detained person. Judicial review today in New Zealand is also substantially more advanced than the largely procedural English remedy in 1987 when *Weeks* was decided; the modern remedy can consider consistency with human rights, and order release where detention is found to be arbitrary.

4.26 On the argument that the summary habeas corpus procedure falls short of article 9, paragraph 4, as it does not afford pretrial disclosure of relevant documentation, the State party notes that as an urgent procedure, the omission of pretrial discovery is intended to avoid any unnecessary delay. To the extent disclosure is required, this is available in judicial review proceedings which can be dealt with urgently; it is anyway disclosed as part of the Parole Board process; and it can be obtained under the Official Information Act within four weeks or more urgently if necessary.

#### **Author's comments on the State party's submissions**

5. By letter of 23 December 2005, the author responded disputing all aspects of the State party's response. On the interim order, the author argues that there was no reason for urgency, and an *ex parte* hearing was not necessary as he had spent the preceding two months in prison, being recalled the day after he left prison. He also argues that the absence of a documented interim order is unfair and arbitrary. The author also argues that rehabilitative programs were not sufficiently tailored to him, and that the remedies available to him were not effective. The author also renews his attacks on the independence and effectiveness of the Parole Board, arguing that the Parole Board is in an all-powerful position vis-à-vis the prisoner and that a prisoner who does not cooperate with the Board process is at a singular potential disadvantage. As to the issue of notification of reasons for arrest, as required by article 9, paragraph 2, the author seeks to distinguish the Committee's Views in *Stephens* on the basis that, in that death penalty case, the author was cautioned as soon as possible.<sup>13</sup>

## 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 issue of exhaustion of domestic remedies, the Committee notes that certain of the claims before the Committee were advanced to the domestic courts, which addressed them on their merits at first instance and on appeal. These claims, which were limited to the interim and final orders for recall, were: (a) that the author's recall was disproportionate to his actual conduct, (b) that unlawfulness of the interim order voided the final order pursuant to which the author remained detained, (c) there was bias arising from the Chairperson who made the interim order also being on the Board making the final order, (d) that at the time he was arrested pursuant to the interim recall, he was not advised at the point of detention of the reason therefore and of his right to counsel, (e) the interim recall order was of *ex parte* nature; (f) that the interim warrant was not accompanied by an interim order in a separate document, and (g) that he had not consented to a short adjournment of the final hearing.

6.3 On the remaining issues advanced to the Committee, the author has not shown to the Committee's satisfaction why these matters could not have been satisfactorily addressed by the domestic courts either (a) under the habeas corpus proceedings the author in fact brought, or (b) under judicial review or (c) under statutory appeal and, in part, reconsideration proceedings provided for under the State party's law. The Committee is not satisfied that variations of procedure or timing under the latter procedures are such as to disqualify these avenues as appropriate, available remedies in terms of the issues raised to the Committee. It follows accordingly that the remaining issues not set out in paragraph 6.2, above are inadmissible for failure to exhaust domestic remedies, in terms of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 On the issues in respect of which domestic remedies were exhausted, the Committee notes that the arguments that that the interim warrant was not accompanied by an interim order in a separate document and was accordingly unlawful, and that due to unlawfulness of the interim order, the final order pursuant to which the author remained detained, was arbitrary were rejected by the domestic courts and found to be lawful. As to the issue of bias arising from the Chairperson who made the interim order also being on the Board making the final order, the Committee notes that it is common, and in principle unobjectionable, for judicial officers to take interim decisions in respect of proceedings the merits of which will later be before them. The author has not shown any elements to displace this presumption in the present case. Similarly, *ex parte* proceedings can, in principle, be necessary in order to act sufficiently promptly and avoid risk of serious harm, of which the author's conduct gave rise to reasonable belief, provided that the affected party has opportunity to state his or her case at an early opportunity. Such an opportunity was afforded in this case by the final recall hearing. On the issue of consent to adjournment, the Committee notes that the domestic courts found, as a matter of fact, that the author had consented, a finding which, absent manifest arbitrariness or a denial of justice, the Committee will not disturb. In light of these elements, the Committee considers that the author has not sufficiently substantiated a claim in respect of these issues under articles 9, 14 or 26 of the Covenant. These claims are accordingly inadmissible, for lack of sufficient substantiation,

under article 2 of the Optional Protocol. On the claim that, at the point of arrest, he was not notified of his right to counsel, the Committee considers likewise that the author has failed to substantiate, for purposes of admissibility, such a claim under article 9, paragraph 2, of the Covenant, which is accordingly also inadmissible under article 2 of the Optional Protocol.

6.5 As to the additional claim under article 9, paragraph 2, that he was not informed at the point of his arrest under the initial warrant of the reasons for his arrest, the Committee notes that the High Court recognized for the purposes of the proceedings before it that the author had not been so informed, and that an action for appropriate damages was open. In the circumstances, the Committee considers that the State party, through its courts, has appropriately addressed the claim with the consequence that the author can no longer be considered a victim for purposes of the Optional Protocol in respect of this issue.<sup>14</sup> The claim is accordingly inadmissible under article 1 of the Optional Protocol.

6.6 As to the claims that the author's recall was disproportionate and amounted to arbitrary detention, the Committee considers that this issue has been sufficiently substantiated, for purposes of admissibility, under article 9, paragraph 1, 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 As to the claim that the author's recall was not justified by his underlying conduct, and was therefore arbitrary in breach of article 9, paragraph 1, the Committee must first assess the extent to which article 9 of the Covenant applies in the context of early release on parole and recall. Assuming *arguendo* that his arrest on the initial warrant while on parole deprived him of liberty, within the meaning of article 9, paragraph 1, such deprivation must be both lawful and not arbitrary. In contrast to the purely preventive detention at issue in *Rameka*, the author's recall meant that he resumed a pre-existing sentence. The State party concedes that the recall decision was taken for protective/preventive purposes given the risk he posed to the public in the future. In order to avoid a characterization of arbitrariness, the State party must demonstrate that recall to detention was not unjustified by the underlying conduct, and that the ensuing detention is regularly reviewed by an independent body.

7.3 The Committee notes that to recall an individual convicted of a violent offence from parole to continue sentence after commission of non-violent acts while on parole may *arguendo* in certain circumstances be arbitrary under the Covenant. The Committee need not decide that issue, as in the present case, the author, who had been convicted of murder, engaged in violent or dangerous conduct after his release on parole. This conduct was of sufficient nexus to the underlying conviction that his recall to continue serving that term was justified in the interests of public safety, and the author has not shown otherwise. The Committee also notes that the author's ongoing detention was reviewed at least once a year by the Parole Board, a body subject to judicial review which it found to satisfy the necessary requirements of independence in *Rameka*. The Committee thus concludes that the author's recall was not arbitrary within the meaning of article 9, paragraph 1, 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 do not disclose a violation of the Covenant.

[Adopted 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 present report.]

### Notes

<sup>1</sup> Section 107 I of the Act provided, at the material time, in relevant part:

“(1) ... [T]he Secretary may apply to the Parole Board for an order that any offender who is subject to an indeterminate sentence and has been released under this Part of this Act be recalled to a penal institution to continue serving his or her sentence.

...

(6) An application may be made under this section where the applicant believes on reasonable grounds that:

(a) The offender has breached the conditions of his or her release; or

(b) The offender has committed an offence; or

(c) Because of the offender’s conduct, or a change in his or her circumstances since release, further offending is likely

...

(7) An application made under this section shall specify the grounds in subsection (6) of this section on which the applicant relies and the reasons for believing that the grounds apply.”

<sup>2</sup> Section 107 J of the Act provided, at the material time, in relevant part:

“(2) Where an application [for recall] is made under ... section 107 I (6) of this Act, the Chairperson of the appropriate Board shall, on behalf of the Board, make an interim order for the recall of the offender where:

(a) The offender is subject to a sentence for a serious violent offence ...; or

(aa) The offender is subject to a sentence of life imprisonment for murder or manslaughter...; or

(b) The Chairperson believes on reasonable grounds that:

(i) The offender poses an immediate risk to the safety of the public or of any person or any class of persons; or

- (ii) The offender is likely to abscond before the determination of the application for recall.

...

(4) Where an order is made under this section and a warrant is issued, the offender shall on, or as soon as practicable after, being taken into custody be given:

- (a) A copy of the application [for recall] made under section 107 I of this Act; and
- (b) A notice
  - (i) Specifying the date on which the application is to be determined, being a date not early than 14 days, nor later than 1 month, after the date on which the offender is taken into custody pursuant to this section
  - (ii) Advising the offender that he or she is entitled to be heard and to state his or her case in person or by counsel; and
  - (iii) Requiring the offender to notify the Board, not later than 7 days before the date on which the application is to be determined, whether he or she wishes to make written submissions or to appear in person or be represented by counsel

<sup>3</sup> In May 1996, the author twice offended against good order and discipline; in April-June 1007 he failed to complete the violence prevention programme and tested positive for drugs; in October 1997, he possessed an article without lawful authority; in June 1998, the temporary release facility declined to accept the author for failure to meet programme rules; in September and November 1998, he disobeyed a lawful order; in October 1998, he committed an offence against order and discipline; in January 1999, he twice disobeyed lawful orders; in April 1999, he consumed drugs and alcohol; in November 1999, he behaved in a threatening manner and consumed drugs and alcohol; between May and July 2000, he tested positive for drugs and escaped from a temporary release facility; in December 2000 and March and December 2001, he used drugs and alcohol; in February 2002, one-on-one counselling as terminated due to argumentative and unresponsive stance; in March 2003, he received counselling but declined to cooperate; in January and March 2004, he was returned from self-care due to security concerns and a positive drugs test respectively; in May 2004, he twice used drugs; in June 2005, he assaulted an officer and used drugs.

<sup>4</sup> Section 23 of the New Zealand Bill of Rights Act provides:

Rights of Persons Arrested or Detained.

- (1) Everyone who is arrested or who is detained under any enactment:
  - (a) Shall be informed at the time of the arrest or detention of the reason for it; and
  - (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and

(c) Shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.

(2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.

(3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.

<sup>5</sup> Communication No. 1090/2002, Views adopted on 6 November 2003.

<sup>6</sup> European Court of Human Rights (2002) 35 EHRR 1121.

<sup>7</sup> European Court of Human Rights; Application No. 9787/82; Judgment of 2 March 1987.

<sup>8</sup> See communication No. 762/1977 *Jensen v. Australia*, Decision adopted on 22 March 2001.

<sup>9</sup> Communication No. 373/1989, Views adopted on 18 October 1995.

<sup>10</sup> Ibid.

<sup>11</sup> *Ganusauskas v. Lithuania*, application No. 47922/99, Judgment of 7 September 1999; *Brown v. United Kingdom*, application No. 968/04, Judgment of 26 October 2004.

<sup>12</sup> European Court of Human Rights, application No. 1190/04, Judgment of 30 November 2004.

<sup>13</sup> See note 9 above.

<sup>14</sup> See, for example, *Dahanayake v. Sri Lanka*, communication No. 1331/2004, Decision adopted on 25 July 2006, at para. 6.5.

**N. Communication No. 1413/2005, *De Jorge Asensi v. Spain*  
(Views adopted on 25 March 2008, ninety-second session)\***

<i>Submitted by:</i>	José Ignacio de Jorge Asensi (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	25 April 2005 (initial submission)
<i>Subject matter:</i>	Irregularities in the decision-making process for the promotion of military personnel
<i>Procedural issues:</i>	Insufficient substantiation; incompatibility with the provisions of the Covenant
<i>Substantive issues:</i>	Lack of a fair hearing; infringement of the right to have access to public service
<i>Articles of the Covenant:</i>	14, paragraph 1; 19, paragraph 2; 25 (c)
<i>Articles of the Optional Protocol:</i>	2, 3

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

*Meeting on 25 March 2008,*

*Having concluded* its consideration of communication No. 1413/2005, submitted by José Ignacio de Jorge Asensi 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. 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**

1.1 The author of the communication, dated 25 April 2005, is José Ignacio de Jorge Asensi, a Spanish citizen born in 1943. He claims to be the victim of violations by Spain of article 14, paragraph 1, taken together with article 19, paragraph 2; and article 25 (c) of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is not represented by counsel.

1.2 On 6 February 2006 the Committee, acting through its Special Rapporteur on new communications, decided to consider the admissibility and merits of the case jointly.

### **Factual background**

2.1 The author, an army colonel, applied for promotion to the rank of brigadier general in the context of the 1998/1999 appraisal cycle. Under Act No. 17/1989 stipulating the regulations for professional military personnel and complementary regulations,<sup>1</sup> the procedure for promotion to this grade consists of one obligatory stage, which is subject to regulations, and two discretionary stages. The stage of the procedure that is subject to regulations consists in assessing candidates' merits and qualifications, with the aim of establishing a ranking order, which serves as a basis for those responsible for the discretionary stages of the procedure to make their proposal and final selection.

2.2 Candidates' merits and qualifications are assessed by the Army High Council, in its capacity as a consultative body, on the basis of a number of public, objective rules for assessment that set out the objective criteria to be applied and the corresponding merit scales. In accordance with these rules the Council draws up a list of candidates and submits it to the Minister of Defence who, after requesting a written report from the Chief of the General Staff, carries out a second appraisal and submits a proposal for the consideration of the Council of Ministers. The Council of Ministers takes the final decision. While the Minister of Defence and the Council of Ministers have full discretionary decision-making powers, the High Council may base its decision solely on the criteria provided for by law, the main one of which is that of the candidates' merits.

2.3 The author claims that when he applied for promotion the appraisal of candidates did not comply with the procedure described, and that the High Council decided on the final ranking order not on the basis of candidates' merits but simply by means of a secret ballot of its members, as shown by the statements signed by two members that the author presented as witnesses. According to the author, the secret ballot system is incompatible with the principle of equality between candidates, since it favours some candidates over others. The author also alleges that the High Council changed, by secret ballot, the ranking order that had been established by the working group assisting the Council in the assessment of candidates' merits and qualifications. To support these claims the author submitted statements by two former members of the High Council. One of the members had taken part in the ballot concerning the selection process in which the author was a candidate.

2.4 According to the second witness, it was common practice to hold secret ballots when making decisions of this kind. He states that the author was ranked No. 26 by the Council, despite having been ranked No. 14 by the working group, which prevented him from being promoted. In the witness' opinion, the reason for the drop in rank could have been that the

author's most recent, higher-level postings had been abroad. This had prevented daily contact with some of the senior commanders sitting on the High Council who, when they voted in the secret ballot, may have incorporated in their ranking the subjective element that always goes with frequent, personal and direct contact with the person concerned, which undoubtedly influences how that person is judged.

2.5 The author lodged an administrative appeal with the Supreme Court, calling for the appointments to be cancelled and for the selection process to be resumed at the point where the Ministry of Defence carried out the appraisals provided for under article 86.1 of Act No. 17/1989. He also called for the appraisals corresponding to the 1997/1998 and 1998/1999 cycles to be carried out, for the results concerning him to be communicated, and for the procedure for promotion to be implemented as provided for under Act No. 17/1989. Lastly, he sought compensation for the damage caused by the administration's shortcomings, which included the material damage resulting from his early transfer to the reserve with the rank of colonel, moral damage and damage with regard to his family and to his honour.

2.6 The appeal was dismissed on 25 July 2003. In its judgement the Court held that, although the legislation in force established the assessment criteria to be taken into account in the analysis of merits and qualifications, it did not establish mathematical formulae for the mechanical calculation of the ranking results. Although the assessment criteria were fixed or pre-established, their evaluation and quantification allowed a wide margin of decision. The appraisal had to take the form of a decision that, for each candidate, incorporated each and every one of the assessment criteria considered. The failure to substantiate the final decision did not render it invalid, provided that the procedures followed prior to the decision had included consideration of the aforementioned criteria, since that was sufficient to ensure that the informational function of the appraisal had been fulfilled.

2.7 The judgement stated that the documents relating to the case showed that the appraisal consisted of two stages. A preparatory appraisal was carried out by the working group assisting the Army High Council, which produced a ranked list of assessed candidates in conformity with the assessment criteria provided for by law. On the basis of that, the Council itself carried out a subsequent appraisal, establishing the ranking order of the candidates. The judgement stated that the Council had not proceeded in the most judicious manner, as it should have been for the Council itself to specify, in respect of each candidate, the assessment criteria used, and the weighting factors applying to each of those criteria. However, this irregularity was not sufficient to nullify the entire procedure. The appraisal served to provide information for the subsequent discretionary acts, and was not binding for the Ministry of Defence or the Council of Ministers. The overriding consideration was to establish that the appraisal had been performed on the basis of the assessment criteria provided for by law, and thus fulfilled its function of providing information to serve as a basis for the subsequent discretionary acts.

2.8 In his appeal, the author requested the Court to ask the Army High Council for information of concern to him, including the list of assessed candidates and the marks obtained. On 15 March 2002 the Secretary of the High Council informed the Court that he could not provide it with the definitive list of all assessed candidates, because the minutes of the High Council were classified as secret under article 1, paragraph 3, of the Council of Ministers decision of 28 November 1986. That decision was taken under the Official Secrets Act, which classifies as "secret" the deliberations of the high councils of the three branches of the armed forces in general. The Secretary did inform the Court, however, of the place assigned to the

author in each of the three appraisals carried out on the candidates in his year. By decision of 19 November 2002, the Court upheld the grounds put forward concerning the secret nature of the information requested and dismissed the author's request. The Court did not refer to the other allegations made by the author regarding the unlawful nature of the secret ballot used by the members of the High Council.

2.9 The author filed an application for *amparo* with the Constitutional Court contesting, inter alia, the judicial decision not to request the Army High Council to submit information about the appraisals of concern to him. The Court held that the complaints lacked constitutional significance in terms of the right to evidence and the right to receive truthful information, enshrined in the Constitution. The Court did not rule on the author's allegations concerning the secret ballot that had been held at the High Council. The application for *amparo* was dismissed on 30 March 2005.

### **The complaint**

3.1 The author alleges that the refusal by the Supreme Court and the Constitutional Court to provide him with information on his appraisal for promotion constitutes a violation of article 14, paragraph 1, and article 19, paragraph 2, of the Covenant. The right to a fair hearing must include the right to use all lawful means of evidence used in proceedings to determine a civil right such as the right to have access to public service on general terms of equality. Lawful means of evidence include, inter alia, information contained in the administrative case file of the person concerned. Consequently, he considers that in the administrative appeal that was dismissed by the Supreme Court - a ruling that was upheld by the Constitutional Court without consideration of the merits - he did not receive a fair hearing. Without legal substantiation of its decision, the Court denied his request to use as evidence the above-mentioned information contained in his administrative case file. For this reason he was unable to properly substantiate his claims with the relevant documents, and the Courts did not have all the necessary objective facts with which to form a judgement.

3.2 The Constitutional Court, in its decision, stated that the Supreme Court considered that not providing the requested information was justified under the Official Secrets Act (Act No. 9/1968). However, neither of the two courts cited which article of that Act classified as secret the information requested. According to the author, this is because no such article exists. The information the Secretary of the High Council provided to the Supreme Court indicated that article 1, paragraph 3, of the Council of Ministers decision of 28 November 1986 classified as secret the deliberations of the high councils of the three branches of the armed forces in general. According to the author, that secrecy does not extend to the minutes of those deliberations.

3.3 The author claims that the secret ballot system is not provided for by law and is incompatible with the principle of equality between candidates, since it favours some candidates over others. In this way, the High Council violated article 25, paragraph (c), of the Covenant. It is clear that the number of votes a candidate obtains is closely related to how well the voters know the candidate in question, and the relationship, friendship or affinity that exists between them. Furthermore, the vote could be the object of prior negotiation between the voters.

### **State party's observations on admissibility**

4.1 In its observations dated 18 January 2006 the State party challenges the admissibility of the communication. It considers that the Supreme Court's decision of 19 November 2002 is sufficiently substantiated with regard to the author's claim that, in having been refused leave to use evidence, he was denied the right to a defence. The information submitted to the Court by the Secretary of the Army High Council provided suitable explanations and, in particular, underlined that it was not possible to submit to the Court the list of names requested, as the deliberations of the working group assisting the Army High Council, and those of the High Council itself, were classified as secret under article 1, paragraph 3, of the Council of Ministers decision of 28 November 1986, and article 10 of Act No. 51/69 of 26 April. The Court held that the evidence submitted during the proceedings, together with the explanations provided by the military authority, were sufficient in order to be able to decide on the author's claims. Similarly, the Constitutional Court stated that, in order for the appeal based on the right to evidence to have been successful, it would have been necessary for the refusal of leave to use evidence to have resulted, in practice, in the violation of the right to a defence. However, a compelling argument had not been made that, in its final judicial decision, the Supreme Court would have found in favour of the author if the evidence in question had been allowed, and had been examined. The author did not specify which facts he claimed the refused information would substantiate.

4.2 The domestic courts weighed and considered the extent and possible consequences of the irregularities observed in the appraisal process. Also, it was decided that the right to impart and receive information, enshrined in the Spanish Constitution, does not extend to the possibility of citizens demanding specific information from public or private institutions.

4.3 Lastly, the courts informed the author that the right to have access to public service on terms of equality was not a simple right to enforcement of the law in the selection process, but must entail infringement of equality between candidates; this requires the existence of a point of comparison on which to base any equality proceedings, which at no time was provided. The communication lacks any point of comparison for the purposes of application of article 25 (c). The author did not specify what facts he intended to substantiate, or indicate any relevant irregularities in the preparatory process for decisions of a discretionary nature.

4.4 The State party therefore considers that the communication should be considered inadmissible because it constitutes an abuse of the purpose of the Covenant, in accordance with article 3 of the Optional Protocol, and because of failure to substantiate the complaint.

### **State party's observations on the merits**

5.1 On 7 December 2006 the State party claimed that there had been no violation of article 14, paragraph 1; article 19, paragraph 2; or article 25 (c) of the Covenant. It was permissible under the Covenant for a member of the armed forces to be promoted to the rank of general as a result of a discretionary decision on the part of the Government or a discretionary proposal on the part of the Minister of Defence, and on the basis of confidential or secret information.

5.2 The State party reiterated the arguments put forward to contest admissibility. It stated that, according to the Supreme Court, the military authority had exercised its rights in accordance with legislation on official secrets, and that the evidence it had submitted, together with the explanations provided, were sufficient to enable the Court to take a decision.

5.3 The evidence invoked by the author was irrelevant in the context of completely discretionary acts linked to issues of national defence. As the Constitutional Court stated, in order for the appeal based on the right to evidence to have been successful, it would have been necessary for the refusal of leave to use evidence to have resulted, in practice, in the violation of the right to a defence; in other words, it would have been necessary for the evidence to have been a decisive element of the defence. Furthermore, a compelling argument had not been made that, in its final judicial decision, the Supreme Court would have found in favour of the author if the evidence in question had been allowed and had been examined. The author did not specify which facts he claimed the refused information would substantiate, or any details or circumstances that would make it possible to identify the legal situation of another candidate alleged to have been unfairly favoured over him on grounds other than the principles of merit and ability.

5.4 The domestic courts weighed and considered the extent and possible consequences of the irregularities observed in the appraisal process. Thus, in its judgement, the Supreme Court stated that the overriding consideration was to establish that the administrative procedure followed in appraisals for promotion had incorporated, for each person assessed, the assessment criteria provided for by law, which fulfilled the function of providing information to serve as a basis for the contested discretionary acts. Similarly, the domestic courts stated that the right to impart and receive information, enshrined in the Spanish Constitution, does not extend to the possibility of citizens demanding specific information from public or private institutions.

5.5 Lastly, the domestic courts maintained that the right to have access to public service on terms of equality was not a simple right to enforcement of the law in the selection process, but must entail infringement of equality between candidates; this requires the existence of a point of comparison on which to base any equality proceedings, which at no time was provided.

5.6 It is clear that the Covenant, in its article 19, allows for a plea invoking official secrets. Such a plea is therefore perfectly legitimate and was upheld by the domestic courts. Furthermore, the communication lacks any point of comparison for the purposes of application of article 25 (c). In any event, the author did not specify what facts he intended to substantiate, or indicate any relevant irregularities in the preparatory process for decisions of a discretionary nature relating to promotion to the rank of general.

#### **Author's comments**

6.1 On 23 March 2007 the author responded to the State party's observations on the admissibility and merits of the communication. The author disagreed with the observation that the court believed the military authority to have exercised its rights in accordance with the legislation on official secrets. Under the legislation in force at the time, the military authority referred to by the State party did not have the power to classify certain material as secret. Consequently, the authority did not exercise any legally granted right; rather, it refused to provide the information that was repeatedly requested by the author, wrongfully alleging that the information was legally classified as secret.

6.2 It is not true that the author did not specify the facts he intended to substantiate with the information that was refused. These facts were recorded in his complaint to the Supreme Court in which it was stated, inter alia, that during the 1998/1999 cycle, colonels of his year with merits and qualifications inferior to his - according to the appraisal and ranking carried out by the working group - were promoted to the grade of brigadier general. It was also stated in the

complaint that Ministerial Order No. 24/92 establishing rules for the appraisal and ranking of professional military personnel required there to be a report justifying the discrepancy between the author's provisional ranking by the working group and his final ranking by the Army High Council, carried out by means of a secret ballot, which entailed a drop of 12 places.

6.3 The author dismisses the State party's claim that the appraisal for promotion incorporated, for each candidate, the assessment criteria provided for by law. The statements obtained from two members of the High Council confirm that the ranking order was established by means of secret ballot. Therefore, it did not take into account the assessment criteria provided for by law.

6.4 With regard to the claim that the author did not provide any point of comparison that might have made it possible to determine whether or not the right to equality between candidates was respected, the author alleges that the court prevented him from doing so, by arguing that the appraisals were secret. Furthermore, the Committee's general comment No. 25 (1996), on article 25 of the Covenant does not require any comparison to be made; it simply requires that access to public service should be based on the application of objective and reasonable criteria and processes, which was not the case in this instance.

6.5 According to the author, the fact that the final decision is discretionary does not mean that the prior appraisal process is incidental. The discretionary powers enjoyed by the Minister of Defence and the Council of Ministers, under the legislation on promotion, are not absolute but limited. Those of the Minister of Defence consist in evaluating, with complete freedom, the appraisals that were carried out, together with the report of the Chief of the General Staff, and in nominating for promotion any colonel included in those appraisals. The Council of Ministers, in turn, has the freedom to approve the proposals made by the Minister of Defence. It is clear that the Minister may not nominate for promotion a colonel who was not included in the appraisals, and that the Council of Ministers may not promote a colonel who has not undergone appraisal in the manner prescribed by law. Not acting in accordance with the law, in addition to constituting manifest arbitrariness, violates article 25 (c) of the Covenant. If the Administration had followed the procedure provided for by law, it is probable that instead of the ranking order established by the Army High Council by secret ballot, the nominations for promotion would have been different and could have included the author. If the documents contained in the files relating to the appraisals and promotions were legally classified as secret, then article 112 of Act No. 17/1989, which grants military professionals the right to lodge an administrative appeal against decisions that affect them in the area of appraisals and promotions, would be without effect.

## **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 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. The Committee further notes that the State party has

not submitted any information suggesting the non-exhaustion of domestic remedies, and therefore considers there to be no impediment to examining the communication under article 5, paragraph 2 (b), of the Optional Protocol.

7.3 The author argues that the refusal of the Spanish authorities to provide him with information about his appraisal for promotion to the rank of brigadier general violates his right to a fair hearing in the determination of his rights, enshrined in article 14, paragraph 1, of the Covenant. The Committee considers that these claims have been sufficiently substantiated for purposes of admissibility and therefore declares them admissible.

7.4 The author also argues that the refusal of the Spanish authorities to provide him with the above-mentioned information constitutes a violation of article 19, paragraph 2, of the Covenant. However, the Committee considers that the author has not substantiated this complaint for the purposes of admissibility and, therefore, that it need not consider whether or not the complaint falls within the scope of article 19 of the Covenant. This part of the communication is therefore inadmissible in accordance with article 2 of the Optional Protocol.

7.5 With regard to the author's complaint that the secret ballot that took place in the Army High Council is incompatible with the principle of equality between candidates, and constitutes a violation of article 25 (c), the Committee considers that the author has failed to substantiate, for the purposes of admissibility, in what way his rights under this provision could have been affected by this system of voting. Furthermore, the Committee considers that the right to have access to public service on general terms of equality is closely linked to the prohibition of discrimination on the grounds set forth in article 2, paragraph 1, of the Covenant. In the present case, the author has failed to substantiate, for the purposes of admissibility, that the secret ballot resulted in discrimination on the grounds set forth in article 2, paragraph 1. Consequently, the Committee considers that this part of the communication has not been sufficiently substantiated and is inadmissible pursuant to article 2 of the Optional Protocol.

### **Consideration on 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 author claims that the refusal of the Spanish courts to provide him with information about his appraisal for promotion constitutes a violation of his right to a fair hearing. In this regard, the Committee notes that, although article 14 does not explain what is meant by a "fair hearing" in a suit at law, the concept of a fair hearing in the context of article 14, paragraph 1, of the Covenant should be interpreted as requiring certain conditions, such as equality of arms<sup>2</sup> and absence of arbitrariness, manifest error or denial of justice.<sup>3</sup>

8.3 The Committee observes that the Supreme Court examined the complaints and evidence submitted by the author and, upon the author's request, sought and obtained from the military authority information about the selection process. On the evidence, and given that domestic legislation provides for broad discretionary decision-making power regarding the promotion of military professionals, the Court found no irregularities in the selection process in which the author was a candidate. The Committee also notes the finding of the Constitutional Court that a compelling argument had not been made by the author that, in its final judicial decision, the Supreme Court would have found in his favour if it had been given the information requested by

the author. On this basis, the Committee concludes that the information before it does not point to arbitrariness, manifest error or denial of justice by the Supreme Court or the Constitutional Court, and consequently does not find a violation of article 14, 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, considers that the facts before it do not disclose a violation 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 present report.]

### Notes

<sup>1</sup> General regulations on the appraisal, ranking and promotion of professional military personnel of 14 December 1990, and Ministerial Order of 30 March 1992 establishing rules for the appraisal and ranking of professional military personnel.

<sup>2</sup> Communication No. 207/1986, *Moraël v. France*, para. 9.3.

<sup>3</sup> See the Committee's general comment No. 32, para. 26, (2007) on article 14 of the Covenant, "Right to equality before courts and tribunals and to a fair trial".



**O. Communication No. 1422/2005, *El Hassy v. The Libyan Arab Jamahiriya*  
(Views adopted on 24 October 2007, ninety-first session)\***

<i>Submitted by:</i>	Mr. Edriss El Hassy (represented by the World Organisation Against Torture)
<i>Alleged victim:</i>	The author and his brother (Mr. Abu Bakar El Hassy)
<i>State party:</i>	Libyan Arab Jamahiriya
<i>Date of communication:</i>	29 July 2005 (initial submission)
<i>Subject matter:</i>	Unlawful arrest, incommunicado detention, ill-treatment, enforced disappearance
<i>Procedural issue:</i>	State failure to cooperate
<i>Substantive issues:</i>	Right to life, prohibition of torture and cruel and inhuman treatment; right to liberty and security of the person; arbitrary arrest and detention; respect for the inherent dignity of the human person
<i>Articles of the Covenant:</i>	2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1 to 5; and 10, paragraph 1
<i>Articles of the Optional Protocol:</i>	5, paragraph 2 (b)

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

*Meeting on 24 October 2007,*

*Having concluded* its consideration of communication No. 1422/2005, submitted to the Human Rights Committee by Edriss El Hassy on behalf of his brother, Abu Bakar El Hassy, 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, Ms. Christine Chanet, 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, 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 Edriss El Hassy, a Libyan citizen, born in 1970 and currently residing in the United Kingdom of Great Britain and Northern Ireland. He is acting on his own behalf and on behalf of his brother, Abu Bakar El Hassy, also a Libyan national, born in 1967, who is said to have disappeared in Libya in 1995. The author claims to be a victim of a violation by Libyan Arab Jamahiriya of article 7, read in conjunction with article 2, paragraph 3, of the Covenant, and that his brother is a victim of a violation of article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1 to 5; and article 10, paragraph 1, of the Covenant. He is represented by the World Organisation Against Torture. The Covenant and its Optional Protocol entered into force for Libyan Arab Jamahiriya on 15 August 1970 and 16 August 1989 respectively.

### **The facts as presented by the author**

2.1 The author is the younger brother of Abu Bakar El Hassy. The El Hassy family was a prominent family under the monarchy, which was later harassed by the current political regime. The father, a former mayor of Al-Bayda, was forced to resign after Colonel Gaddafi's military coup. After the father died in 1974, the author's brother became the family's main breadwinner. He was a successful businessman and was considered a respectable person in his community, serving as a mediator in private disputes and making donations to charitable organizations.

2.2 In the early 1990s, the author's brother was forbidden to leave his hometown by the Libyan internal security police. Between 1993 and 1995, he had to report regularly to the internal security police's offices, where he was questioned about his activities. On some occasions, he was forced to stay for two or three days at their offices to answer questions. No official charges were brought against him. In July 1993, the internal security police searched his house without a warrant and seized all his books and personal belongings. He was handcuffed, taken to Tripoli and held in detention for around two months. He was then released and returned to home. Again, he was never formally charged.

2.3 In early 1995, the author's brother was detained again, sent to Tripoli and held for one month. After his release, he had to report to the police every day. On or about 25 March 1995, a police unit came to his house to arrest him, placing a black bag over his head. His mother and some of his siblings witnessed the arrest. The same day, the author himself was also arrested in Benghazi while attending a lecture at the university.

2.4 The author's brother was taken to Abu Salim prison in Tripoli, where he was placed in the so-called "Military Unit". While waiting to be assigned a proper cell, he was placed in a toilet area adjacent to the author's cell. When a prison guard discovered that the two brothers could communicate through a hole in the wall, he severely beat the author's brother. According to witness accounts by other detainees who spoke to the author in March and April 1995, the author's brother was constantly interrogated and systematically beaten by prison officers. He started to have health problems as a result of this ill-treatment and poor detention conditions, including lack of adequate food and water and the damp, hot and unventilated cells. On or about 20 May 1995, he was released from Abu Salim prison. He returned home but was kept under tight surveillance and obliged to report every day to the internal security police.

2.5 On or about 24 August 1995, the author's brother was detained again and taken to Abu Salim prison, where he was placed in the "Central Unit" for about ten days and then transferred to the "Military Unit". The author explains that the "Military Unit" is reserved to members of the army serving prison sentences, although there were exceptions to this rule. Political dissidents were held in the Central Unit, where conditions of detention were considerably worse. On one occasion, the author's brother was brought by mistake to the author's cell and the author was able to confirm the extremely poor physical condition of his brother, due to the beatings and the poor prison conditions.

2.6 At the beginning of May 1996, the author's brother was transferred with some other 20 detainees back to the Central Unit. In June 1996, the poor detention conditions in the Central Unit (e.g. lack of proper food and water, constant beatings, overcrowding and heat) led to some sort of disturbance later described by the authorities as a "riot". The poor prison conditions that sparked the Abu Salim "riot" have been widely documented by major non-governmental organizations and by the Special Rapporteur on the question of torture.<sup>1</sup> After the "riot", the usual prison guards were replaced by a special military unit. At the end of June 1996, the special military forces stormed the Central Unit, killing large numbers of detainees. Over several days, the detainees in the other unit, including the author, could hear gunfire and screams of detainees being killed.

2.7 The author has not heard of or seen his brother since these events. The author himself was detained at Abu Salim for another four years until July 2000: presumably, had his brother survived, he would have met or heard about him again. Because he did not, the author has strong reasons to believe that his brother was killed in the massacre. However, the Libyan authorities have not given the author's family any information on the fate or whereabouts of the author's brother. Neither have they confirmed his death or returned his body for burial. Therefore, the author cannot be completely sure that his brother is dead, and continues to live with this excruciatingly painful uncertainty. Every attempt by the family to inquire about the fate of the author's brother has been unsuccessful. One of his brothers even went to Abu Salim prison to ask about him and was warned by prison officials never to make inquiries again.

### **The complaint**

3.1 The author claims that his brother is a victim of a violation of article 2, paragraph 3. He invokes general comment No. 6 (1982) on article 6 (right to life), in which the Committee stated that "States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life".<sup>2</sup> He recalls that if the disappeared victim died in custody, it is incumbent on the State party to explain how the victim lost his life and inform the family of the location of the victim's body.<sup>3</sup> In the present case, the State party has taken no steps to investigate the disappearance of the author's brother and has provided no information to his family as to his whereabouts or fate for more than ten years. No public official has been prosecuted and no compensation was ever paid to the family. If the author's brother is dead, which is likely to be the case, the State party also breached its duty to inform the family of how he died or where his remains are located. The author thus argues that the facts of the case reveal a breach of the right to a remedy guaranteed under article 2, paragraph 3, of the Covenant.

3.2 The author argues that it may be presumed that his brother was arbitrarily deprived of his life in violation of article 6 of the Covenant. He submits that the killing of many prisoners at Abu Salim prison in 1996 was not reasonably necessary for protecting life or preventing escape. According to estimates, up to 250 detainees are still missing. The sheer number of prisoners killed during the incident suggests that the State party's actions were out of proportion to any legitimate law enforcement objective. The State party has attempted to avoid all accountability for the massacre by blocking all international and domestic scrutiny into what happened. This suggests a government cover-up.

3.3 The author claims that his brother is also a victim of violations of articles 7 and 10, paragraph 1. First, his brother was detained several times incommunicado, including twice at Abu Salim prison, i.e. from around 25 March 1995 to 20 May 1995, then from 24 August 1995 to the present time. At no point during his detention was he given the opportunity to speak with a lawyer or his family, or anyone else in the outside world. He submits that his brother's repeated and prolonged incommunicado detentions of which the second one at Abu Salim prison has lasted ten years if he is still alive or around ten months if he was killed in 1996 amount to torture and cruel and inhuman treatment in violation of articles 7 and 10, paragraph 1.<sup>4</sup> Secondly, the author recalls that his brother was severely and systematically beaten during interrogation and once also for having attempted to communicate with his brother. The accounts given by eye-witnesses at the prison to the author, as well as the brother's subsequent physical deterioration witnessed by the author himself are consistent with what is known about the practices of torture and ill-treatment inside Abu Salim prison in the 1990s.<sup>5</sup> Thirdly, the author argues that his brother was held in life-threatening detention conditions, i.e. severe overcrowding, poor ventilation, insufficient and irregular food supply, lack of medical care and substandard hygienic conditions. He recalls that the Committee has consistently ruled that such conditions violate article 7.<sup>6</sup>

3.4 The author claims that his brother is a victim of violations of article 9. With regard to article 9, paragraph 1, his brother was arrested on several occasions without a warrant and held incommunicado for prolonged periods of time, without ever being charged or convicted of a crime or other offence. With regard to article 9, paragraph 2, he was never informed of the reasons for his multiple arrests and was never informed of the charges against him. With regard to article 9, paragraph 3, he was never brought before a judge. With regard to article 9, paragraph 4, the authorities made it impossible for him to challenge the legality of his detention by "disappearing him". With regard to article 9, paragraph 5, the authorities made it impossible for him to seek compensation for his unlawful arrests and detentions.

3.5 With regard to the author himself, he claims to be victim of a violation of article 7, read in conjunction with article 2, paragraph 3, because of the anguish caused to him by his brother's disappearance.<sup>7</sup> This anguish was exacerbated by the fact that he witnessed his brother's physical and psychological deterioration in prison before his disappearance, knowing that he was being subjected to torture. Moreover, he was present in Abu Salim prison when special military forces stormed the unit where his brother was held and could hear the gunshots and screaming of the prisoners as they were being killed.

3.6 With regard to the issue of exhaustion of domestic remedies, the author recalls that since he was released from Abu Salim prison in July 2000, he was required to report regularly to the local police station, where he was routinely threatened with further detention, should he intend to file a complaint to the judiciary. He contends that there are no available remedies for human

rights violations in Libya, because the judiciary is not independent from the government. Successful prosecutions of government officials for human rights violations are virtually non-existent and the regime has never accounted for the fate of disappeared persons or investigated or prosecuted officials responsible for such disappearances.<sup>8</sup> The author further contends that he was not in a position to appeal to the judicial system to investigate the fate of his missing brother because such a course of action would have exposed him and his family to a high risk of harm at the hands of government officials, especially considering that he had been held in detention for over five years and that his family and him have been threatened on several occasions by the internal security police. He makes several references to cases where relatives have been killed after making enquiries about their detained loved ones. He also recalls that one of his brothers went to Abu Salim prison to enquire about the missing brother and received threats as a result.

3.7 The author requests that the Committee recommend to the State party to fully investigate the circumstances of the disappearance of his brother and promptly communicate this information to the family, and to release him immediately if he is still detained at Abu Salim prison or to return his remains to his family if he is dead; to bring to justice those responsible for the disappearance, ill-treatment and death of his brother; to adopt measures necessary to ensure he and his family receive full compensation for the violations suffered; and to adopt necessary measures to ensure that similar violations do not occur in the future.

#### **State party's failure to cooperate**

4. On 9 May 2006, 20 September 2006 and 28 November 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. It 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.

#### **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 article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol of the Covenant.

5.2 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.

5.3 With respect to the requirement of 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 the communication inadmissible and thus proceeds to its consideration on the merits, in as much as the claims under article 6; article 7; article 9; article 10, paragraph 1; and article 2, paragraph 3, are concerned. It also notes that issues may arise under article 7, with respect to the disappearance of the author's brother.

### **Consideration of merits**

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

6.2 As to the alleged detention incommunicado of the author's brother, 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 (1992) on article 7, which recommends that States parties should make provision against detention incommunicado. It notes that the author claims that his brother was detained incommunicado on several occasions, including twice at Abu Salim prison, from around 25 March 1995 to 20 May 1995, and then again from 24 August 1995 to the present time. The Committee notes that the author was detained in the same prison and saw his brother there on several occasions, although he was not allowed to communicate with him. In these circumstances, and in the absence of any explanations from the State party in this respect, due weight must be given to the author's allegations. The Committee concludes that to keep the author's brother in captivity and to prevent him from communicating with his family and the outside world constitutes a violation of article 7 of the Covenant.<sup>9</sup>

6.3 As to the alleged beatings of the author's brother, the Committee notes that eye-witnesses at the prison informed the author that his brother was severely and systematically beaten during interrogation. Furthermore, the author himself witnessed the subsequent deterioration of his brother's poor physical condition. In these circumstances, and again in the absence of any explanations from the State party in this respect, due weight must be given to the author's allegations. The Committee concludes that the treatment of the author's brother at Abu Salim prison amounts to a violation of article 7.

6.4 As to the alleged conditions of detention at Abu Salim, the Committee takes note of the author's allegations that the conditions of detention in which his brother was kept were life-threatening. It 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. In the absence of information from the State party on the conditions of detention at Abu Salim prison in which the author's brother stayed, the Committee finds a violation of article 10, paragraph 1.<sup>10</sup>

6.5 With regard to the alleged violation of article 9, the information before the Committee shows that the author's brother was arrested on several occasions by agents of the State party without a warrant and held incommunicado without ever being informed of the reasons for his arrests or the charges against him. The Committee recalls that the author's brother was never brought before a judge and never could challenge the legality of his detention. In the absence of any pertinent explanations from the State party, the Committee finds a violation of article 9.<sup>11</sup>

6.6 As to the alleged disappearance of the author's brother, 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 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).<sup>12</sup> In the present case, in view of his brother’s disappearance since June 1996, the author invokes article 2, paragraph 3.

6.7 The Committee notes that the State party has provided no response to the author’s allegations regarding the forced disappearance of his brother. 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.<sup>13</sup> 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.

6.8 In the present case, counsel has informed the Committee that the author’s brother disappeared in June 1996 at Abu Salim prison where he was last seen by the author himself and other detained, and that his family still does not know what has happened to him. In the absence of any comments by the State party on the author’s brother’s disappearance, the Committee considers that this disappearance constitutes a violation of article 7.

6.9 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 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, 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.<sup>14</sup> In the present case, the information before it indicates that the author’s brother 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, read in conjunction with article 7.<sup>15</sup>

6.10 As to the possible violation of article 6 of the Covenant, the Committee notes that the author has not explicitly requested the Committee to conclude that his brother is dead. Moreover, while invoking article 6, the author also asks for the release of his brother, indicating that he has not abandoned hope for his reappearance. The Committee considers that, in such circumstances, it is not for it to formulate a finding on article 6.

6.11 With regard to the author himself, the Committee notes the anguish and stress that the disappearance of the author's brother since June 1996 caused to the author. It therefore is of the opinion that the facts before it reveal a violation of article 7 of the Covenant with regard to the author himself.<sup>16</sup>

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 2, paragraph 3, read in conjunction with article 7; article 7 standing alone; article 9, article 10, paragraph 1, of the Covenant with regard to the author's brother; and of article 7 of the Covenant with regard to 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 fate of the author's brother, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the author and his family for the violations suffered by the author's brother. The Committee considers the State party duty-bound to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and acts of torture, and also to prosecute, try and punish those held responsible for such violations.<sup>17</sup> The State party is also under an obligation 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 in case a violation has been established, the Committee wishes to receive from the State party, within 180 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 present report.]

### Notes

<sup>1</sup> In his report of 12 January 1999 (E/CN.4/1999/61, para. 448), the prison conditions are described as harsh, overcrowded and unsanitary. Available information indicated that the lack of adequate food, medical care and the use of torture and other forms of ill-treatment had resulted in the deaths of political prisoners.

<sup>2</sup> See also communication No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 16.

<sup>3</sup> See communication No. 886/1999, *Schedko v. Belarus*, Views adopted on 3 April 2003, para. 12; and communication No. 887/1999, *Staselovich v. Belarus*, Views adopted on 3 April 2003, para. 11.



<sup>4</sup> See communication No. 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya*, Views adopted on 23 March 1994, para. 5.4.

<sup>5</sup> E/CN.4/1999/61, 12 January 1999, para. 447.

<sup>6</sup> See communication No. 414/1990, *Mika Miha v. Equatorial Guinea*, Views adopted on 8 July 1994, para. 6.4; communication No. 763/1997, *Pavlova v. Russian Federation*, Views adopted on 26 March 2002, para. 9.1; communication No. 798/1998, *Howell v. Jamaica*, Views adopted on 21 October 2003, para. 6.2; and communication No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002, para. 8.4.

<sup>7</sup> See communication No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14.

<sup>8</sup> The author refers to the Committee's latest concluding observations on the Libyan Arab Jamahiriya (CCPR/C/79/Add.101), as well as various non-governmental organization reports.

<sup>9</sup> 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.

<sup>10</sup> See communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2.

<sup>11</sup> See communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.5.

<sup>12</sup> See communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.3.

<sup>13</sup> 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.

<sup>14</sup> See para. 15.

<sup>15</sup> See communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 9.9.

<sup>16</sup> See communication No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14; and communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 31 July 2003, para. 9.5.

<sup>17</sup> See communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11; and communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 10.

**P. Communication No. 1423/2005, Šipin v. Estonia  
(Views adopted on 9 July 2008, ninety-third session)\***

<i>Submitted by:</i>	Mr. Gennadi Šipin (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Estonia
<i>Date of communication:</i>	18 July 2005 (initial submission)
<i>Subject matter:</i>	Alleged arbitrary denial of citizenship
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Discrimination; equality before the law and equal protection of the law
<i>Article of the Covenant:</i>	26
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (a)

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

*Meeting on 9 July 2008,*

*Having concluded* its consideration of communication No. 1423/2005, submitted to the Human Rights Committee by Mr. Gennadi Šipin 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 is Mr. Gennadi Šipin, an ethnic Russian, born in the Kirovskaya region of the Russian Soviet Federative Socialist Republic on 8 October 1961 and

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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. 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, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

currently residing in Estonia. He claims to be a victim of violations by Estonia of article 26 of the Covenant. The Optional Protocol entered into force for the State party on 21 January 1992. The author is not represented by counsel.

### **The facts as presented by the author**

2.1 On 21 August 2001, the author, a former military servant of the former Union of Soviet Socialist Republics (USSR) army, submitted an application for Estonian citizenship by way of naturalization. On 5 February 2003, the author's application was denied, by Decree of the Government of 28 January 2003, on the ground that he belonged to a group of persons mentioned in paragraph 21 (1) clause 6 of the Citizenship Act 1995. The relevant section of the Act states as follows:

“§21. Refusal to grant or refusal for resumption of Estonian citizenship

(1) Estonian citizenship shall not be granted to or resumed by a person who:

...

(6) has served as a professional member of the armed forces of a foreign state or who has been assigned to the reserve forces thereof or has retired therefrom.

2.2 On 27 November 2003, the Tallinn Administrative Court dismissed the author's request for an appeal. A further appeal to the Tallinn Court of Appeal was dismissed on 21 June 2004. On 27 October 2004, the Supreme Court decided that the author's appeal was manifestly ill-founded.

### **The complaint**

3.1 The author claims that paragraph 21 (1) clause 6 of the Law on Citizenship is a discriminatory provision which imposed unreasonable and unjustified restrictions on his rights on the basis of his social origin, attachment to a specific social group and/or position. This provision of the law includes a presumption that all foreigners who have served in the armed forces pose an indefinite threat to the State party, notwithstanding individual features of their service or training obtained. There is no evidence in the court documents that the author poses a threat to Estonian security. In addition, he adds that residence permits shall not be granted or shall be annulled where the individual in question is regarded as a threat to national security. However, the State party has granted temporary permits to the author several times, thus demonstrating that he does not represent such a threat.

3.2 Although the author concedes that there is no right to citizenship under the Covenant, article 26 provides for equality before the law, equal protection of the law and prohibition from discrimination. As the law itself unreasonably forbids persons belonging to a determined social group (or of determined social origin/position), from obtaining citizenship, it violates article 26, as it is discriminatory. In addition, as there are a number of people in Estonia who have received citizenship, despite their former service as military personnel of a foreign State (including the USSR), the law in question has not been applied in the same manner to all those subject to it. Thus, the author's right to equality before the law has been violated. The State party has failed to submit any reasonable justification for the refusal to grant him citizenship. He has no criminal record and has never been tried for a criminal offence, he cannot be called for service in the

security forces or armed forces “of any foreign State” because he is stateless and there is no pressing social need to refuse him citizenship. The only justification, provided by the State party, is paragraph 21 (1) clause 6 of the Citizenship Act, which the author regards as discriminatory in itself.

### **The State party’s submission on admissibility and the merits**

4.1 On 22 February 2006, the State party confirms that the author has exhausted domestic remedies but submits that the communication is manifestly ill-founded and thus inadmissible. The author was refused citizenship on national security grounds on account of his previous service as a professional member of the armed forces of the former USSR, pursuant to paragraph 21 (1) clause 6 of the Citizenship Act. The type or nature of service is irrelevant. As to the facts, the State party submits that in 1979, the author entered Ashinsky Technical Aviation Military Educational Institute from which he graduated in 1982. He continued his service as an air force technician in Kaliningrad between 1982 and 1985. In 1985, he was seconded to Paldiski in then Estonian Soviet Socialist Republic (ESSR) where he performed the tasks of squad commander. He entered the ESSR on 10 April 1985 after his appointment to Paldiski. He was assigned to the reserve from the armed forces of the former USSR with a rank of First Lieutenant in 1989 in connection with the commission of a criminal offence.

4.2 The State party argues that the exclusion in its law from citizenship of persons who have served as professional members of the armed forces of a foreign country is based on historical reasons, and must be viewed in the light of its treaty with the Russian Federation concerning the status and rights of former military officers. The State party explains that by 31 August 1994, troops of the Russian Federation were withdrawn pursuant to the 1994 treaty. The social and economic status of military pensioners was regulated by the separate 1996 agreement on the issues of social guarantees to the retired military personnel of the armed forces of the Russian Federation on the territory of Estonia, pursuant to which military pensioners and family members received an Estonian residence permit on the basis of personal application and lists submitted by the Russian Federation. Thus, the social and legal issues concerning military pensioners, of which the author is one, were regulated with separate agreements between the State party and the Russian Federation. After the collapse of the USSR and the restoration of Estonian independence in 1991, the author has the status of former military personnel and thus has had the right to apply for a residence permit in Estonia as of 26 July 1994, pursuant to bilateral treaties between the State party and the Russian Federation. Upon application, he was granted a residence permit that is valid until 2008.

4.3 As the State party has the right to establish conditions for granting citizenship and the right to refuse granting it on grounds of national security, such a refusal cannot in itself constitute discrimination. As the right to citizenship is neither a fundamental right nor a Covenant right, the author cannot claim that the refusal to grant him citizenship was discriminatory. The State party refers to the Committee’s established jurisprudence that not all differences in treatment are discriminatory; differences that are justified on a reasonable and objective basis are consistent with article 26. The State party states that differences which remain between those with residence permits as opposed to citizenship largely relate to political rights. The author has a residence permit allowing him to reside in Estonia and he has wide social, economic and cultural rights. When considering the issuance of a residence permit or the granting of citizenship, the State party takes into account “different level[s] of threat”.

4.4 The State party submits that paragraph 21 (1) clause 6 of the Citizenship Act is justified for national security reasons, as a person who has been a member of the armed forces of a foreign country is someone with a strong relationship with that State, who dedicated his activities to its national security, was prepared to risk his life, and as a rule swore an oath to this effect. Granting citizenship to such a person may later cause him ethical and moral dilemmas, as having sworn a military oath to one country he might later have to act against as a citizen of another country.

4.5 According to the State party, the country in which the applicant served as a member of the armed forces is irrelevant for the purposes of paragraph 21 (1) clause 6, as whenever such a fact is ascertained the applicant is refused citizenship. Such service is not the only ground for refusal. The State party quotes from the Committee's jurisprudence<sup>1</sup> for the proposition that considerations related to national security may serve a legitimate aim in the exercise of a State party's sovereignty in the granting of its citizenship. According to the State party, both the Tallinn Administrative Court and the Tallinn Court of Appeal considered the same claims raised before the Committee, including the claims of discrimination, as well as the claim that the refusal to grant him citizenship on the basis of paragraph 21 (1) clause 6 of the Citizenship Act was unconstitutional, as there was no right of discretion. The author was represented by counsel and both had the opportunity to attend the hearing and make submissions.

4.6 The State party sets out the findings of both courts. The Court of Appeal found that the distinction in the legislation was reasonable and objective, as the State party had not been newly independent for very long and the potential threat to its security arising from a large number of persons who had served in the armed forces of another country, including a country that had been occupying Estonia, could not be ruled out. In being refused citizenship, the person's participation in general decision-making on the national level is restricted. Considering the number of former professional members of the armed forces of a foreign country residing in the State party, this restriction was considered a suitable and necessary measure. However, the resident is not completely deprived of the opportunity to participate in politics within the State party and may vote in elections to local government councils.

4.7 The Court considered that the author's reference to professional members of armed forces who have been provided with citizenship is irrelevant, as in such cases the individuals were treated differently either because their spouse was of Estonian nationality and thus fell into the exception under paragraph 21 (2) or arose through an administrative error. It emphasised that the refusal to grant citizenship to the author and the failure to grant any discretion to the administrative authority did not yield a disproportionate result. There were no significant reasons why he should have been granted citizenship and his statelessness could not be such a reason. In this regard, it refers to the Committee's Views in *Borzov v. Estonia*<sup>2</sup>, in which it stated that the role of the State parties' courts in reviewing administrative decisions, including those decided with reference to national security, appears to entail genuine substantive review.

4.8 The State party submits that according to the Citizenship Act of the Russian Federation of 28 November 1991, the former USSR citizens, of which the author is one, could register as Russian citizens until 31 December 2000. In the State party's view, the author had the opportunity to define his citizenship that he had not used.

## **The author's comments on the State party's submission**

5.1 On 9 June 2006, the author commented on the State party's submission. He submits that the denial of citizenship was based not on national security reasons but purely on the basis of his membership of a particular group. In making its decree, the Government did not take into account any considerations regarding the author's personal threat to the national security of the State party. In the fifteen years since independence, the State party has not demonstrated any personal danger from the author.

5.2 The author refers to paragraph 12 (6) of the Law on Aliens Act which sets out criteria for the establishment of a threat to the security of the State, including if an alien has submitted false information upon application of a visa, does not observe the laws of the State party, he or she is in the active service of the armed forces of a foreign state, has been repeatedly punished for committing criminal offences etc. The author submits that he does not meet any of these criteria and thus does not pose such a threat. He insists that he has no criminal record, has never been tried of a criminal offence and cannot understand how, as a retired electrician, he could be a threat to national security. Furthermore, he cannot be called to service in the security forces or armed forces of any foreign State as he is stateless. He highlights that even those who have been convicted of criminal offences on the basis of which they are denied citizenship may reapply after expiry of a certain period.

5.3 The author notes that the State party had failed to provide reasonable justification for the fact that some people have received Estonian citizenship despite their former service as military personnel of a foreign State (including the USSR). He states that he has the same possibility as any other Estonian resident to apply for a citizenship of any country in the world, including neighbouring Latvia, Finland and the Russian Federation, provided that he meets the naturalization requirements of a country in question. He further submits that the State party cannot force him to choose citizenship of another State, and that since 1988 he has integrated into Estonian society to the extent that he may apply for Estonian citizenship.

## **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. 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 international procedure of international investigation or settlement.

6.2 The Committee notes that the only argument advanced by the State party on the admissibility of the communication is that the author's claims are "manifestly ill-founded". The Committee does not find the State party's argument persuasive and finds that the author's claims are sufficiently substantiated, for purposes of admissibility. As it can see no other reason to consider the claims inadmissible, it proceeds to its consideration of the merits.

## 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 author claims that paragraph 21 (1) clause 6 of the Citizenship Act, which automatically excludes him from receiving Estonian citizenship on the basis that “he is a former member of the armed forces of another country”, violates article 26 of the Covenant. The State party invokes national security grounds as a justification for this provision of the Act. The Committee refers to its jurisprudence that an individual may be wrongly deprived of his right to equality before the law, if the application of a provision of law to an individual’s detriment, is not based on reasonable and objective grounds.<sup>3</sup> It also refers to its Views in *Borzov v. Estonia*<sup>4</sup> and *Tsarjov v. Estonia*,<sup>5</sup> where it was held that considerations related to national security may serve a legitimate aim in the exercise of a State party’s sovereignty in the granting of its citizenship. It recalls that the invocation of national security on the part of a State party does not, ipso facto, remove an issue wholly from the Committee’s scrutiny and recognizes that its own role in reviewing the existence and relevance of such considerations will depend on the circumstances of each case.<sup>6</sup>

7.3 In this particular case, article 26 requires no more than reasonable and objective justification and a legitimate aim for the operation of distinctions. The Committee observes that the enactment of the Citizenship Act 1995 and, in particular, a blanket prohibition to grant Estonian citizenship to anyone who “served as a professional member of the armed forces of a foreign state or who has been assigned to the reserve forces thereof or has retired therefrom” cannot be examined outside its factual context. While the above-mentioned blanket prohibition does amount to differential treatment, in the circumstances of the present case, the reasonableness of such differential treatment depends on how the State party justifies its national security arguments.

7.4 In the present case, the State party has concluded that granting citizenship to the author would raise national security issues on account of his former service in the armed forces of another country, including a country that had previously occupied Estonia, and that the denial of any discretionary power to administrative authority in the application of the Citizenship Act was not disproportionate. The Committee notes that neither the Covenant nor international law in general spell out specific criteria for the granting of citizenship by naturalization, and that the author indeed was able to have the denial of his citizenship application reviewed by the State party’s courts.

7.5 The Committee also notes that the category of individuals excluded by the State party’s legislation from the benefit of Estonian citizenship is closely linked to considerations of national security. Furthermore, where such justification for differential treatment is persuasive, it is unnecessary that the application of the legislation be additionally justified in the circumstances of an individual case.<sup>7</sup> The decision in *Borzov*<sup>8</sup> is consistent with the view that distinctions made in the legislation itself, where justifiable on reasonable and objective grounds, do not require additional justification on these grounds in their application to an individual. Consequently, the Committee does not, in the circumstances of the present case, conclude that there was a violation of article 26 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 do not disclose a violation of article 26 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 present report.]

### Notes

<sup>1</sup> Communication No. 1136/2002, *Borzov v. Estonia* Views adopted on 26 July 2004.

<sup>2</sup> Ibid.

<sup>3</sup> Communication No. 819/1998, *Kavanagh v. Ireland* (No. 1), Views adopted on 4 April 2001, para. 10.3, *Borzov v. Estonia*, (note 1 above), para. 7.2 and communication No. 1223/2003, *Tsarjov v. Estonia*, Views adopted on 26 October 2007, para. 7.3.

<sup>4</sup> *Borzov v. Estonia*, (note 1 above), para. 7.3.

<sup>5</sup> *Tsarjov v. Estonia*, (note 3 above), para. 7.3.

<sup>6</sup> Communication No. 236/1987 *V.M.R.B. v. Canada*, Decision adopted on 18 July 1988, and *Borzov v. Estonia*, (note 1 above).

<sup>7</sup> *Tsarjov v. Estonia*, (note 3 above), para. 7.6.

<sup>8</sup> *Borzov v. Estonia*, (note 1 above).



**Q. Communication No. 1426/2005, *Dingiri Banda v. Sri Lanka*  
(Views adopted on 26 October 2007, ninety-first session)\***

<i>Submitted by:</i>	Raththinde Katupollande Gedara Dingiri Banda (represented by counsel, the Asian Legal Resource Centre)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Sri Lanka
<i>Date of communication:</i>	20 June 2005 (initial submission)
<i>Subject matter:</i>	Ill-treatment of army officer by other members of the armed forces
<i>Procedural issue:</i>	Non-substantiation of claim
<i>Substantive issues:</i>	Prohibition of torture and cruel, inhuman and degrading treatment; right to security of the person; right to an effective remedy
<i>Articles of the Covenant:</i>	7; 9; 2, paragraph 3
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 26 October 2007,*

*Having concluded* its consideration of communication No. 1426/2005, submitted to the Human Rights Committee by Raththinde Katupollande Gedara Dingiri Banda, 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, 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.

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

1. The author of the communication, dated 20 June 2005, is Raththinde Katupollande Gedara Dingiri Banda, a Sri Lankan national born on 24 February 1962. He claims to be a victim of violations by Sri Lanka of article 7; article 9, paragraph 1; and article 2, paragraph 3, of the Covenant. He is represented by counsel, the Asian Legal Resource Centre. The Covenant and the Optional Protocol entered into force for the State party on 11 September 1980 and 3 January 1998, respectively.

### **The facts as presented by the author**

2.1 The author was an officer in the Gajaba regiment of the Sri Lanka Army. On the night of 21 October 2000, he was asleep at his quarters at the Saliyapura camp. Just after midnight, two superior officers came and physically assaulted him. As a result of the assault, the author suffered severe injuries and was admitted to the Military Hospital of Anuradhapura the following day. He was soon moved to the General Hospital of Anuradhapura for further treatment, since his condition was deemed critical. On 3 November 2000, he was moved to the intensive care unit of the General Hospital of Kandy where he remained for one month. He remained at this hospital until 26 January 2001. The injuries sustained by the author included renal and respiratory failures, genital bleeding and impairment of liver functions.

2.2 The author was granted leave for medical reasons until 16 February 2001. After that date, he was moved to the Army Hospital in Colombo for a week and granted a further period of sick leave until 20 April 2001. On 21 April 2001, he was admitted to the Centre for Rehabilitation of the Saliyapura Army Camp. Since his health was still deteriorating, he was re-admitted at the Military Hospital of Anuradhapura on 30 April 2001. He was then categorized as a person “not fit enough to handle firearms” by the psychiatrist of the General Hospital of Kandy. On 20 October 2001, he was also categorized as a person destined to “sedentary duties”, since his left kneecap had calcified as a result of the injuries he had suffered. Since then, the author has lost his position in the Sri Lanka army because he was declared unfit to serve in the military.

2.3 The author filed a complaint against the perpetrators of the assault before the Military Court. As a result, the Regimental Commander of the Gajaba Regiment Detachment at the Saliyapura camp ordered an inquiry into the incident. However, the author was not granted any opportunity to present evidence during that inquiry. The Court of Inquiry, composed of officers from the Gajaba Regiment, concluded that the two perpetrators of the assault had acted in an offensive and scandalous manner that caused disrepute to the Sri Lanka Army. Nevertheless, no Court Martial was subsequently convened and the perpetrators were only given a temporary suspension of their promotion. The perpetrators were later promoted and serve today as captains in the Sri Lanka Army.

2.4 Following the submission of a police report, a non-summary inquiry was initiated before the Magistrate’s Court of Anuradhapura against the two perpetrators on charges of attempted murder.<sup>1</sup> On 13 June 2003, the author gave a statement before the court, providing all details about the incident. The inquiry is still on-going after five years. The delay has been caused by the failure of the Medical Officer to send his medical report on the author’s injuries, despite several requests from the Court.

2.5 On 19 August 2002, the author filed a fundamental rights application in the Supreme Court of Sri Lanka. He was assisted by a pro bono counsel assigned to him by the Human Rights Centre of the Colombo Bar Association. In view of several attempts made by the perpetrators to reach a friendly settlement in the matter, the author sent a letter to his counsel dated 25 June 2004 giving him specific instructions not to agree to any settlement with the perpetrators. However, on 28 June 2004, he learnt that his counsel had appeared before the Supreme Court and withdrawn his application. The proceedings before the Supreme Court were thus terminated. He immediately wrote to the Chief Justice and to his counsel to have the case resumed for hearing. He has not received any reply. The author also filed a complaint against his counsel with the Colombo Bar Association. However, no inquiry in this matter has been conducted so far.

2.6 On 14 October 2002, the author filed a civil complaint before the District Court of Anuradhapura, claiming civil damages from the perpetrators. This procedure has also been repeatedly adjourned and no decision has been handed down.

2.7 On 3 September 2004, two unknown persons called at the author's house asking for him. When his sister replied that she did not know where he was, they warned her that they knew how to trace him. Following this incident, the author started to receive death threats, warning him not to proceed with his case. He has been in hiding since 3 September 2004. Despite several requests to this effect from his current counsel, he has not yet been provided with any protection by the authorities.

### **The complaint**

3.1 The author alleges a violation of article 7 of the Covenant, because he was severely assaulted by two Army officers on 21 October 2000. The resulting injuries were so severe that they led to the author being certified as unfit to serve in the Army.

3.2 The author claims a violation of article 9, paragraph 1, of the Covenant because he is under continued threat from his assailants who have successfully evaded any form of punishment for injuring him. He argues that it is not rare for victims of torture in Sri Lanka to be harassed for the mere reason that they pursue their torture case against the police. By failing to take adequate action to ensure that he is protected from threats by those who tortured him or other persons acting on their behalf, the State party has breached article 9, paragraph 1.

3.3 The author further alleges a violation of article 2, paragraph 3, of the Covenant. He recalls that despite four different proceedings initiated by the author, none of the domestic bodies has provided him with an effective remedy against the violation of his rights under the Covenant. He also recalls that the Committee has concluded in the past that the lack of effective remedies was in itself a violation of the Covenant<sup>2</sup> and invokes the Committee's general comment No. 20 (1992) on article 7. In his own case, investigations into the acts of torture were not initiated after five years since the incident. No disciplinary or other action was taken against the alleged perpetrators and the existing proceedings are at a standstill. Moreover, the author has been the object of threats and other acts of intimidation.

3.4 The author states that his complaint has not been submitted to another procedure of international investigation or settlement. With regard to the issue of exhaustion of domestic remedies, he recalls that he has attempted to obtain redress through a fundamental rights

application and before the criminal and civil courts. He has not obtained any result after five years and has even been subjected to threats and other acts of intimidation because he has initiated these procedures. He therefore considers that the remedies are not effective and need not be exhausted.<sup>3</sup>

3.5 The author invites the Committee to recommend that the State party take necessary action to ensure:

- That he receives full reparation, including rehabilitation without delay
- That criminal procedures relating to his assault and torture be concluded promptly
- That he is not submitted to further threats in connection with the procedures that he has initiated
- And that appropriate legislative changes be adopted to provide effective, impartial and adequate remedies for the violations of individual rights without delay by ensuring a prompt investigation and trial.

#### **State party's observations on admissibility and merits**

4.1 On 22 February 2006, the State party contested the sequence of events as presented by the author. It recalled that having served at several formations in the Sri Lanka Army, the author had reported for duties to the Saliyapura camp on 20 October 2000. On 24 October 2000, he requested sick leave because he had been found at "fault for unusual rhythm in saluting". Since his behaviour had been thought suspicious, he was brought before the Centre Commander. He did not complain of any assault then. On the same day, he was admitted to the Military Hospital of Anuradhapura. He was later transferred to the General Hospital of Anuradhapura, and then to the General Hospital of Kandy.

4.2 On a complaint made by the author, the Military Police and the civil police initiated investigations into the alleged assault by Captains Bandusena and Rajapaksha from the Gajaba regiment. On 6 November 2000, the Military Police handed the two officers over to the civil police. The following day, they appeared before the Magistrate's Court of Anuradhapura and were remanded in custody. They were released on bail on 22 November 2000. On a complaint made by the author's wife, the Human Rights Commission of Sri Lanka called for a report from the Commander of the Army with regard to the alleged assault. This report was submitted on 20 November 2000. The author also filed a fundamental rights application to the Supreme Court. On 28 June 2004, proceedings in this case were terminated.

4.3 The Gajaba regiment appointed a Court of Inquiry to investigate the alleged assault. The Court found that the two officers mentioned above had assaulted the author on 21 October 2000. Upon the recommendation of the Commander of the Army, summary trials were held against the two officers who pleaded guilty to the charges against them. By way of punishment, they were awarded forfeiture of seniority of 10 and 9 places in the Officers' Seniority List of the Regular Force of Sri Lanka Army. They were also denied promotions, local and foreign courses and other privileges.

4.4 The State party submits that it was the author who requested, on 16 March 2001, that he appear before an Army Medical Board in order to retire from military service. The Board recommended that he be discharged from the Army on medical grounds and he accordingly retired from the Army on 23 February 2002. He was paid a lump sum and started receiving a monthly pension, as well as an annual disability pension.

4.5 On the alleged violation of article 7, the State party submits that the two officers who assaulted the author were allegedly “ragging” him, as he was a newcomer to the regiment. It notes that the author does not describe the background to this assault and that instead he submitted to the Committee selected extracts of the proceedings before the Magistrate’s Court of Anuradhapura. It claims that the text of the full proceedings would have shown why the case was postponed and would have highlighted the weakness of the author’s evidence. The State party also submits that any form of ragging newcomers by the seniors is contrary to the rules and regulations pertaining to discipline in the Sri Lanka Army which has established a Court of inquiry and conducted trials against the officers responsible. Since the two officers held the rank of Captain, they were tried summarily. This is normal practice for all officers below the rank of Major. The State party explains that the accused officers received the highest possible punishment which could be given at a summary trial, namely forfeiture of seniority. It also explains that the summary trial held under the Army Act is for all purposes a criminal trial. Therefore, since the two officers were tried and punished, it is now impossible to hold another criminal trial against them based on the same facts. The State party submits that the author has failed to establish a violation of article 7, that the accused officers have been tried and punished, that the maximum possible sentence has been imposed on them, that the Supreme Court has terminated the proceedings on the basis that the author agreed to receive compensation and that the author has claimed damages from the two officers before the District Court.

4.6 On the alleged violation of article 9, paragraph 1, the State party argues that the author never claimed or alleged that he was subjected to any arrest or detention. He has made a vague allegation of being subjected to threats from those who had assaulted him. While he claims that he has made some written requests for protection, he does not state where such complaints were directed to, nor does he submit copies of them. In any case, he should have directed them to the nearest police station or to the Commander of the Army. He thus cannot complain of a violation of article 9, paragraph 1.

4.7 On the alleged violation of article 2, paragraph 3, the State party notes that the author himself admits that he had recourse to four different proceedings. With regard to the summary trial conducted by the Sri Lanka Army, it explains that since the offences were not of the category which had to be tried only by a court martial and on the basis of the ranks held by the accused officers, they could be tried only by a summary trial since they did not make any request for a court martial. As the officers pleaded guilty, there was no need to present evidence against them. The Court imposed the maximum possible punishment that could be imposed at a summary trial. With regard to the Magistrate’s Court proceedings, the State party submits that the author has “failed to provide all the proceedings at this trial” and that in any case, the same accused should not be tried again for the same incident under the “double jeopardy” rule. With regard to the District Court proceedings, it notes that it has not been named as a party to these proceedings and that it cannot be held liable for any delay if any.

4.8 With regard to the Supreme Court proceedings, the State party notes that since these proceedings were not criminal proceedings, it was not possible to either convict or sentence those who violated the author's fundamental rights: the Supreme Court can only grant a declaration that the author's fundamental rights have been violated and any further relief in a just and equitable manner. It submits an affidavit from the author's counsel dated 16 February 2006 in which he denies having received the letter from the author prior to the settlement entered in court on 28 June 2004. Counsel recalls that the author was present in court on that day and never instructed him against the settlement. The State party claims that the author has tried to mislead the Committee by hiding the following facts. First, he did write to the Supreme Court on 23 July 2004 requesting that his case be re-listed and this request was to be examined by the Court on 27 September 2004. However, he did not appear in court that day and consequently, the Court decided not to take any further action on the request. Secondly, the author made a second attempt on 20 October 2004 to have his case re-listed. This request was denied by the Chief Justice in the light of the Order made by the Court on 27 September 2004.

4.9 The State party added that the wife also made a complaint to the National Human Rights Commission. As a result, the Commission requested on 7 November 2000 that the Sri Lanka Army submit a full report on the incident. The Army submitted its report to the Commission on 20 November 2000, in which it explained that a Court of inquiry had been established to look into the matter. The Human Rights Commission appeared to be satisfied with the action taken by the Army, since it did not send any further communication afterwards.

4.10 The State party implicitly argues that domestic remedies have not been exhausted in the case, by asserting that the domestic mechanisms available provide more than adequate avenues of redress for any person, such as the author, who claims that his human rights have been violated.

#### **Author's comments on the State party's submissions**

5.1 On 12 May 2006, the author notes that the State party accepts that two officers had assaulted him and argues that, in the light of the detailed medical evidence on the injuries that he suffered as a result, this assault amounts to torture or cruel and inhuman treatment under article 7 of the Covenant. He recalls that the Convention against Torture has been incorporated into Sri Lankan law through Act No. 22 of 1994 and this Act provides that a person committing torture should be tried by the High Court. He argues that the State party has breached its obligation to provide him with a remedy since he was given no remedy under criminal law and has received no compensation.

5.2 The author submits that the arguments raised by the State party on the basis of the summary trial held against the two alleged perpetrators, i.e. the issue of double jeopardy and the issue of the pending civil case, are not valid defences against his claim of violations of his rights. The officers were charged only for breach of military discipline and had the option of choosing court martial proceedings or a summary trial. During the trial, the author had no choice to advance his case. The punishment given to the two officers was a forfeiture of seniority, which was not effective since both have since been promoted. The two officers were neither tried, nor convicted for torturing the author, because the military court had no jurisdiction to try anyone for acts of torture. Only the High Court can do so. On the issue of double jeopardy, the author recalls that section 77 of the Army Act does not limit the jurisdiction of a civil court to try the two officers for committing acts of torture.<sup>4</sup> Consequently, there is no obstacle for the two officers to

be tried by the appropriate High Court. Besides, the author notes that the two officers have not raised the defence of double jeopardy before the Magistrate's Court where the initial proceedings have been pending for the last five years.

5.3 With regard to the fundamental rights case filed by the author before the Supreme Court, he recalls that proceedings were terminated on 28 June 2006 without explanation. It is not mentioned anywhere in the journal entries of the Court that proceedings were terminated with the consent of the parties. The author also explains that where a person applies to withdraw the case, the Supreme Court has held that it will in each case use its discretion to allow or not such an application for withdrawal. In the present case, there is no indication that the Court has allowed what the parties had consented to. The author did not consent to any form of termination of the proceedings and has not accepted any money as part of a settlement. While the State party seems to suggest that a friendly settlement was reached between the parties, the author denies this. In any case, in a fundamental rights case, the Supreme Court can only dismiss the case under article 126 of the Constitution for lack of merits or grant the relief claimed by the petitioner.<sup>5</sup> Therefore, the word "terminated" has no legal meaning within the Constitution of Sri Lanka. The author had filed before the Court all the relevant documents and the Court could only have made a decision on merits.

5.4 The author tried to get the case reopened before the Supreme Court on two occasions. On the first occasion, the court allowed the case to be called. However, as the author received the notice after the date in which he was called to appear in court, he filed a further motion seeking another occasion to request the Court to proceed with his case. This time, the Court did not issue notice for the author to come before it.

5.5 With regard to the case pending before the Magistrate's Court, the author recalls that proceedings have not been concluded five years and six months after the incident. This cannot be considered an effective remedy. With regard to the civil case pending before the District Court of Anuradhapura, he notes that the State party affirms that since it is not a party to these proceedings, it does not acknowledge its obligation to provide an effective civil remedy to human rights violations.

5.6 With regard to the alleged violation of article 9, paragraph 1, the author reiterates that he has been repeatedly threatened and has made several complaints to the police and military authorities. On one occasion, he even received death threats from unidentified persons. He regularly moves places in order to evade danger.

## **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 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 On the alleged violation of article 9, paragraph 1, the Committee notes the State party's argument that the author has never claimed or alleged that he was subjected to any arrest or detention. With regard to the author's allegation of being subjected to threats from those who had assaulted him, the State party argued that the author does not state where such complaints were directed to, nor does he submit copies of these complaints. The Committee notes that the author merely reiterated that he had made several complaints to the police and military authorities, without providing any further details. It therefore concludes that the author has not substantiated his claim under the Covenant, for purposes of admissibility, and finds that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.4 In relation to the State party's contention that domestic mechanisms available provide more than adequate redress to any person complaining about a violation of his or her human rights, the Committee recalls its jurisprudence that domestic remedies must not only be available but also effective. It considers that in the present case, the remedies relied upon by the State party have either been unduly prolonged or appear to be ineffective.

6.5 On the basis of the information available to it, the Committee concludes that the claims based on article 7 and article 2, paragraph 3, are sufficiently substantiated, for purposes of admissibility, and it finds the rest of the communication 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 to it, as provided under article 5, paragraph 1, of the Optional Protocol.

7.2 With regard to the alleged violation of article 2, paragraph 3, the Committee notes that the proceedings against the two alleged perpetrators have been pending in the Magistrate's Court of Anuradhapura since 2003, and that the proceedings concerning the author's fundamental rights application before the Supreme Court have been terminated in unclear circumstances. The Committee reiterates its jurisprudence that the State party is under a duty to investigate thoroughly alleged violations of human rights, and to prosecute and punish those held responsible for such violations.<sup>6</sup>

7.3 The Committee notes the State party's argument that the two perpetrators have already been tried and punished by a Military Court of Inquiry and cannot be tried again. The Committee observes that this Court of Inquiry had no jurisdiction to try anyone for acts of torture, that the author was not represented and that the punishment given to the two perpetrators was only forfeiture of seniority, despite the fact that the author had to be hospitalized for several months and had several medical reports describing his injuries. With regard to the proceedings before the Magistrate's Court, the Committee notes that while both parties accuse each other of responsibility for certain delays in these proceedings, they are still ongoing after more than seven years. The delay is further compounded by the State party's failure to provide any timeframe for the consideration of the case. With regard to the proceedings before the District Court which are still pending after five years, the Committee notes that the State party merely argues that it has not been named as a party to these proceedings and that it cannot be held liable for any delay if any. However, the Committee reiterates the settled rule of general international law that all branches of government, including the judicial branch, may be in a position to engage the responsibility of a State party.<sup>7</sup>



7.4 Under article 2, paragraph 3, the State party has an obligation to ensure that remedies are effective. Expedition and effectiveness are particularly important in the adjudication of cases involving torture and other forms of mistreatment. The Committee considers that the State party may not avoid its responsibilities under the Covenant with the argument that the domestic courts have already dealt or are still dealing with the matter, when it is clear that the remedies relied upon by the State party have been unduly prolonged and would appear to be ineffective. For these reasons, the Committee finds that the State party has violated article 2, paragraph 3, read together with article 7 of the Covenant. Having found a violation of article 2, paragraph 3, read together with article 7, and in light of the fact that the consideration of this case, as it relates to the claim of torture, remains pending before the Magistrate's Court, the Committee does not consider it necessary, in this particular case, to determine the issue of a possible violation of article 7 alone of the Covenant.<sup>8</sup>

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 article 2, paragraph 3, read together with article 7 of the Covenant.

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 adequate compensation. The State party is under an obligation to take effective measures to ensure that the Magistrate's Court proceedings are expeditiously completed and that the author is granted full reparation. The State party is also under an obligation to take measures 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, 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 180 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 present report.]

### Notes

<sup>1</sup> A non-summary inquiry is a preliminary inquiry for the recording of statements by a magistrate before the indictment is filed at the High Court for a serious crime, e.g. murder or attempted murder.

<sup>2</sup> See communication No. 90/1981, *Luyeye c. Zaire*, Views adopted on 21 July 1983, para. 8.

<sup>3</sup> See communication No. 986/2001, *Semey v. Spain*, Views adopted on 30 July 2003, para. 8.2; and communication No. 859/1999, *Jiménez Vaca v. Colombia*, Views adopted on 25 March 2002, para. 6.3.

<sup>4</sup> Section 77 of the Army Act provides that “Save as provided in subsection (2) of this section, nothing in this Act shall affect the jurisdiction of a civil court to try, arrest, or to punish of any civil offence any person subjected to military law”. Section 162 of the Act defines a “civil court” as “any court other than courts martial” and a “civil offence” as “an offence against any law of Sri Lanka which is not a military offence”.

<sup>5</sup> Article 126 of the Constitution provides that:

“(1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV.

(2) Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two Judges.

(3) Where in the course of hearing in the Court of Appeal into an application for orders in the nature of a writ of habeas corpus, *certiorari*, prohibition, *procedendo*, *mandamus* or *quo warranto*, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer such matter for determination by the Supreme Court.

(4) The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstance in respect of any petition or reference referred to in paras. (2) and (3) of this article or refer the matter back to the Court of Appeal if in its opinion there is no infringement of a fundamental right or language right.

(5) The Supreme Court shall hear and finally dispose of any petition or reference under this article within two months of the filing of such petition or the making of such reference.”

<sup>6</sup> See communication No. 1250/2004, *Rajapakse v. Sri Lanka*, Views adopted on 14 July 2006, para. 9.3.

<sup>7</sup> See general comment No.31 (2004), para. 4.

<sup>8</sup> See *Rajapakse v. Sri Lanka*, (note 6 above), para. 9.5.

**R. Communication No. 1436/2005, *Sathasivam et al. v. Sri Lanka*  
(Views adopted on 8 July 2008, ninety-third session)\***

<i>Submitted by:</i>	Mr. Vadivel Sathasivam and Mrs. Parathesi Saraswathi (represented by counsel, Mr. V.S. Ganesalingam and Interights)
<i>Alleged victims:</i>	The authors and their son, Mr. Sathasivam Sanjeevan
<i>State party:</i>	Sri Lanka
<i>Date of communication:</i>	15 September 2005 (initial submission)
<i>Subject matter:</i>	Mistreatment and death of prisoner while in police custody
<i>Procedural issue:</i>	Non-cooperation of State party
<i>Substantive issues:</i>	Arbitrary deprivation of life; torture and ill-treatment; adequacy of investigation; effectiveness of remedy
<i>Articles of the Covenant:</i>	2, paragraph 3; 6 and 7
<i>Article of the Optional Protocol:</i>	None

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

*Meeting* on 8 July 2008,

*Having concluded* its consideration of communication No. 1436/2005, submitted to the Human Rights Committee on behalf of Mr. Vadivel Sathasivam, Mrs. Parathesi Saraswathi and their son Mr. Sathasivam Sanjeevan 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, 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 authors of the communication are Vadivel Sathasivam and Parathesi Saraswathi, They submit the communication on their own behalf and on behalf of their son, Sathasivam Sanjeevan, deceased on or about 15 October 1998 at age 18. They claim to be victims of article 2, paragraph 3; article 6 and article 7 of the Covenant by the Democratic People's Republic of Sri Lanka ("Sri Lanka"). They are represented by counsel, V.S. Ganesalingam and Interights.

### **The facts as submitted by the authors**

2.1 On 13 October 1998, the authors' son, Sathasivam, then aged 18, left their home in Kalmunai for an errand and did not return. The next day, around 9 a.m., the police informed the first author that his son had been arrested and was being detained at a police station. The first author was not provided with any reasons for the arrest. He went to the local (Kalmunai) police station, but, upon arrival, was denied access to his son. Around 4 p.m., he returned with a lawyer and was permitted to visit his son. His son was in poor physical condition, unable to walk and eat, his right ear swollen and oozing blood. His son informed him and the lawyer that upon his arrest by two police officers he had been thrown against a telephone post and further tortured and ill-treated.

2.2 On 15 October 1998, the first author and his sister visited Sathasivam again at around 5 p.m. They were told that he had not been taken to hospital but treated by a doctor, which meant that no medical report of his condition and treatment existed. He was in an even worse condition, pleading for his release. Seated and unable to raise his hands, he recounted again that he had been thrown with force against a telephone post by two police officers, and as a result was unable to walk, eat or drink. The first author noticed swelling on the back of his neck, and blood oozing from both shoulders. Unable to stand by himself, he reiterated that his injuries resulted from assaults by police officers. The first author inquired of the police officer present how his son had been injured, but was informed that there would be an inquiry and that his son would be released subsequently. When the first author again visited his son on 15 October, his condition had deteriorated. He could not stand and could hardly talk, eat or drink. He could only indicate that he had been taken to a doctor the previous night and been given medicine.

2.3 On 16 October 1998, the first author was denied access to his son. That evening, he received a message from the police station requesting that he proceed to Ampara hospital immediately. The following day, the first author went to Ampara and was shown his son's body at the mortuary. Stitches could be seen on his tongue and his body had been cut open from chest to stomach. The first author was informed that the post-mortem and inquest had been completed and that he could therefore take the body, although it could not be removed from Ampara. Subsequently, he was allowed to take the body to Kalmunai for burial.

2.4 The first author subsequently learned that following filing of police notification, an inquest into his son's death had been conducted on 15 October by the Acting Magistrate of Kalmunai. The Acting Magistrate considered a report filed by the local Samamnathurai police, which stated that on 15 October, while the authors' son was being taken from Kalmunai to Ampara police station by eight police officers, the convoy was attacked around 9 p.m. by Liberation Tigers of Tamil Eelam fighters. The report stated, without further substantiation, that two police officers and the first authors son were wounded, with the vehicle sustaining damage. All three were

admitted to Ampara hospital, where the son died and the two officers survived. The Magistrate ordered that an inquest and post-mortem be performed with results sent to him by 21 October, in order to undertake a full inquiry.

2.5 On 16 October, the Acting Magistrate of Kalmunai held an inquest after visiting the scene of the alleged incident. His inquest report noted five bullet wounds in the body of the first author's son, but stated that there were no other injuries. While observing that a shooting incident had taken place, he did not conclude that an attack could have been carried out as described by the police. He ordered that a post-mortem be carried out by the Ampara District Medical Officer, and that the body then be released to the next of kin.

2.6 The District Medical Officer carried out a post-mortem later the same day. His report found injuries to the lower abdomen, bladder and right femur, as well as a fracture of the right pelvic bone. He concluded that the cause of death was shock following severe bleeding due to injuries caused by firearms. There was no mention of torture. The report did not state whether the fatal gunshot injuries were, or could have been, inflicted before or after the victim's death, although there was provision in the form to so indicate.

2.7 The Acting Magistrate did not receive the post-mortem report by the date of the inquiry hearing on 21 October 1998, leading to postponements until 29 October and then to 12 November, and again to 26 November, to secure the attendance of Kalmunai police officers. The authors had not received notice of the inquiry and thus neither they nor their lawyer were present at the hearings of 21 and 29 October. Having heard independently about the 12 November hearing date they were represented from that point onwards.

2.8 The authors brought the case to the attention of the Kalmunai office of the Human Rights Commission, which transmitted the case to the Colombo head office. On 2 November 1998, the authors' counsel wrote to the Chairperson of the Commission, requesting action under sections 14 and 15 of the Human Rights Commission of Sri Lanka Act 1996 by (a) directing the Deputy Inspector General of Police for the Kalmunai region to order an investigation, and (b) bringing this action to the attention of the local Magistrate. The letter was not acknowledged, nor was any action taken.

2.9 At the Magisterial hearing on 26 November, the first author and his sister gave evidence of the nature and extent of torture inflicted on the son, based on what they had seen and been told by him. The first author described the physical injuries, his son's inability to stand unassisted or walk, and the description his son had given during the visit of the physical abuse to which he had been subjected. The first author also described the extremely poor physical condition of his son during the second visit.

2.10 The authors' representatives submitted that the District Medical Officer erred in failing to reach a conclusion of torture and ill-treatment, since there was clear evidence both from the injuries listed in the report and the testimony of the authors that the son had been subject to such treatment before being killed. The Magistrate agreed, ordering that the body be exhumed and sent to the Judicial Medical Officer at Batticaloa for further examination pursuant to section 373 (2) of the Criminal Code.

2.11 On 27 November 1998, the body was exhumed in the presence of the Acting Magistrate and the body sent to the Judicial Medical Officer. The latter's report identified nine *ante mortem*

injuries and concluded that these were caused by a blunt weapon applied prior to any shooting, whilst injuries to the neck could have been made by application of fingers. The cause of death was identified as four gunshot injuries.

2.12 On 21 October 1999, the Magistrate's verdict entered a finding of homicide, holding that the victim had been subjected to torture and had died of bleeding caused by gunshot wounds. He ordered that the supervisory officer of the Sammanthurai police should arrange for investigation by the Criminal Investigation Department, with a view to arrest and trial of the perpetrators. Also in 1999, Amnesty International, in a report on torture in Sri Lanka, cited the case as "an example of how police have tried to cover up torture in custody even if the inquest procedure is held under normal law".<sup>1</sup>

2.13 On 10 July 2002, over two and a half years later and after several requests, the Magistrate received a letter from the Director of the Criminal Investigation Department, informing him that an investigation had been conducted following a letter on the case from the Special Rapporteur on the question of torture to the Attorney-General.

2.14 On 19 August 2002, the Attorney-General wrote to the Director, with copy to the Registrar of the Kalmunai Magistrates' Court, to the effect that having considered all available evidence, it was clear that the police version of the events of arrest and death were false and had been fabricated. The available material did not however provide a basis for instituting criminal proceedings for torture and murder against the police officers, but only disciplinary action. The Director was therefore requested to forward the letter and the investigative report to the relevant disciplinary body for appropriate action. To the authors' knowledge, no further action was taken.

2.15 In 2000, the then Special Rapporteur on the question of torture described the case in his annual report to the United Nations Commission on Human Rights.<sup>2</sup> In 2002, his successor as Special Rapporteur noted in his annual report to the Commission<sup>3</sup> that the Attorney-General had concluded that there was insufficient evidence to initiate a criminal prosecution and instead recommended disciplinary measures. The Special Rapporteur expressed concern that the Government had not responded to a number of torture cases that he had brought to its attention.

2.16 Despite the international attention, the State party has refused to acknowledge its responsibility, pursue a criminal investigation against those considered responsible, or otherwise make reparation to the victim's family.

### **The complaint**

3.1 The authors argue that the facts described disclose violations of article 2, paragraph 3; article 6 and article 7 of the Covenant.

3.2 Under article 6, they claim first that the State party had failed in various respects to discharge its obligation to take sufficient measures to protect the right to life. First, the evidence indicated that the victim died of gunshot wounds in police custody, which the police claims occurred while transporting him. While in the absence of a thorough and independent

investigation it is difficult to ascertain who actually carried out the fatal shooting, the evidence clearly showed that, at a minimum the State party failed in its positive duty to protect the victim while in police custody.

3.3 The authors refer in this respect to the jurisprudence of the Human Rights Committee and the European Court of Human Rights that (a) the State party is under a duty to protect the well-being of those under its control or care, particularly in police custody;<sup>4</sup> and (b) there is a strong presumption of State responsibility for the death of an individual in police custody, in respect of which the State must provide a satisfactory and convincing explanation in order to successfully rebut.<sup>5</sup> In this case, the State party has failed to provide an explanation for the theory that the victim was in fact killed by the LTTE. This failure is supported by the Attorney-General's conclusions that the police had fabricated the account of death, with the result that the presumption of sole State responsibility for the death must prevail.

3.4 As to the second aspect of article 6 obligation, the authors note that the evidence indicates that the victim was subjected to serious, life-threatening torture. The State party failed to take adequate measures to protect the life of and well-being of Sathasivam. For example, at no stage was he brought before a judicial officer, a step recognized as essential not only for verification of reasons for arrest but also for monitoring detainee treatment.

3.5 As to the third aspect of the article 6 obligation, the authors observe that there was a failure by the State party to investigate and prosecute the perpetrators after the victim's death. The Criminal Investigation Department, despite repeated requests from the local Magistrate, failed to carry out any investigation for over two years, and then only did so in response to a letter from the then Special Rapporteur on the question of torture. This was despite the fact that there was strong evidence that could have been followed up immediately, in view of the fact that there were a number of clearly identified police witnesses in the vehicle at the time of the shooting.

3.6 The authors note the jurisprudence of the Committee, the European Court of Human Rights and the Inter-American Court of Human Rights that States parties have an obligation deriving from the right to life, combined with the right to an effective remedy, to take positive measures to protect the right to life, including implementation of appropriate procedural safeguards that encompass investigation and prosecution of alleged State killings.<sup>6</sup> The absence of such safeguards can constitute a violation of the right to life even if there is insufficient evidence to hold the State responsible for the actual death.<sup>7</sup>

3.7 The authors submit that even if there remained doubts about the involvement of the police in the death of the victim, the State party remains in breach of article 6 due to the failure to prevent it and respond thereto. Even when limited investigation was eventually carried out, the Attorney-General refused to recommend prosecution and opted in favour of clearly inadequate disciplinary action, which, in any event, has not been initiated. Mere disciplinary measures, which trivialize so serious an offence are no substitute for criminal investigation and prosecution, which are required to be adopted in cases of arbitrary taking of life.<sup>8</sup> Further, in breach of the obligation to provide compensation to the family of the victim<sup>9</sup> neither compensation nor apology has been rendered by the State party for the death of the victim, even following the Attorney-General's recognition of culpability.

3.8 Under article 7, the authors argue that the victim was tortured in circumstances where the State's responsibility was clearly engaged, there being ample evidence that he was subjected to

acts constituting cruel and inhuman treatment and, due to their severity, also to torture. Eyewitness testimony from the first author and his sister upon visiting the victim in the police station within 24 hours of arrest, indicated that he had sustained severe injuries in custody, to such extent that he was unable to stand, eat or drink. This evidence was reinforced by the post-mortem finding of specific and detailed injuries consistent with severe ill-treatment and beating. According to the Committee's jurisprudence there was clear violation of article 7 by reason of the victim being subjected to the type of treatment described by the Judicial Medical Officer.<sup>10</sup> In the absence of any plausible explanation by the State party, it must be concluded that torture and ill-treatment had indeed occurred.

3.9 The authors argue that there was no evidence that the victim was offered any protection against torture, beyond the two visits of his closest relatives. There was no judicial scrutiny of detention, no records maintained of his condition, nor monitoring at all by senior police officers or medical staff. The authors invoke the Committee's general comment No. 20 (1992) (para. 11) and the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, as safeguards necessary to guard against torture.<sup>11</sup>

3.10 The State party not only failed to provide adequate safeguards against torture, but also properly to investigate the conduct and prosecute the perpetrators. No investigation was carried out until over two years after the incident, and then only at the behest of the then Special Rapporteur on the question of torture. Following the investigation, the Attorney-General, despite having established the guilt of the police for torture of the victim, refused to prosecute the perpetrators, trivializing the crime by treating it instead as a disciplinary matter.<sup>12</sup> The Committee has held that as part of its duty to protect individuals against conduct in breach of article 7, the State must take measures to prevent, investigate and punish acts of torture, whether committed in an official capacity or otherwise.<sup>13</sup> Nor was compensation paid to the authors, the victim's parents, further compounding the breach of article 7.<sup>14</sup>

3.11 Under article 2, paragraph 3, the authors invoke the Committee's jurisprudence for the proposition that the circumstances of the victim's death, comprising arbitrary arrest and detention followed by torture and arbitrary and unlawful killing, indicate that criminal investigation and appropriate prosecution is the only effective remedy.<sup>15</sup> The failure of the State party to take effective legal, administrative, judicial and other measures to bring to justice those responsible for the torture and death of the victim thus breaches this obligation. The Committee against Torture has likewise insisted that the right to a remedy requires an effective, independent and impartial investigation of allegations of torture.<sup>16</sup>

3.12 The decision of the Attorney-General not to initiate a prosecution but instead recommend disciplinary proceedings is clearly inadequate and does not constitute an effective remedy.<sup>17</sup> This breach was further compounded by the failure, to the authors' knowledge, of even disciplinary proceedings in fact being conducted. No apology or compensation has ever been offered to the authors despite the State party's acknowledgment, through its Magistrate and Attorney-General, that the police were responsible for the victim's torture and death.<sup>18</sup>

### **State party's failure to cooperate**

4. By notes verbales of 21 November 2005, 25 July 2006 and 6 November 2007, the State party was requested to submit to the Committee 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 admissibility or the 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.

## **Issues and proceedings before the Committee**

### **Consideration of admissibility**

5.1 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.

5.2 In the absence of any submission by the State party on the admissibility of the communication, and there being no further obstacle apparent to the Committee, the Committee must give due weight to the material before it. It concludes that the authors have properly substantiated, for purposes of admissibility, their claims under article 6; article 7; and article 2, paragraph 3, of the Covenant for 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, as provided in article 5, paragraph 1, of the Optional Protocol.

6.2 As to the claim under article 6 that the death of the victim is directly attributable to the State party, the Committee recalls that according to the uncontested material the victim was in normal health before being taken into police custody, where he was shortly thereafter seen by eyewitnesses suffering substantial and severe injuries. The alleged reasons for his subsequent death, namely that he died during an LTTE attack, have been dismissed by the State party's own judicial and executive authorities. In these circumstances, the Committee must give due weight to the presumption that injury and, a fortiori, death suffered in custody must be held to be attributable to the State party itself. The Committee accordingly concludes that the State party is responsible for arbitrary deprivation of the victim's life, in breach of article 6 of the Covenant.

6.3 As to the claim under article 7 that the injuries suffered by the victim prior to his death amounted to a violation of that provision, the Committee recalls that the State party has offered no challenge to the evidence submitted to the Committee that the victim suffered severe injuries in police custody, and that the victim himself imputed these injuries to the police. On the basis of the presumptive responsibility described in paragraph 6.2 above, and in view of the gravity of injuries described, the Committee concludes that the State party subjected the victim to treatment in violation of article 7 of the Covenant.

6.4 As to the claims under articles 6 and 7 on the ground that the State party failed in its procedural obligation to properly investigate the victim's death and incidents of torture, and to

take appropriate investigative and remedial measures, the Committee recalls its constant jurisprudence that criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by articles 6 and 7 of the Covenant.<sup>19</sup> In the instant case, the State party's own authorities dismissed the explanation for the victim's death advanced by the police in whose custody the victim died, and its judicial authorities directed criminal proceedings against the offending police officers. In the absence of any explanation by the State party and in view of the detailed evidence placed before it, the Committee must conclude that the Attorney-General's decision not to initiate criminal proceedings in favour of disciplinary proceedings was clearly arbitrary and amounted to a denial of justice. The State party must accordingly be held to be in breach of its obligations under articles 6 and 7 to properly investigate the death and torture of the victim and take appropriate action against those found guilty. For the same reasons, the State party is in breach of its obligation under article 2, paragraph 3, to provide an effective remedy to the authors.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Sri Lanka of article 6; article 7; and article 2, paragraph 3 in conjunction with articles 6 and 7, 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 authors with an effective remedy, including initiation and pursuit of criminal proceedings and payment of appropriate compensation to the family of the victim. The State party should also take measures to ensure that such violations do not recur 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, 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 180 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 present report.]

### Notes

<sup>1</sup> Amnesty International "Sri Lanka: Torture in Custody" (ASA 37/10/99), section 5.2.

<sup>2</sup> E/CN.4/2000/9, para. 937: "Sathasivam Sanjeevan died in police custody allegedly as a result of torture. He was reportedly arrested during a police search operation on 13 October 1998 in Paandiruppu and detained at the Almunai police station, where he was allegedly tortured. On 17 October 1998, the family reportedly went to the Amparai police station and then to the Government Hospital where they were informed that their son had been killed in an armed confrontation with the LTTE when he was being transferred to the Amparai station. A deep cut along his chest had reportedly been stitched up, his tongue severed and stitched together, and

there were injuries on his head and hip. A second post-mortem inquiry ordered by the local magistrate confirmed signs of injuries by blunt weapons inflicted before the shooting. The second magisterial inquiry was still continuing.”

See also the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2000/3/Add.1), para. 405: “Sathasivam Sanjeevan was arrested by the police at Paandiruppu, Amparai district, on 3 October 1998. It was reported that when his relatives visited him at the Kalmunai police station on 14 and 15 October, they noted that he could not lift his arms and that he had difficulty swallowing. On 16 October the police informed his relatives that he had been killed in an armed confrontation with the Liberation Tigers of Tamil Eelam (LTTE) while being taken to Amparai by the police.”

<sup>3</sup> E/CN.4/2003/68/Add.1, para. 1655.

<sup>4</sup> Communication No. 84/1981, *Barbato v. Uruguay*, Views adopted on 21 October 1981; communication No. 763/1997, *Lantsova v. Russian Federation*, Views adopted on 26 March 2002; and *Salman v. Turkey* (2002) 34 EHRR 17, para. 99.

<sup>5</sup> *Jordan v. United Kingdom* (2003) EHRR 52, para. 103; *McKerr v. United Kingdom* (2002) 24 EHRR, para. 109; and *Salman v. Turkey* (2002) 34 EHRR, para. 99.

<sup>6</sup> General comment No. 6 (1982) on article 6, para. 3; communication No. 612/1995, *Chaparro v. Colombia*, Views adopted on 29 July 1997; communication Nos. 146 and 148-154/1983, *Baboeram-Adhin v. Suriname*, Views adopted on 4 April 1985; communication No. 161/1983, *Herrera Rubio v. Colombia*, Views adopted on 2 November 1987; *Velasquez Rodriguez v. Honduras* (Series C) No. 4 (1988), para. 188; *Edwards v. United Kingdom* (2002) 35 EHRR 19, para. 69; *McCann v. United Kingdom* (1996) 21 EHRR 97, para. 161; and *Kaya v. Turkey* (1999) 28 EHRR 1, para. 86.

<sup>7</sup> *Kaya v. Turkey* (note); *Tanrikulu v. Turkey* (2000) 30 EHRR 950; *Kilic v. Turkey* (2001) 33 EHRR 1357.

<sup>8</sup> *Baboeram-Adhin* (note 6 above); communication No. 563/1993, *Bautista de Arellana v. Colombia*, Views adopted on 27 October 1995; paras. 8.2 and 10.

<sup>9</sup> *Chaparro v. Colombia* (note 6 above), para. 10.

<sup>10</sup> Communication No. 334/1988, *Bailey v. Jamaica*, Views adopted on 31 March 1993; communication No. 255/1987, *Linton v. Jamaica*, Views adopted on 22 October 1992; communication No. 752/1997, *Henry v. Trinidad & Tobago*, Views adopted on 3 February 1999; communication No. 124/1982, *Muteba v. Zaire*, Views adopted on 24 July 1984, para. 10.2; communication No. 74/1980, *Estrella v. Uruguay*, Views adopted on 29 March 1983; and communication No. 147/1983, *Arzuaga Gilboa v. Uruguay*, Views adopted on 1 November 1985.

<sup>11</sup> See also *Algur v. Turkey*, Appln. 32574/1996; judgement of 22 October 2002, paras. 33-47.

<sup>12</sup> See *Bautista de Arellana v. Colombia* (note 8 above), para. 10.

<sup>13</sup> See communication No. 322/1988, *Rodriguez v. Uruguay*, Views adopted on 19 July 1994, para. 12.2; and general comment No. 20, paras. 8 and 13. See also articles 12 to 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which the State party acceded in 1994, *Aydin v. Turkey* (1998) 25 EHRR 251, para. 109; and *Assenov v. Bulgaria* (1999) 31 EHRR 372, para. 106.

<sup>14</sup> General comment No. 20, para. 14. See also article 14 of the Convention against Torture, and Committee against Torture; communication No. 161/2000, *Dzemajl v. Yugoslavia*, Views adopted on 21 November 2002, para. 9.6.

<sup>15</sup> General comment No. 31, para. 18.

<sup>16</sup> Communication No. 233/2003, *Agiza v. Sweden*, Views adopted on 20 May 2005, para. 13.7.

<sup>17</sup> *Bautista de Arellana v. Colombia* (note 8 above), para. 8.2; and *Chaparro v. Colombia* (note 6 above), para. 10.

<sup>18</sup> *Chaparro v. Colombia* (note 6 above), para. 10; and *Dzemajl v. Yugoslavia* (note 14 above), para. 9.6.

<sup>19</sup> See the Committee's general comment No. 31 (2004), Nature of the General Legal Obligation on States Parties to the Covenant.

**S. Communication No. 1437/2005, *Jenny v. Autriche*  
(Views adopted on 9 July 2008, ninety-third session)\***

<i>Submitted by:</i>	Mr. Wolfgang Jenny (represented by counsel, Mr. Alexander H.E. Morawa)
<i>Alleged victims:</i>	The author
<i>State party:</i>	Austria
<i>Date of communication:</i>	8 August 2005 (initial submission)
<i>Decision of admissibility:</i>	5 March 2007
<i>Subject matter:</i>	Bias of judge during judicial proceedings
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Fair and public hearing; equality of arms
<i>Articles of the Covenant:</i>	2, 14 and 26
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

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

*Meeting on 9 July 2008,*

*Having concluded* its consideration of communication No. 1437/2005, submitted to the Human Rights Committee on behalf of Mr. Wolfgang Jenny 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 Chanut, 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, 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 is Mr. Wolfgang Jenny, an Austrian citizen born on 2 October 1940. He claims to be a victim of violations by Austria<sup>1</sup> of articles 14, paragraph 1, alone and read in conjunction with articles 2, paragraph 1, and 26 of the International Covenant on Civil and Political Rights. The author is represented by counsel, Mr. Alexander H.E. Morawa.

1.2 On 24 January 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.

### **The facts as submitted by the author**

2.1 On an unspecified date, the author engaged in a joint venture with three other individuals, to construct an apartment and office building in Salzburg. The author's share was 81.15 per cent. In November 1997, the trustee appointed to manage the project accounts determined that the author had over-fulfilled his financial obligations as a partner, by approximately €7,475, and that the partners owed a total of approximately €60,000, including financial obligations and taxes. The partners did not make the corresponding payments on time. On 9 September 1998, the tax authorities evaluated the outstanding turnover tax due by the end of 1996 at €13,176, the author's share being €10,692. On advice of his lawyer, Dr. W., the author paid the total amount with the intention to seek reimbursement from the partners.

2.2 In January 1999, after beginning negotiations for a friendly settlement, Dr. W. announced that the partners were willing to reimburse the author for the payment he had made to the tax authorities. In February 1999, the tax authorities evaluated a further corporate turnover tax at €31,291 for the year 1997, which according to the trustee, was liable to be paid by the partners. However, Dr. W. informed the author that further action against the partners was precluded because on 27 January 1999, he had entered into a global settlement agreement on behalf of the author, which erased any mutual financial obligations between the parties in a binding way, precluding the author from pursuing any further action against the partners, also for future potential claims.

2.3 On 23 February 1999, the author instructed his lawyer to revoke the global settlement agreement with the partners, as it had been concluded without his knowledge and approval and exceeded the scope of the power of attorney given to him. He also revoked counsel's power of attorney with immediate effect, and engaged another lawyer.

2.4 On the advice of the latter, he instituted three distinct sets of proceedings:

- A civil lawsuit against his partners for their outstanding financial contributions (hereafter first set of proceedings)
- A civil lawsuit against Dr. W. for professional misconduct (hereafter second set of proceedings), and
- A criminal complaint against Dr. W. (hereafter third set of proceedings)

2.5 In the first set of proceedings, the author filed a lawsuit in the Salzburg Regional Court on 17 March 1999 against his partners, for their outstanding contributions towards the building costs, arguing that his claims remained enforceable since the global settlement agreement entered into by Dr. W. was not attributable to him, as Dr. W. had concluded the agreement without his knowledge and consent. He argued that it would be contrary to common sense to assume that he would have agreed to waive claims amounting to about €60,000 for payment of a mere 20 per cent of his total claim, and that the global settlement agreement, which was concluded in excess of the power of attorney and in breach of Dr. W.'s professional duties, had no effect under Austrian law. The partners based their defence on the global settlement agreement concluded by Dr. W. and argued that the matter was precluded from judicial review.

2.6 During the first hearing, the trial judge of the Salzburg Regional Court remarked that he had doubts whether the author had sued the right parties and asked why he had sued the partners and not Dr. W. He added that he "could not imagine that Dr. W. should have done something like that". The author challenged the trial judge's impartiality before the Review Senate of the Salzburg Regional Court, which rejected the challenge on 9 August 1999. During the challenge proceedings, the judge declared that "it cannot be excluded that my full impartiality has been impaired by the - from the viewpoint of the judge - unfounded challenge, although as a judge I still consider myself capable of deciding the matter based on the results of the evaluation of the evidence". The author did not appeal the rejection of his challenge. As a result, the same judge continued to deal with the case.

2.7 In a hearing on 30 June 2000, Dr. W. testified that he had called the author on 27 January 1999, the day he had concluded the agreement and that the author had verbally agreed to it. Dr. W. produced a memo to that effect.

2.8 On 18 April 2001, the Regional Court dismissed the author's lawsuit holding that the global settlement agreement precluded the author from pursuing any claims against the partners, and considering that "it cannot be presumed to be true that Dr. W., as an attorney and a witness under threat of criminal sanctions, would commit perjury in the present trial, nor that he would forge a memo about his telephone conversation with the author", during which the author had allegedly verbally agreed to the settlement. In his judgement, the trial judge reiterated his view on credibility of testimonies. He admitted his preference for the testimony of an attorney, by stating that "it cannot be presumed" that Dr. W. lied as a witness.

2.9 The author appealed to the Appeal Court of Linz, arguing that the trial court had failed to assess the facts from a "common sense" point of view, that it had failed to take into consideration all the evidence available and that it had breached procedural rules of evaluating evidence. The trial judge had based his judgement on a mere conviction that a lawyer such as Dr. W. could not possibly be presumed to have testified untruthfully and that a rule that the testimony of an attorney should generally be given more weight than other evidence was alien to the Austrian legal order. He denounced the alleged bias of the judge and the absence of a fair hearing, and requested the Court to hold an evidentiary hearing and to summon, as witnesses, the author, Dr. W., and the legal counsel who had negotiated the global settlement agreement for the partners.

2.10 The appeal was dismissed on 9 January 2002, without the court having heard the witnesses. The Appeal Court stated that it was not its responsibility to evaluate the evidence in a hearing and that only an "obviously frivolous, superficial or arbitrary" evaluation of the evidence by a

trial judge would warrant the finding of a lack of adequate reasoning. It considered that “there were no indications that Dr. W. had acted with the intent to cause damage” to the author and that “it cannot be excluded that even in a well-organized law firm, mistakes may happen”. With respect to the author’s renewed challenge of the trial judge, the Court considered that this issue had already been addressed by the Review Senate of the Salzburg Regional Court. The author filed an extraordinary petition for review to the Supreme Court, which was declared inadmissible on 13 March 2002 for formal reasons.

2.11 In the second set of proceedings, initiated on 23 November 1999, the author asked the Salzburg Regional Court to hold that the lawyer was liable for any and all future damages resulting from the fact that he had concluded the global settlement agreement without the author’s approval or consent. This lawsuit was dismissed on 4 December 2000, and the author appealed to the Linz Court of Appeal, which suspended the proceedings pending the conclusion of the case against the partners (first set of proceedings). Due to the outcome of that case, where it was held that Dr. W. was not guilty of professional misconduct, neither the author nor Dr. W. petitioned the court to reopen the proceedings, as they had become moot.

2.12 In the third set of proceedings, the author filed a criminal information report against Dr. W. with the Salzburg Federal Police, for fraud and perjury, and fraud committed during court proceedings. This complaint was rejected in September 2002, as Dr. W.’s guilt could not be proven. The author requested the Minister to review the decision not to prosecute, but his request was rejected in February 2003. Finally he submitted a private criminal complaint in the Salzburg Regional Court, which was dismissed on 13 June 2003.

### **The complaint**

3.1 The author contends that his claims were wrongly dismissed by the domestic courts, as they failed to adhere to the minimum requirements of a fair trial stipulated in article 14, paragraph 1, of the Covenant. While fully aware that the Committee is generally not in a position to evaluate facts and evidence, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice, he claims that a manifestly wrong decision was taken in his case. The failure of the domestic courts to arrive at a conclusion that does not contradict common sense and makes the decision “suspect”, should prompt the Committee to apply a heightened level of scrutiny in assessing the fulfilment of the requirements of fairness, independence and impartiality.

3.2 The author submits that the trial judge was manifestly biased, which rendered the hearing and decision flawed because the author was placed at a significant disadvantage with respect to the opposing party. The trial judge made it clear that he “[could] not imagine that Dr. W. should have done something like that”. The author refers to the Committee’s decision in *Karttunen*,<sup>2</sup> where it found that “impartiality of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties”. Furthermore, the partiality of the judge was ignored on appeal, as the Court of Appeal only assessed whether the trial judge had decided the matter in a manner that was “inconceivable”. The Court was not ready to undergo a reassessment of the evidence and failed to look into the details of the trial judge’s evaluation of evidence.



3.3 The author claims that the principle of equality of arms was not respected, in violation of articles 14, paragraph 1; 26 and 2, paragraph 1, as the judge stated that it “cannot be presumed” that the lawyer lied as a witness, which implicitly meant that the author’s conflicting statements could be presumed to be lies. Thus, the Court elevated the value of the testimony of a member of the legal profession (Dr. W.) above the value of the testimony of anyone else and raised the burden of proof beyond what is the standard in civil cases in Austria. The author was disadvantaged because he had to overcome a “presumption of credibility” of the opposing party.

3.4 The author claims that the same matter is not being examined under another procedure of international investigation or settlement and that he has exhausted domestic remedies.

#### **State party’s observations on admissibility**

4.1 On 19 January 2006, the State party challenged the admissibility of the communication, on grounds of non-exhaustion of domestic remedies, with respect to the first set of proceedings. The State party recalled that the author initiated proceedings before the Salzburg Regional Court, and challenged the trial judge during an oral hearing on 6 July 1999. On 9 August 1999, the Review Senate of the Salzburg Regional Court rejected the request challenging the judge. As the author did not appeal this decision, the proceedings continued before the same judge.

4.2 The State party indicates that the author had the possibility to appeal the decision of the Review Senate to the Linz Court of Appeal, under section 24, paragraph 2, of the Austrian Jurisdiction Act. However, he failed to do so and accepted the continuation of the civil proceedings. Accordingly, the communication should be declared inadmissible.

#### **Author’s comments**

5.1 On 1 April 2006, the author commented on the State party’s observations. He claimed that the State party had failed to show that the remedy which exists in theory under sections 23 and 24 of the Jurisdiction Act, would have been available and efficient to him to obtain a remedy for breaches of his Covenant rights. He argued that it is not sufficient to refer to a legal provision to describe a procedure, and that the application of the provision in judicial and administrative practice must be taken into consideration.

5.2 The author contended that the decision of the Review Senate of the Salzburg Regional Court, dated 9 August 1999, did not contain instructions as to which appeals could be filed or inform him of his right to bring an appeal against the rejection of his challenge of the trial judge to the Linz Court of Appeals. He refers to a decision of the Constitutional Court, according to which a failure to give, or an incorrect appeals instruction, cannot be held against the party concerned.<sup>3</sup> Therefore, the author was deprived of equal and fair access to the remedy in question, and was not required to exhaust it.

5.3 The author argues that Austrian law governing challenges to judges is rigorous and requires a burden of proof for bias which is alien to the requirements of “impartiality” of article 14, paragraph 1. He refers to a judgement of the Supreme Court,<sup>4</sup> in which it was ruled that a challenge is the “sharpest weapon” a party can use against a trial judge. Such a challenge can only be successful if the reasons advanced therein are so grave that the impartiality of the judge in question is in severe doubt. Reasons for a challenge must be provided in detail and concretely. The Supreme Court has also held that facts must be shown which permit the

conclusion that a judge will be guided by other than reasonable considerations when deciding the case; mere subjective doubts or concerns of a party that the judge may be biased are insufficient.<sup>5</sup> According to the author, a challenge under these conditions is therefore not an effective remedy within the meaning of the Optional Protocol.

5.4 Under international standards, when testing the objective impartiality of a judge, petitioners are not required to *prove* that a judge was biased, but only to show that there existed a *legitimate doubt* as to his impartiality. Subjective bias is to be tested by assessing whether the judges “harbour preconceptions about the matter put before them”.<sup>6</sup> The personal conviction of a judge as perceived by a party may give rise to an “objectively justified fear” of a lack of impartiality. “In certain circumstances, the appearance of bias may be such as to violate the right to a fair hearing by an independent and impartial tribunal.”<sup>7</sup> Austrian law governing challenges, as applied by the Supreme Court, does not reflect these international standards. It imposes an exclusively objective standard for testing the impartiality of judges.

5.5 The Supreme Court has ruled that judges who consider it possible that they were biased but nevertheless “felt” that they could rule without bias in the given case would not be removed. This precedent would apply to the author’s case. An appeal would therefore have been futile.

5.6 The author contends that challenges of trial judges and appeals of decisions rejecting such challenges do not have suspensive effect, with the result that the challenged judge can continue to conduct the proceedings, although he cannot render a final decision. His handling of the case may or may not be set aside or repeated after a judge has been recused because of bias. This issue would be determined by the court deciding on the challenge, without substantive contribution from the petitioner.

5.7 The author claims that by challenging the trial judge in his appeal to the Court of Appeal, as required by the law, he exhausted domestic remedies. For the purposes of article 5, paragraph 2 (b), authors are required to bring the substance of their complaint before the domestic authorities so that the State party is given an opportunity to rectify the matter.<sup>8</sup> The author did challenge the judge first during the hearing in which the judge expressed his bias, and again in his appeals brief to the Court of Appeal. That the renewed challenge was made in the appeals brief rather than in an appeal against the decision which rejected the original challenge is justified under Austrian law. Some reasons for challenging the trial judge became known to him only after the trial at first instance was concluded, which allowed him to raise this matter in his appeal on the merits. The author claimed in his appeal brief that the trial judge had decided the case arbitrarily by not evaluating the evidence fully, by not carefully balancing the evidence, by failing to take a certain memorandum into consideration, by not making due use of the evidence, and by introducing a “presumption of credibility” of a lawyer’s testimony over the testimony of a private party. The initial challenge, on the other hand, related only to the judge’s statements during the first hearing. The author refers to the jurisprudence of the Supreme Court<sup>9</sup> and indicates that in civil cases, as opposed to criminal cases, judges may 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. These new reasons for a challenge could not have been raised by the author if he had appealed against the decision not to recuse the trial judge, but only in his appeal on the merits.

5.8 Furthermore, appeal courts can review matters only within the limits of the facts established by the first instance judge. The Supreme Court has ruled that “in an appeal against a rejection of a challenge of a judge, no new reasons for the challenge can be advanced”.<sup>10</sup>

5.9 Finally, the author argues that the scope of his communication extends beyond the bias of the trial judge, to the absence of adequate review at the appeal level and the absence of an equal opportunity to approach a court. These aspects of the communication are not covered by the State party’s objection to admissibility.

### **Decision on admissibility**

6.1 At its eighty-ninth session, on 5 March 2007, the Committee considered the admissibility of the communication. It noted that the State party had challenged the admissibility of the communication for non-exhaustion of domestic remedies, because the author did not appeal the decision rejecting his request to recuse the judge. The Committee observed, however, that under Austrian jurisprudence invoked by the author, he could challenge the judge in his appeal on the merits, if new grounds for a challenge arose from the decision. The author did so, on the grounds that the trial judge had decided the case arbitrarily by not evaluating the evidence fully, by not carefully balancing the evidence, by failing to take a certain memorandum into consideration, by not making due use of the evidence, and by introducing a “presumption of credibility” for a lawyer’s testimony over that of a private party. The author discovered these grounds only once the judgement was delivered and was therefore entitled to raise these claims in his appeal of that decision. His appeal to the Supreme Court was rejected on 13 March 2002. The Committee concluded that the author, who raised the issue of the bias of the judge at all levels up to the Supreme Court, had exhausted domestic remedies for purposes of article 5, paragraph 2 (b), of the Optional Protocol.

6.2 Furthermore, the Committee noted that even if it was generally for the national courts to evaluate facts and evidence, it fell within the Committee’s competence to examine whether the trial was conducted in accordance with article 14 of the Covenant. The Committee considered that the author had sufficiently substantiated his claims under article 14, read together with article 26 of the Covenant for purposes of admissibility. Accordingly, the Committee considered the communication admissible.

### **State party’s observations on the merits**

7.1 By submissions of 9 October 2007, the State party claimed that the communication should be considered inadmissible under article 2 of the Optional Protocol. It also reiterated that the author failed to challenge the decision of the Review Senate of the Salzburg Regional Court, despite the fact that, under Austrian law, he had the right to appeal to the higher court. The author’s view that he had exhausted domestic remedies as he had denounced the judge’s bias in his appeal to the Appeal Court of Linz is incorrect, especially since the author had based his arguments concerning the bias of the trial judge on the latter’s allegedly biased evaluation of the evidence and grounds given for the judgement, i.e. on a manifestly wrong allegation which was completely inadequate to dismiss the judge for partiality. On the contrary, the grounds given for the judgement clearly showed the impartiality of the trial judge.

7.2 Regarding the merits of the communication, the State party contends that there is no violation of articles 14 and 26 of the Covenant. The author’s contention that the testimonies of

members of the legal profession are generally more credible and that opposing allegations of other parties involved in a lawsuit would have to overcome a “presumption of credibility” has no legal basis. The Austrian judge has to evaluate the testimonies of all parties and witnesses impartially and give them - in particular based on his personal impression at the hearing - the appropriate weight. In the Austrian legal system there is no rule of evidence elevating the value of the testimony of specific parties or witnesses generally above the value of the testimony of anyone else.

7.3 The author’s claim that the Regional Court had given more weight to the testimony of Dr. W. than to his regarding the conclusion of the global settlement agreement and particularly the decisive telephone conversation with the author, in view of the fact that Dr. W. was a lawyer, is incorrect. The evaluation of the evidence - which had been made with due care by the court - led to a completely different conclusion. The Regional Court did address the fact that there were contradictions between the testimonies of the author and Dr. W. with respect to the global settlement agreement. However, in evaluating the evidence the Court accepted the version of the facts presented by Dr. W. for the following reasons:

- Dr. W. delivered his testimony as a witness, and was thus under an obligation to present true facts and under threat of sanctions, while the testimony of the plaintiff (the author) was not subjected to the obligation of truthfulness under threat of (criminal) sanctions
- The assumption that Dr. W. had given false testimony would not only have implied that he committed perjury in the trial, but also that he committed forgery of documents, i.e. that he had forged the memo about his telephone conversation with the plaintiff
- The letter of his then trustee Mag. F. of 19 May 1998 indicated that the approval of the author to the global settlement clause was probable
- The letter of the author to Dr. W. of 11 February 1999 also seemed to support the version of the facts presented by Dr. W.

7.4 The evaluation of the evidence by the Court also included an examination of the opposing testimonies of the author and Dr. W. The author’s presumption that the Court did not believe his version of the facts because he was generally less credible as a non-lawyer is incorrect and unequivocally contradicts the very clear explanations given by the Court in evaluating the evidence. The considerations taken into account by the Court in its evaluation of the evidence are, in fact, based on understandable objective circumstances which unequivocally justify its conclusions.

7.5 No final conclusion can be drawn as to whether the trial judge might have caused this basic misunderstanding about his evaluation of the evidence by his remarks during the nonbinding talks about the legal foundation of the case. It could be that the trial judge should have exercised more caution. On the other hand, it is by no means unusual that the trial judge expresses certain preliminary views and assessments when he discusses the case for the first time with the parties and their counsels. Of course, this has to be subjected to the explicit reservation of a more in-depth examination, the course of the procedure of taking evidence and the concrete findings of the evaluation of evidence. In the present case, this reservation was made by the trial judge. Subsequently, the decision contained in the judgement of 18 April 2001 and the grounds given clearly showed that the judge was guided exclusively by objective criteria.

## **Author's comments on the State party's observations on the merits**

8.1 On 19 December 2007, the author submitted comments with regard to the State party's observations. Regarding admissibility he stated that he had given the State party every opportunity provided for by Austrian law (namely, a challenge to the senate of the Regional Court and a review by the Court of Appeal) to rectify the alleged breach of his right to a hearing by an impartial tribunal.

8.2 The State party is incorrect in its assertion that the trial judge had not disclosed any bias in his judgement. As described in the initial communication, the judge, in his written judgement reiterated his earlier comments ("I cannot imagine that Dr. W. should have done something like that"). Thus, according to the transcript of the hearing of 6 July 1999 he said: "it cannot be presumed to be true that Dr. W. as an attorney and a witness under threat of criminal sanctions would commit perjury in the present trial, nor that he would falsify a memo about his telephone conversation [with the author]". The pursuit of the author's bias complaint in the appeal on the merits (after his initial challenge in a separate complaint) was thus entirely prudent, given that the same court (the Linz Court of Appeal) was in charge of examining the bias of the trial judge and the merits of the case. The author further reiterates his allegations regarding the inefficiency of a challenge as a remedy against lack of impartiality of a judge.

8.3 Regarding the merits, the State party is correct in its assertion that there is no formal rule in Austrian law that would elevate the testimony of members of the legal profession over that of ordinary citizens. This does not mean, however, that there may not be a systematic practice that treats ordinary citizens who litigate against members of the legal profession, unfavourably. It does not mean either that there was not an explicit act of treating the author unfavourably because of his opponent being a member of the legal profession under the concrete circumstances of the case.

8.4 The State party's list of what the trial court actually based its decision on contains four items of which the first two are:

(a) The author's opponent testified under threat of sanctions, while such threat did not exist for the author. In fact, a party is as much under an obligation to testify truthfully as a witness; the difference lies only in the circumstances under which they are criminally liable. While witnesses are generally liable, parties are so only if they testify under oath. Austrian civil procedure law allows the judge to request that a statement is made or repeated under oath under any circumstances. Thus, the trial judge could very easily have "elevated" the criminal threat against the author to severe, if he had any doubt about the author's truthfulness. That he did not do it is an additional sign that he may already have made up his mind at that point in time;

(b) The "assumption" that the opponent of the author had given false testimony would have meant that he had committed perjury as well as forgery of documents. Without in any way suggesting that the author's opponent has in fact done that, the negative assumption that he has not is not based on any objective material evidence, except for him being a member of the - more credible - legal profession. The negative assumption also means that it is more probable that the author had testified falsely - an assumption that is not supported by any evidence whatsoever;

8.5 The State party concludes that there were understandable objective circumstances which unequivocally justify the conclusion arrived at by the Court. However, it does not explain which

are those circumstances. Nothing in the State party's explanations undoes the impression of the author, grounded in two explicit statements by the trial judge, that his opponent, as a lawyer, was elevated to a witness of higher credibility.

### **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 The author claims that the judge who tried his case against Dr. W. was biased because during the proceedings he made remarks, on two occasions, which showed his partiality in favour of Dr. W.

9.3 The Committee recalls that the requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial.<sup>11</sup> The two aspects refer to the subjective and objective elements of impartiality, respectively.

9.4 As to the subjective element, the impartiality of a judge must be presumed until there is evidence to the contrary. In this respect the Committee notes the State party's statement regarding the evaluation of evidence carried out by the Regional Court, in particular the fact that the Court accepted the version of facts presented by Dr. W. in view of documentary evidence suggesting the approval of the author to the global settlement. The Committee concludes that the material before it does not disclose that the judge subjectively lacked impartiality in the present case.

9.5 It must further be determined whether, quite apart from the judge's personal mindset, there are ascertainable objective facts which may raise doubt as to his impartiality. Judges must not only be impartial, they must also be seen to be impartial. When deciding whether there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of those claiming that there is a reason to doubt his impartiality is significant but not decisive. What is decisive is whether the fear can be objectively justified.

9.6 In the present case, the remarks made by the judge may well have raised certain doubts as to his impartiality on the part of the author. However, the Committee finds that the remarks were not such as to objectively justify, in the absence of other elements, the author's fear as to the judge's impartiality. Accordingly, the Committee finds that in the present case the facts do not disclose a violation of article 14, paragraph 1 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 do not disclose a violation 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 present report.]

## Notes

<sup>1</sup> The International Covenant on Civil and Political Rights and the Optional Protocol entered into force for Austria respectively on 10 December 1978 and on 10 March 1988. Austria has made a reservation to the effect of excluding a case which has already been examined by the European Court of Human Rights.

<sup>2</sup> Communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, para. 7.2.

<sup>3</sup> Constitutional Court Decision, B 1588/04 (28 February 2005).

<sup>4</sup> Supreme Court Judgement, 11 Bkd 9/03 (13 January 2004).

<sup>5</sup> Supreme Court Judgement, 11 Ns 4/89 (11 April 1989).

<sup>6</sup> See communication No. 387/1989 (note 2 above), para. 7.2.

<sup>7</sup> See communication No. 904/2000, *Van Marcke v. Belgium*, Views adopted on 7 July 2004, para. 8.2.

<sup>8</sup> See communication No. 1356/2005, *Parra Coral v. Spain*, decision on admissibility adopted on 29 March 2005, para. 4.2.

<sup>9</sup> See Supreme Court Judgement, 6 Ob 276/05i (15 December 2005).

<sup>10</sup> Supreme Court Judgement, 5Ob347/87 (1 September 1987).

<sup>11</sup> General comment No. 32 (2007) on article 14, para. 21.

**T. Communication No. 1448/2006, *Kohoutek v. The Czech Republic*  
(Views adopted on 17 July 2008, ninety-third session)\***

<i>Submitted by:</i>	Mrs. Ivanka Kohoutek (not represented)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Czech Republic
<i>Date of communication:</i>	2 February 2006 (initial submission)
<i>Subject matter:</i>	Discrimination on the basis of citizenship with respect to restitution of property
<i>Procedural issues:</i>	Abuse of right of submission; non-substantiation
<i>Substantive issues:</i>	Equality before the law; equal protection of the law
<i>Articles of the Covenant:</i>	26; 12
<i>Articles of the Optional Protocol:</i>	3; 2

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

*Meeting on 17 July 2008,*

*Having concluded* its consideration of communication No. 1448/2006, submitted to the Human Rights Committee by Mrs. Ivanka Kohoutek 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, 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.



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

1.1 The author of the communication dated 2 February 2006 is Ms. Ivanka Kohoutek, a German citizen of Czech origin, born in 1947 in the former Czechoslovakia. She claims to be victim of a violation by the Czech Republic of article 26 of the International Covenant on Civil and Political Rights. She is not represented.

1.2 The Optional Protocol to the International Covenant on Civil and Political Rights (Optional Protocol) entered into force for the Czech Republic on 22 February 1993.

### **The facts as presented by the author**

2.1 In 1981, the author left the former Czechoslovakia with her husband and their two children and emigrated to the former Federal Republic of Germany. They were sentenced in absentia in the former Czechoslovakia to 12 months' imprisonment, with confiscation of their property for leaving the country.

2.2 The author explains that their property was a family house in Hosov, now Jihlava district, with a garage, separate buildings, and an 861 sq.m. garden. According to her, their property right was duly recorded in the cadastral office of Jihlava, and an ownership certificate (No. 433) was established to this effect.

2.3 On 23 February 1982, the author's sister applied to purchase the house. Due to political considerations, and although the author's sister had filed an application first, the house and land were transferred to Mr. and Mrs. Ch. This transfer of property was recorded on 12 November 1982 by notary in Jihlava. Although Mr. and Mrs. Ch. still occupy the house, the property right was officially transferred to one Michael S., allegedly to exclude any other possible litigation.

2.4 The author's husband died in 1987. At the time of his death, he was still a Czechoslovak citizen. The author obtained German citizenship in 1991, whereupon she lost her original Czechoslovak citizenship.

2.5 The author claims that she and her deceased husband were fully rehabilitated in 1990 under the provisions of Act No. 119/1990 on judicial rehabilitation. She requested restitution of their property from Mr. and Mrs. Ch. under the provisions of the Extra-Judicial Rehabilitation Act No. 87/1991. As Mr. and Mrs. Ch. refused to return the house, the author filed a complaint with the District Court of Jihlava. On an unspecified date, the court rejected her application, on the ground that the author was not a Czech national. On 8 December 1998, the Brno Regional Court confirmed the ruling of the District Court.

2.6 The author filed a recourse to the Constitutional Court, claiming to be victim of discrimination, invoking article 26 of the International Covenant on Civil and Political Rights. The Constitutional Court rejected her complaint on 27 September 1999.

2.7 The author lodged a complaint with the European Court for Human Rights (registered as case No. 58716/00). On 10 September 2002, a Committee of three judges of the Court declared her application inadmissible as manifestly ill-founded.

### **The complaint**

3. The author claims to be a victim of a violation of article 26 of the Covenant, as the citizenship requirement of the Act No. 87/1991 constitutes unlawful discrimination. She invokes the jurisprudence of the Committee in the case of *Marik v. Czech Republic*<sup>1</sup> and *Kriz v. Czech Republic*,<sup>2</sup> in which the Committee found a violation of article 26 by the State party.

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

4.1 On 6 September 2006, the State party commented on the admissibility and merits of the communication. Factually, the State party clarifies that on 23 February 1982, the Jihlava District Court sentenced the author and her husband to, inter alia, forfeiture of property for the offence of illegally emigrating. On 16 February 1989, the author and her husband, who had died in 1987, were granted amnesty by the Jihlava District Court. The State party confirms that they were rehabilitated by a decision adopted under Act No. 119/1990 on 13 February 1991 which quashed the judgement of 23 February 1982.

4.2 The State party underlines that Act No. 87/1991 on extra-judicial rehabilitations ("the restitution law") laid down other conditions that had to be met by claimants to be eligible for restitution beside the citizenship and permanence residence requirements. By judgement of the Constitutional Court No. 164/1994 of 12 July 1994, the condition of permanent residence was revoked. This judgement established a new time frame of six months for the submission of restitution claims, beginning on 1 November 1994.

4.3 On 3 October 1995, the author and her children claimed the restitution of the property. Her claim was rejected on 10 September 1997 because they did not satisfy the condition of citizenship. On 8 December 1998, the Brno Regional Court upheld the first instance court's decision.

4.4 The State party challenges the admissibility of the communication as an abuse of the right of submission of communications within the meaning of article 3 of the Optional Protocol. While acknowledging that the Optional Protocol does not set forth any fixed time limits for submitting a communication to the Committee, the State party invokes the Committee's jurisprudence in *Gobin v. Mauritius*,<sup>3</sup> where the Committee declared inadmissible a communication submitted five years after the alleged violation of the Covenant, as the author did not provide a "convincing explanation" to justify this delay. In the present case, the State party argues that the author petitioned the Committee in February 2006, i.e. seven years and two months after the Brno Regional Court decision of 8 December 1998 or at least 3 years and almost 5 months after the decision of the European Court of Human Rights of 10 September 2002, without offering any explanation to justify such an unreasonable delay. In this respect, the State party refers to the six-month time limit for submitting an application to the European Court of Human Rights (article 35, paragraph 1, of the European Convention on

Human Rights). It further argues that the author's specific interest in this case cannot be deemed important enough to outweigh the generally accepted interest in maintaining the principle of legal certainty, all the more so because the author has already submitted earlier in the past a complaint to a different international body established for the protection of human rights and freedoms.

4.5 On the merits, the State party refers to its earlier observations submitted to the Committee in similar cases,<sup>4</sup> in which it outlined the political circumstances and legal conditions pertaining to restitutions laws, including Act No. 87/1991 on extra-judicial rehabilitation. The State party underlines that it was aware at the time of the passing of those laws that it was not feasible to eliminate all the injustices committed during the Communist regime, and that the Constitutional Court has repeatedly considered and dismissed the question of whether the precondition of citizenship violated the Constitution and fundamental rights and freedoms (for example Judgment No. 185/1997). It further explains that restitution laws were adopted as part of a two-fold approach. First, in an effort to mitigate, to a certain degree, some of the injustices committed earlier; and second, in an effort to carry out a speedy and comprehensive economic reform, with a view to introducing a market economy. Restitution laws were among those whose objective was the transformation of the whole society, and it appeared adequate to put in place restrictive preconditions, including that of citizenship, which was envisaged to ensure that due professional diligence would be devoted to returned property.

4.6 The State party further notes that it became possible for potential restitution claimants to reacquire Czech citizenship from 29 March 1990 to 31 December 1993. It refers in this regard to the Brno Regional Court decision according to which "the national law thereby created sufficient room for raising restitution claims under the law on extra-judicial rehabilitations also for persons who did not satisfy the precondition of citizenship. It notes that Brno Regional Court was not compelled to and in fact did not consider, for reasons of procedural economy, other preconditions for restitution. It therefore argues that it is not possible to speculate whether the author's action would have been successful if she had met the precondition of the country's citizenship.

#### **Authors' comments on the State party's observations**

5.1 On 28 September 2006, the author commented on the State party's response. She argues that they escaped from communist Czechoslovakia in 1981, and that the Jihlava District Court's judgement of 23 February 1982 violated article 12, paragraph 2, of the Covenant. With regard to Act No. 119/1990 on judicial rehabilitation, she contends that it did not spell out any condition of citizenship for persons rehabilitated and that such conditions have been incorporated into Act No. 87/1991 on extra-judicial rehabilitation, enacted 14 months later.

5.2 Regarding the argument that the submission of her communication amounts to an abuse of the right of submission, the author denies the existence of such an abuse and recalls that there is no deadline for submitting a communication specified in the Optional Protocol. She was crushed by the miscarriage of justice in the court judgements, and was exhausted emotionally and financially. She filed her complaint before the Committee as soon as she had been notified

of the Committee's Views in Communications No. 945/2000, *Marik v. Czech Republic*, Views adopted on 26 July 2005; and No. 1054/2002, *Kriz v. Czech Republic*, Views adopted on 1 November 2005.

## **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 required by article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that a similar complaint submitted by the author was declared inadmissible as manifestly ill-founded by a Committee of three judges of the European Court for Human Rights on 10 September 2002 (application No. 58716/00). Article 5, paragraph 2 (a), however, does not preclude the Committee from examining the present communication as the issue is no longer being examined by the European Court and the State party has formulated no reservation under article 5, paragraph 2 (a) of the Optional Protocol.

6.3 With regard to the author's claim that the Jihlava District Court's judgement of 23 February 1982 violated article 12, paragraph 2, of the Covenant, the Committee notes that the claim was not part of the original communication upon which the State party submitted comments. The Committee considers that the author has not sufficiently substantiated her allegations under article 12 for the purposes of admissibility and finds this part of the communication inadmissible under article 2 of the Optional Protocol.

6.4 The Committee notes also the State party's argument that the communication should be considered inadmissible as constituting an abuse of the right to submit communications under article 3 of the Optional Protocol, in view of the delay in submitting the communication to the Committee. The State party recalls that the author waited three years and five months after the decision of the European Court of Human Rights before submitting her complaint to the Committee. In the instant case, and having regard to the reasons given by the author, the Committee does not consider the delay to amount to an abuse of the right of submission.<sup>5</sup> It therefore decides that the communication is admissible in as far as it appears to raise issues under article 26 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 The issue before the Committee is whether the application to the author of Act No. 87/1991 amounted to discrimination, in violation of article 26 of the Covenant. 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.<sup>6</sup>

7.3 The Committee recalls its Views in the cases of *Adam, Blazek, Marik, Kriz, Gratzinger* and *Ondracka*<sup>7</sup> where it held that article 26 had been violated, and that it would be incompatible with the Covenant to require the authors to meet the condition of Czech citizenship for the restitution of their property or alternatively for its compensation. The Committee considers that the principle established in these cases also applies in the case of the author of the present communication, and that the application by the domestic courts of the citizenship requirement violated her 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 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, including compensation if the property cannot be returned. 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 that a violation has been established, the Committee wishes to receive from the State party, within 180 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 present report.]

#### Notes

<sup>1</sup> Communication No. 945/2000, *Marik v. Czech Republic*, Views adopted on 26 July 2005.

<sup>2</sup> Communication No. 1054/2002, *Kriz v. Czech Republic*, Views adopted on 1 November 2005.

<sup>3</sup> Communication No. 787/1997, inadmissibility decision of 16 July 2001, para. 6.3.

<sup>4</sup> Communication No. 587/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996.

<sup>5</sup> See communication No. 1305/2004, *Victor Villamon Ventura v. Spain*, Views adopted on 31 October 2006, para. 6.4, communication No. 1101/2002, *Alba Cabriada v. Spain*, Views adopted on 1 November 2004, para. 6.3.

<sup>6</sup> See communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, para. 13.

<sup>7</sup> Communication No. 586/1994, *Adam v. Czech Republic* (noted 4 above), para. 12.6; communication No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, para. 5.8; communication No. 945/2000, *Marik v. Czech Republic* (noted 1 above), para. 6.4; communication No. 1054/2002, *Kriz v. Czech Republic* (noted 2 above), para. 7.3; communication No. 1463/2006, *Gratzinger v. Czech Republic*, Views adopted on 25 October 2007, para. 7.5; and communication No. 1533/2006, *Ondracka v. Czech Republic*, Views adopted on 2 November 2007, para. 7.3.

**U. Communication No. 1450/2006, Komarovski v. Turkmenistan  
(Views adopted on 24 July 2008, ninety-third session)\***

<i>Submitted by:</i>	Leonid Komarovski (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Turkmenistan
<i>Date of communication:</i>	25 November 2005 (initial submission)
<i>Subject matter:</i>	Arbitrary arrest and detention of the author
<i>Substantive issues:</i>	Arbitrary arrest and detention; torture; attack on author's honour and reputation; absence of effective domestic remedies
<i>Articles of the Covenant:</i>	7; 9, paragraphs 1 to 4; 10, paragraphs 1 and 2 (a); 17, paragraph 1

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

*Meeting on 24 July 2008,*

*Having concluded* its consideration of communication No. 1450/2006, submitted to the Human Rights Committee by Mr. Leonid Komarovski for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

*Adopts the following:*

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

1.1 The author of the communication is Mr. Leonid Komarovski, national of the United States of America. He claims to be victim of a violation by Turkmenistan of articles 7, 9, 10 and 17 of 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 Chanut, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, 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.

1.2 Both the Covenant and the Optional Protocol entered into force for the State party on 1 August 1997.

### **The facts as submitted by the author**

2.1 On 25 November 2002, the motorcade with the State party's President, Saparmurad Niyazov, was fired at while driving through Ashgabat, the capital. The President survived what appeared to be an assassination attempt. The same day, the President accused three opposition leaders of being involved in the attack against him. Large-scale investigations began immediately and 16 persons were arrested between 26 and 27 November, including the author.

2.2 The author arrived in Turkmenistan on 23 November 2002. He states that the only purpose of his trip was to deal with matters related to the beer trade, a business he had started in Turkmenistan in 1991. He stayed at the house of Guvanch Dzumaev, a friend and business partner. On 25 November 2002, the author - who is also a professional journalist - went with Mr. Dzumaev to a peaceful rally organized in front of the Parliament (Mejlis) by the Turkmen Popular Democratic Movement (NDDT), to protest against President Niyazov's regime.

2.3 On the way to Parliament, the author and Mr. Dzumaev picked up one of the leaders of NDDT, Mr. Shikhmuradov, former Minister for Foreign Affairs of Turkmenistan between 1995 and 2000. At the Parliament building, having realized that only a few people had gathered in front, Mr. Shikhmuradov decided to postpone the demonstration. The author and Mr. Dzumaev then drove back home.

2.4 In the afternoon of the same day, local TV channels broadcasted a public speech by President Niyazov announcing that he had been the victim of an assassination attempt in the morning. He openly accused Mr. Shikhmuradov and other NDDT leaders of having organized the assassination attempt.

2.5 Mr. Dzumaev was arrested at his house together with his son, father and brother on 26 November 2002. The author was also arrested at Mr. Dzumaev's house in the early morning of 27 November 2002 by three men in civilian clothes, who declared that they belonged to the General Prosecutor's Office. Once the author handed over to them his United States passport, armed men jumped from the surrounding trees and houses, tackled him down and started to beat him. The reasons for his arrest were not explained to the author and he was put into the back seat of a car where he continued to be beaten every time he dared to ask for explanations for his arrest. He was taken to the National Security Ministry (MNB) building and interrogated.

2.6 During the first hours of interrogation, the author was asked to write down "everything he had done". As he did not write what they wanted he was declared to be under arrest. He was neither shown an arrest warrant nor given reasons for his arrest. Only on the third day of detention, 29 November 2002, he was presented with a list of 14 criminal charges, including attempted assassination of the President, attempted coup d'état and smuggling of drugs and arms.

2.7 During the following five months the author was detained at the MNB "inner jail". Despite his requests, he was never brought before a judge or tried in court and was not given the opportunity to contact a lawyer of his choice. Instead, he was assigned an ex officio lawyer,



Ms. Djumagul, appointed by the Office of the General Prosecutor. However, she was not helpful and refused to file a complaint regarding the ill-treatment he suffered in detention. She appeared scared when the author showed her the bruises and scars on his body and said that she would not risk her life for him.

2.8 During the entire detention period, the author was not allowed to contact his family in writing or over the phone, or receive their visit. He was held incommunicado for the first seven days of detention, before the United States embassy in Ashgabat was notified of his detention.

2.9 The author claims that he was severely beaten several times by MNB officers and at times injected with psychotropic substances in order to extract his confession. On the day of his arrest, after refusing to confess his participation in the assassination attempt, he was beaten by two men in military uniform with rubber sticks and military boots before losing consciousness. On another occasion, at the beginning of December, after the meeting with a representative from the United States embassy, he was woken up by guards in the middle of the night and brought to the interrogation room, where he was immobilized and hit on his heels with a rubber stick. He lost consciousness and when he woke up, the officers continued the beating until he fainted again. On 10 December, he was awoken again and taken to another room where he was immobilized on a chair. A woman who was dressed like a nurse administered an injection in his arm. He does not remember what happened after this injection. Only after his release, he was shown a video of himself admitting to be a drug addict and to have participated in the plot against the President. He does not remember having made this statement, which was broadcast on 18 December 2002 on Turkmen Public Television.

2.10 The conditions of detention in the MNB inner jail were inhumane and degrading, including lack of natural light, cold temperatures and very bad hygiene conditions. He was detained in cell No. 30 together with a prisoner convicted and sentenced to 25 years' imprisonment for the attempted assassination of President Niyazov. He was transferred to cell No. 33 at the end of February 2003, which he shared with an Iranian citizen convicted and sentenced to 25 years' imprisonment for drug smuggling. He was also denied repeated requests to see a doctor, despite his diabetic condition.

2.11 On 15 April 2003, following the intervention of the United States Embassy, the author was released by Presidential pardon. At the end of 2003, the Turkmen authorities published a book, allegedly written by the author, in which he admits his participation in the attempted assassination of the President. The author denies having written this book.

### **The complaint**

3.1 The author claims that the facts described disclose violations of article 7; article 9, paragraphs 1 to 4; article 10, paragraphs 1 and 2 (a); and article 17, paragraph 1, of the Covenant.

3.2 The author alleges that he was a victim of arbitrary arrest and detention in violation of article 9, paragraph 1, of the Covenant. Under the State party's legislation, officials from the General Prosecutor's Office do not have the power to arrest people. Furthermore, he was arrested without a proper arrest warrant. He remained unlawfully in detention for 150 days, out of which 7 days completely incommunicado.

3.3 The author also claims to be a victim of a violation of article 9, paragraph 2, since despite his requests he was not informed at the time of the arrest of the reasons for it. He was informed of the charges against him only on the third day of detention. He was never informed of his right to contact the consular or diplomatic authorities of the United States. He explains that, according to changes in the Penal Code and Criminal Procedure Code that had recently been adopted, the authorities may detain individuals for 72 hours without a formal arrest warrant, but a formal indictment is needed within 10 days to keep a person in detention longer. These provisions were not respected in his case.

3.4 The author claims to be a victim of violations of article 9, paragraphs 3 and 4. During the five months he spent in prison, and despite his numerous requests, he was never brought before a judge who could determine the lawfulness of his detention. He was neither tried nor convicted on any charges against him. He was not allowed to appoint a lawyer of his choice. The ex officio lawyer appointed by the General Prosecutor's Office advised him to cooperate with the investigation, admit the charges and sign all the documents presented to him. Despite his repeated requests, she refused to file a complaint on his behalf for ill-treatment in detention, for fear of reprisals. She visited him occasionally but he did not have the possibility to contact her on his own initiative.

3.5 The author claims that conditions of detention in the MNB inner jail were inhuman and degrading, in violation of article 10, paragraph 1. The cell was very small, lacked natural light and water in the toilet and was infested by roaches. Showers were allowed only once every two weeks and the temperature was very cold (below 0° C in winter). The food quality was very poor and he was not allowed to do physical exercise outside the cell. The author was also denied medical care in spite of his diabetes.

3.6 The author claims a violation of article 10, paragraph 2 (a), due to the fact that, despite being only an accused person, he was detained together with convicted persons and always treated as such.

3.7 The author claims that the treatment received during his detention in the inner MNB jail amounts to torture and cruel, inhuman or degrading treatment or punishment under article 7 of the Covenant. He was severely beaten on different occasions with rubber sticks and kicked on his head with boots. On 10 December 2002 and on two other occasions, he was also injected, against his will, with a psychotropic substance, to force him to confess.

3.8 The author further claims to be a victim of a violation of article 17, paragraph 1 of the Covenant in that, at the end of 2003, the State party Government published a book, allegedly written by him, containing the official version of the events of 25 November 2002. On several occasions the author has publicly stated that he did not write the book, is unfamiliar with its contents and does not have copyright in it, despite the copyright symbol appearing next to his name. He never signed any contract with the State party's authorities allowing them to use his name on any publication or to publish or sell anything under his name. The existence of this book constitutes an unlawful attack on his honour and reputation. The official version of the events of 25 November 2002 contained in the book is a falsification aiming at eliminating the opposition movement in the country. The existence of such a book jeopardizes his professional career as a journalist and misleadingly places him in the eyes of Turkmen people as a devoted defender of the regime.

3.9 The author submits that there are no domestic remedies available to him and, even if there were, they would be ineffective due to the lack of independence of the State party's judiciary, which is at the mercy of the President. While article 101 of the Constitution guarantees the independence of the judiciary, such independence does not exist in practice. Furthermore, article 102 of the Constitution provides that judges of all courts are appointed by the President and article 112 states that the Attorney General is subordinate to the President. The lack of an independent Constitutional Court means that the principles of separation of powers and legality are not effectively protected. The lack of independence of the judiciary and the total lack of respect for any basic procedural rule is exemplified by the summary trials of those who were accused of the alleged plot of November 2002. The author reports that these violations include, among others: lack of access to an independent lawyer; no access to prosecution material; violation of the right to call witnesses on the accused's behalf; violation of the prohibition of *reformatio in pejus*; violation of the prohibition of non-retroactivity of criminal law; no right to family visits and the visit of consular authorities. The author submits various reports from international governmental and non-governmental organizations and other sources in corroboration of these allegations.

#### **State party's observations**

4. On 15 April 2008, the State party informed the Committee that the author was arrested on 27 November 2002 and charged with committing a crime in accordance with the criminal legislation of the country. No acts of torture were used against him in the course of the investigation. In compliance with international and national law, access to him by the consular section of the United States Embassy in Turkmenistan was granted. Based on the principles of humanity and justice and taking into account the request of the United States Government, the author was handed over to the representatives of the United States Government on 24 April 2003.

#### **Author's comments**

5. The author did not provide comments to the State party's observations.

#### **Issues and proceedings before the Committee**

##### **Considerations 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 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 The Committee notes that the State party does not challenge admissibility, nor provide information on available and effective remedies. In the absence of any apparent obstacle to admissibility the Committee concludes that the claims are sufficiently substantiated and the communication is admissible insofar as it raises issues with respect to articles 7; 9, paragraphs 1 to 4; 10, paragraphs 1 and 2 (a); and 17, paragraph 1, 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 available to it, as provided in article 5, paragraph 1, of the Optional Protocol. It notes that the State party has not addressed in detail the author's allegations. In the circumstances, due weight must be given to such allegations to the extent that they have been sufficiently substantiated.

7.2 With respect to the author's allegation that he was subjected to arbitrary arrest or detention in violation of article 9, paragraph 1 of the Covenant, the Committee recalls that deprivation of liberty is permissible only when occurring on such grounds and in accordance with such procedures as are established by law. In this case, the fact that the author was arrested by officers belonging to the General Prosecutor's Office who reportedly did not have the power to arrest individuals under the State party's legislation and held incommunicado for at least seven days makes his detention arbitrary. The Committee thus concludes, in the absence of any challenge to this claim by the State party, that the circumstances in which the author was deprived of his liberty violate the prohibition of arbitrary arrest and detention in article 9, paragraph 1, of the Covenant.

7.3 As to the claim related to article 9, paragraph 2, the Committee notes that at the time of his arrest, the author was apparently not informed of the reasons for his arrest and the charges against him, which were presented to him only during the third day of detention. Again, in the absence of relevant State party's information on this claim the Committee considers that the facts as presented constitute a violation of article 9, paragraph 2, of the Covenant.

7.4 With regard to the possible violation of article 9, paragraphs 3 and 4, of the Covenant, the Committee notes that the author was not brought before a judge or any other officer authorized by law to exercise judicial power for the entire duration of his detention, i.e. almost five months. The Committee reiterates that the length of custody without judicial authorization should not exceed a few days.<sup>1</sup> It also notes that the author, despite having been assigned an ex officio lawyer, was prevented from taking proceedings before a court to assess the lawfulness of his detention. The Committee considers that in the circumstances, and in the absence of any explanation from the State party, these facts amount to a violation of article 9, paragraphs 3 and 4 of the Covenant.

7.5 As to the claims related to the conditions of detention in the MNB inner jail, described by the author in detail (see paragraph 3.5 supra), the Committee concludes that he was treated inhumanely and without respect for his inherent dignity, in violation of article 10, paragraph 1, of the Covenant.<sup>2</sup> Equally, and in the absence of information from the State party, the Committee concludes that article 10, paragraph 2 (a), was violated, since the author was detained on two occasions together with convicted persons, without any indication of exceptional circumstances justifying such detention.

7.6 As to the alleged violation of article 7 of the Covenant, the Committee notes the State party's general statement that no acts of torture were used against the author in the course of the investigation. However, the author's specific allegations that he was subjected to severe beatings and intimidation with the purpose of coercing him to confess, and that he was

administered unidentified substances against his free will for the same purposes, have not been rebutted by the State party. Accordingly, the Committee concludes that these facts, as reported by the author, constitute a violation of article 7.

7.7 Finally, the publication of a book confirming the official version of the events of 25 November 2002 which falsely portrays the author as the writer of the book, constitutes, in the absence of relevant information from the State party, an unlawful interference with the author's privacy and an unlawful attack against his honour and reputation, in violation of article 17, paragraph 1, 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 a violation by the State party of article 7; article 9; paragraphs (1), (2), (3), and (4); article 10, paragraphs (1) and (2) (a); and article 17 (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 and, to that effect, take appropriate steps to: (a) institute criminal proceedings for the prosecution and punishment of the persons responsible for the violations to which the author was subjected; (b) provide the author with appropriate reparation, including compensation; and (c) make a public retraction of the imputed authorship of the book referred to above. The State party is also under an obligation to take measures to prevent similar violations in the future.

10. By becoming a party to the 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. In this respect, the Committee wishes to receive from the State party, within 180 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 present report.]

## Notes

<sup>1</sup> General comment No. 8 (1982) on article 9 (right to liberty and security of persons), para. 2.

<sup>2</sup> See for instance communications No. 590/1994, *Bennet v. Jamaica*, Views adopted on 10 May 1999, paras. 10.7 and 10.8; No. 695/1996, *Simpson v. Jamaica*, Views adopted on 31 October 2001, para. 7.2; No. 704/1996, *Shaw v. Jamaica*, Views adopted on 2 April 1998, para. 7.1; and No. 734/1997, *McLeod v. Jamaica*, Views adopted on 31 March 1998, para. 6.4.

**V. Communication No. 1456/2006, X. v. Spain**  
**(Views adopted on 24 July 2008, ninety-third session)\***

<i>Submitted by:</i>	X (on her own behalf and on behalf of her daughter, Y) (represented by counsel, Mr. José Luís Mazón Costa)
<i>Alleged victim:</i>	Y
<i>State party:</i>	Spain
<i>Date of communication:</i>	14 February 2006 (initial submission)
<i>Subject matter:</i>	Acquittal of a father charged with sexual abuse of his 3-year-old daughter and restoration of visiting rights
<i>Procedural issues:</i>	Insufficient substantiation of the alleged violations; abuse of the right to submit communications; failure to exhaust domestic remedies
<i>Substantive issues:</i>	Alleged denial of justice through arbitrary evaluation of the evidence; a minor's right to private and personal life; a minor's right to protection
<i>Articles of the Covenant:</i>	14, paragraph 1; 17 and 24, paragraph 1
<i>Articles of the Optional Protocol:</i>	2, 3, 5.2 (b)

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

*Meeting* on 24 July 2008,

*Having concluded* its consideration of communication No. 1456/2006, submitted to the Human Rights Committee on behalf of X under the Optional Protocol to the International Covenant on Civil and Political Rights,

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\* The following Committee members participated in the consideration of the communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

Two individual opinions co-signed by Committee members Mr. Rajsoomer Lallah, Ms. Christine Chanet and Mr. Prafullachandra Natwarlal Bhagwati in one and by Committee members Ms. Ruth Wedgwood and Sir Nigel Rodley in the other.

*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 of the communication, dated 14 February 2006, is X, a Spanish national acting on her own behalf and on behalf of her daughter, Y, born in 1994. She claims that her daughter is a victim of violations by Spain of article 14, paragraph 1, and of article 24, paragraph 1, read in conjunction with article 17, 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 3 May 2006, the Committee, acting through its Special Rapporteur on new communications, decided to consider the admissibility and merits of the case jointly.

### **Factual background**

2.1 The author, a bank employee resident in Murcia who is legally separated from Z, filed a criminal complaint against the latter on 14 November 1997 for alleged sexual assault on their daughter, who was three years old at the material time. The complaint was based on the child's behaviour and comments after visits to her father, a child psychiatrist's report and a written testimonial from the child's day-care centre.

2.2 By a decision of 14 November 1997, Murcia Investigating Court No. 5 agreed to institute preliminary proceedings on the basis of the author's complaint. By a decision of 18 November 1997, the same Court agreed on a provisional suspension of the visiting arrangements between the father and daughter. As a result of the preliminary proceedings on 19 October 1998, the Court ordered the opening of oral proceedings and transferred the records to the Murcia Provincial Court after the Public Prosecutor's Office characterized the facts as constituting a continuing offence of sexual abuse of minors, pursuant to articles 74, 181.1, 2 and 3, and 192.2 of the Spanish Criminal Code. The private indictment characterized the facts as an attempted sexual assault.

2.3 On 21 May 2002, the Provincial Court acquitted Z of the alleged offences of sexual abuse and assault. The text of the judgement presents the proven facts as follows:

- That, following their legal separation in early 1997, the parties were continuously embroiled in legal disputes over the visiting arrangements for their daughter, with some 20 criminal charges being filed.
- That between late September and October 1997, the teaching staff at the kindergarten where the author's daughter was enrolled noticed a change in the minor's behaviour following visits to her father. She tended to be irritable, was abnormally tired and sleepy, and referred repeatedly to the "little tortoise" game, explaining that it involved her father having a little tortoise beneath his trousers and underpants which she caught and kissed. She had occasionally drawn the tortoise in the form of a penis.

- That in November 1997 the person in charge of the kindergarten decided to bring the foregoing facts to the author's attention. The author raised the matter with her psychiatrist, who referred her to a gynaecologist. The gynaecologist concluded that the child was anatomically normal but that the vaginal entrance seemed to be enlarged. She drew attention to the child's passivity during the examination, which was unusual for a child of that age. The mother subsequently took her daughter to a child psychiatrist, who issued a preliminary report concluding that sexual abuse had taken place, consisting, at a minimum, of exposure of an erect penis that the child had manipulated with masturbatory movements and had kissed in the course of erotic games.

2.4 The discussion in the oral proceedings focused on the evidence adduced in support of the charges, namely: (a) the report and video prepared by the psychologist and social worker of the Family Court technical team; (b) the report of the child psychologist who visited the minor; (c) the testimony of the kindergarten teachers; and (d) the report of the gynaecologist who visited the minor. The Court, having examined each of these items, concluded that the evidence they contained failed "to provide solid grounds for the conclusion that abuse actually occurred. The child's age and the contextual background, involving a confrontational marriage break-up, made it extremely difficult to establish what had occurred. It would therefore have been advisable to base the case on a rigorous and meticulous code of procedure conducted by specialists, with judicial intervention *ab initio*, so as to obtain a statement by the child based on adequate safeguards, and carefully recorded by audio-visual media to facilitate its reproduction whenever necessary and, in particular, for the trial (...). As such action had not been taken, any evidence that might have existed had been effectively lost. Furthermore, the father had consistently denied the facts, sticking to an account that was consistent, unchanging and basically watertight".<sup>1</sup>

2.5 The judgement of acquittal handed down by the Murcia Provincial Court invalidated the decision by Murcia Investigating Court No. 5 of 18 November 1997 to suspend the visiting arrangements as a preventive measure. The Provincial Court held that "although it could take steps, acting on article 158 of the Civil Code and, in general, on Act 1/96 organizing the legal protection of minors, to restore and normalize relations between the father and daughter - which have been seriously damaged, to the child's detriment - in the Court's view, such measures should be ordered, at the earliest opportunity, by the Family Court dealing with the parents' marriage break-up, which is better equipped (psychosocial team) than this Court to devise whatever arrangements its experts consider to be most fitting, the basic aim being to serve the best interests of the child, and on the understanding that the goal is not merely the resumption of contact and visits but the restoration and strengthening of the bond between father and child so necessary for the daughter's personal and emotional stability, paying particular attention to those who might wish to obstruct that process".<sup>2</sup>

2.6 The author filed an appeal with the Supreme Court for annulment (*casación*) of the judgement of acquittal handed down by the Provincial Court, citing an alleged violation of the right to effective legal protection and the right not to be deprived of a defence, recognized in article 24, paragraphs 1 and 2, of the Spanish Constitution by virtue of the fact that the Provincial Court had no direct statement from the victim. The author further alleged that the Court had erred in its evaluation of the evidence provided by experts and witnesses. Lastly, she challenged the failure to apply articles 181.1 and 192 of the Criminal Code, arguing that the proven facts were subsumed in the offences characterized in those articles.



2.7 On 23 June 2003 the Supreme Court dismissed the grounds for annulment, ruling that the Provincial Court's reasoning in support of its judgement of dismissal had been sound. It had explicitly addressed the evidence in its possession, particularly the problem raised by the lack of direct viewing of the alleged victim's statement, and had concluded that there was insufficient evidence of the charges against the accused to undermine his right to be presumed innocent. The Court also found that "the documentary and witness evidence presented in the oral proceedings lacked probative value, so that the Provincial Court's finding that there was sufficient doubt concerning the facts to preclude the necessary conviction was justified". Lastly, the Court considered that the description of the facts in the Provincial Court's judgement did not warrant the subsumption of those facts under the alleged offences inasmuch as the Court was unable to conclude from the body of evidence that such abuse had actually occurred.

2.8 On 26 April 2004 the author filed an application for *amparo* (enforcement of constitutional rights) with the Constitutional Court, invoking three grounds: (a) lack of defence due to the invalidation of the prosecution's main item of evidence, the video recording of the minor's statement before the Family Court's technical team, and the fact that it was impossible to obtain a direct statement from the child during the proceedings; (b) the manifest arbitrariness of the judgements at first and second instance in terms of their evaluation of the evidence; and (c) violation of the minor's right to privacy by the judgement of acquittal through its order for immediate contact between the minor and her father.

2.9 By a judgement of 17 January 2005, the Constitutional Court dismissed the application for *amparo*. With regard to the alleged violation of the minor's right to privacy, the Court held that since the argument had not been raised at the cassation stage it was inadmissible on account of the subsidiary nature of the *amparo* application. With regard to the complaint of lack of defence due to the invalidation of the prosecution's main item of evidence, the Constitutional Court held that the Provincial Court had found the evidence to be valid and had even described it as "a key piece of evidence", so that the finding of invalidity did not refer to the evidence as such, which had been admitted and presented to the court, but rather to its purported aim, namely to serve as prosecution evidence of the guilt of the accused, since it failed to meet the evidentiary standard required to guarantee the credibility of the minor's testimony. Lastly, with regard to the ground of lack of defence due to the arbitrariness of the evaluation of evidence by the Provincial Court, the Constitutional Court held that the *amparo* procedure was not the proper avenue for effecting a review of the evaluation of the evidentiary material by the trial court unless the latter had acted in a manner that was arbitrary or unreasonable. According to the Constitutional Court, the Provisional Court had evaluated each item of expert or witness evidence presented during the oral proceedings and had disqualified each item on grounds that could not on any account be characterized as unreasonable or arbitrary.

### **The complaint**

3.1 The author claims that there was a denial of justice constituting a violation of article 14, paragraph 1, because the trial courts invalidated an item of evidence, the video recording by the Family Court's technical team, the nature of which was such that it could not have been submitted in any other form owing to the very young age of the witness and the delay in bringing the case to trial, which meant that the child no longer remembered the facts. She submits that the

judgements handed down by the Provincial Court and the Supreme Court were inconsistent, since they maintained that the facts of the case could not be considered credible unless they were related by the minor herself during the proceedings, while acknowledging at the same time that it was impossible to reproduce the statement owing to the child's age and the time that had elapsed before the case came to trial. According to the author, the preconstituted evidence consisting of a video-recorded statement by the child that had been viewed during the proceedings was the only possible means of reproducing the minor's statements and should therefore have been recognized as a key item of evidence. Yet the trial courts had invalidated the evidence, leaving the plaintiff defenceless.

3.2 The author also claims that there was a denial of justice as a result of the manifest arbitrariness of the judgements in terms of their evaluation of the evidence. She contends that the courts resorted in their reasoning to *probatio diabolica*, rendering proof impossible, since only a statement to the court by the minor was deemed to constitute sufficient evidence for the prosecution, although such evidence could not possibly be adduced.

3.3 Lastly, she maintains that the order by the Provincial Court to restore contact between the minor and her father as a matter of urgency, reversing the suspension of the visiting arrangements, violates article 24, paragraph 1, of the Covenant, read in conjunction with article 17. She submits that this order leaves the child unprotected, in violation of article 24, paragraph 1. Moreover, in the author's view, it constitutes arbitrary interference with the minor's privacy inasmuch as she is compelled to live with a father who, according to the substantial evidentiary material described in the account of the facts set forth in the judgement, sexually abused the child. She points out that jurisdiction to prescribe measures of protection for the minor lies with the Family Court, which is not bound by the acquittal, although that ruling undoubtedly brings unlawful pressure to bear on the Family Court, since the Murcia Provincial Court is the authority of higher instance.

### **Observations by the State party on admissibility**

4.1 In its observations of 27 April 2006, the State party maintains that the communication is inadmissible as manifestly unfounded and as an abuse of the right of submission of communications as well as on the ground of failure to exhaust domestic remedies.

4.2 The State party notes that the author's complaint concerns an issue of evaluation of evidence, although the evidence was thoroughly analysed by the court that rendered the judgement. The court in question, referring to the evidence consisting of a video recording of the minor's statements made by the Family Court's technical team, held that "her statement lacks evidentiary value because it failed to present the facts as a freely recalled memory, since she was persistently asked leading questions, with positive and negative reinforcement, including suggested answers to which the minor conveniently assented in an attempt to please the adults and have done with a subject in which she had no interest whatsoever. Moreover, the various repetitions of the interview were bound to prove fatal since they entailed the risk that the child would no longer be able to distinguish between what actually happened and the information from others that she had internalized and incorporated in her account". The State party points out that every item of evidence presented during the proceedings was thoroughly and separately evaluated by the Provincial Court, including the statements by the plaintiff and the defendant,

before the judgement of acquittal was rendered. It notes that the Committee's role, as it has acknowledged on numerous occasions, is not to substitute its evaluation of evidence for that of national courts unless their evaluation is manifestly arbitrary or ill-founded. The State party submits that it is clear from a reading of the judgement of acquittal handed down by the Provincial Court that it is based on a thorough analysis that can on no account be branded as arbitrary.

4.3 With regard to article 17 of the Covenant, the State party asserts that it was a perfectly logical step for the Provincial Court to stipulate that the judgement of acquittal should be communicated to the Family Court with a view to terminating the measures concerning the visiting arrangements adopted pending the judicial proceedings. It points out that the terms used by the Provincial Court were distorted by the author, the Court having stated: "A certified true copy of this decision shall be communicated to the Family Court (...) for its cognizance and so that it may adopt appropriate decisions, promptly and as a matter of urgency (article 158 of the Civil Code), aimed at normalizing relations between the father and daughter, taking such precautions as it deems fit." The State party maintains that, according to aforementioned article 158, "measures to protect minors can be adopted in any civil or criminal proceedings or in non-contentious jurisdiction proceedings", notwithstanding which the court that rendered the judgement merely communicated its decision to the Family Court so that the latter could make an appropriate ruling.

4.4 The State party points out that, in any case, such measures as the Family Court might have adopted pursuant to the acquittal of which it was informed are not at issue here, since relevant domestic remedies pertaining to the alleged violation of articles 17 and 24 of the Covenant have not been exhausted.

#### **Observations by the State party on the merits**

5. In its observations of 10 July 2006, the State party submits its observations on the merits, reiterating the arguments set out in its observations of 26 April 2006.

#### **Comments by the author**

6.1 In her comments of 16 October 2006, the author claims that the Provincial Court's order to communicate the judgement of acquittal to the Family Court with a view to the urgent resumption of relations between the father and daughter had left her in a state of deep distress. She points out that article 158 of the Civil Code does not require the Family Court to adopt such a measure but that paragraph 4 of the article requires it to take appropriate steps, on its own initiative, to remove the child from danger or harm. The author adds that, although the Family Court did not act on the request contained in the Provincial Court's judgement, she spent years in a state of anxiety, fearing that at any time the father could demand to exercise his right to visit the minor.

6.2 She insists that the existence of sexual abuse can be inferred from the account of the proven facts set out in the judgement, facts that allegedly were not taken into account by the Provisional Court when it handed down its judgement of acquittal, leaving the minor unprotected.

6.3 She asserts that the invalidation of the evidence consisting of the video recording of the minor's statement is arbitrary and sanctions impunity for pederasty.

## **Issues and proceedings before the Committee**

### **Consideration of admissibility**

7.1 Before considering any allegations 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, in accordance with article 5, paragraph 2 (a), of the Optional Protocol.

7.3 The Committee takes note of the State party's allegation that domestic remedies have not been exhausted in the case of the complaint based on articles 17 and 24 inasmuch as the issue of the invalidity of the measures taken by the Family Court regarding the possible restoration of visiting arrangements was not raised before a domestic court. The Committee notes, however, that the author exhausted all available domestic remedies, including an application for *amparo* before the Constitutional Court, on grounds of violation of the minor's right to privacy.

7.4 As to the claim that the communication is inadmissible under article 17, the Committee notes that the complaint is based on the Provincial Court's decision, upheld in cassation by the Supreme Court, denying the validity of the evidence submitted by the author. It is this alleged arbitrariness on the part of the Provincial Court and the Supreme Court, which could constitute a violation of article 14, paragraph 1, that forms the basis of the author's claim of a violation of articles 17 and 24. In the Committee's view, the complaint under these articles has been sufficiently substantiated for the purposes of admissibility.

7.5 With regard to the State party's argument regarding abuse of the right to submit communications, the Committee notes that the State party has failed to substantiate its claim and that, furthermore, there are no grounds to consider that such abuse occurred in the light of the circumstances of the case.

### **Consideration of the merits**

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

8.2 The Committee takes note of the author's allegations to the effect that a denial of justice occurred in the form of alleged arbitrariness in the domestic courts' evaluation of the evidence adduced by the prosecution and, specifically, the invalidation of an item of evidence, the video recording of the minor's statement, which by its very nature could not have been submitted in any other form because of the minor's young age and the delay in bringing the legal proceedings. It also takes note of the State party's allegations that all the evidence, including the video

recording of the minor, was thoroughly analysed by the trial court, which dismissed it on well-reasoned grounds. The Committee refers to its well-established jurisprudence, according to which it is generally for domestic courts to evaluate facts and evidence, unless it can be ascertained that such evaluation was manifestly arbitrary or amounted to a denial of justice.<sup>3</sup>

8.3 The Committee notes that the Provincial Court thoroughly analysed each and every item of evidence adduced by the prosecution, separately and coherently. The Provincial Court's evaluation of the evidence was again thoroughly reviewed by the Supreme Court, which concluded that it had been well-reasoned and adequate. Specifically, with regard to the evidence that the author deemed to be vital, namely the video recording of the minor by the Family Court's technical team, the Committee notes that that evidence was thoroughly analysed by the Provincial Court, which concluded that it was inadequate on account of the circumstances in which it was taken and the minor's young age. The Committee considers that it is not in a position to rule on the soundness of the arguments advanced by the Provincial Court to dismiss the probative value of the evidence, in the light of the Court's detailed reasoning and line of argument. Therefore, the Committee considers that there is insufficient basis for the conclusion that the domestic courts acted arbitrarily in evaluating the evidence.

8.4 Having failed to find a violation of article 14, paragraph 1, the Committee considers that the author's complaints under articles 17 and 24 have no basis in law. The acquittal, by two courts, of the author's husband does not constitute sufficient grounds for finding a violation of the rights contained in articles 17 and 24.

9. In the light of the foregoing, 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 Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

#### Notes

<sup>1</sup> Judgement No. 32/2002 of the Murcia Provincial Court rendered on 21 May 2002, seventh legal ground.

<sup>2</sup> *Ibid.*, *in fine*.

<sup>3</sup> See, *inter alia*, communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision of 3 April 1995, para. 6.2.

## APPENDIX

### **Individual opinion of Committee members Mr. Rajsoomer Lallah, Ms. Christine Chanet and Mr. Prafullachandra Natwarlal Bhagwati**

Insofar as the author's complaint in relation to article 14, paragraph 1 of the Covenant is concerned, it is in our view inadmissible on the following grounds:

- The Covenant does not provide a right to see another person prosecuted (See communication No. 578/1994, *Leonardus J. de Groot v. The Netherlands*, decision adopted on 14 July 1995, which follows the established jurisprudence of the Committee.)
- In prosecutions, article 14, paragraph 1, as indeed the other paragraphs of article 14, has for object the protection of the due process rights of the person accused and not those of the prosecutor
- The author admittedly had rights as a parent to ensure the protection of her child and the Family Court was best equipped to determine any relevant issues in this regard, as explained by the Supreme Court

*(Signed):* Mr. Rajsoomer Lallah

*(Signed):* Ms. Christine Chanet

*(Signed):* Mr. Prafullachandra Natwarlal Bhagwati

[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 present report.]

**Individual opinion of Committee member Ms. Ruth Wedgwood  
and Sir Nigel Rodley (concurring)**

In its general practice, the Committee has deferred to the reasoned decisions of national courts as to the evaluation of evidence presented at trial. In the matter currently before the Committee, a very young child was allegedly the victim of serious sexual abuse by one of her parents. A videotaped statement by the child was excluded by the Spanish criminal courts, because it consisted of leading questions and suggested answers, repetitively put to the child, and the child was no longer able to testify to the events in open court because of loss of memory. The Committee defers to this decision, and I concur in the Committee's Views.

But I would add a cautionary note, in regard to the limits of our decision. Children have a moral and legal right to protection against physical and sexual abuse. This right to protection is grounded under articles 7, 9, 17, and 23 of the Covenant. The evidentiary standards applicable to decisions on custody and visitation rights may be quite different from a criminal prosecution.

In the instant case, after the acquittal of the accused parent on criminal charges, the Provincial Court delivered a strong suggestion, if not a mandate, to the family court, that visiting rights with the accused parent should be restored, though the particular arrangements were to be determined by the family court. The family court declined to follow the views of the Provincial Court.

In this directive, the Provincial Court apparently overlooked the fact that the evidentiary standards applicable to a decision on visiting rights are appropriately quite different from the nearly perfect proof required for a criminal case. Thus, the applicant in this case, acting on behalf of the daughter, had a basis to complain that the right to protection enjoyed by every child should not be overlooked, even in the face of a criminal acquittal.

*(Signed):* Ms. Ruth Wedgwood

*(Signed):* Sir Nigel Rodley

[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 present report.]

**W. Communication No. 1461/2006, Maksudov v. Kyrgyzstan  
Communication No. 1462/2006, Rakhimov v. Kyrgyzstan  
Communication No. 1476/2006, Tashbaev v. Kyrgyzstan  
Communication No. 1477/2006, Pirmatov v. Kyrgyzstan  
(Views adopted on 16 July 2008, ninety-third session)\***

<i>Submitted by:</i>	Mr. Zhakhongir Maksudov and Mr. Adil Rakhimov (represented by counsel, Mrs. Khurnisa Makhaddinova); Mr. Yakub Tashbaev and Mr. Rasuldzhon Pirmatov (represented by counsel, Mr. Nurlan Abdyldaev)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Kyrgyzstan
<i>Date of communications:</i>	2 March 2006 (Maksudov/Rakhimov), 7 June 2006 (Tashbaev) and 13 June 2006 (Pirmatov) (initial submissions)
<i>Subject matter:</i>	Extradition of four recognized refugees from Kyrgyzstan to Uzbekistan despite request for interim measures of protection
<i>Procedural issues:</i>	Non-substantiation of claims; incompatibility <i>ratione materiae</i>
<i>Substantive issues:</i>	Death penalty; torture, cruel, inhuman or degrading treatment or punishment; non-refoulement; arbitrary detention; right to be brought promptly before a judge; right to adequate time and facilities for the preparation of the defence
<i>Articles of the Covenant:</i>	6; 7, read together with 2, paragraph 3; 9, paragraphs 1 and 3; 14, paragraph 3 (b)
<i>Articles of the Optional Protocol:</i>	2 and 3

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

*Meeting on 16 July 2008,*

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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, 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.



*Having concluded* its consideration of communications Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, submitted to the Human Rights Committee by Zhakhongir Maksudov, Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the authors of the communications, and the State party,

*Adopts the following:*

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

1.1 The authors of the communications are Zhakhongir Maksudov, Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov, all Uzbek nationals born in 1975, 1974, 1956 and 1959, respectively. At the time of submission of their cases, all authors were granted refugee status by the Office of the United Nations High Commissioner for Refugees (UNHCR) and were detained in a detention centre (SIZO) of Osh, Kyrgyzstan, awaiting removal to Uzbekistan on the basis of an extradition request from the Uzbek General Prosecutor's Office. They claim violations by Kyrgyzstan of their rights under article 6; article 7, read together with article 2, paragraph 3; article 9, paragraphs 1 and 3; and article 14, paragraph 3 (b), of the International Covenant on Civil and Political Rights.<sup>1</sup> They are represented by counsel, Khurnisa Makhaddinova (Maksudov/Rakhimov) and Nurlan Abdyl daev (Tashbaev/Pirmatov).

1.2 On 6 March 2006 (for Maksudov/Rakhimov), 8 June 2006 (for Tashbaev) and 13 June 2006 (for Pirmatov), in accordance with rule 92 of its rules of procedure, the Human Rights Committee, acting through its Special Rapporteur for new communications, requested the State party not to forcibly remove the authors while their communications are under consideration by the Committee. No reply was received from the State party on the request for interim measures of protection. On 11 August 2006, counsel informed the Committee that all authors had been handed over to the Uzbek law enforcement authorities on 9 August 2006 on the basis of the decision issued by the Kyrgyz General Prosecutor's Office.

1.3 Pursuant to rule 94 of its rules of procedure, the Committee decided to join consideration of the four communications as they are all based on the same facts, and advance the same claims.

#### **The facts as presented by the authors**

##### *Case of Zhakhongir Maksudov*

2.1 At around 5-6 a.m. on 13 May 2005, on his way to work in Andijan, Uzbekistan, Maksudov learnt that a demonstration was taking place in the city's main square. He approached the square at around 7-8 a.m. and observed other people expressing their grievances related to poverty, government repression and widespread corruption. He did not address the gathering. After some time, the demonstrators were fired on; soldiers were indiscriminately shooting into the crowd. In panic and fearing persecution by Uzbek authorities, Maksudov crossed the border into Kyrgyzstan on 14 May 2005.

2.2 Maksudov, together with 524 other individuals who fled Andijan on 13 May 2005, was installed in a tent camp set up along the Uzbek-Kyrgyz border in the Suzak region near Jalalabad (Kyrgyzstan) by UNHCR and administered by the Department of Migration Services under the Kyrgyz Ministry of Foreign Affairs (DMS).<sup>2</sup>

2.3 On 28 May 2005, the Uzbek General Prosecutor's Office issued an authorisation for Maksudov's placement in custody, and his transportation to the detention facility of the Uzbek Ministry of Internal Affairs in the Andijan region. On 28 May 2005, he was charged in absentia with terrorism (article 155, part 3, of the Uzbek Criminal Code), violent attempt to overthrow the Uzbek constitutional order (art. 159, part 3), sabotage (art. 161), organization of criminal community (art. 242, part 2), mass disturbances (art. 244), illegal acquisition of firearms, ammunition, explosives and explosive devices (art. 247, part 3) and premeditated murder (art. 97, part 2).

2.4 Under the terms of the decision of 28 May 2005, Maksudov was accused of participating in a criminal conspiracy which resulted in an attack on the police station of the Andijan Regional Department of Internal Affairs during the night of 12-13 May 2005. Having killed several law enforcement officers and acquired a large quantity of firearms and ammunitions, "terrorists" broke through the gates of Andijan prison, freed and armed prison inmates. They then moved to make armed assaults on the premises of the Andijan Regional Department of the National Security and of the Andijan Regional Administration. In the course of these acts, Maksudov allegedly took hostage the Andijan City Prosecutor and other high-ranking officials of the Andijan regional administration, subjected them to torture and then killed them. The fact of hostage-taking was corroborated by photographs obtained during the preliminary investigation.

2.5 In early June 2005, the Uzbek authorities requested Kyrgyzstan to extradite 33 individuals, including Maksudov; all were charged with having committed crimes under various articles of the Uzbek Criminal Code (see paragraph 2.3). The extradition request was based on the 1993 Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (1993 Minsk Convention) and the 1996 Agreement between Kyrgyzstan and Uzbekistan on the provision of mutual legal assistance in civil, family and criminal matters (1996 Agreement).

2.6 On 9 June 2005, Mr. Maksudov applied for asylum in Kyrgyzstan. On the same day, he was issued a certificate confirming that his application had been registered by the DMS.

2.7 On 16 June 2005, Maksudov, together with 16 other individuals, was taken into custody by Kyrgyz law enforcement officers and placed into the temporary confinement ward (IVS) of the Jalalabad Regional Department of Internal Affairs (Kyrgyzstan) on the basis of the decision of the Uzbek General Prosecutor's Office of 28 May 2005, where the individuals concerned were designated as "terrorists". Maksudov's arrest warrant was issued by the Andijan Regional Prosecutor (Uzbekistan) on 29 May 2005. In violation of the Kyrgyz Criminal Procedure Code (Kyrgyz CPC),<sup>3</sup> the legality of his placement into custody was not examined either by a supervising prosecutor or a court.

2.8 On 16 June 2005, two Kyrgyz lawyers, Makhaddinova and Abdyldaev tried to meet with Maksudov in the IVS premises to brief him on the possibility of legal representation. They were refused access to him, allegedly on the grounds that they had not obtained the authorisation for such a meeting from the Jalalabad Regional Prosecutor.<sup>4</sup> Finally, Abdyldaev managed to secure

Maksudov's request to be represented by him and his colleague but he was prevented from having a discussion with Maksudov by the IVS administration. On an unspecified date, Maksudov was transferred to the SIZO of Osh (Kyrgyzstan). There, both counsel again unsuccessfully attempted to see him. On 22 June 2005, both counsel managed to receive authorisation of the Interregional Specialized Prosecutor's Office for Osh, Jalalabad and Batken regions to meet Maksudov, and on 24 June 2005, Makhaddinova finally met with her client.

2.9 Both counsel tried to access the case file relating to Maksudov's removal at the Jalalabad Regional Prosecutor's Office, but were refused permission to do so. The Deputy Jalalabad Regional Prosecutor explained that the Kyrgyz CPC did not provide for any possibility for an individual under threat of extradition or his representative, to examine the extradition file.

2.10 The DMS examined Maksudov's asylum application from 9 June to 26 July 2005. On 19 July 2005, it established that Maksudov's asylum request was well founded, as he could be persecuted in Uzbekistan, as a participant in and eyewitness of the Andijan events. The DMS recognized that his case fell within the definition of "refugee", within the meaning of article 1 A-2 of the 1951 Convention on the Status of Refugees and article 1 of the Kyrgyz Refugee Law. The DMS then examined information received from the Jalalabad Regional Department of Internal Affairs and the Jalalabad Regional Prosecutor's Office (Kyrgyzstan) about individuals accused of having committed serious crimes on Uzbek territory, including Maksudov. Despite being presented with a photograph where he was shown with three other individuals accompanying the Andijan City Prosecutor on his way to and from the besieged building of the Andijan Regional Administration, Maksudov claimed that he did not know the Andijan City Prosecutor and was unaware of the circumstances of his participation in the demonstration. He added that he did not notice that armed individuals in civilian clothes were present during the demonstration, although this fact was corroborated by numerous witness accounts collected by the international non-governmental organizations (NGOs).<sup>5</sup> These circumstances were interpreted by DMS as an attempt by Maksudov to hide some facts about the demonstration and his participation in it. It concluded, therefore, that Maksudov fell under the exclusion clause of article 1 F-b of the Refugee Convention and his asylum application should be rejected. On 26 July 2005, the DMS issued a decision rejecting Maksudov's asylum application on the basis of article 1 F-b of the 1951 Refugee Convention.

2.11 On 3 August 2005, the DMS decision was appealed to the Interregional City Court of Bishkek by Maksudov's counsel. They submitted that:

(a) There were significant discrepancies between the questionnaire filled in by DMS officials on 28 June 2005 during an asylum interview with Maksudov and notes taken by UNHCR staff present at that same interview. These discrepancies had a negative impact on the DMS decision of 26 July 2005;

(b) Neither DMS nor the Prosecutor's Office provided evidence that Maksudov had personally participated in the attack on the police station or the siege of the Andijan Regional Administration building;

(c) Maksudov's statement that he did not notice armed individuals in civilian clothes during the demonstration was based on what he had seen himself. Although accounts collected by NGOs from other witnesses among the demonstrators suggested the presence of armed

individuals, Maksudov's statement only indicated that there were no armed individuals in his proximity and did not refer to the demonstration as a whole. Moreover, UNHCR staff present during the interview of 28 June 2005 endorsed his description of the facts;

(d) The photograph presented by the DMS and the Prosecutor's Office did not prove that Maksudov directly participated in the killing of the individual shown on it. The materials from the preliminary investigation received from Uzbekistan did not contain any evidence of, nor detailed information on, Maksudov's direct participation in the activities of which he was accused of.

2.12 On 11 August 2005, counsel requested the competent judge to allow Maksudov to be present during the court hearing. This request was rejected. As a result, Maksudov was unable to take part in any court hearings relating to his case. On 18 August 2005, the Interregional City Court of Bishkek annulled the DMS decision of 26 July 2005 and upheld Maksudov's appeal. On 14 October 2005, the DMS appealed the decision of the Interregional City Court of Bishkek on cassation to the Judicial Chamber for Economic and Administrative Cases of the Bishkek City Court (Bishkek City Court).

2.13 On 28 October 2005, Maksudov was granted refugee status by UNHCR. According to a UNHCR note verbale of 28 October 2005 addressed to the Permanent Mission of Kyrgyzstan to the United Nations Office at Geneva, the decision had been made after a thorough review of all circumstances surrounding Maksudov's case, including the assessment of the extradition materials and other elements related to the consideration of the exclusion clauses which UNHCR found not to be applicable. In the same note, UNHCR informed the Kyrgyz authorities that it was prepared to provide a durable solution for Maksudov's case through resettlement to a third country, should he be released from detention.

2.14 On 31 October 2005, Maksudov's counsel filed objections to the cassation appeal lodged by the DMS with the Bishkek City Court.

2.15 On 13 December 2005, the Bishkek City Court quashed the decision of the Interregional City Court of Bishkek of 18 August 2005 and upheld the DMS cassation appeal. On 28 December 2005, Maksudov's counsel filed a request for supervisory review of the ruling of the Bishkek City Court with the Supreme Court. In this appeal, counsel referred, inter alia, to UNHCR decision of 28 October 2005 granting Maksudov refugee status. On 16 February 2006, the Supreme Court upheld the ruling of the Bishkek City Court of 13 December 2005. Under article 359, paragraph 1, of the Kyrgyz Civil Procedure Code, the "resolution of a review instance court becomes executory after its adoption, it is final and cannot be appealed".

#### *Case of Adil Rakhimov*

3.1 On 13 May 2005, Rakhimov learnt from his neighbours that a demonstration was taking place in the city's main square. He approached the square at around 8-9 a.m. He wanted to address the meeting but was unable to do so. The remaining facts of Rakhimov's case are identical to those described in paragraphs 2.1-2.9 above.

3.2 The DMS examined Rakhimov's asylum application from 10 June to 26 July 2005. On 19 July 2005, it established that Rakhimov's asylum request was well founded, as he

could be persecuted in Uzbekistan, as a participant in and eyewitness of the Andijan events. The DMS recognized that his case fell within the definition of “refugee”, within the meaning of article 1 A-2 of the 1951 Convention relating to the Status of Refugees and article 1 of the Kyrgyz Refugee Law. The DMS then examined information received from the Jalalabad Regional Department of Internal Affairs and the Jalalabad Regional Prosecutor’s Office (Kyrgyzstan) about individuals accused of having committed serious crimes on Uzbek territory, including Rakhimov. In the DMS questionnaire of 28 June 2005, Rakhimov stated that he did not know the Andijan City Prosecutor and that he did not see him, in particular, on 13 May 2005. On 18 June 2005 Rakhimov stated in the interrogation protocol that he saw the Andijan City Prosecutor speaking to demonstrators on 13 May 2005, and that he subsequently helped to protect the prosecutor from these demonstrators. The DMS had a photograph on which Rakhimov was shown with other individuals accompanying the Andijan City Prosecutor. He further stated that he did not notice that armed individuals in civilian clothes were present during the demonstration, although this fact was corroborated by numerous witness accounts collected by the NGOs. These circumstances were interpreted by DMS as an attempt by Rakhimov to hide some facts about the demonstration and his participation in it. It thus concluded that Rakhimov fell under the exclusion clause of article 1 F-b of the Convention relating to the Status of Refugees and his asylum application should be rejected. On 26 July 2005, the DMS issued a decision rejecting Rakhimov’s asylum application on the basis of article 1 F-b of the Convention relating to the Status of Refugees.

3.3 On 10 August 2005, the DMS decision was appealed to the Interregional City Court of Bishkek. Rakhimov’s counsel submitted the same arguments as in Maksudov’s case (see paragraph 2.11 above).

3.4 On an unspecified date, Rakhimov’s counsel requested the competent judge to allow Rakhimov to be present during the court hearing; this was rejected. As a result, Rakhimov did not take part in any court hearings relating to his case. On 8 September 2005, the Interregional City Court of Bishkek annulled the DMS decision of 26 July 2005 and upheld Rakhimov’s appeal. On 6 October 2005, DMS appealed the decision of the Interregional City Court of Bishkek to the Bishkek City Court.

3.5 On 28 October 2005, Rakhimov was granted refugee status by UNHCR. The content of UNHCR note verbale was the same as in Maksudov’s case (see paragraph 2.13 above).

3.6 On 31 October 2005, Rakhimov’s counsel filed objections to the cassation appeal lodged by the DMS with the Bishkek City Court.

3.7 On 13 December 2005, the Bishkek City Court quashed the decision of the Interregional City Court of Bishkek of 8 September 2005 and upheld the DMS appeal. On 28 December 2005, counsel filed a request for supervisory review of the ruling of the Bishkek City Court with the Supreme Court. Counsel invoked, inter alia, the UNHCR decision of 28 October 2005 granting Rakhimov refugee status. On 16 February 2006, the Supreme Court upheld the ruling of the Bishkek City Court of 13 December 2005.

#### *Case of Yakub Tashbaev*

4.1 During the night of 12-13 May 2005, Tashbaev, together with other inmates, was freed from Andijan prison by unknown individuals. At that time, he was serving a sentence

of 14 years' imprisonment after being convicted, on 3 May 2005, of possession of drugs (article 273, part 5, of the Uzbek Criminal Code) and fraud (art. 168, part 1). After his escape from prison, Tashbaev participated in the demonstration that took place in Andijan's main square. He did not address the meeting. The remaining facts of Tashbaev's case are identical to those described in paragraphs 2.1-2.2 and 2.6 above.

4.2 On 23 May 2005, the Uzbek General Prosecutor's Office issued an authorisation for Tashbaev's placement in custody, and his transportation to the detention facility of the Uzbek Ministry of Internal Affairs in the Andijan region. On 21 May 2005, he was charged in absentia with terrorism (article 155, part 3, of the Uzbek Criminal Code) and escape from prison (art. 222, part 2).

4.3 Under the terms of the decision of 23 May 2005, Tashbaev was accused of participating in a criminal conspiracy with the members of the illegal *Akramiya* extremist group, which resulted in his escape from Andijan prison and participation in armed assaults on the premises of a number of administrative buildings in Andijan, resulting in the death of several individuals.

4.4 Further to the Uzbek authorities' extradition request to Kyrgyzstan (see paragraph 2.5 above), Tashbaev was taken into custody on 9 June 2005. The remaining facts of Tashbaev's case are identical to those described in paragraphs 2.6-2.7. On 22 June 2005, counsel managed to receive authorisation of the Interregional Specialized Prosecutor's Office for Osh, Jalalabad and Batken regions to meet Tashbaev, the meeting took place on the same day.

4.5 The DMS examined Tashbaev's asylum application from 10 June to 26 July 2005. On 19 July 2005, it established that his asylum request was well founded, as he could be persecuted in Uzbekistan, as a participant in and eyewitness of the Andijan events and as an escapee from Andijan prison. The DMS recognized that his case fell within the definition of "refugee". The DMS then examined information received from the Jalalabad Regional Department of Internal Affairs and the Jalalabad Regional Prosecutor's Office (Kyrgyzstan), according to which Tashbaev was sentenced to 14 years' imprisonment for possession of drugs and fraud and was recognized as particularly dangerous recidivist. On 21 May 2005, he was presented with additional charges of terrorism and escape from prison. During the interview of 21 June 2005, Tashbaev acknowledged that in the past he had been serving yet another prison term from 1996 to 2003 after being found guilty of possession of drugs. He stated, however, that at the time of his escape from Andijan prison during the night of 12-13 May 2005, he was still awaiting trial on the charges of illegal possession of drugs and fraud. Tashbaev further stated that he did not notice that armed individuals in civilian clothes were present during the demonstration, although this fact was corroborated by numerous witness accounts collected by the NGOs. These circumstances were interpreted by DMS as an attempt by Tashbaev to hide some facts about the demonstration and his participation in it. It concluded, therefore, that he fell under the exclusion clause of article 1 F-b of the Convention relating to the Status of Refugees and his asylum application should be rejected. On 26 July 2005, the DMS issued a decision rejecting Tashbaev's asylum application on the basis of article 1 F-b of the Refugee Convention.

4.6 On 3 August 2005, the DMS decision was appealed to the Interregional City Court of Bishkek. Tashbaev's counsel submitted that:

(a) The asylum interview with Tashbaev on 21 June 2005 was conducted by the DMS in the absence of an interpreter and there was no document on file confirming that Tashbaev

refused the interpreter's services. The DSM questionnaire was incomplete; many questions and answers were simply not reflected. The incompleteness of the questionnaire negatively impacted on the DMS's decision of 26 July 2005;

(b) Neither DMS nor the Prosecutor's Office provided evidence that Tashbaev personally participated in the attack on the police station or the siege of the Andijan Regional Administration building. Moreover, the DMS officials did not sufficiently clarify whether there were any armed individuals present at the time when Tashbaev was freed from Andijan prison;

(c) Tashbaev's statement that he did not notice any armed individuals in civilian clothes during the demonstration was based on what he had seen himself. Although accounts collected by NGOs from other witnesses among the demonstrators suggested the presence of armed individuals, Tashbaev's statement only indicated that there were no armed individuals in his proximity and did not refer to the demonstration as a whole;

(d) Materials received from the Jalalabad Regional Prosecutor's Office did not contain any evidence of, nor detailed information on, Tashbaev's direct participation in the terrorist acts.

4.7 On 15 August 2005, counsel requested the competent judge to allow Tashbaev to be present during the court hearing; this was rejected. As a result, Tashbaev was unable to take part in any court hearings relating to his case.

4.8 On 28 October 2005, Tashbaev was granted refugee status by UNHCR. The content of UNHCR note verbale was the same as in Maksudov's case (see paragraph 2.13 above).

4.9 On 26 December 2005, the Interregional City Court of Bishkek upheld the DMS decision of 26 July 2005 and rejected Tashbaev's appeal. On 18 January 2006, Tashbaev's counsel appealed the decision of the Interregional City Court of Bishkek to the Bishkek City Court. Counsel invoked, inter alia, the UNHCR decision of 28 October 2005 granting Tashbaev refugee status.

4.10 On 2 March 2006, the Bishkek City Court upheld the decision of the Interregional City Court of Bishkek of 26 December 2005 and rejected Tashbaev's appeal. On 4 April 2006, counsel filed a request for supervisory review of the ruling of the Bishkek City Court with the Supreme Court. On 25 May 2006, the Supreme Court upheld the ruling of the Bishkek City Court of 26 December 2005.

#### *Case of Rasuldzhon Pirmatov*

5.1 At around 8 a.m. on 13 May 2005, Pirmatov travelled to Andijan from a neighbouring village for business purposes and was on his way to Andijan market when he learnt that a demonstration was taking place in the city's main square. He participated in the demonstration, wanted to address the meeting but his turn did not come. The remaining facts of Rakhimov's case are identical to those described in paragraphs 2.1-2.3 and 2.6 above.

5.2 Under the terms of the decision of 28 May 2005, Pirmatov was accused of participating in a criminal conspiracy which resulted in an attack at the police station of the Department of Internal Affairs of the Andijan region during the night of 12-13 May 2005. Having killed several law enforcement officers and acquired a large quantity of firearms and ammunitions, "terrorists"

broke through the gates of Andijan prison, freed and armed prison inmates. They then moved to make armed assaults on the premises of the Andijan Regional Department of the National Security and of the Andijan Regional Administration.

5.3 Further to the Uzbek authorities' extradition request to Kyrgyzstan (see paragraph 2.5 above), Pirmatov was taken into custody on 16 June 2005. The remaining facts of Pirmatov's case are identical to those described in paragraphs 2.7-2.9.

5.4 The DMS examined Pirmatov's asylum application from 9 June to 26 July 2005. On 19 July 2005, it established that his asylum request was well founded, as he could be persecuted in Uzbekistan, as a participant in and eyewitness of the Andijan events. The DMS recognized that his case fell within the definition of "refugee". The DMS then examined information received from the Jalalabad Regional Department of Internal Affairs and the Jalalabad Regional Prosecutor's Office (Kyrgyzstan) about individuals accused of having committed serious on Uzbek territory, including Pirmatov. In addition, in the interrogation protocol, Pirmatov stated that during the night of 12-13 May 2005 he was at home, whereas during a subsequent asylum interview on 1 July 2005 he said that he had spent that night in his shop. According to the DMS, he provided conflicting statements which gave grounds to suspect that Pirmatov was hiding other information about the events that took place on the night of 12-13 May 2005 and, in particular, his participation in them. Moreover, Pirmatov claimed that he knew the Andijan City Prosecutor, since he was his fellow countryman, and therefore on 13 May 2005 he tried to protect the prosecutor from the demonstrators. Pirmatov claimed that he pulled the prosecutor out of the crowd and pushed him behind the fence of the Andijan Regional Administration. The DMS had a photograph where Pirmatov was shown with three other individuals accompanying the Andijan City Prosecutor on his way to and from the besieged Administration building. During the interview of 28 June 2005, Pirmatov stated that he saw only 5-6 armed individuals in civilian clothes, who were standing, whereas during the interview of 1 July 2005, he said that they were walking and coming from the right side of the Administration building. He did not know anything about the hostages, although presence of hostages was corroborated by numerous witness accounts collected by NGOs. These circumstances were interpreted by the DMS as an attempt by Pirmatov to hide some facts about the demonstration, as well as his refusal to cooperate with the DMS. It concluded, therefore, that Pirmatov fell under the exclusion clause of article 1 F-b of the Refugee Convention and his asylum application should be rejected. On 26 July 2005, the DMS issued a decision rejecting Pirmatov's asylum application on the basis of article 1 F-b of the Refugee Convention.

5.5 On 2 August 2005, the DMS decision was appealed to the Interregional City Court of Bishkek. Pirmatov's counsel submitted the same arguments as in Maksudov's case (see paragraph 2.11, arguments (a), (b), (d) above). In addition, he claimed that discrepancies in Pirmatov's statement about his whereabouts during the night of 12-13 May 2005 were explained by him during the supplementary interview. He stated, inter alia, that he was stressed during the interrogation, gave a wrong answer to this question but did not dare to correct it when the protocol was read aloud to him. Moreover, UNHCR staff present during the interview of 28 June 2005 concluded to the veracity of his description of facts.

5.6 On 16 August 2005, counsel requested the competent judge to allow Pirmatov to be present during the court hearing; this was rejected. As a result, Pirmatov was unable to take part



in any court hearings relating to his case. On 14 October 2005, counsel requested the competent judge to postpone examination of Pirmatov's case until the completion of transformation of DMS into the State Committee on Migration and Employment.<sup>6</sup>

5.7 On 28 October 2005, Pirmatov was granted refugee status by UNHCR. The content of UNHCR note verbale was the same as in Maksudov's case (see paragraph 2.13 above).

5.8 On 29 December 2005, the Interregional City Court of Bishkek upheld the DMS decision of 26 July 2005 and rejected Pirmatov's appeal. This decision was adopted in the absence of both Pirmatov's counsel and despite their request of 29 December 2005 to postpone the hearing to another date, as none of them could participate in the hearing. On 13 January 2006, counsel appealed the decision of the Interregional City Court of Bishkek to the Bishkek City Court. Counsel invoked, inter alia, the UNHCR decision of 28 October 2005 granting Pirmatov refugee status.

5.9 On 2 March 2006, the Bishkek City Court upheld the decision of the Interregional City Court of Bishkek of 29 December 2005 and rejected Pirmatov's appeal. On 4 April 2006, Pirmatov's counsel filed a request for supervisory review of the ruling of the Bishkek City Court in to the Supreme Court. On 13 June 2006, the Supreme Court upheld the ruling of the Bishkek City Court of 29 December 2005.

6. In their initial communication, the authors claimed that the Uzbek General Prosecutor's Office provided the Kyrgyz authorities with documents showing that they were charged in absentia, respectively, with terrorism (Tashbaev) and premeditated murder and terrorism (Maksudov/Rakhimov/Pirmatov), for which Uzbek law imposes the death penalty. None of these documents, however, contain any evidence that the authors directly participated in the crimes with which they were charged. Furthermore, the authors challenge veracity of these documents, as Uzbekistan submitted a total of 253 extradition requests with regard to the male population of the Suzak refugee camp on the basis of almost identical charges.

### **The original complaint**

7.1 When the authors' cases were examined by the Kyrgyz courts, the Kyrgyz president had extended a moratorium on the imposition of death penalty until its final abolition, whereas the death penalty at that time still existed in Uzbekistan. According to the authors, the DMS, and subsequently all Kyrgyz courts, concluded that the authors' life and freedom were at risk, should they be returned to Uzbekistan. The authors claim that by extraditing them under these circumstances to Uzbekistan without verifying the veracity of the documents submitted by Uzbek authorities and in circumstances where there is a real risk to their lives, Kyrgyzstan would violate its obligations under article 6 of the Covenant. They refer to the Committee's jurisprudence in *Charles Chitat Ng v. Canada*.<sup>7</sup>

7.2 The authors recall that the prohibition of torture is absolute. The exclusion clauses of the Convention relating to the Status of Refugees are irrelevant for cases in which there is a danger of exposing an individual to torture upon return. They refer to numerous NGO and the United Nations reports confirming that torture is prevalent in Uzbekistan. According to the Report on the Mission to Kyrgyzstan of the Office of the United Nations High Commissioner for Human Rights concerning the events in Andijan, Uzbekistan, 13-14 May 2005, "[t]here is an

urgent need for a stay of deportation to Uzbekistan of the Uzbek asylum-seekers and eyewitnesses of the Andijan events who would face the risk of torture if returned”.<sup>8</sup>

7.3 The authors claim that there is a high risk that they will be subjected to torture and tried in violation of fair trial guarantees, if they are extradited to Uzbekistan. Even if the Kyrgyz authorities received diplomatic assurances from Uzbek authorities that the authors would not be subjected to torture upon extradition, such assurances would not be sufficient. Taking into account that the Kyrgyz authorities had to airlift 450 asylum-seekers from Uzbekistan for resettlement in third countries because they could not guarantee their security on Kyrgyz territory, serious doubts exist as to the capacity of Kyrgyz authorities to guarantee the authors’ security on Uzbek territory. Furthermore, the State party is under an obligation to carry out an independent investigation if there is a suspicion that subsequent to his/her extradition an individual was subjected to torture.

7.4 The authors claim that articles 6 and 7, read together with article 2, paragraph 3, are violated, because the principle of non-refoulement is not included in the exhaustive list of grounds for refusing the extradition request provided by the Kyrgyz Criminal Procedure Code, the 1993 Minsk Convention and 1996 Agreement. Non-refoulement is guaranteed by article 11 of the Kyrgyz Refugee Law but this article is not applied in practice. Furthermore, under article 435 of the Kyrgyz CPC, decisions on extradition of foreign nationals are taken by the Kyrgyz General Prosecutor on the basis of the extradition request. The extradition decision is subject to immediate execution and there are no effective legal remedies to challenge it. The Kyrgyz Civil Procedure Code allows an appeal against actions of public officials who violate Kyrgyz law, but this procedure can only be used after the violation in question has taken place.

7.5 The authors were taken into custody in Kyrgyzstan on the basis of the arrest warrants issued by the Uzbek prosecutor and a letter from the Jalalabad Regional Prosecutor (Kyrgyzstan). Under article 435 of the Kyrgyz CPC, upon receipt of another state’s extradition request, an individual is taken into custody under the procedure established by article 110 of the CPC. This article stipulates that placement in custody may be decided by an investigator or prosecutor, with the approval of a supervising prosecutor and in the presence of a defence lawyer, for crimes punishable by a minimum of three years’ imprisonment. In the authors’ cases, this procedure was not observed, as their placement in custody was not authorised by the Kyrgyz prosecutor and it was done in the absence of their counsel. Under article 435, part 3, of the Kyrgyz CPC, an individual whose extradition was requested should be released if the extradition is not carried out within 30 days after he/she was taken into custody. The authors further claim that article 110 of the Kyrgyz CPC violates article 9, paragraph 3, of the Covenant in that it does not require that anyone detained on a criminal charge is brought promptly before a judge. The authors respectively submit that their rights under article 9, paragraphs 1 and 3, were violated, as all of them were kept in custody for more than a year without being brought before a judge.

7.6 Finally, the authors submit that their right under article 14, paragraph 3 (b), was violated as they were not allowed to communicate with counsel of their choosing between the date of their placement in custody and, respectively, 22 (Tashbaev) and 24 (Maksudov/Rakhimov/Pirmatov) June 2005.

## **Further issues arising following the Committee's request for interim measures**

8.1 On 11 August 2006, the Committee was informed by counsel that all four authors had been handed over to Uzbek law enforcement authorities on 9 August 2006. By letter of 14 August 2006 to the Permanent Mission of Kyrgyzstan to the United Nations Office at Geneva, the Committee, without wishing to prejudice the accuracy of counsel's allegations, reminded the State party's authorities that it considered failure by a State party to comply with the Committee's formal request for interim measures of protection as a serious breach of the State party's obligations under the Optional Protocol. The Committee requested the State party's authorities to inform it without delay about the authors' status and, should the State party's investigation find the counsel's allegation to be correct, to provide the Committee with explanations as soon as possible.

8.2 On 23 August 2006, the State party, in response to the Committee's request for explanations, noted that, by decisions of 16 February 2006 (Maksudov/Rakhimov), 25 May (Tashbaev) and 13 June (Pirmatov) 2006, the Kyrgyz Supreme Court endorsed the findings of the Bishkek City Court, which upheld the DMS decision to deny refugee status to the authors.

8.3 The State party submits that according to evidence presented by Uzbek authorities, Tashbaev had been sentenced to 16 years' imprisonment in 1996. In 2005 he was convicted for drug trafficking and sentenced to 14 years' imprisonment. He was also recognized as being a recidivist. During the Andijan events, he escaped from detention and joined those seeking asylum in Kyrgyzstan. Pirmatov, Rakhimov and Maksudov were accused of taking the Andijan City Prosecutor hostage during the riots in Andijan. He was subsequently assassinated.

8.4 Under Kyrgyz law and the State party's obligations under bilateral and multilateral agreements on legal assistance and under United Nations conventions, the Kyrgyz General Prosecutor's Office decided, on 8 August 2005, to accept the request of the Uzbek General Prosecutor's Office to return the Uzbek citizens in question to Uzbekistan. They would be charged by Uzbek authorities for offences that they had committed prior to their arrival in Kyrgyzstan.

8.5 The State party argues that this decision was taken on the basis of a comprehensive and objective study of all the evidence submitted by Uzbek authorities, which prove that the authors had committed serious criminal offences in Uzbekistan. Under Kyrgyz criminal law, they would be accused of committing acts recognized as serious crimes, incurring deprivation of liberty and, therefore, their extradition to the requesting State is fully justified. The decision by the Kyrgyz General Prosecutor's Office complies with the Refugee Convention, as the provisions of the Convention do not apply to any person with respect to whom there are serious reasons for considering that he has committed a serious non-political crime outside the country of refuge prior to his admission to that country.

8.6 The State party explains that the commitments entered into by Kyrgyzstan in the framework of the Commonwealth of Independent States, the Shanghai Cooperation Organization and bilateral agreements also underpinned its decision to return the authors to Uzbekistan. In particular, the official request from Uzbek authorities was processed in accordance with

Kyrgyzstan's obligations under the 1993 Minsk Convention, the 1996 Agreement, the 1994 agreement on legal assistance and cooperation between the Kyrgyz General Prosecutor's Office and the Uzbek General Prosecutor's Office, and the Shanghai Convention on Combating Terrorism, Separatism and Extremism, adopted on 15 June 2001.

8.7 The Kyrgyz General Prosecutor's Office received assurances from the Uzbek General Prosecutor's Office that a full and objective investigation would be carried out into the authors' cases, and that none of them would be persecuted for political reasons or subjected to torture. Uzbekistan is a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, under which it is obliged to take effective legislative, administrative, judicial or other measures to prevent acts of torture.

8.8 Regarding the allegations of violations of human rights during the extradition process, in particular the right to asylum, the State party recalls that this right may not be invoked in the case of prosecutions arising from non-political crimes. Article 33, paragraph 2, of the Convention relating to the Status of Refugees states that the benefit of that provision may not be claimed by a refugee if there are reasonable grounds to regard him as a danger to the national security of the country in which he is, or who, having been convicted of a particularly serious crime, constitutes a danger to the community of that country. The State party submits that characterisation of a threat to national security is its sovereign right and fully within its domestic jurisdiction, as per Article 2, paragraph 7, of the Charter of the United Nations.

8.9 As explained by the representatives of the Kyrgyz General Prosecutor's Office during a press conference of 11 August 2006, neither Kyrgyz legislation nor international conventions oblige the State party to give prior notice to UNHCR and to authors' counsel of the imminent extraditions. Moreover, UNHCR decision to grant refugee status to them was made without waiting for the judgement of the Kyrgyz Supreme Court on the appeals brought by the authors against Kyrgyz authorities' denial to grant them refugee status.

#### **State party non-response on admissibility and merits**

9. By notes verbales of 6 March 2006 (Maksudov/Rakhimov), 8 June 2006 (Tashbaev) and 13 June 2006 (Pirmatov), 5 September 2006 (Maksudov/Rakhimov/Tashbaev/Pirmatov), 1 February 2007 (Maksudov), 5 February 2007 (Rakhimov/Tashbaev/Pirmatov) and 10 August 2007 (Maksudov/Rakhimov/Tashbaev/Pirmatov), the State party was requested to submit to the Committee information on the admissibility and merits of the communications. The Committee notes that this information has not been received. While acknowledging the State party's response of 23 August 2006 (paras. 8.2-8.9) in relation to the Committee's request for interim measures, the Committee regrets the State party's failure to provide the further information requested with regard to the admissibility or the merits of the authors' 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 authors' allegations, to the extent that these have been properly substantiated.<sup>9</sup>

## **Issues and proceedings before the Committee**

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

10.1 The Committee notes that the State party extradited the authors although their communications had been registered under the Optional Protocol and a request for interim measures of protection had been addressed to the State party in this respect. The Committee recalls<sup>10</sup> 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 permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (art. 5, paras. 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.

10.2 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 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 communications, the authors alleged that their rights under article 6 and article 7 of the Covenant would be violated, should they be extradited to Uzbekistan. Having been notified of the communications, the State party breached its obligations under the Protocol by extraditing the authors before the Committee could conclude its consideration and examination and the formulation and communication of its Views. It is particularly regrettable for the State to having done so after the Committee has acted under rule 92 of its rules of procedure, requesting the State party to refrain from doing so.

10.3 The Committee recalls<sup>11</sup> 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 irreversible measures such as, as in the present case, the authors' extradition undermines the protection of Covenant rights through the Optional Protocol.

### **Consideration of admissibility**

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

11.2 The Committee notes that the same matter is not being examined under any other international procedure, in line with the requirements of article 5, paragraph 2 (a), of the Optional Protocol. 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.

11.3 The Committee has noted that the authors invoke their right under article 14, paragraph 3 (b). The Committee does not consider it necessary to decide the question of admissibility of the communications on the basis of article 14, paragraph 3 (b), *as such*, as the principles underlying that provision are taken into account when considering the other claims of the authors.

11.4 The Committee considers that the remaining part of the authors' allegations, raising issues under article 6 and article 7, read alone and together with article 2, paragraph 3; article 9, have been sufficiently substantiated, for purposes of admissibility, and declares them admissible.

### **Consideration of the merits**

12.1 The Human Rights Committee has considered the communications 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.

12.2 On the question of whether the authors' placement in custody was carried out in conformity with the requirements of article 9, paragraphs 1, of the Covenant, the Committee notes that deprivation of liberty is permissible only when it takes place on such grounds and in accordance with such procedure as are established by domestic law and when this is not arbitrary. In other words, the first issue before the Committee is whether the authors' deprivation of liberty was in accordance with the State party's relevant laws. The authors claimed that contrary to article 110 of the Kyrgyz CPC their placement in custody was not authorised by the Kyrgyz prosecutor and was done in the absence of their counsel and therefore violated relevant domestic provisions. In the absence of a reply from the State party, due weight must be given to the authors' allegations, to the extent that they are substantiated, and it must be assumed that the events occurred as described by the authors. Consequently, the Committee finds a violation of article 9, paragraphs 1, of the Covenant.

12.3 Under the above circumstances and in the light of the finding of a violation of article 9, paragraph 1, the Committee does not deem it necessary to separately examine the authors' claims under article 9, paragraph 3.

12.4 As to whether the authors' extradition from Kyrgyzstan to Uzbekistan exposed them to a real risk of torture or other ill-treatment in the receiving State, in breach of the prohibition of *refoulement* contained in article 7 of the Covenant, the Committee observes that the existence of such a real risk must be decided in the light of the information that was known, or ought to have been known, to the State party's authorities at the time of the extradition, 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 determining the risk of such treatment in the present cases, the Committee must consider all relevant elements. The existence of assurances, their content and the existence and implementation of enforcement mechanisms are all elements which are relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment existed. In this regard, the Committee reiterates that States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.<sup>12</sup> This principle should not be subject to any balancing with considerations of national security or the type of criminal conduct an individual is accused or suspected of.

12.5 The Committee considers at the outset that it was known, or should have been known, to the State party's authorities at the time of the authors' extradition that there were widely noted and credible public reports that Uzbekistan resorted to consistent and widespread use of torture against detainees<sup>13</sup> and that the risk of such treatment was usually high in the case of detainees held for political and security reasons. In the Committee's view, these elements in their combination show that the authors faced a real risk of torture in Uzbekistan if extradited. Moreover, the offences for which the authors were sought by Uzbekistan were punishable by death in that country. Given the risk of a conviction and death sentence being procured by treatment incompatible with article 7, there was also a similar risk of a violation of article 6, paragraph 2, of the Covenant. The procurement of assurances from the Uzbek General Prosecutor's Office, which, moreover, contained no concrete mechanism for their enforcement, was insufficient to protect against such risk. The Committee reiterates that at the very minimum, the assurances procured should contain such a monitoring mechanism and be safeguarded by arrangements made outside the text of the assurances themselves which would provide for their effective implementation.<sup>14</sup>

12.6 The Committee recalls<sup>15</sup> that if a State party removes a person within its jurisdiction to another jurisdiction and there are substantial grounds for believing that there is a real risk of irreparable harm in the other jurisdiction, such as that contemplated by articles 6 and 7 of the Covenant, the State party itself may be in violation of the Covenant. Since the State party has not shown that the assurances procured from Uzbekistan were sufficient to eliminate the risk of torture and of imposition of the death penalty consistent with the requirements of article 6, paragraph 2, and article 7, the Committee concludes that the authors' extradition thus amounted to a violation of article 6, paragraph 2, and article 7 of the Covenant.

12.7 As to the claim that no effective remedies were available to challenge the Kyrgyz General Prosecutor's extradition decision of 8 August 2006, the Committee notes that given the presence of a real risk of torture and of imposition of the death penalty, article 2 of the Covenant, read together with article 6, paragraph 2, and article 7, requires that an effective remedy be available for violations of the latter provisions. In this regard, the Committee notes that all of the authors' proceedings in the State party's courts were related to asylum, and not to extradition proceedings. It further notes that Kyrgyz laws do not allow for judicial review of the General Prosecutor's extradition decisions before the extradition takes place and that in the case of the authors these decisions were implemented the following day. The Committee recalls that by the nature of *refoulement*, effective review of an extradition decision must have an opportunity to take place prior to extradition, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning.<sup>16</sup> The absence of any opportunity for effective, independent review of the decision to extradite in the authors' cases accordingly amounted to a breach of article 6, paragraph 2, and article 7, read together with article 2, of the Covenant.

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation by Kyrgyzstan of the authors' rights under article 9, paragraph 1; article 6, paragraph 2, and article 7, read alone and together 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.

14. 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 adequate compensation. The State is requested to put in place effective measures for the monitoring of the situation of the authors of the communication. The State party is urged to provide the Committee with updated information, on a regular basis, of the authors' current situation. The State party is also under an obligation to prevent similar violations in the future.

15. 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 180 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 present report.]

### Notes

<sup>1</sup> The Optional Protocol entered into force for the State party on 7 January 1995.

<sup>2</sup> On 22 September 2005, the Department of Migration Services under the Kyrgyz Ministry of Foreign Affairs was transformed by the Resolution of the Zhogorku Kenesh (Parliament) into the State Committee on Migration and Employment of the Kyrgyz Republic.

<sup>3</sup> The author refers to Article 104 of the Kyrgyz CPC (correctly: article 110 of the read together with article 435 of the same Code).

<sup>4</sup> Reference is made to article 17 of the Law "On the Procedure and Conditions of Keeping in Custody of Individuals Detained on the Suspicion and Accused of Having Committed Crimes".

<sup>5</sup> Reference is made to the Human Rights Watch Publication "Bullets Were Falling Like Rain", the Andijan Massacre, May 13, 2005.

<sup>6</sup> Note 2 above.

<sup>7</sup> Communication No. 469/1991, *Charles Chitat Ng v. Canada*, Views adopted on 5 November 1993, para. 14.1.

<sup>8</sup> E/CN.4/2006/119, para. 55.

<sup>9</sup> See, e.g., communication No. 1208/2003, *Kurbonov v. Tajikistan*, Views adopted on 16 March 2006, para. 4.

<sup>10</sup> See communication No. 869/1999, *Piandiong et al. v. the Philippines*, Views adopted on 19 October 2000.



<sup>11</sup> See communication No. 964/2001, *Saidova v. Tajikistan*, Views adopted on 8 July 2004.

<sup>12</sup> Human Rights Committee, general comment No. 20 (1992): Prohibition of torture and cruel treatment or punishment (art. 7), para. 9.

<sup>13</sup> Report of the Special Rapporteur on the question of torture, Theo van Boven, on the mission to Uzbekistan (E/CN.4/2003/68/Add.2); and E/CN.4/2006/119 (note 8 above).

<sup>14</sup> See communication No. 1416/2005, *Alzery v. Sweden*, Views adopted on 25 October 2006, para. 11.5.

<sup>15</sup> Communication No. 469/1991, *Ng v. Canada*, Views adopted on 5 November 1993, para. 6.2; Human Rights Committee, general comment No. 31 (2004): The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 12.

<sup>16</sup> See *Alzery v. Sweden* (note 14 above), para. 11.8.

**X. Communication No. 1463/2006, *Gratzinger v. The Czech Republic*  
(Views adopted on 25 October 2007, ninety-first session)\***

<i>Submitted by:</i>	Peter and Eva Gratzinger (not represented by counsel)
<i>Alleged victim:</i>	The authors
<i>State party:</i>	Czech Republic
<i>Date of communication:</i>	12 February 2006 (initial submission)
<i>Subject matter:</i>	Discrimination on the basis of citizenship with respect to restitution of property
<i>Procedural issues:</i>	Another international instance of investigation; abuse of the right of submission
<i>Substantive issues:</i>	Equality before the law and equal protection of the law
<i>Article of the Covenant:</i>	26
<i>Articles of the Optional Protocol:</i>	3, and 5, 2 (a)

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

*Meeting on 25 October 2007,*

*Having concluded* its consideration of communication No. 1463/2006, submitted to the Human Rights Committee by Peter and Eva Gratzinger 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:*

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

1. The authors of the communication are Mr. Peter Gratzinger and Mrs. Eva Gratzinger, both dual United States and Czech citizens of Czech origin and both born in 1949 in the former

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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, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sánchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

Czechoslovakia. 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.<sup>1</sup> They are not represented.

### **Factual background**

2.1 In 1978, the authors bought a house in Liberec, Czechoslovakia. They lived there until 1982, when they fled from Czechoslovakia. In 1983 they were granted refugee status in the United States on the basis of their persecution on political grounds. The same year, a Czechoslovakian court convicted them *in absentia* for the offence of illegally emigrating from the country and sentenced them to forfeiture of property and imprisonment. Their property was transferred to the State and sold to a couple in 1983. In 1989 the authors became United States citizens, thereby losing their Czech citizenship pursuant to a bi-lateral treaty, the 1928 Naturalization Treaty. On several occasions since the fall of the communist regime in 1989, they allegedly attempted to reclaim Czech citizenship, which was repeatedly denied by Czech authorities. The authors reacquired Czech citizenship in 2000.

2.2 On the basis of Act No. 119/1990 Coll. on Judicial Rehabilitation, which rendered null and void all sentences handed down by Communist courts for political reasons, the judgment that had sentenced the authors to forfeiture of property was quashed *ex lege*. Persons whose property had been confiscated were eligible to recover their property, subject to conditions spelled out in a separate restitution law, Act No. 87/1991 on extra-judicial rehabilitation, which entered into force on 1 April 1991.

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 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 requested the current owners of their property to return it, which they refused to do. In January 1995, they applied for the restitution of their property to the Court in Liberec under restitution Act 87/1991. On 30 September 1996, the court denied their application on the ground that they were not Czech citizens. The Court noted that the authors had failed to demonstrate that the owners had acquired their property on the basis of an unlawful advantage. On 13 February 1997, the District Court of Ustí dismissed their appeal on the same ground. Both in the original petition and in the appeal the authors argued that the condition of citizenship was unreasonable under the Covenant and invoked the Committee's Views in the case of *Simunek et al. v. Czech Republic*.<sup>2</sup> On 2 September 1997 the Constitutional Court dismissed their constitutional appeal, based on the right to protection of property, as being manifestly ill-founded.

2.6 The authors applied to the European Commission on Human Rights, alleging inter alia violations of article 1 of Protocol No. 1 (right to property) and article 14 (non-discrimination) of the European Convention. On 10 July 2002, the European Court of Human Rights declared the author's complaint inadmissible.<sup>3</sup> The court held that the authors did not have the status of owners, but were merely claimants, and declared their claim under article 1 of Protocol 1 of the European Convention inadmissible *ratione materiae*. It concluded that article 14 of the European Convention, which has no independent existence since it has effect solely in relation to the enjoyment of the rights and freedoms safeguarded by the Convention, was not applicable to the authors' case.

### **The complaint**

3. The authors claim a violation of article 26 of the Covenant, because they were discriminated against on the basis of their citizenship. They invoke the Committee's case law on the subject of discrimination in property restitution claims against the Czech Republic.

### **The State party's submission on admissibility and merits**

4.1 On 4 September 2006, the State party commented on the admissibility and merits of the communication. On the facts, the State party submits that despite the Naturalisation 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 three years and seven months the authors waited after the decision of the European Court of Human Rights (ECHR) of 10 July 2002 before submitting their case to the Committee on 12 February 2006. While acknowledging that there is no explicit time limit for the submission of communications to the Committee, the State party refers to the Committee's jurisprudence<sup>4</sup> according to which a reasonable and objectively understandable explanation should be provided to justify such a delay.

4.3 On the merits, the State party refers to its observations made in earlier property restitution cases considered by the Committee,<sup>5</sup> 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 judgments of the Constitutional Court, which upheld the constitutionality of the restitution law, specifically the precondition for citizenship. It argues that the authors were themselves responsible for the failure to obtain restitution of their property, as they failed to apply for citizenship within the deadline. Even if they 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 had rejected their claims not only on such ground, but also on the ground that the authors had failed to prove that the new owners had acquired the property in question on the basis of an unlawful advantage.<sup>6</sup>

### **The authors' comments to the State party's observations**

5.1 On 2 November 2006, the authors commented on the State party's submission. They highlight that they fled the country in 1983 because of strong political oppression, due to their refusal to join the Communist Party, the fact that they had acquaintances living in the West, and their Jewish origins. Confiscations during this period were not related to the collectivization of the economy, as the confiscated property was transferred from one private owner to another. It was taken from enemies of the state, such as the authors, and given (or sold at advantageous rates) to collaborators and friends of the Communist regime, such as the current occupants of their home.

5.2 On the admissibility, the authors argue that they have been diligently pursuing the restitution of their home through the Czech and European systems for 15 years. They are unaware of any deadline for submitting their communication to the Committee and submit that it was presented in a timely manner.

5.3 On the merits, with respect to the State party's argument that they could have acquired Czech citizenship in 1991, the authors argue that the fact that a person can change or acquire citizenship does not justify discrimination based on citizenship. Furthermore, the opportunity to obtain restitution was illusory. One of the eligibility requirements during the original restitution period from April to October 1991 was permanent residence. The authors, who resided in the United States, could not have obtained restitution even if they had acquired citizenship by October 1991. The residence requirement was abolished by the Constitutional Court in 1994, and another six-month period was opened for restitution claims. However, only persons who had become citizens by October 1991 could take advantage of the second restitution period. This had the effect of excluding from the applicability of the law political dissidents who had temporarily lost their citizenship as a result of emigration.

5.4 The authors claim that it was impossible for American citizens to reclaim their Czech citizenship until 1999, long after the first and second restitution periods in 1991 and 1994 had expired. When they wished to regain their Czech citizenship between 1990 and 1993, they were told that they could not do so without renouncing their United States citizenship, on the basis of the 1928 Naturalisation Treaty between the United States and the former Czechoslovakia. The Czech citizenship law, Act No. 88/1990 of 28 March 1990, 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.”

This treaty was terminated in August 1997, and in 1999, the government again allowed applications for restoration of citizenship. The authors became citizens in 2000.

## **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 1994, 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 12 February 2006. Thus, a period of three years and seven months passed prior to addressing the Committee. The Committee notes that there are no fixed time limits for the submission of communications under the Optional Protocol, and that delay in submission does not of itself necessarily constitute an abuse of the right to submit a communication.<sup>7</sup> The Committee does not regard the delay to have been so unreasonable as to amount to an abuse of the right of submission in the instant case, 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.<sup>8</sup>

7.4 The Committee recalls its Views in the cases of *Simunek, Adam, Blazek and Des Fours Walderode*,<sup>9</sup> 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."<sup>10</sup> The Committee further recalls its jurisprudence<sup>11</sup> that the citizenship requirement in these circumstances is unreasonable.

7.5 The Committee considers that the principle established in the above cases also applies to the authors of the present communication. It notes the State party's confirmation that the lack of fulfilment of the citizenship criterion was central in dismissing the authors' request for restitution. 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, including compensation if the property in question cannot be returned. The Committee reiterates that the State party should review its legislation and practice 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 180 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 present report.]

### Notes

<sup>1</sup> 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.

<sup>2</sup> Communication No. 516/1992, *Simunek et al. v. Czech Republic*, Views adopted on 19 July 1995.

<sup>3</sup> European Court of Human Rights, application No. 39794/98, *Peter Gratzinger and Eva Gratzinger v. the Czech Republic*, decision of 10 July 2002.

<sup>4</sup> Communication No. 787/1997, *Gobin v. Mauritius*, decision on admissibility of 16 July 2001, para. 6.3.

<sup>5</sup> Communication No. 586/1994, *Adam v. the Czech Republic*, Views adopted on 23 July 1996.

<sup>6</sup> According to section 4, subsection 2 of Act No. 87/1991.

<sup>7</sup> See *Gobin v. Mauritius* (note 4 above), 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.

<sup>8</sup> See communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, para. 13.

<sup>9</sup> See *Adam v. Czech Republic* (note 5 above), para. 12.6; communication No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, para. 5.8, and communication No. 747/1997, *Des Fours Walderode v. Czech Republic*, Views adopted on 30 October 2001, para. 8.3.

<sup>10</sup> See *Adam v. Czech Republic* (note 5 above), para. 12.6.

<sup>11</sup> See *Simunek v. Czech Republic* (note 2 above), para. 11.6.



**Y. Communication No. 1466/2006, *Lumanog and Santos v. The Philippines*  
(Views adopted on 20 March 2008, ninety-second session)\***

<i>Submitted by:</i>	Lenido Lumanog and Augusto Santos (represented by counsels, Soliman M. Santos, and Cecilia Jimenez).
<i>Alleged victim:</i>	The authors
<i>State Party:</i>	Philippines
<i>Date of communication:</i>	7 March 2006 (initial submission)
<i>Subject matter:</i>	Delay in the review of a conviction imposing death penalty.
<i>Procedural issues:</i>	Exhaustion of domestic remedies; non-substantiation of claim.
<i>Substantive issues:</i>	Right to be tried without undue delay; right to review of the conviction and sentence by a higher tribunal; right to equality before the courts and tribunals; death penalty, prolonged detention with detrimental effect on the author's health.
<i>Articles of the Covenant:</i>	6, paragraph 1; 9, paragraph 1; 14, paragraphs 1, 3 (c) and 5.
<i>Articles of the Optional Protocol:</i>	2, 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 2008,*

*Having concluded* its consideration of communication No. 1466/2006, submitted to the Human Rights Committee on behalf of Mr. Lenido Lumanog and Mr. Augusto Santos for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the authors of the 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 Chanut, 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, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

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

1.1 The authors of the communication are Mr. Lenido Lumanog and Mr. Augusto Santos, Filipino nationals who, at the time of the submission of the communication, were on death row, at New Bilibid Prison, Muntinlupa City, the Philippines. They claim to be victims of a violation by the Philippines of articles 6, paragraph 1; 9, paragraph 1; 14, paragraphs 1, 3 (c) and 5; and 26 of the Covenant. They are represented by counsels, Soliman Santos and Cecilia Jimenez.

1.2 The Covenant entered into force for the State party on 23 January 1986 and the Optional Protocol on 22 November 1989. On 20 November 2007, the State party ratified the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty.

### **Legal background**

2.1 Criminal trials for alleged murder in the State party are conducted by regional trial courts having jurisdiction over the place where the crime was committed. Before 2004, criminal convictions by regional trial courts imposing the death penalty, *reclusion perpetua* and life imprisonment were automatically appealed to the Supreme Court, i.e. even if the accused did not appeal. Cases involving other kind of convictions could be appealed to the Court of Appeals and eventually in case of confirmation of the conviction - to the Supreme Court. However, in its judgment *People of the Philippines v. Mateo*, of 7 July 2004, the Supreme Court revisited and amended its previous rule on automatic review, pursuant to the Supreme Court's power to promulgate rules of procedure in all courts under article VIII, section V of the Philippine's Constitution.

2.2 According to the Court "if only to ensure utmost circumspection before the penalty of death, *reclusion perpetua* or life imprisonment is imposed, the Court now deems it wise and compelling to provide in these cases a review by the Court of Appeals before the case is elevated to the Supreme Court ... A prior determination by the Court of Appeals on, particularly, the factual issues would minimize the possibility of an error in judgment." Thus, all death penalty cases which had not yet been decided when the "*Mateo*" judgment was issued, were transferred to the Court of Appeals for review.

### **The facts as submitted by the authors**

3.1 The authors and three other individuals were sentenced to death for the murder of former Colonel Rolando Abadilla, occurred on 13 June 1996, by judgment of the Regional Trial Court (RTC) of Quezon City, Branch 103, in Criminal Case No. 96-66679-84 of 30 July 1999. They have been in detention since June 1996. After their motions for reconsideration and new trial were rejected by the RTC in January 2000, the case was transmitted to the Supreme Court in February 2000 for automatic review (appeal) of the death penalty.

3.2 All defence and prosecution appeals briefs for the purpose of the Supreme Court review were filed by June 2004. Soon after the last appeal brief, on 6 July 2004, the authors filed a "*Consolidated Motion for Early Decisions*". On 10 December 2004, they filed a "*Motion for Early Decision*", which was responded to by Supreme Court is resolution of 18 January 2005.

3.3 In the latter resolution, the Supreme Court transferred the case to the Court of Appeals for appropriate action and disposition, in conformity with its new jurisprudence pursuant to the judgment in “*Mateo*”.

3.4 As a result, the authors filed an “*Urgent Motion for Reconsideration of Transfer to the Court of Appeals*” on 24 February 2005, stressing that the jurisprudence in “*Mateo*” should not be applied automatically to each death penalty case, but rather take into account the specific circumstances of each case. Furthermore, it was argued that the Supreme Court was in a position to proceed with the review of the case.

3.5 The Supreme Court rejected the motion on 29 March 2005 for lack of merits. A new similar and more substantiated request to reconsider the Supreme Court’s decision was filed on 2 June 2005, but by resolution of 12 July 2005 the Supreme Court reiterated its decision to transfer the case to the Court of Appeals, declaring that its decision was “in conformity with the *Mateo* decision”.

3.6 The review of the case has been pending before the Court of Appeals since January 2005. Having lost the possibility of an earlier decision before the Supreme Court, the authors filed a “*Joint Motion for Early Decision*” on 12 September 2005. By resolution of the Court of Appeals, the case was remitted for decision on 29 November 2006. On 11 January 2007, due to internal organizational matters of the Court of Appeals, the criminal case concerning the authors (*Cesar Fortuna et al.*) was transferred to a newly appointed judge in the Court.<sup>1</sup>

3.7 With respect to Mr. Lumanog only, it is submitted that he was denied interlocutory relief while the case was pending before the Supreme Court. The Court denied his “*Motion for New Trial and Related Relief*” by resolution of 17 September 2002, even though its jurisprudence in death penalty cases allowed a new trial in other precedents like “*The People of Philippines v. Del Mundo*”, of 20 September 1996. In a subsequent resolution dated 9 November 2004, the Supreme Court denied another motion filed by Mr. Lumanog, who had become a kidney transplant patient in 2003 and asked the Court to be returned to the specialist kidney hospital where he was treated as a patient in 2002 instead of being placed in the prison’s general hospital. Mr. Lumanog went back to his cell, on his own request, as he preferred the conditions there to those of the prison’s hospital.

### **The complaint**

4.1 The authors claim to be victims of a violation of articles 6 paragraph 1; 9, paragraph 1; and 14, paragraphs 1, 3 (c) and 5; and 26 of the Covenant.

4.2 The authors indicate that their complaint does not concern the judgment of the RTC of Quezon City or any other deliberations on the merits of their conviction. Their complaint is limited to the alleged violations of the Covenant caused by the transfer of their case from the Supreme Court to the Court of Appeals.

4.3 The authors claim that the decision of the Supreme Court not to review their case and transfer it to the Court of Appeals violates article 14, paragraph 5 of the Covenant insofar as it violates their right to have their conviction and sentence reviewed by a higher tribunal. They argue that the right to appeal involves a right to an effective appeal. A review of a case which

has been pending for five years before the Supreme Court and then is transferred to the Court of Appeals which has no knowledge of the case and should start to study the files anew, makes the right to review ineffective.

4.4 The authors claim that the same issue constitutes a violation of article 14, paragraph 3 (c) of the Covenant, since their case had been pending for five years before the Supreme Court and was ready for a decision when it was transferred to the Court of Appeals, thereby unduly delaying the hearing. The case has been pending before the Court of Appeals since January 2005.

4.5 The authors further claim that the Supreme Court's decision violates article 14, paragraph 1 read together with article 26 of the Covenant, because in similar cases (i.e. "*The People of Philippines v. Francisco Larrañaga*", of 3 February 2004), the Supreme Court denied to refer the case to the Court of Appeals and decided to review itself the case. Furthermore, with respect to Mr. Lumanog, it is submitted that the denial of his motions for a new trial and for return to a specialist hospital as a kidney transplant patient was discriminatory and violated article 14, paragraph 1 read together with article 26.

4.6 The authors assert that since the notion of a fair trial must be understood to include the right to a prompt trial, all of the above constitutes a violation of article 14, paragraph 1, especially of the right to a fair hearing by an impartial tribunal.

4.7 The authors allege a violation of article 6, paragraph 1 and article 9, paragraph 1, since the alleged violations of article 14 occurred in the context of a death penalty case with prolonged detention which had very detrimental effect on the authors, and notably for Mr. Lumanog.

4.8 By letter dated 28 February 2007, counsels provide supplementary submissions, claiming an aggravation of the alleged violation of articles 6, paragraph 1, and articles 14 paragraphs 3 (c) and 5. According to the authors, the transfer of the case, on 11 January 2007, to a newly appointed judge in the Court of Appeals will create a further delay in the review of the case, because the new judge will have to study the file anew. These developments are accompanied by the further aggravation of the medical conditions of Mr. Lumanog. A medical report dated 16 February 2007 is submitted in that respect.

4.9 The authors claim that - since the complaint is limited to the decision of the Supreme Court to transfer the review of their case to the Court of Appeals - there is no other domestic remedy to exhaust. Another transfer from the Court of Appeals back to the Supreme Court would only delay further the final decision and be detrimental to the authors.

4.10 The authors request the Committee to recommend that the State party direct the Court of Appeals to swiftly decide on their case in order to remedy as far as possible the delay caused by the Supreme Court's previous transfer of the case. The Committee should advise the Supreme Court to review its position set out in "*Mateo*", especially with respect to old cases which could be easily decided by the Supreme Court.

4.11 The authors further submit that their complaint, as set out above, has not been submitted to any other procedure of international investigation or settlement.

## State party's submission on admissibility and merits

5.1 By note verbale dated 4 July 2006, the State party challenges the admissibility of the communication for non-exhaustion of domestic remedies. It states that the transfer of the authors' case to the Court of Appeals was made pursuant to an amendment to the Revised Rules of Court on Criminal Procedure (sections 3 and 10 of rule 122), providing that when the death penalty is imposed, the case must be considered by the Court of Appeals for Review. This amendment was prompted by the judgment in "*People of the Philippines v. Mateo*" of 7 July 2004, after which all death penalty cases which had not yet been decided by the Supreme Court were automatically transferred to the Court of Appeals for review and consideration.

5.2 The State party notes that the authors never challenged the modification of the Revised Rules of Court on Criminal Procedure in the State's party courts and thus did not duly exhaust domestic remedies, as per in article 5, paragraph 2 (b) of the Optional Protocol.

5.3 On 2 November 2006, the State party submitted comments on the merits of the communication. On the alleged violation of article 14, paragraph 5 of the Covenant, the State party asserts that this claim has no merits, since the authors appealed against the decision of the trial court in conformity with the right of review of conviction by a higher tribunal under article 14, paragraph 5, of the Covenant.

5.4 With regard to the alleged violation of article 14, paragraph 3 (c), the State party argues that only in case of delays in proceedings which are caused by "vexatious, capricious and oppressive delays" such a violation may occur. The case itself was ready for decision only in June 2004, when all briefs necessary for the deliberation were finalized. On 18 January 2005 - i.e. less than one year after the case was ready for a decision - the Supreme Court transferred it to the Court of Appeals following the change of the rules of procedure pursuant to the *Mateo* judgment. The new rules provide that in cases involving the death penalty the Court of Appeals must be seized. Only thereafter, if circumstances so warrant, the case may be sent to the Supreme Court for final disposition. With the modification prompted by the *Mateo* case, an additional layer of jurisdiction is granted for the review of death penalty cases.<sup>2</sup>

5.5 On the authors' claim that their right to equal protection before the law was violated, because in a similar case (*The People of Philippines v. Francisco Larrañaga*), the Supreme Court denied Larrañaga's motion to refer his case to the Court of Appeals and decided the case itself, the State party notes that "*People v. Larrañaga*" was decided by the Supreme Court on 3 February 2004, i.e. five months *before* the "Mateo" ruling. After the decision, the accused Larrañaga filed a motion for reconsideration of his case by the Court of Appeals, but this motion was denied. The State party concludes that the case of "*Larrañaga*" differs substantially from the present one, where the Supreme Court had not yet ruled on any factual matters at the time the "*Mateo*" judgment was handed down.

5.6 With respect to the alleged discriminatory treatment which Mr. Lumanog suffered because of the Supreme Court's denial of his motion for new trial, the State party submits that, under the domestic criminal justice system, the court may grant a new trial only in case of: (a) errors of law or irregularities committed during the trial; (b) discovery of new evidence which the accused could not with reasonable diligence have produced at the trial. In the case quoted by Mr. Lumanog, i.e. "*People v. Del Mundo*", the Supreme Court granted a new trial upon

presentation by the accused of relevant new criminal evidence. In the present case the author has failed to prove the existence of all the elements necessary for a re-trial. Regarding Mr. Lumanog's claim that the denial of his motion for return to the specialist kidney hospital was discriminatory, the State party asserts that the order of the Supreme Court was based on a careful review of all the circumstances of the case, including the medical condition of Mr. Lumanog.

5.7 As to the claim that the authors' prolonged detention, particularly in the case of Mr. Lumanog as a kidney transplant patient, would constitute a violation of article 6, paragraph 1 and article 9, paragraph 1, the State party submits that the detention of the authors occurred pursuant to a lawful judgment rendered by a trial court which afforded all guarantees of due process and found them guilty of murder. The State party recalls that there is no "additional stress in view of the pending death penalty", as the death penalty was abolished in the Philippines on 25 July 2006.

### **Authors' comments**

6.1 On 17 January 2007, the authors submitted their comments on the State party's observations.

6.2 With respect to exhaustion of domestic remedies, they submit that they did challenge internally the modification of the rules of procedure. Thus, two motions were filed on behalf of Mr. Santos: An *Urgent Joint Motion for Reconsideration of Transfer to the Court of Appeals*, filed on 24 February 2005; and an "*Urgent Joint Motion for Explanation and Reconsideration of the resolution of 29 March 2005 Denying Recall from the Court of Appeals*", filed on 2 June 2005. Despite these motions, the Supreme Court did not change the decision to transfer the case to the Court of Appeals. Furthermore, the authors recall that if a new rule of procedure can be modified by case-law - as it happened in "*Mateo*" - then another case-law could create a further modification or amendment. In conclusion, the authors argue that the above-mentioned "*Urgent Motions for Reconsideration*" were the last available domestic remedy, because the Supreme Court is the last and supreme judicial authority.

6.3 On the merits, the authors submit that their main substantive claims relate to article 14, paragraphs 5 and 3 (c), which should be considered jointly by the Committee. With respect to article 14, paragraph 5, they argue that the fact that they appealed the conviction of the trial court does not mean per se that their right to appeal to a higher tribunal was respected. They reiterate that the right to appeal involves a right to an effective appeal, and that the fact that their case was pending for five years before the Supreme Court renders it ineffective. When the case was transferred to the Court of Appeals, the Supreme Court was ready to deal with it. The Court of Appeals, on the contrary, did not have any knowledge of the procedural and factual elements involved.

6.4 The violation of the right to be tried without undue delay under article 14, paragraph 3 (c), is linked to the violation of article 14, paragraph 5. It is submitted that the transfer of the case from the Supreme Court to the Court of Appeals added an additional period of time of more than two years to the five years the case had already been pending at the Supreme Court. The authors are in detention since June 1996 and their case remains under review for reasons not attributable to them.

6.5 On the alleged violation of articles 14 (1) and 26, the authors submit that while it is true that the Supreme Court, in *Larrañaga*, had already reviewed the death penalty conviction decision before the “*Mateo*” ruling was adopted, this decision was not final and could still have been reviewed by the Court of Appeals. The authors further submit that the Supreme Court’s resolution denying Larrañaga’s motion was denied for “lack of merit” rather than on procedural grounds. While it is true that in the State party’s judicial system, it is the Court of Appeals rather than the Supreme Court to deal with questions of fact, the Supreme Court retains always discretionary power to review questions of fact before it. The authors assert that the right to equality before the law was violated because, even in presence of similar circumstances, the Supreme Court refused to decide on their case, while it used its discretionary power to decide on the merits of the *Larrañaga* case.

6.6 On the alleged violation of articles 6, paragraph 1 and 9, paragraph 1, the authors claim that, despite the abolition of the death penalty in June 2006, the right to life should be interpreted extensively, as a right to “quality life”. The conditions of detention of the authors are incompatible with this right. The same argument is applied to the alleged violation of article 9, paragraph 1.

## **Issues and proceedings before the Committee**

### **Considerations 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 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 With respect to the requirement of exhaustion of domestic remedies, the Committee notes that the State party has challenged the admissibility of the communication on the ground that the authors did not challenge the new rules of criminal procedure before the State party’s courts. The Committee considers, however, that domestic remedies have been exhausted insofar as the authors did challenge the transfer of their appeal from the Supreme Court to the Court of Appeals by filing two motions in the Supreme Court on 24 February and 2 June 2005, both of which were rejected.

7.4 In relation to the alleged violation of article 14, paragraph 1, together with article 26 of the Covenant on the ground that in similar cases the Supreme Court refused to refer the case to the Court of Appeals and instead decided to review the case itself, the Committee considers that it has no competence to compare the present case with other cases dealt with by the Supreme Court. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.5 With respect to the alleged violation of articles 14, paragraph 1, and 26 claimed on behalf of author Lumanog only, in relation to the alleged discrimination inherent in the Supreme Court’s decision to deny his motion for a new trial, the Committee also finds the claim inadmissible under article 2 of the Optional Protocol, in view of the fact that it has no

competence to compare the present case with other cases dealt with by the Supreme Court. Regarding the denial of his motion for return to a specialist kidney hospital as a kidney transplant patient, the Committee finds that the allegations have not been sufficiently substantiated and therefore declares this claim inadmissible under article 2 of the Optional Protocol.

7.6 With respect to Mr. Lumanog's claim concerning a violation of article 6, paragraph 1 in that his detention at the National Bilibid Prison is incompatible with his medical status, the Committee notes that despite the medical reports, such claim is not sufficiently substantiated, also in view of his refusal to be placed in the prison's general hospital. Accordingly, the Committee considers this claim inadmissible under article 2 of the Optional Protocol.

7.7 In relation to the alleged violation of article 9, paragraph 1 of the Covenant, the Committee also considers that this part of the communication is inadmissible for lack of substantiation, under article 2 of the Optional Protocol.

7.8 With respect to the alleged violation of article 14, paragraph 5, of the Covenant, the Committee notes that the authors' appeal remains pending before the Court of Appeals, a higher tribunal within the meaning of article 14, paragraph 5, which is seized of the case so as to enable it to review all factual issues pertaining to the authors' conviction. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

7.9 The Committee therefore decides that the communication is admissible only insofar as it raises issues under article 6, paragraph 1, and article 14, paragraph 3 (c), 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 available to it, as provided for in article 5, paragraph 1, of the Optional Protocol.

8.2 With respect to a possible violation of article 6, paragraph 1, the Committee considers that this claim has been rendered moot after the abolition by the Philippine Congress of the death penalty in July 2006.

8.3 In relation to the authors' claim under article 14, paragraph 3 (c), it may be noted that the right of the accused to be tried without undue delay relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgment on appeal.<sup>3</sup> All stages whether at first instance or on appeal, must be completed "without undue delay". Therefore, the Committee must not limit its consideration exclusively to the part of the judicial proceedings subsequent to the transfer of the case from the Supreme Court to the Court of Appeals, but rather take into account the totality of time, i.e. from the moment the authors were charged until the final disposition by the Court of Appeals.

8.4 The Committee recalls that the right of the accused to be tried without undue delay is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests



of justice.<sup>4</sup> In this respect, the Committee notes that, the authors are in continuous detention since 1996 and their conviction, dated 30 July 1999, had been pending for review before the Supreme Court for 5 years before being transferred to the Court of Appeals on 18 January 2005. To date, more than three years have elapsed since the transfer to the Court of Appeals and still the authors' case has not been heard.

8.5 The Committee considers that the establishment of an additional layer of jurisdiction to review death penalty cases is a positive step in the interest of the accused person. However, State parties have an obligation to organize their system of administration of justice in such a manner as to ensure an effective and expeditious disposal of the cases. In the Committee's view, the State party has failed to take into consideration the consequences, in terms of undue delay of the proceedings, that the change in its criminal procedure caused in this case, where the review of a criminal conviction was pending for many years before the Supreme Court and was likely to be heard soon after the change in the procedural rules.

8.6 The Committee is of the view that, under the aforesaid circumstances, there is no justification for the delay in the disposal of the appeal, more than eight years having passed without the authors' conviction and sentence been reviewed by a higher tribunal. Accordingly, the Committee finds that the authors' rights under article 14, paragraph 3 (c) of the Covenant, have 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 reveal a violation of article 14, paragraph 3 (c) 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 the prompt review of their appeal before the Court of Appeals and compensation for the undue delay. The State party is also under an obligation to take measures to prevent similar violations in the future.

11. By becoming a party to the Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and, pursuant to article 2 of the Covenant, the 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. In this respect, the Committee wishes to receive from the State party, within 180 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 present report.]

## Notes

<sup>1</sup> Supplementary information contained in a letter dated 28 February 2007. The State party did not respond to this letter.

<sup>2</sup> On 25 July 2006, the Philippine Congress passed Republic Act No. 9346, abolishing the death penalty.

<sup>3</sup> See general comment No. 32 (2007) on article 14 “Right to equality before courts and tribunals and to a fair trial”, para. 35. See also, for instance, communications No. 526/1993, *Hill v. Spain*, Views adopted on 2 April 1997, para. 12.3; No. 1089/2002, *Rouse v. Philippines*, para. 7.4; and No. 1085/2002, *Taright, Touadi, Remli and Yousfi v. Algeria*, para. 8.5.

<sup>4</sup> See general comment No. 32, para. 35.

**Z. Communication No. 1474/2006, *Prince v. South Africa*  
(Views adopted on 31 October 2007, ninety-first session)\***

<i>Submitted by:</i>	Mr. Gareth Anver Prince (represented by counsel, Prof. Frans Viljoen)
<i>Alleged victim:</i>	The author
<i>State party:</i>	South Africa
<i>Date of communication:</i>	20 October 2005 (initial submission)
<i>Subject matter:</i>	Religious use of cannabis
<i>Procedural issues:</i>	Exhaustion of domestic remedies, other international instance of investigation or settlement; admissibility <i>ratione temporis</i> ; continuing effects
<i>Substantive issues:</i>	Freedom of religion; manifestation of one's religion; indirect discrimination; right of minorities to practise their own religion
<i>Articles of the Covenant:</i>	18, 26 and 27
<i>Articles of the Optional Protocol:</i>	1 and 5, paragraphs (a) and (b)

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

*Meeting on 31 October 2007,*

*Having concluded* its consideration of communication No. 1474/2006, submitted to the Human Rights Committee by Gareth Anver Prince 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, Ms. Christine Chanut, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, 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, 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. Gareth Anver Prince, a South African national born on 6 December 1969. He claims to be the victim of violations by South Africa of his rights under article 18, paragraph 1; article 26; and article 27 of the International Covenant on Civil and Political Rights. The Covenant and its Optional Protocol entered into force for South Africa respectively on 10 March 1999 and 28 November 2002. The author is represented by counsel, Prof. Frans Viljoen.

### Facts as presented by the author

2.1 The author is a follower of the Rastafari religion, which originated in Jamaica and later in Ethiopia, as a black consciousness movement seeking to overthrow colonialism, oppression and domination. There are about 12 000 Rastafarians in South Africa. The use of *cannabis sativa* (cannabis) is central to the Rastafari religion. It is used at religious gatherings and in the privacy of one's home where it does not offend others. At religious ceremonies, it is smoked through a chalice (water-pipe) as part of Holy Communion, and burnt as incense. In private, cannabis is also used as incense, to bathe in, for smoking, drinking and eating. Although not all Rastafarians in South Africa belong to formal organizations, there are four Rastafari houses and a Rastafari National Council.

2.2 The author fulfilled all academic requirements for becoming an attorney. Before being allowed to practise, prospective attorneys in South Africa must, in addition to these academic requirements, perform a period of community service, as required by the Attorneys Act.<sup>1</sup> The author applied to the relevant body (the Law Society of Cape of Good Hope) to register his contract of community service. In its determination of this issue, the Law Society must assess whether the candidate is a "fit and proper person". A criminal record, or a propensity to commit crime, will jeopardize such a finding.

2.3 Under the Drugs and Drugs Trafficking Act and the Medicines and Related Substances Control Act,<sup>2</sup> it is, among others, an offence to possess or use cannabis. These laws allow for exemptions under specified conditions for patients, medical practitioners, dentists, pharmacists, other professionals, or anyone that has "otherwise come into possession" of a prohibited substance in a lawful manner.<sup>3</sup>

2.4 When applying to the Law Society, the author disclosed that he had two previous convictions for possessing cannabis, and expressed his intention, in light of his religious dictates, to continue using cannabis. On this basis, his application for registration for community service was refused. He was thus placed in a position where he must choose between his faith and his legal career.

2.5 The author claimed before the South African courts that the failure of the relevant legislation to make provision for an exemption allowing bona fide Rastafarians to possess and use cannabis for religious purposes constitutes a violation of his constitutional rights under the South African Bill of Rights.<sup>4</sup> On 23 March 1998, the Cape High Court dismissed the author's application for review of the Law Society's decision.<sup>5</sup> On 25 May 2000, the Supreme Court dismissed his appeal.<sup>6</sup> The Constitutional Court delivered two judgments, on 12 December 2000 and 25 January 2002.<sup>7</sup> In the latter, it decided, by a majority of 5 to 4, that although the Drugs Act did limit the author's constitutional rights, such limitations were reasonable and justifiable

under section 36<sup>8</sup> of the Constitution. The minority found unconstitutional the prohibition on the use and possession of cannabis in religious practices which does not pose an unacceptable risk to society and the individual, and considered that the government should allow an exemption.

2.6 In 2002, the author applied to the African Commission on Human and Peoples' Rights. The issue was whether the failure to exempt bona fide Rastafarians from using and possessing cannabis for religious purposes violated the African Charter. In December 2004, the African Commission found no violation of the complainant's rights as alleged.

### **The complaint**

3.1 The author claims a violation of article 18, paragraph 1, of the Covenant, and refers to general comment No. 22 (1993) on freedom of thought, conscience or religion, which states that the concept of worship "extends to ritual and ceremonial acts giving direct expression to belief". The author is a bona fide adherent to Rastafarianism. The use of cannabis is accepted to be an integral part of that religion and fundamental to its practice. The author claims that the State party has a positive obligation to take measures to ensure the de facto protection of his right to freedom of religion.

3.2 He argues that his case differs from the case of *Bhinder v. Canada*,<sup>9</sup> because the justification of the limitation in the present case is much less concrete, and the failure to exempt Rastafarians is based on pragmatic concerns such as the cost and difficulties to apply and enforce an exemption. The author is fully informed and prepared to accept any risk, if any, to him personally. He submits that the legitimate aim of preventing the harm associated with the use of dangerous dependence producing substances does not necessitate a blanket ban on the use and possession of cannabis for religious purposes. The limitation is excessive in that it affects all uses of cannabis by Rastafarians, no matter what the form of use, the amount involved, or the circumstances, while the use of cannabis for religious purposes takes many forms. A tailor-made exemption would not open the floodgates of illicit use; and there is no evidence that an exemption would pose substantial health or safety risks to society at large. The denial of his right to freedom of religion is greater than the necessary to achieve any legitimate aim.

3.3 The author claims to be the victim of a violation of article 26, as the failure to differentiate the Rastafari religion from other religions constitutes discrimination. He is coerced into a choice between adherence to his religion and respect for the laws of the land.

3.4 The author claims that the failure to explore and find an effective exemption for Rastafarians constitutes a violation of article 27. Rastafarianism is essentially collective in nature, as it is a particular way of life, in community with others. This way of life has deep African roots.

3.5 The author contends that his complaint is admissible. His communication is not being examined under another procedure of international investigation or settlement, as the African Commission has already made a finding on the merits. He has exhausted domestic remedies, as his case was examined by the Supreme Court of Appeal and the Constitutional Court.

3.6 The author argues that his claim is admissible *ratione temporis*. Although the judgments of the national courts were issued before the entry into force of the Optional Protocol for the State party in 2002, the alleged violations constitute "continuous violations" with "continuing

effects”, which persist into the period after the entry into force and into the present. The Attorneys Act 53 of 1979 and the Drugs and Drug Trafficking Act 140 of 1992 remaining in force, the legislative framework still presents an obstacle to the author’s free expression of his right to religion. He refers to the case of *Lovelace v. Canada*<sup>10</sup> and argues that his communication concerns the continuing effect of the Attorney’s Act and the Drugs Traffic Act, as a result of which he cannot register for community service with the Law Society.

### **The State party’s submission on admissibility and merits**

4.1 On 24 July 2006, the State party commented on the admissibility of the communication. It argues that domestic remedies have not been exhausted, as the author did not, in his applications to the domestic courts, seek to have the prohibition of cannabis declared unconstitutional and invalid, and to have such prohibitions removed from the respective act for the benefit of the whole population, as is the usual way in challenging legislative provisions which are believed to be inconsistent with the Constitution. He only challenged the constitutionality of the laws prohibiting the use of cannabis in as far as they did not make an exception in the favour of a minority of 10,000 people, permitting the use of cannabis for religious purposes. The State party submits that the reason why the prohibition of possession and use of cannabis remains in force is the result of the author’s misguided approach in the domestic courts.

4.2 The State party contends that the communication is inadmissible *ratione temporis*. The Optional Protocol entered into force for the State party on 28 November 2002. The facts and applications in domestic courts were completed before the entry into force of the Optional Protocol, with the Constitutional Court delivering its final judgment on 25 January 2002. On the author’s argument that the violation has continuous effects because the laws still prohibit the possession and use of cannabis, the State party considers that it to be invalid, because the author did not seek to have the prohibition laws declared unconstitutional and invalid. He cannot therefore claim that the fact that these laws still apply amounts to a continuous violation. The State party refers to the Committee’s jurisprudence<sup>11</sup> according to which continuous effects can be seen as an affirmation of previous alleged violations. It submits that it has not affirmed the concerned provisions of the relevant laws, as they remain unchanged.

4.3 The State party recalls that the same facts were already examined by the African Commission, which found no violation of the African Charter on Human and People’s Rights. The State party suggests that the Committee should broaden its literal interpretation of the concept of “being examined” to address policy issues such as the phenomenon of “appeal” from one body to another, as the risk of “human rights forum shopping”<sup>12</sup> is considerable. It considers that the Committee, in dealing with the present case, has the opportunity to give clear guidance, in an innovative and creative manner, on how it intends to contribute to the maintenance of a credible and respected unified international human rights system.

4.4 On 24 November 2006, the State party commented on the merits. It argues that while its legislation indeed results in a limitation of the right to freedom of religion of Rastafarians, such limitation is reasonable and justifiable in terms of the limitation clause contained in article 18, paragraph 3. Furthermore, it is proportionate to and necessary for the achievement of the legitimate aims provided for in that article, namely the protection of public safety, order, health, morals or the fundamental rights and freedoms of others. The Cape High Court, the

Supreme Court and the Constitutional Court all found that while the legislation the author complained about limited his constitutional rights, such limitation was reasonable and justifiable under section 36 of the State party's Constitution.

4.5 For the State party, the essential question before the Committee is not whether a limitation on the rights of Rastafarians has taken place, but whether such limitation will be encompassed by the limitation clause contained in article 18, paragraph 3. It emphasizes that at the national level, the author did not challenge the constitutionality of the prohibition on the possession and use of cannabis, accepting that it serves a legitimate purpose, but alleged that this prohibition is overbroad and that exemption should be made for the religious use by Rastafarians. In the case before the Cape High Court, it was requested that the possession and use of cannabis for religious purposes by Rastafarians be legalized. On appeal, it was requested that an exemption also be granted for transporting and cultivating cannabis, while the requested exemption became far wider before the Constitutional Court, where importation and transportation to centres of use and distribution to Rastafarians were requested. It follows that the practical relief sought by the author is an exemption to legalize a whole chain of cultivation, import, transport, supply and sale of cannabis to Rastafarians. In practice, the only workable solution would be the creation and implementation of a "legal" chain of supply of cannabis, as an exception and parallel to the illegal trade in cannabis. The majority in the 2002 Constitutional Court judgment found, after thoroughly considering the limitations clause in section 36 of the Constitution and applicable foreign law, that the relief sought could not be implemented in practice.<sup>13</sup>

4.6 In finding that the "blanket" ban on the use of cannabis was proportional to the legitimate aim of protecting the public against the harm caused by the use of drugs, the Constitutional Court evaluated the importance of the limitation, the relationship between the limitation and its purpose, and the impact that an exemption for religious reasons would have on the overall purpose of the limitation, against the author's right to freedom of religion. It took into account the nature and importance of that right in a democratic society based on human dignity, equality and freedom, the importance of the use of cannabis in the Rastafari religion and the impact of the limitation on the right to practise the religion.

4.7 On counsel's reference to the *Bhinder* case and his contention that allowing a permitted exemption for the benefit of Rastafarians would present little danger to public safety or health, the State party reiterates that implementing such a permit system would present practical difficulties, and that it is impossible to prevent a dangerous substance from escaping from the system and threatening the public at large. Medical evidence on the harmful effects of cannabis was considered and accepted by the Constitutional Court as such.<sup>14</sup>

4.8 The State party invokes the Committee's inadmissibility decision in *M.A.B., W.A.T. and J.-A.Y.T. v. Canada*,<sup>15</sup> where it considered that the use of cannabis for religious purposes cannot be brought within the scope of article 18. The State party concludes that there was no violation of article 18.

4.9 With respect to the author's claim under article 26, the State party recalls that distinctions are justified, provided they are based on reasonable and objective criteria, which in turn depends on the specific circumstances and general situation in the country concerned. It refers to Views in *Broeks*,<sup>16</sup> where the Committee held that "the right to equality before the law and to equal

protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.”

4.10 The State party’s legislation and the limitation relating to cannabis apply equally to all, Rastafarians and others. The limitation therefore does not violate the right to equal treatment and equality before the law. The author claims the right to see positive measures adopted, at great financial and administrative cost, in favour of Rastafarians to ensure equality for this group with any other religious groups. However, such special treatment in favour of Rastafarians may be interpreted as a form of discrimination against other groups in society who also feel that they have special needs and legitimate claims to be exempted from certain provisions of domestic legislation. The obligations contained in article 26 relate to equality, non-discrimination and equal protection before the law, norms also enshrined in and protected in terms of the State party’s Constitution. Equal protection in this context does not include an obligation to make exemptions for certain classes of people.

4.11 On the author’s claim under article 27, the State party points out that its Constitution contains the same right framed in almost identical language.<sup>17</sup> It is common cause that the Rastafarians form a religious minority group in South African society. When it decided the issue, the Constitutional Court took into account the protection afforded to minority religious groups, like the Rastafarians, in terms of section 15, paragraph 1,<sup>18</sup> and section 31<sup>19</sup> of the Constitution, and the constitutional protection required by a small, vulnerable and marginalized group like the Rastafarians.<sup>20</sup> The Court concluded that the relief sought by the author was impractical and found that the legislation in question set reasonable and justifiable limitations to the right to freedom of religion, including within its association context provided for in section 31 of the Constitution.

4.12 The State party emphasizes that the author did not act on behalf of Rastafarians as a group before domestic courts or the Committee. In addition, he failed to advance facts before the Committee on which to base his view that Rastafarians as a minority group are being singled out for discrimination. If a right to use cannabis during religious ceremonies does not accrue to a member of a minority group because of reasonable and justifiable limitations, such a right cannot be construed in a collective form, as the same limitations will apply.

### **Authors’ comments to the State party’s observations**

5.1 On 31 January 2007, the author commented on the State party’s submissions, reaffirming that his communication is admissible. On the State party’s argument of inadmissibility *ratione temporis*, he argues that if the violation or its effects continue after the entry into force of the Optional Protocol, then, notwithstanding that it entered into force after the violation itself occurred, a continuing violation should be found and the communication declared admissible.<sup>21</sup> The Constitutional Court expressed its opinion that the legislation in question in the case is constitutional. This legislation remains in force. It can hardly be expected of the author to “affirm” the *same* arguments before the *same* courts related to the *same* legislation - in fact, such an attempt would be met with judicial *res judicata* reply, or that it is moot. In any event, the author remains unable to be registered for his contract of community service, required for practice as an attorney, and thus cannot engage in his chosen profession as a result of his religious convictions.



5.2 On the issue of exhaustion of domestic remedies, the author acknowledges that his case before the South African courts was not to contest the constitutionality of the *general* prohibition against the possession and use of cannabis, but to contest the constitutionality of the relevant legislation only in so far as it does not provide for a circumscribed exemption allowing a particular group, on established religious grounds, to possess and use cannabis. Under South African law, the complainant is entitled to contest the constitutionality of legislation for being excessive and is not required to contest the constitutional validity of a “general provision” *in toto*, as the State party argues. In fact, the Constitutional Court itself characterized the author’s constitutional complaint as one contesting that the “impugned provisions are overbroad”,<sup>22</sup> and dealt with it on these terms.

5.3 On the merits, the author accepts that the right to freedom of religion may reasonably and justifiably be limited. He does not argue that article 18, paragraph 3, of the Covenant is not applicable to this case. While the State party emphasizes the “thorough consideration” of the relevant factors by the Constitutional Court, the author points out that the Court’s finding was narrow, with the Court split 5-4.<sup>23</sup> He contends that the government did not properly consider all the possible forms that an appropriate statutory amendment and administrative infrastructure allowing for a circumscribed exemption could take. Ngcobo J, for the Court minority, noted that the State’s representatives did not suggest “that it would be impossible to address these problems by appropriate legislation and administrative infrastructure”. There is no need to raise the spectre of a “whole chain of cultivation, import, transport, supply and sale” of cannabis, as all that the complainant requests is that his religious use of cannabis be accommodated within the legislative and administrative scheme of existing legislation. The government did not engage in a consultative process to establish how the author’s rights may be accommodated within a workable scheme that does not pose the risks outlined in evidence.

5.4 The author refers to the Committee’s general comment No. 22 (1993) on article 18, according to which limitations imposed on the right to practise or manifest one’s religion must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. He argues that the laws in question<sup>24</sup> are applied in a way that negates the author’s right to practise and manifest his religion in as much as the freedom to use cannabis for religious purposes is denied to him.

5.5 The author submits that if exceptions to the prohibition of the use of cannabis could be made for medical and professional purposes and effectively enforced by the State party, exceptions to the prohibition of the use of cannabis could also be made and effectively enforced on religious grounds with no additional burden on the State party. Its failure and unwillingness to exempt the religious use of cannabis from the prohibition of the law negates the author’s freedom to manifest his religion guaranteed by article 18, and cannot be not justified under article 18, paragraph 3.

5.6 With respect to article 26, the author reiterates that the current legal position constitutes a *de facto* violation of his right to equality, and the government has a duty to correct that situation. He argues that the law outlawing the possession and use of cannabis applies to “everyone”, and does not single out Rastafarians by name, but in its effect it discriminates against them, because it affects *them* and their religion, not everyone else and their religion.<sup>25</sup>

5.7 The author argues that it is for the Committee to decide if his rights were reasonably accommodated. If not, a workable exemption clause has to be found - not by the Committee, but by the State party's Executive. In determining the most workable solution, Parliament will have regard to factors such as financial and administrative cost. These considerations may affect the course it chooses, but cannot justify a violation of the Covenant.

5.8 The author contends that as a member of a religious minority, he can invoke article 27, which requires that someone invoking this provision must be a "person belonging" to such a minority. Although the author may not have acted explicitly "on behalf of" all Rastafarians, both the majority and minority judgments of the Constitutional Court indicate that the author is a member of the Rastafarian community, and that the exercise of his religion has strong communal elements.

5.9 Finally, the author submits that the onus is on the State party to prove that the interest of the State outweighs his own. Its mere assertions that a permit system in the author's favour would be burdensome to enforce is no proof, all the more so since there *are* already exceptions to the general prohibition of use of cannabis under the State party's laws. The restriction on the practise of the Rastafari religion occasioned by the State party's legislation is not reasonable, justifiable or proportionate to the aim of protecting the public in the State party.

## **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 the State party's contention that a similar claim filed by the author in the African Commission on Human and Peoples' Rights was dismissed on the merits in December 2004. However, article 5, paragraph 2 (a), of the Optional Protocol does not constitute an obstacle to the admissibility of the present communication, since the matter is no longer pending before another procedure of international investigation or settlement, and South Africa has not entered a reservation to article 5, paragraph 2, (a), of the Optional Protocol. The clear wording of the provisions of article 5, paragraph 2 (a) militates against the State party's interpretation in paragraph 4.3 above.

6.3 As to the State party's argument that the author has failed to exhaust domestic remedies because he has not brought a general challenge of the law before national courts, the Committee notes that the author brought the claim that Rastafarians should be granted a workable exemption from the general prohibition of the possession and use of cannabis up to the Constitutional Court, the highest court in the State party. As this is precisely the claim argued before the Committee, it concludes that the author has exhausted domestic remedies for the purpose of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 The State party has challenged the admissibility *ratione temporis* of the communication, because the facts and applications in domestic courts were completed before the entry into force

of the Optional Protocol on 28 November 2002, and because it has not affirmed the relevant provisions in the legislation in question. The Committee recalls that it is precluded from examining 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.<sup>26</sup> While the author's complaint was finally decided by the domestic courts before the entry into force of the Optional Protocol, the Committee notes that the author's claims relate to the application of the Drugs and Drug Trafficking Act 140 of 1992 and the Attorneys Act 53 of 1979, which remain in force. The Committee considers that the issue of whether the effects of the challenged legislation, which continue after the entry into force of the Optional Protocol, constitute a violation is an issue closely interwoven with the merits of the case. It is therefore more appropriately examined at the same time as the substance of the author's claims under articles 18, 26 and 27.

6.5 Regarding the State party's reference to the Committee's inadmissibility decision in *M.A.B., W.A.T. and J.A.Y.T. v. Canada*,<sup>27</sup> the Committee considers that the factual and legal position in the present case can and should be distinguished from that in the Canadian case which, it understood, concerned the activities of a religious organization whose belief consisted primarily or exclusively in the worship and distribution of a narcotic drug. Rastafarianism as a religion within the meaning of article 18 is not an issue in the present case. The Committee concluded that such a belief could not be brought within the scope of article 18 of the Covenant.

6.6 For the above reasons, the Committee concludes that the communication is 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 author has claimed a violation of his right to freedom of religion, because the impugned law does not make an exemption to allow him to use cannabis for religious purposes. The Committee recalls that the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts and that the concept of worship extends to ritual and ceremonial acts giving expression to belief, as well as various acts integral to such acts.<sup>28</sup> The Committee notes that the material before it is to the effect that the use of cannabis is inherent to the manifestation of the Rastafari religion. In this regard, it recalls that the freedom to manifest one's religion or beliefs is not absolute and may be subject to limitations, which are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.

7.3 The Committee observes that the prohibition of the possession and use of cannabis, which constitutes the limitation on the author's freedom to manifest his religion, is prescribed by the law (the Drugs and Drug Trafficking Act 140 of 1992). It further notes the State party's conclusion that the law in question was designed to protect public safety, order, health, morals or the fundamental rights and freedoms of others, based on the harmful effects of cannabis, and that an exemption allowing a system of importation, transportation and distribution to Rastafarians may constitute a threat to the public at large, were any of the cannabis enter into general circulation. Under these circumstances the Committee cannot conclude that the prohibition of the

possession and use of drugs, without any exemption for specific religious groups, is not proportionate and necessary to achieve this purpose. The Committee finds that the failure of the State party to grant Rastafarians an exemption to its general prohibition of possession and use of cannabis is, in the circumstances of the present case, justified under article 18, paragraph 3, and accordingly finds that the facts of the case do not disclose a violation of article 18, paragraph 1.

7.4 On the author's claim that the failure to provide an exemption for Rastafarians violates his rights under article 27, the Committee notes that it is undisputed that the author is a member of a religious minority and that the use of cannabis is an essential part of the practice of his religion. The State party's legislation therefore constitutes interference with the author's right, as a member of a religious minority, to practise his own religion, in community with the other members of his group. However, the Committee recalls that not every interference can be regarded as a denial of rights within the meaning of article 27.<sup>29</sup> Certain limitations on the right to practise one's religion through the use of drugs are compatible with the exercise of the right under article 27 of the Covenant. The Committee cannot conclude that a general prohibition of possession and use of cannabis constitutes an unreasonable justification for the interference with the author's rights under this article and concludes that the facts do not disclose a violation of article 27.

7.5 The author argues that he is the victim of a *de facto* discrimination because unlike others, he has to choose between adherence to his religion and respect for the laws of the land. The Committee recalls that a violation of article 26 may result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate. However, such indirect discrimination can only be said to be based on the grounds set out in article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds.<sup>30</sup> In the circumstances of the present case, the Committee notes that the prohibition of the possession and use of cannabis affects all individuals equally, including members of other religious movements who may also believe in the beneficial nature of drugs. Accordingly, it considers that the prohibition is based on objective and reasonable grounds. It concludes that the failure of the State party to provide an exemption for Rastafarians does not constitute differential treatment contrary to article 26.

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 reveal a breach of any articles 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 present report.]

## Notes

<sup>1</sup> Act 53 of 1979.

<sup>2</sup> Act 108 of 1996.

<sup>3</sup> See e.g. section 4 (b) (i), (ii), (iii), (iv) and (v) of the Drugs and Drugs Trafficking Act.

<sup>4</sup> See the sections of the Constitution referred to in para. 4.11 below.

<sup>5</sup> *Prince v. President of the Law Society, Cape of Good Hope and Others* 1998 8 BCLR 976 (C), decided on 23 March 1998.

<sup>6</sup> *Prince v. President, Cape Law Society and Others* 2000 3 SA 845 (SCA), decided on 25 May 2000.

<sup>7</sup> *Prince v. President, Cape Law Society and Others* 2001 2 SA 388 (CC), delivered on 12 December 2000 (*Prince I*) and *Prince v. President, Cape Law Society and Others* 2002 2 SA 794 (CC), decided on 25 January 2002 (*Prince II*).

<sup>8</sup> Section 36 of the Constitution: Limitations of rights

“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

<sup>9</sup> Communication 208/1986, Views adopted on 9 November 1989.

<sup>10</sup> Communication No. 24/1977, Views adopted on 30 July 1981, para. 13.1.

<sup>11</sup> Communication No. 520/1992, *Könye and Könye v. Hungary*, Decision on Admissibility of 7 April 1994, para. 6.4; communication No. 422/1990, *Aduayoum et al. v. Togo*, Views adopted on 12 July 1996, para. 6.2.

<sup>12</sup> The State party refers to an article by J.S. Davidson, “The Procedure and Practice of the Human Rights Committee under the First OP to the ICCPR” *Canterbury Law Review*, 4, vol. 4 (1991), p. 337 para. 342, which is annexed to its submissions.

<sup>13</sup> “There is no objective way in which a law enforcement official could distinguish between the use of *cannabis* for religious purpose and the use of *cannabis* for recreation purposes. It would be even more difficult, if not impossible, to distinguish objectively between the possession of *cannabis* for one or the other of the above purposes” (para. 130).

“There would be practical difficulties in enforcing a permit system ... They include the financial and administrative problems associated with setting up and implementing such a system, and the difficulties in policing that would follow if permits were issued sanctioning the possession and use of *cannabis* for religious purposes” (para. 134).

“The use made of *cannabis* by Rastafari cannot in the circumstances be sanctioned without impairing the State’s ability to enforce its legislation in the interests of the public at large and to honour its international obligation to do so. The failure to make provision for an exemption in respect of the possession and use of *cannabis* by Rastafari is thus reasonable and justifiable under our Constitution” (para. 139).

<sup>14</sup> See para. 13 of the 2002 judgement.

<sup>15</sup> Communication No. 570/1993, Admissibility decision of 8 April 1994.

<sup>16</sup> Communication No. 172/1984, Views adopted on 9 April 1987, para. 13.

<sup>17</sup> Section 31 of the South African Constitution:

“(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community:

- (a) To enjoy their culture, practise their religion and use their language; and
- (b) To form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”

<sup>18</sup> Section 15, para. 1: “Everyone has the right to freedom of conscience, religion, thought, belief and opinion.”

<sup>19</sup> Section 31: “Cultural, religious and linguistic communities

1. Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community:

- (a) To enjoy their culture, practise their religion and use their language; and
- (b) To form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

2. The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”

<sup>20</sup> See para. 122 of the 2002 Constitutional Court decision.

<sup>21</sup> See *Aduayom et al. v. Togo* (note 11 above); and *Lovelace v. Canada* (note 10 above), para. 13.1: “The Committee considers that the essence of the present communication concerns the continuing effect of the Indian Act, in denying Sandra Lovelace legal status as an Indian ... This fact persists after the entry into force of the Covenant, and its effects have to be examined, without regard to their original cause.”

<sup>22</sup> *Prince II* (note 7 above), para. 31.

<sup>23</sup> The majority judgment is by Chaskalson C.J.; with Ackermann J., Kriegler J., Goldstone J. and Yacoob J. concurring. The minority is that of Ncobo J.; with Mokgoro J., Sachs J. and Madlanga A.J. concurring. Only 9 of the 11 Constitutional Court judges participated in this case.

<sup>24</sup> The Drugs and Drug Trafficking Act 140 of 1992 and the Medicines and Related Substances Act 101 of 1965.

<sup>25</sup> The author refers to communication No. 666/1995, *Foin v. France*, Views adopted on 3 November 1999, paras. 8.3-8.8.

<sup>26</sup> See *Lovelace v. Canada* (note 10 above), para. 7.3; communication No. 1367/2005, *Anderson v. Australia*, Decision on Admissibility of 31 October 2006, para. 7.3; and communication No. 1424/2005, *Anton v. Algeria*, Decision on Admissibility of 1 November 2006, para. 8.3.

<sup>27</sup> See para. 4.8 and note 15 above.

<sup>28</sup> See communication No. 721/1996, *Clement Boodoo v. Trinidad and Tobago*, Views adopted on 2 April 2002, para. 6.6.

<sup>29</sup> See *Lovelace v. Canada* (note 10 above), para. 15.

<sup>30</sup> See the Committee’s general comment No. 18 (1989) on non-discrimination and communication No. 998/2001, *Rupert Althammer et al. v. Austria*, Views adopted on 8 August 2003, para. 10.2.

**AA. Communication No. 1482/2006, *M.G. v. Germany*  
(Views adopted on 23 July 2008, ninety-third session)\***

<i>Submitted by:</i>	M. G. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Germany
<i>Date of communication:</i>	26 May 2006 (initial submission)
<i>Subject matter:</i>	Court order for a medical assessment of complainant's capacity to take part in certain legal proceedings
<i>Substantive issues:</i>	Right not to be subjected to cruel, inhuman or degrading treatment or punishment; right not to be subjected to arbitrary or unlawful interference with one's privacy; right to a fair and public hearing by an independent and impartial tribunal
<i>Procedural issue:</i>	Level of substantiation of claim
<i>Articles of the Covenant:</i>	7; 14, paragraph 1; 17
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 23 July 2008,*

*Having concluded* its consideration of communication No. 1482/2006, submitted to the Human Rights Committee on behalf of M. G., 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, 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, 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.

Two individual opinions signed by Committee members Mr. Ivan Shearer and Ms. Ruth Wedgwood are attached to the present decision.



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

1.1 The author of the communication is Ms. M. G., a German national, born on 28 January 1963. She claims to be a victim of violations by Germany<sup>1</sup> of articles 7, 17 and 14, paragraph 1, of the Covenant. The author is currently residing in Paraguay. She was represented by counsel, Mr. Alexander H.E. Morawa, until 15 May 2008, when counsel informed the Committee that he no longer represented the author in the proceedings before the Committee.

1.2 On 18 July 2006, the Secretariat informed the author that the Committee, through its Special Rapporteur on new communications, had decided not to issue a request for interim measures under rule 92 of the Committee's rules of procedure.

### **Factual background**

2.1 The author's parents divorced in 1981. Subsequently, numerous legal proceedings involving family law and civil matters were initiated by and litigated between the author's father, his relatives, and the author.

2.2 In July 2004, three members of the author's family, including her father, filed lawsuits in the Ellwangen Regional Court, asking for an order compelling her to cease and desist making certain statements, as well as for pecuniary damages. On 7 November 2005, the Ellwangen Regional Court, without hearing or seeing the author in person, ordered a medical examination of the author to assess whether she was capable of taking part in the legal proceedings. The Court appointed Professor R. H., a psychiatrist at the Berlin Charité University Hospital, "to undertake all the examinations he deems necessary to assess the physical and mental state of health of the [author]".

2.3 In its order of 7 November 2005, the Court reasoned that the behaviour of the author in the proceedings including her many very voluminous submissions to the court raised doubts as to her capacity to take part in the proceedings, particularly for the following reasons: (a) That, in her submissions, the author had indicated that the legal proceedings she was involved in required her to work up to 20 hours per day for preparing briefs and other documents, and that this had negatively affected, as attested by medical certificates, her health and her life as a whole; despite these negative effects and regardless of the fact that she was represented by counsel she continued to make frequent and voluminous submission without sufficient cause; (b) that the fact that the author had copied her submissions to the Berlin Senator for Justice, the presiding judges of the Berlin Regional Court, the Stuttgart Higher Regional Court and of the Federal Court, the President of the Federal Constitutional Court, and to the European Court of Human Rights indicated that she was under stress and overestimated the importance of the proceedings; and (c) that the author appealed every single decision that she considered disadvantageous also where no comprehensible reasons justifying such appeals were apparent.

2.4 On 22 November 2005, the author filed a complaint against the order of the Ellwangen Regional Court with the Federal Constitutional Court and requested interim protection. The author was not represented by a lawyer in these proceedings. The Court rejected the complaint on 21 December 2005, without stating reasons.

2.5 On 2 December 2005, the author, now legally represented, challenged the order of the Ellwangen Regional Court in a counter statement, claiming that there were no objective reasons

for ordering a medical examination and challenging the absence of an oral hearing prior to issuing the order. She explained that she was involved in numerous lawsuits against members of her father's family. As she had not been represented by a lawyer during part of the proceedings, she could not be blamed for writing lengthier and more frequent letters to explain the context of her lawsuits. She was entitled to present her case as fully as possible and to contact higher courts and international bodies. That she had availed herself of remedies should not lead to such far-reaching consequences as an involuntary medical examination. On 8 December 2005, the Ellwangen Regional Court affirmed its order. It had not been required to hear the author prior to ordering the medical examination, as her procedural conduct and her submissions gave rise to sufficient doubts about her capacity to take part in the proceedings.

2.6 On 2 December 2005, the author challenged the judges of the Ellwangen Regional Court, who had ordered her medical examination without objective reasons and without a prior oral hearing, for bias. On 16 January 2006, the Court, composed of different judges, rejected the challenge, considering that the decision that an oral hearing of the author, who was domiciled in Berlin, was unnecessary in the light of the voluminous case file, did not amount to bias.

2.7 On 22 March 2006, the Stuttgart Higher Regional Court rejected the author's challenge of the judges of the Ellwangen Regional Court, as the author's conduct justified the decision to order an expert opinion. The Court noted that she had pursued her interests with "noticeable vigor" and that her written submissions contained abusive language. The absence of an oral hearing prior to ordering the examination did not violate the author's right to a fair trial, since the Court was required to hear her only before making its final determination on her capacity to take part in the proceedings.

2.8 On 6 April 2006, the author filed a complaint against the decisions of the Stuttgart Higher Regional Court and the Ellwangen Regional Court with the Federal Constitutional Court, in which she also challenged the absence of an early oral hearing. The Court rejected the complaint on 27 April 2006, without giving reasons.

## **Complaint**

3.1 The author claims that the decision ordering her medical examination amounts to degrading treatment and unduly interferes with her right to privacy, in violation of articles 7 and 17 of the Covenant; the absence of an oral hearing prior to issuing the order violated her right to a fair trial under article 14, paragraph 1, of the Covenant.

3.2 The author recalls that the purpose of article 7 of the Covenant is to protect the integrity and dignity of the individual from acts that cause physical pain or mental suffering.<sup>2</sup> Invoking the jurisprudence of the European Court of Human Rights,<sup>3</sup> she argues that treatment is considered "degrading" if it causes feelings of fear, anguish and inferiority capable of humiliating or debasing the victim. An order to be examined against one's will offends the victim's dignity and privacy and places a person, who has never been subjected to a psychiatric assessment, in a "particularly vulnerable position".<sup>4</sup>

3.3 On article 17, the author submits that an involuntary medical examination of one's physical and mental state of health constitutes interference with a person's privacy or integrity. According to the European Court of Human Rights, "[t]he preservation of mental stability is [...] an

indispensable precondition to effective enjoyment of the right to respect for private life”.<sup>5</sup> A compulsory medical examination or treatment is only permissible if it is “a therapeutic necessity”.<sup>6</sup>

3.4 The author emphasizes that only in exceptional circumstances and for compelling reasons may a person be subjected to medical or psychiatric examinations or treatment without his or her explicit consent. As for the standard of proof, the European Court of Human Rights held that the necessity of such interference in the public interest must be “convincingly shown to exist”.<sup>7</sup>

3.5 For the author, the reasons given by the Ellwangen Regional Court as to the necessity of a medical examination were not compelling: (a) While it was true that she was extremely burdened with the workload related to her lawsuits, the fact that she attended to them with such energy was understandable given the financial and other implications of that litigation. Although the typing required for maintaining her case files had caused her dizziness, neck pain and eyesight problems, these *physical* health problems did not justify presuming that she also suffered from *mental* defects. The real reason for the order was probably that the Court itself was burdened by the litigation between her and her family members. The Court had sufficient means at its disposal to streamline, channel, or otherwise restrict the motions and briefs it receives and includes in its case file. Subjecting her to a compulsory medical examination was an excessive and unjustifiable measure under article 14, paragraph 1, of the Covenant. (b) The reason why she had copied her submissions to various higher courts while her case was still pending was not that she was “stressed”. Rather, she wanted to accelerate proceedings and prepare the submission of a complaint to international human rights bodies. The European Court of Human Rights had repeatedly stated that “actual or potential applicants” must not be subjected to pressure designed to discourage them from submitting an application. (c) She was entitled to appeal any unfavourable decision. Even if her extensive use of such appeals may be perceived as an obstacle to the administration of justice, this did not justify subjecting her to a medical examination.

3.6 Subsidiarily, the author argues that the adverse effects of a medical examination on her dignity and her physical and mental integrity exceeded the purpose of such an examination by far.

3.7 The author submits that the right to an oral hearing is an essential element of the due process guarantees in article 14, paragraph 1,<sup>8</sup> especially when a far-reaching order such as involuntary medical examination is concerned, or when there is an imminent threat to the physical and moral well-being of the victim.<sup>9</sup> She concludes that the refusal of the Ellwangen Regional Court to hear or see her in person prior to ordering her medical examination, as well as the decisions of the Stuttgart Higher Regional Court and the Federal Constitutional Court affirming this decision, violated her right to a fair trial under article 14, paragraph 1.

3.8 The author submits that the same matter is not being, and has not been, examined under another procedure of international investigation or settlement, and that she has exhausted all available domestic remedies.

3.9 The author argues that the implementation of the order of a medical assessment of her capacity to take part in the proceedings would constitute an irreversible measure within the meaning of the Committee’s jurisprudence.<sup>10</sup> She recalls that interim measures of protection may be ordered in the context of alleged torture or cruel, inhuman or degrading treatment or punishment within the meaning of article 7 of the Covenant, but also in case of threatened

breaches of the right to privacy,<sup>11</sup> and requests the Committee to ask the State party not to subject her to any non-consensual medical or psychiatric examination, or the threat thereof, before the Committee has considered her case.

### **Additional information from the author**

4.1 On 2 June 2006, the author clarified her request for interim measures, reiterating that she has never undergone any psychiatric examination or treatment. In a medical report dated 15 November 2005, her family doctor confirmed that she has been his patient since 1986 and that “[t]here are no indications that suggest any psychiatric illness or any psychopathological irregularity. [...] her thought processes are entirely organized and well structured.”

4.2 The author clarified that the medical examination ordered by the Ellwangen Regional Court was still pending, but that it would be scheduled shortly, as the Stuttgart Higher Regional Court had dismissed her appeal on 24 May 2006. The Court had held that “an order to take a certain step in the process of taking of evidence to determine the capacity to take part in legal proceedings cannot be reviewed”. An appeal could only be filed after the examination has taken place in order to review the court’s assessment of the expert opinion.

4.3 The author feared the examination because of the unlimited scope of discretion granted to the expert in the court order.

4.4 The author submits that section 56 (1) the German Code of Civil Procedure provides for an ex officio review of the capacity to take part in legal proceedings. Section 144 (1) authorizes the courts to appoint experts for that purpose. Under section 402, the rules governing the testimony of witnesses also apply to the enforcement of an order for an expert to assess evidence. The refusal to submit to an order for examination by a court-appointed expert entails several sanctions: The person refusing to comply with the order must reimburse any costs caused by such refusal, pay a fine, and will be arrested if he or she is cannot pay the fine (section 390 (1)). Upon request by a party, the court must order the arrest of a person who repeatedly refuses to obey an order (section 390 (2)). Under section 390 (b), such arrest is governed by the provisions on the enforcement of civil judgments. An arrest warrant will be issued in case of failure to comply with a court order; the person concerned will be arrested by a bailiff (section 909). The arrest may be ordered for the duration of the court proceedings, but not for longer than six months at a time. The statutes of the federal States provide for compulsory examination and placement measures in case of (presumed) mental disability. The author concludes that she is at a risk of being arrested and forcibly transferred to a psychiatric institution for her examination.

4.5 The author distinguishes between the health effects that she has already sustained as a result of the court order and the possible effects of the pending medical examination on her health. Several medical reports confirmed that she suffers from health problems which are typically caused by anxiety and stress due to extraordinary life circumstances. She claims that her symptoms were caused or at least aggravated by the court order. While the effects of the medical examination on her health could not be predicted with certainty, it was sufficiently documented that her health situation would be aggravated and that she would be in imminent danger of physical collapse. These effects reach the level of “mental suffering”<sup>12</sup> covered by article 7, and unduly interfered with her privacy protected in article 17 of the Covenant.

## **State party's observations on admissibility**

5.1 On 15 August 2006, the State party challenged the admissibility of the communication, arguing that it constitutes abuse of the right of submission of communications and that it is inadmissible *ratione materiae* under article 3 of the Optional Protocol.

5.2 The State party submits that the author failed to inform the Committee that the order of the Ellwangen Regional Court to determine her capacity to take part in legal proceedings only concerned the proceedings against members of her father's family. While the Court had doubts whether she was able to act rationally in relation to these lawsuits, it explicitly stated that there were no such doubts concerning her legal capacity in any other respect. This automatically limited the scope of an expert medical examination of her physical and mental state of health in compliance with the order.

5.3 For the State party, the author attempts to create the erroneous impression that she could be deprived of her liberty for a prolonged time, since the jurisprudence cited by her refers to cases concerning the treatment of patients in compulsory detention in psychiatric institutions. However, the author's commitment to a psychiatric institution, which would be subject to stringent procedural safeguards such as an explicit judicial order, was never an issue. The Court had merely ordered an expert opinion on her capacity to participate in certain legal proceedings. This expert could easily accomplish the task by means of an interview and by reference to the case files.

5.4 The State party rejects the author's assertion that the true reason for the order was the burden that the author's correspondence placed on the Ellwangen Regional Court. The Court provided a full explanation for its doubts about the author's capacity to take part in the proceedings against her family members. Her letters to the court contained serious insults and even threats to the life and health of judges.

5.5 The State party considers that the judicial order of a medical examination, issued in accordance with the law, which serves a legitimate purpose (the proper functioning of the legal system) and is not arbitrary or otherwise disproportionate, does not raise issues under articles 7 and 17 of the Covenant. The author was wrong in assuming that medical examinations against one's will are only permissible in "the overriding interest in preserving that person's mental state of health". Other legitimate purposes also existed. The order of the Ellwangen Regional Court was necessary and justified to protect the proper functioning of the judiciary. It also aimed at preserving the author's mental state of health; the Court was obliged to ascertain at every stage of the proceedings that the parties are able to act rationally in pursuing their rights. The order was proportionate given the minimal interference with the author's rights. Expert opinions on a person's capacity to take part in legal proceedings were frequent in all legal systems.

5.6 Lastly, the State party argues that by ordering an expert opinion to establish whether the author is mentally able to cope with the proceedings, the Court exercised a protective function. Rather than violating article 14, paragraph 1, the order was aimed at securing the preconditions of a fair trial.

## **Additional information from the author**

6.1 On 19 September 2006, the author's counsel informed the Committee that her husband had received a letter dated 1 September 2006 from the Election Office (*Wahlamt*) of the District Authority of Berlin Steglitz-Zehlendorf, advising her that she had been removed from the register of voters following a notification dated 18 August 2006 from the Berlin Citizens and Public Order Department (*Landesamt für Bürger- und Ordnungsangelegenheiten*) that she had been removed from the register of residents with effect from 4 May 2006. In the letter of 1 September 2006, the author was informed that her address had been marked as "unknown" and that "[i]t cannot be ascertained by the Election Office who initiated the removal from the register of residents, nor for what reasons". The letter adds that "a clarification of your registration as a resident can be obtained at any time at any Citizens Office [*Bürgeramt*] in Berlin". However, on 14 September 2006, the author's husband was told by the Citizens Office of Berlin-Mitte, where he tried to have her removal from the register of residents reversed, that nothing could be done about its removal, since a non-disclosure order had been issued concerning the author's address at her request.

6.2 The author's counsel, without however claiming a violation of article 25 of the Covenant, submits that she had been travelling abroad during the past two months in order to recover from her health problems and that her temporary absence does not justify the removal from the register of residents.

## **State party's observations on the merits**

7.1 On 16 January 2007, the State party made observations on the merits and considered the author's claims to be "manifestly ill-founded". It submits that the relevant provisions of the German Code of Civil Procedure are in conformity with the Covenant: section 52 provides that anyone capable of entering into contracts also has the capacity to take part in civil proceedings. There are several grounds for lack of such capacity, including under-age and permanent mental illness. Moreover, a person may lack the capacity to take part in specific proceedings when these proceedings are rooted in disputes which are connected to personal problems of the parties which go beyond the scope of the legal matter at issue. In such cases, if the party concerned does not already have a guardian or other legal representative, the court must appoint a special representative. While it is generally presumed that the parties to civil proceedings have the necessary legal capacity, the court must, in cases of doubt, ascertain whether such capacity exists (section 56). These provisions seek to protect persons unable to follow the proceedings and in no way violate the right to be recognized as a person before the law, as they merely set out the conditions and restrictions on the exercise of civil rights. Far from excluding a party from the proceedings, they ensure that the person concerned is represented by someone.

7.2 The State party argues that nothing in the decision of the Ellwangen Regional Court compelled the author to submit to a psychiatric examination. While sections 402 *et seq.* of the Code of Civil Procedure provided that experts, similar to witnesses, may be compelled to provide evidence, such compulsory measures did not apply to persons who were the object of an expert opinion. The only provision authorizing civil courts to specifically order a party to submit to an expert examination is section 144 (1) of the Code of Civil Procedure. There was no reference to section 144 in the decision of the Ellwangen Regional Court, nor was the author "ordered to undergo" or "to make herself available" for such an examination. The Court merely ordered "that the defendant's capacity to take part in legal proceedings is to be clarified by

seeking a written expert opinion”. Even if the Court had made an explicit order under section 144 (1), the author could not have been compelled to submit to the examination, given the jurisprudence that “[a] party to the proceedings cannot be compelled to undergo an examination as to his or her mental state, except in proceedings for legal incapacitation under sections 654, 656”.

7.3 The State party submits that the only consequence of a refusal by the author to submit to an examination would be that the expert opinion may be prepared on the basis of the files, as well as the expert’s impression of the author’s conduct in court, and that the Court would be free to interpret her action in its assessment of her legal capacity to take part in the proceedings. The consequences of a court finding that the author lacks capacity to take part in the relevant proceedings would be that the case against her would be inadmissible, unless a special representative (normally a lawyer at the seat of the Court) is appointed by the Court on the plaintiff’s request. In that case, the Court would have to inform the author about any procedural developments and serve any documents on her. The State party concludes that the author’s allegations concerning a compulsory medical examination of her physical and mental state of health are without basis, since there is no possibility of her being forced to submit to such an examination.

7.4 The State party argues that the author’s claim under article 14, paragraph 1, is based on the erroneous assumption that the Ellwangen Regional Court had ordered her to submit to an involuntary medical examination of her physical and mental state of health without having heard her in person, whereas the Court never issued such a far-reaching order. While the Court would be required to evaluate the expert opinion in a hearing, providing the author with an opportunity to make submissions and challenge the opinion, this stage has not been reached in the proceedings.

#### **Additional information and author’s comments**

8.1 On 10 February 2007, the author informed the Committee that, on 6 December 2006, the Ellwangen Regional Court had sent a letter to Professor R. H. of the Charité Hospital in Berlin, instructing him to prepare an expert opinion on her physical and mental state of health, summon her to the hospital, and allow the opposing party to attend the examination. By fax of 29 December 2006 sent to the Ellwangen Regional Court, she objected to the letter. The letter had been copied to the opposing party but not to her, and she had only received it by coincidence. On 4 January 2007, Professor R. H. informed the Court that his practice was to prepare expert opinions together with an assistant and that he would ask another colleague to prepare a psychological expert opinion, if necessary. These services would be charged extra, even though the various opinions would be incorporated into the main expert opinion. He would keep the Court informed about the dates of the examination and whether the author had complied with the summons. On 8 January 2007, the Court rejected the author’s objection, as it had not been submitted by a lawyer and because the law did not provide for complaints against decisions to appoint an expert. In a letter dated 13 January 2007, Professor R. H. suggested three possible dates for the examination. On 20 January 2007, the author’s husband replied that she could not come to the hospital on any of the suggested days, since she was travelling in South America and could not be reached. He requested that the appointments be cancelled.

8.2 On 26 April 2007, the author commented on the State party’s observations and denies an abuse of the right of submission on her part. She argues that she has neither submitted “entirely

unsupported [...] allegations”,<sup>13</sup> nor shown gross disregard for the Committee, e.g. by deliberately changing essential facts. Her allegation that the scope of the medical examination was left entirely to the discretion of the expert was not “wrong and misleading”, but was corroborated by the absence of any limitations in the court order and by the fact that, in his letter of 13 January 2007, Professor R. H. had summoned her for a thorough examination and asked her to “prepare herself for further examination appointments [...] which may have to be arranged”. Rather than “insinuating” that she would be deprived of her liberty “for a prolonged time”, she feared that her physical liberty would be restricted during a non-voluntary examination. Even without that element, her rights to dignity and privacy would be infringed.

8.3 On the merits, the author argues that, in practice, it does not make a difference whether a court order to submit to a medical examination is directly addressed to the individual concerned or whether it is directed at a third person who is to subject the individual to said examination. The distinction made by the State party as to the addressee of the order was artificial, since the Ellwangen Regional Court had instructed the expert to “undertake all the examinations he deems necessary [...]”. Based on this authority, the expert summoned her to the medical examination of her physical and mental state of health. Professor R. H. acted as an agent of the State party. Both the general mandate of court-appointed experts, who often determine the outcome of a case, as well as the scope of power given to R. H., grants him broad discretion, without providing for “the legal safeguards against arbitrary application” of the expert’s mandate required by article 17 of the Covenant.<sup>14</sup>

8.4 The author disagrees that her refusal to submit to the examination would not lead to any significant negative consequences. Having to choose between the options of either submitting to the examination, or refusing to do so and letting the expert decide on the basis of the case file, with the risk of being found mentally incapacitated *in absentia*, amounted to coercion. The contention of the State party that the appointed expert could easily accomplish his task by means of an interview and by reference to the case file was refuted by R. H.’s summons for a thorough examination.

8.5 While acknowledging that an *ex officio* review under section 56 of the Code of Civil Procedure of the capacity to take part in legal proceedings may serve the protection of persons who are potentially unable to follow the proceedings and to conduct their case, the author reiterates that none of the reasons given by the court would suffice, either alone or cumulatively, as a justification for ordering her medical examination. The State party’s argument that she submitted “confused” or insulting or threatening statements casting doubt on her “ability to act rationally in the context of these proceedings” is an *ex post facto* attempt to explain why the Ellwangen Regional Court ordered the examination.

8.6 The author submits that subjecting her to an involuntary medical examination was a disproportionate measure given the social stigma attached to being found mentally incapacitated, albeit in the limited context of a single trial. In the absence of any compelling reasons for the court order, the order was arbitrary and unlawful under article 17.

8.7 With regard to her claim under article 7, the author submits that having to choose between obeying expert’s summons or, alternatively, having her capacity to take part in the proceedings examined *in absentia*, resulted in “feelings of fear, anguish and inferiority capable of humiliating and debasing [her]”.<sup>15</sup>



8.8 She argues that the interference with her rights to privacy and dignity had such far-reaching effects on the underlying civil case, that article 14, paragraph 1, would have required an oral hearing prior to ordering the examination, especially since the broad scope of discretion granted to the expert compromised her position to assert her rights. The fact that there would be a main hearing before deciding on her capacity to take part in the proceedings could not cure the absence of a hearing at an early stage where she still could assert her right not to be subjected to an examination.

8.9 Also under article 14, paragraph 1, the author submits that her right to an impartial tribunal has been violated. While ordering an expert opinion on her capacity to take part in the proceedings without having heard or seen her, the Ellwangen Regional Court did not order a similar expert opinion with regard to the other parties to the proceedings, despite the fact that her father had threatened her and her siblings' life, resulting in the termination of his visiting rights. The author provides documents which, in her opinion, constitute *prima facie* evidence questioning her father's capacity to take part in the proceedings. By ordering an examination of only her mental state, the Ellwangen Regional Court had acted in a way that showed bias against her and promoted the interests of one of the parties.

8.10 On 28 April 2008, the author submitted copies of the expert opinion dated 6 December 2007 prepared by Professor R. H. and his assistant Dr. S. R. on the basis of the case file and other documents, concluding that the author should be considered to be incapable of taking part in the legal proceedings initiated by her father and other family members against her.

8.11 On 6 May 2008, the author submitted a copy of her summons for an oral hearing scheduled for 8 May 2008 at the Ellwangen Regional Court.

8.12 On 21 May 2008, the author informed the Committee that she had challenged the judges of the Ellwangen Regional Court to whom her case had been reassigned, for bias.

## **Issues and proceedings before the Committee**

### **Consideration of admissibility**

9.1 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.

9.2 With regard to the author's claim under article 7, the Committee recalls that this article seeks to protect both the dignity and the physical and mental integrity of the individual.<sup>16</sup> The assessment of what constitutes inhuman or degrading treatment within the meaning of article 7 depends on all the circumstances of the case, including the duration and manner of the treatment, its physical or mental effects, as well as the sex, age and mental health of the victim.<sup>17</sup> The object of the treatment may also be relevant. The Committee has taken note of the author's arguments concerning the possible effects of a medical examination on her physical and mental health. The Committee notes that the author has been invited to submit to an expert examination for the purposes of judicial proceedings, in respect of which her mental condition is a pertinent factor. It considers that the author has failed to substantiate, for purposes of admissibility, that such an

invitation by itself raises issues under article 7 or that the undoubted suffering imposed on her by the decision so to invite her is of a nature to fall within the scope of article 7. It follows that this part of the communication is inadmissible under article 2 of the Optional Protocol.

9.3 With regard to the author's claim that her right under article 14, paragraph 1, to an impartial tribunal was violated, since the Ellwangen Regional Court ordered only her, but not her father, to submit to a medical examination, despite *prima facie* evidence that her father lacked capacity to take part in the proceedings, the Committee notes that the order of the Court was issued in response to an application by the author for legal aid, i.e. regarding exclusively her own position in the proceedings and not that of her father. The Committee considers that the author has not sufficiently substantiated this claim, for purposes of admissibility and declares this part of the communication inadmissible under article 2 of the Optional Protocol.

9.4 As regards the author's claims under article 17 of the Covenant, as well as the alleged violation of her right to an oral hearing under article 14, paragraph 1, the Committee has ascertained, and the State party has not challenged, that the author exhausted domestic remedies. The Committee also considers that the author has substantiated those claims, for purposes of admissibility, and concludes that this part of the communication is admissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol.

### **Consideration of the merits**

10.1 As regards the author's claim under article 17 of the Covenant, the Committee observes that to subject a person to an order to undergo medical treatment or examination without the consent or against the will of that person constitutes an interference with privacy, and may amount to an unlawful attack on his or her honour and reputation.<sup>18</sup> The issue before the Committee is therefore whether the interference with the author's privacy was arbitrary or unlawful, or whether the order of the Ellwangen Regional Court constituted an unlawful attack against her honour or reputation. For an interference to be permissible under article 17, it must cumulatively meet several conditions, i.e. it must be provided for by law, be in accordance with the provisions, aims and objectives of the Covenant, and be reasonable in the particular circumstances of the case.<sup>19</sup>

10.2 The Committee recalls that the order of the Ellwangen Regional Court to examine the author's capacity to take part in the proceedings was based on section 56 of the German Code of Civil Procedure. It notes the reasons given by the Ellwangen Regional Court for ordering a medical examination of the author, i.e. her excessive written submissions and appeals and all the work she had put into the case affecting her health, as well as the State party's argument that the order served the legitimate purpose of protecting the "proper functioning of the judiciary" and the author's mental state of health. However, the Committee observes that the order of the Ellwangen Regional Court had the effect of requiring the author to undergo a medical examination of her physical and mental state of health, or alternatively Professor R. H. would prepare the expert opinion solely on the basis of the existing case file. It considers that to issue such an order without having heard or seen the author in person and to base this decision merely on her procedural conduct and written court submissions was not reasonable in the particular circumstances of the case. The Committee therefore finds that the interference with the author's privacy and her honour and reputation was disproportionate to the end sought and therefore "arbitrary", and concludes that her rights under article 17, in conjunction with article 14, paragraph 1, of the Covenant have been violated.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the author's rights under article 17, in conjunction with article 14, paragraph 1, of the Covenant.

12. 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 prevent similar violations in the future.

13. 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 180 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 present report.]

#### Notes

<sup>1</sup> The Covenant and the Optional Protocol to the Covenant entered into force for Germany on 23 March 1976 and 25 November 1993 respectively.

<sup>2</sup> General comment No. 20 (1992) on *Prohibition of torture or cruel, inhuman or degrading treatment or punishment* (article 7), paras. 2 and 5.

<sup>3</sup> European Court of Human Rights, *Kudla v. Poland*, judgement of 26 October 2000, Reports 2000-XI, at para. 92; *Tyrer v. United Kingdom*, judgment of 5 April 1978, Series A, No. 26, at para. 30; *Soering v. United Kingdom*, judgement of 7 July 1989, Series A, No. 161, at para. 100.

<sup>4</sup> Inter-American Commission on Human Rights, Case 11427, *Victor Rosario Congo v. Ecuador*, Report 29/99 of 9 March 1999, at para. 54.

<sup>5</sup> European Court of Human Rights, *Bensaid v. United Kingdom*, judgment of 6 February 2001, at para. 47.

<sup>6</sup> European Court of Human Rights, *Herczegfalzy v. Austria*, judgment of 24 September 1992, Series A, No. 244, para. 82.

<sup>7</sup> *Ibid.*

<sup>8</sup> Human Rights Committee, communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, at para. 9.3.

- <sup>9</sup> General comment No. 20 (1992), para. 14.
- <sup>10</sup> Communication No. 1086/2002, *Weiss v. Austria*, Views adopted on 3 April 2003, para. 7.2.
- <sup>11</sup> European Court of Human Rights, Application No. 46827/99 and 46951/99, *Mamatkuliv and Askarov v. Turkey*, judgment of 4 February 2005, para. 104.
- <sup>12</sup> General comment No. 20 (1992), para. 5.
- <sup>13</sup> The author refers to the Committee's jurisprudence in *J. J. C. v. Canada* (A/47/40), p. 381 and *M. A. B., W. A. T. and J.-A. Y. T. v. Canada* (A/49/40), p. 368.
- <sup>14</sup> Communication No. 27/1978, *Pinkney v. Canada*, Views adopted on 29 October 1981, para. 34.
- <sup>15</sup> European Court of Human Rights, *Kudla v. Poland*, judgment of 26 October 2000, reports 2000-XI, para. 92.
- <sup>16</sup> General comment No. 20 (1992), para. 2.
- <sup>17</sup> Communication No. 265/1987, *Vuolanne v. Finland*, Views adopted on 7 April 1989, at para. 9.2.
- <sup>18</sup> See communication No. 242/1987, *Tshisekedi wa Mulumba v. Zaire*, Views adopted on 2 November 1989, paras. 12.7 and 13.
- <sup>19</sup> See communication No. 903/1999, *Van Hulst v. The Netherlands*, Views adopted on 1 November 2004, para. 7.3.

## APPENDIX

### **Individual opinion of Committee member Mr. Ivan Shearer (dissenting)**

I regret that I am unable to join the majority of my colleagues in finding a violation in the present case. I cannot regard the action of the Ellwangen Regional Court in ordering an examination of the author prior to the oral hearing of the case to be unreasonable in all the circumstances. There was a justifiable apprehension by the Court that the author might not be capable of acting in her own best interests. It seems to me only reasonable that the author's state of health should have been examined, and reported on, before the oral proceedings began. The report would not have been conclusive: the Court was competent to decide that the author was fully competent to proceed with her action. On the other hand, were it to have been, as the author wished, that these matters be determined only at the oral hearing stage, without a prior examination and report, much valuable court hearing time might be lost if the Court was then forced to delay the proceedings by reason of a finding at that stage that the author was not competent to act on her own behalf.

*(Signed):* Mr. Ivan Shearer

[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 present report.]

### **Individual Opinion of Committee member Ms. Ruth Wedgwood (dissenting)**

Though the pleadings in this case are not a model of clarity, it appears that a German Regional Court, located in the town of Ellwangen, in the state of Baden-Wurttemberg, Germany, concluded that it had a legal responsibility to examine whether the author, described here as “M.G.,” was competent to defend herself in a civil lawsuit brought by three family members against her. The suit asked for damages and injunctive relief against the author. Under German law, if the author was not competent to protect her own interests, a legal representative could be appointed for her.

The pleadings before the Committee do not make clear whether this representative would be tasked simply to act as an attorney in the regional court proceedings (instead of perhaps permitting M.G. to defend the case *pro se*, without an attorney), or instead to act more broadly as a legal guardian to advise or decide what was in the author’s best interests in the case.

But in either event, there were rather evident grounds for apprehension on the part of the Ellwangen Regional Court concerning the capacity of the author to defend herself in a civil suit. A letter sent by the author to the presiding judge of the Ellwangen District Court, for example, contains highly abusive and threatening language directed at the presiding judge. This letter might afford any reasonable judge concern about the capacity of the author to function as her own attorney and indeed, as guardian of her own interests, as well as the appropriate procedures for carrying out an orderly trial.

The question now put to the Committee by the author is whether the State Party has violated the Covenant because the Regional Court attempted to engage an expert to give an opinion on the author’s “physical and psychological state of health”, before affording the author an oral hearing at which she could dispute the necessity for doing so. The expert assessment has never been carried out, not least, because the author left the country and went travelling in South America at the time of the proposed dates.

But in any event, the examination was not mandatory. Rather, if the author preferred not to have an examination, the court was willing to base a preliminary evaluation of her capacity to proceed in light of the pleadings contained in the case file. It is thus hard to see what basis remains for the author’s claim that the request by the court to cooperate in a psychological examination constituted an unlawful invasion of her privacy or arbitrary attack on her honour or reputation, actionable under article 17 of the International Covenant on Civil and Political Rights.

A court has an independent right and responsibility to protect the integrity of its proceedings, and to assure that the litigants before it have competent representation. The author does not dispute that she was also assured of a full hearing before the court before there was to be any final and dispositive determination of her competence to act on her own behalf. There is nothing in the case that suggests the court was acting for any other reason than its interest in

orderly and just proceedings. Against the background of the abusive written filings noted above, it would seem tendentious to require a judge to gather additional “personal impressions” of a litigant, before even seeking a psychological examination that itself was a voluntary choice for the author. Hence, I cannot join in the finding of a violation by the State Party in this case.

*(Signed):* Ms. 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 present report.]

**BB. Communication No. 1484/2006, *Lněnička v. The Czech Republic*  
(Views adopted on 25 March 2008, ninety-second session)\***

<i>Submitted by:</i>	Mr. Josef Lněnička (represented by Jan Sammer, Czech Coordinating Office)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Czech Republic
<i>Date of communication:</i>	9 February 2006 (initial submission)
<i>Subject matter:</i>	Discrimination on basis of citizenship with respect to restitution of property
<i>Procedural issues:</i>	Abuse of the right of submission; non exhaustion of domestic remedies; non-substantiation
<i>Substantive issues:</i>	Equality before the law; equal protection of the law
<i>Articles of the Covenant:</i>	2, paragraph 3; 26
<i>Articles of the Optional Protocol:</i>	2; 3

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

*Meeting on 25 March 2008,*

*Having concluded* its consideration of communication No. 1484/2006, submitted to the Human Rights Committee by Mr. Josef Lněnička, 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, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

The text of an individual opinion signed by Committee member Mr. Abdelfattah Amor has been appended to the present Views.



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

1.1 The author of the communication, dated 9 February 2006, is Josef Lněnička, born on 11 April 1930 in the former Czechoslovakia, and currently a resident of the United States of America. He claims to be a victim of a violation by the Czech Republic of articles 12 and 26 of the International Covenant on Civil and Political Rights (the Covenant). He is represented by Jan Sammer of the Czech Coordinating Office in Toronto, Canada.

1.2 The Optional Protocol to the International Covenant on Civil and Political Rights (Optional Protocol) entered into force for Czech Republic on 22 February 1993.

### **The facts as presented by the author**

2.1 The author was arrested in 1949 in the former Czechoslovakia, released in 1957, and then worked for the next 11 years in a mine. In 1968 he escaped, and returned in 1969. He built a house, left the former Czechoslovakia again in 1981 to escape the Communist regime, and arrived in the United States of America in April 1982. He obtained United States citizenship in 1988, upon which he lost his original Czechoslovak citizenship. He was sentenced *in absentia* by the Trutnov District Court to imprisonment and confiscation of all his possessions, including half of his family home in Rtyně, as he had left the country without authorisation. He was fully rehabilitated in 1990 in accordance with Act No. 119/1990 on Judicial Rehabilitation.

2.2 The author's wife remained in the former Czechoslovakia. According to the author, and in order not to be evicted, she was forced to conclude an agreement with the Ministry of Finance for the purchase of half of the family house and half of all possessions. The author sent money to his wife to enable her to pay the sums due.

2.3 In 1999, the author asked for compensation for the half of the family home. On 18 March 1999, the Ministry of Finance refused his request for compensation on the sole ground that the author had obtained citizenship of the United States of America and had lost his original Czech citizenship. The letter of the Ministry of Finance highlighted that the author could "file a request for financial compensation for the confiscated property together with the documentation of your Czech citizenship". In this regard, and regarding domestic remedies, the author states that he did not exhaust all available Czech court remedies as he knows that they are not available to him and he did not want to waste money on lawyers and other futile steps.<sup>1</sup> The author also refers to a decision of the Czech Constitutional Court by which the constitutional complaint to strike out the condition of citizenship in the restitution laws was rejected. According to the author, this is definite proof of the non-existence of any further judicial remedies available in the Czech Republic.

### **The complaint**

3. The author claims to be victim of a violation of article 26 of the Covenant, as the citizenship requirement of the Act No. 87/1991 constitutes unlawful discrimination. He invokes the jurisprudence of the Committee in the case of *Marik v. Czech Republic*<sup>2</sup> and *Kriz v. Czech Republic*,<sup>3</sup> in which the Committee found a violation of article 26 by the State party. The author subsequently also claims to be victim of a violation of article 12 of the Covenant (see paragraph 5.1 below).

## **The State party's observations on the admissibility and merits of the communication**

4.1 On 18 January 2007, the State party clarifies that on 11 August 1982, the Trutnov District Court sentenced the author to forfeiture of property, inter alia one half of his real estate properties (a garage and a house with garden), as a result of his illegal emigration. Subsequently, the State party entered into an agreement with the author's wife in March 1989, on the settlement of the property held jointly by the spouses. Under this agreement, the author's wife was required to pay the State one half of the total value of the property held jointly, while she became the sole owner of the properties concerned. Upon a request by the author's wife, her payment was partly waived by a decision of the Trutnov District National Committee. She was therefore only required to pay CZK 157,690 instead of CZK 271,075, and settled the full amount on 26 October 1989.

4.2 The State party confirms that the author acquired United States citizenship in 1986 and automatically lost his Czechoslovak citizenship under the Treaty of Naturalization entered into by the former Czechoslovak Republic and the United States of America in 1928 (the Treaty of Naturalization). In 1990, on the basis of the Act on Judicial Rehabilitation No. 119/1990, the judgment that had sentenced the author was quashed *ex lege*, including the ruling on forfeiture of property. This Act also provided for the conditions and the modalities for indemnifying judicially rehabilitated persons, with the exception of their claims arising from quashed rulings on the sentence of forfeiture of property. The Act did not provide for these claims, which was addressed by Act No. 87/1991 on extra-judicial rehabilitation, which entered into force on 1 April 1991. The Act No. 87/1991, inter alia, stipulated that an eligible person within the meaning of the Act must possess citizenship of the Czech and Slovak Federal Republic and have permanent residence in the country.

4.3 In August 1991, the author requested financial compensation for the property forfeited as a result of his emigration. In this request, he noted that he had never given up his Czechoslovak citizenship and that he was a dual citizen. He filed his request with the Trutnov District Authority and the Ministry of Finance, which subsequently reviewed his request as the competent authority. During its review of the matter, the Ministry of Finance invited the author, on 24 September 1992, to provide evidence that he had reacquired Czechoslovak citizenship, in light of the Treaty of Naturalization, otherwise his request for financial compensation would not be granted. The author's wife responded to this letter in late February 1995. She reiterated her opinion that the author had never given up his citizenship of the Czech and Slovak Federal Republic, and that the Treaty of Naturalization was not valid due to its amendments. The Ministry of Finance advised her that the author's request could not be granted without him providing evidence that he had been a citizen of the former Czech and Slovak Federal Republic at the time of submission of his request (1 April 1992 at the latest, when the time period for filing compensation requests expired).

4.4 On 3 October 1995, the author filed a new request for compensation with the Ministry of Finance. The Ministry replied that although a judgment of the Constitutional Court No. 164/1994 had revoked the precondition of permanent residence in the Czech and Slovak Federal Republic, in order to be eligible for compensation, the citizenship precondition remained. In March 1999, in light of the Constitutional Court's judgment No. 153/1998, the Ministry of Finance advised the author that he "could claim financial compensation for the forfeited property without the need to initiate court proceedings on the surrender of the thing, or without the need to reject a proposal for an agreement on the surrender of the thing"; however the author must provide proof

of citizenship. On 21 March 2000, the Ministry of Finance once again invited the author to provide a citizenship certificate. In May 2000, the author provided a certificate dated 10 May 2000 stating that he was a citizen of the Czech Republic under section 1, subsection 1, of Act No. 193/1999. On 5 February 2001, the Ministry of Finance refused the author's request for compensation, as he had not fulfilled the precondition relating to citizenship on or before 1 April 1992, but had been awarded citizenship on 10 May 2000.

4.5 Under section 10 of Act No. 231/1991 on the Competence of the Czech Republic Authorities within Extra-Judicial Rehabilitations, Act No. 58/1969 on Liability for Damage Caused by a Decision or Incorrect Official Procedure of an Authority of the State (Act No. 82/1998, as amended) should have been used in relation to section 13 of the Act on extra-judicial rehabilitation. According to the Civil Code, the author, as an eligible person within the meaning of restitution legislation, had the right to raise his claim in a court. The State party is unaware that the author ever made such a claim.

4.6 On the admissibility of the communication, the State party suggests that it is inadmissible for abuse of the right of submission within the meaning of article 3 of the Optional Protocol. The State party is aware that the Optional Protocol does not set forth any fixed time limits for submitting a communication, and that mere delay does not in itself present an abuse of this right. It recalls the jurisprudence of the Committee, which, when such a time lapse occurs, expects a reasonable and objectively understandable explanation.<sup>4</sup> The State party alleges that the same reasoning applies in this instance, where the author addressed the Committee in 2006, i.e. more than five years after the Ministry of Finance had finally refused to grant his request for financial compensation, and approximately two years after the three-year time limitation period under the Civil Code for raising a claim in the ordinary courts had expired. In this respect, the State party refers to the six-month time limit for submitting an application to the European Court of Human Rights (article 35, paragraph 1, of the European Convention on Human Rights, article 46, paragraph 1(b), of the American Convention on Human Rights and article 14, paragraph 5, of the International Convention on the Elimination of all Forms of Racial Discrimination). The author does not mention any circumstances that would justify the delay of his submission to the Committee. The author's specific interest in his case cannot be deemed important enough to outweigh the generally accepted interest in maintaining the principle of legal certainty. This is compounded by the fact that the author has already submitted his matter to a different international body.

4.7 As to the requirement of exhaustion of domestic remedies, the State party recalls that in March 1989 part of the disputed real property was transferred to the author's wife. Under section 13, subsection 1 of the Act on extra-judicial rehabilitation, an eligible person is financially compensated only for real estate property that cannot be surrendered (which is the provision that applies in this instance), or if the person requests financial compensation under section 7 of the Act. However, as the author was not able to show that he fulfilled the citizenship criteria on 1 April 1992, and therefore was not eligible for financial compensation, the Ministry denied his request. He was nonetheless not prevented from (and is still not prevented from) claiming financial compensation in the ordinary courts. As he has not shown that he has used such procedure, the State party claims that he did not exhaust available domestic remedies.

4.8 On the alleged violation of article 2, paragraph 3, of the Covenant, and the author's claim that no domestic remedies were available to him, the State party notes that the effectiveness of a remedy does not mean a guarantee that the author will be successful in his case. The author had

and still has the opportunity to defend himself against the denial of his request by the Ministry of Finance before the courts. While the eventual outcome of such a dispute cannot be anticipated, there are doubts indeed about the chances of success, in light of the consistent case law of the Czech courts, including the Constitutional Court, regarding the precondition of citizenship within restitution proceedings.

4.9 On the alleged violation of article 26 of the Covenant, the State party refers to its observations submitted to the Committee in similar cases,<sup>5</sup> in which it outlined the political circumstances and legal conditions pertaining to the Restitution Act. The State party recalls that it was aware at the time of the passing of the Act that it was not feasible to eliminate all the injustices committed during the Communist regime, and that the Constitutional court has repeatedly considered and dismissed the question of whether the precondition of citizenship violated the Constitution and fundamental rights and freedoms (see for example Judgment No. 185/1997). It clarifies that the restitution laws were adopted as part of a two-fold approach. First, in an effort to mitigate, to a certain degree, some of the injustices committed earlier; and second, in an effort to carry out a speedy and comprehensive economic reform, with a view to introducing a market economy. Restitution laws were among those whose objective was the transformation of the whole society, and it appeared adequate in connection with the economic reforms to prefer the straightening out of ownership relations in favour of the country's citizens. Property restitution can be viewed as a form of property privatization, i.e. the restitution of property to private hands. Another reason for certain restricting preconditions is to ensure that due care for the returned property would be exercised.

4.10 The State party notes that despite the Treaty of Naturalization, it became possible for persons to reacquire Czech citizenship from 1990, before the expiry of the time limit for submitting restitution claims. All applications for citizenship submitted between 1990 and 1992 by persons who had acquired United States citizenship were granted. The State party adds that the author did not submit an application for citizenship during that period, although he had filed his request for financial compensation as early as August 1991. He thus deprived himself of the opportunity to comply with the requirements of the Act on extra-judicial rehabilitation. He only acquired citizenship on the basis of a later Act No. 193/1999, on the Citizenship of Some Former Czechoslovak Citizens.

4.11 The State party also notes that after the author's departure, his wife continued to use the forfeited property. Subsequently, the State party made it possible for her to become the sole owner of the forfeited real properties, which therefore remained in the family.

#### **Author's comments on the State party's observations**

5.1 On 20 February 2007, counsel alleges that article 12 of the Covenant was also violated in 1981, when the author left the former Czechoslovakia, and highlights that the State party signed the Covenant in 1975. Counsel notes that the State party itself admits the discriminatory nature of Act No. 87/1991. As to its contention that the author should have reacquired citizenship within the deadline for restitution, counsel claims that this was made impossible by Act No. 88/1990, which states that "citizenship cannot be granted in case it is in contradiction to international obligations, which have been assumed by Czechoslovakia" (art. II, paragraph 3 (b)). According to counsel, this is a reference to the Treaty of Naturalization.

5.2 As to the State party's contention that the author could have raised his claim in the courts, counsel claims that the Constitutional Court had put an end to this possibility by Judgment No. 117/1996: there, the Court found that although the rehabilitated person kept his right to property, section 23 of Act No. 119/1990 did not allow the rehabilitated person to acquire the property through "reivindication" (Civil Code). Counsel also rejects the allegation of abuse of the right of submission and the State party's request that the communication be deemed inadmissible under article 2 of the Optional Protocol. He considers that the European Convention does not come into play, nor do the State party's arguments based on legal certainty. On the issue of domestic remedies, he recalls that there are no available domestic remedies for persons who did not have Czech citizenship during the reference period in question, as confirmed by the Constitutional Court decision 33/96 of 4 June 1997.

5.3 As to the State party's justifications for the discriminatory nature of the restitution laws, counsel argues that the impossibility of redressing all injustices may apply to persons executed, shot at the border while escaping, jailed for many years and dismissed from universities and jobs, but never to property, where the redress of all those injustices is possible and would be easiest.

5.4 Concerning the State party's argument that the author could have obtained Czech citizenship before April 1991, counsel argues that this was only possible for those who became United States citizens by mistake, fraud or bribery, in light of Act No. 88/1990.

## **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 is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With respect to the requirement of exhaustion of domestic remedies, the Committee notes that the State party contends that the author was not prevented, and is still not prevented, from claiming financial compensation before ordinary courts in relation to the Ministry of Finance's refusal to grant him compensation. The Committee also notes that the State party concedes that there are doubts about the chances of success in such proceedings, in light of the consistent case law of the domestic courts, including the Constitutional Court, as regards the citizenship requirement in restitution cases (see paragraph 4.8). In this context, the Committee recalls that only remedies which are both available and effective must be exhausted. The applicable law on confiscated property does not allow restitution or compensation to the author. After the decision of the Ministry of Justice of 5 February 2001, which rejected the author's compensation claim, there was no effective or reasonably available remedy for the author to pursue within the Czech legal system. By decision No. 185/1997, the Constitutional Court of the Czech Republic confirmed that it considers the requirement of citizenship for restitution to be reasonable.<sup>6</sup> In this regard, the Committee reiterates that when the highest domestic court has ruled on the matter in dispute, thereby eliminating any prospect that a remedy before the domestic court may succeed,

the author is not obliged to exhaust domestic remedies for the purposes of the Optional Protocol.<sup>7</sup> Therefore, the Committee considers that the author has sufficiently substantiated that it would have been futile for him to challenge the decision in his case.

6.4 The Committee has also noted the State party's argument that the communication should be considered inadmissible as constituting an abuse of the right to submit communications under article 3 of the Optional Protocol, in view of the excessive delay in submitting the communication to the Committee. The State party asserts that the author waited for five years after the date of the final decision of the Ministry of Finance before submitting his complaint to the Committee. The Committee reiterates 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 in itself constitute an abuse of the right to submit a communication. In the instant case, where counsel for the author indicates that the author contacted him after being apprised of the Committee's Views in *Marik v. Czech Republic* (note 1 above) and *Kriz v. Czech Republic* (note 3 above), both adopted in 2005, the Committee does not consider a five-year delay to amount to an abuse of the right of submission.<sup>8</sup> It therefore decides that the communication is admissible in as far as it appears to raise issues under article 26 of the Covenant.

6.5 The Committee notes that, in his response to the State party's observations, the author's counsel alleges that article 12 of the Covenant was also violated in 1981, when the author left the former Czechoslovakia. In the absence of further information on such substantiation of this claim, the Committee considers that this allegation is not sufficiently substantiated and accordingly declares it inadmissible under article 2 of the Optional Protocol.

### **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 issue before the Committee is whether the application to the author of Act No. 87/1991 amounted to discrimination, in violation of article 26 of the Covenant. 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.<sup>9</sup>

7.3 The Committee recalls its Views in the cases of *Adam, Blazek, Marik, Kriz, Gratzinger and Ondracka*,<sup>10</sup> where it held that article 26 had been violated. Taking into account that the State party itself is responsible for the departure of the author from the former Czechoslovakia in seeking refuge in another country, where he eventually established permanent residence and obtained that country's citizenship, the Committee considers that it would be incompatible with the Covenant to require the author to meet the condition of Czech citizenship for the restitution of his property or alternatively for its compensation.

7.4 The Committee considers that the principle established in the above cases also applies in the case of the author of the present communication, and that the application by the domestic courts of the citizenship requirement violated his rights under article 26 of the Covenant.

7.5 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 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, including 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.

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, 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 that a violation has been established, the Committee wishes to receive from the State party, within 180 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 present report.]

#### Notes

<sup>1</sup> The author refers to communication No. 945/2000, *Marik v. Czech Republic*, Views adopted on 26 July 2005, para. 5.3.

<sup>2</sup> Ibid.

<sup>3</sup> Communication No. 1054/2002, *Kriz v. Czech Republic*, Views adopted on 1 November 2005.

<sup>4</sup> The State party refers to communication No. 787/1997, *Gobin v. Mauritius*, inadmissibility decision adopted on 16 July 2001, where the Committee declared a communication inadmissible as it had been submitted five years after the alleged violation of the Covenant (para. 6.3), holding that the author did not provide a "convincing explanation" in justifying the delay.

<sup>5</sup> Communication No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996.

<sup>6</sup> The International Covenant on Civil and Political Rights stipulates the principle of equality in its article 2, para. 1 and its article 26. The right to equality stipulated in article 2 is of the accessory nature; e.g. it applies only in conjunction with another right enshrined in the Covenant. The Covenant does not contain the right to property. Article 26 stipulates the equality before the law and the prohibition of discrimination. Citizenship is not listed among the demonstrative enumeration of the grounds on which discrimination is prohibited. The Human Rights Committee repeatedly admitted differentiation based on reasonable and objective criteria. The Constitutional Court considers the consequences of article 11 para. 2 of the Charter of Fundamental Rights and Freedoms as well as the objectives of the restitution legislation and also the legislation concerning the citizenship as being such reasonable and objective criteria.

<sup>7</sup> Communication No. 1095/2002, *Bernardino Gomariz Valera v. Spain*, Views adopted on 22 July 2005, para. 6.4.

<sup>8</sup> Communications No. 1305/2004, *Victor Villamon Ventura v. Spain*, Views adopted on 31 October 2006, para. 6.4; No. 1101/2002, *Alba Cabriada v. Spain*, Views adopted on 1 November 2004, para. 6.3; No. 1533/2006, *Zdenek and Ondracka v. Czech Republic*, Views adopted on 31 October 2007, para. 7.3.

<sup>9</sup> Communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, para. 13.

<sup>10</sup> *Adam v. Czech Republic* (note 5 above), para. 12.6; No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, para. 5.8; No. 945/2000, *Marik v. Czech Republic* (note 1 above), para. 6.4; *Kriz v. Czech Republic* (note 3 above), para. 7.3; No. 1463/2006, *Gratzinger v. Czech Republic*, Views adopted on 25 October 2007, para. 7.5; No. 1533/2006, *Zdenek and Ondracka v. Czech Republic*, Views adopted on 31 October 2007, para. 7.3.



## APPENDIX

### Individual opinion of Committee member, Mr. Abdelfattah Amor

In light of the jurisprudence in the *Gobin* case (Communication No. 787/1997, *Gobin v. Mauritius*, inadmissibility decision of 16 July 2001), I believe that this communication is inadmissible as it was submitted late, after a five-year interval. In this connection, I would like to refer to my dissenting opinion on the *Ondracka* case (Communication 1533/2006, *Zdenek and Ondracka v. Czech Republic*, Views adopted on 31 October 2007) in which the time lapse was more than eight years. I am convinced that the Committee urgently needs to have coherent and perfectly clear jurisprudence on the issue of the submission deadline for communications.

(Signed): Mr. 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 present report.]

**CC. Communication No. 1485/2006, *Vlček v. The Czech Republic*  
(Views adopted on 10 July 2008, ninety-third session)\***

<i>Submitted by:</i>	Mr. Zdenek Vlček (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Czech Republic
<i>Date of communication:</i>	21 March 2006 (initial submission)
<i>Subject matter:</i>	Discrimination on the basis of citizenship with respect to restitution of property
<i>Procedural issue:</i>	Abuse of the right of submission
<i>Substantive issues:</i>	Equality before the law and equal protection of the law
<i>Article of the Covenant:</i>	26
<i>Article of the Optional Protocol:</i>	3

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

*Meeting on 10 July 2008,*

*Having concluded* its consideration of communication No. 1485/2006, submitted to the Human Rights Committee by Zdenek Vlček 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 is Zdenek Vlček, a naturalised American citizen residing in Illinois, born on 12 August 1925 in Kresin, Czechoslovakia. He claims to be a victim of a violation by the Czech Republic of article 26 of the International Covenant on Civil and Political Rights.<sup>1</sup> 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. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, 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. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

## **Factual background**

2.1 The author states that he fled the communist regime in Czechoslovakia in September 1951. On 15 March 1960 he obtained the citizenship of the United States of America and lost his Czechoslovakian citizenship, in accordance with the Bilateral Treaty of Naturalisation of 1928. He regained Czech citizenship on 10 June 2000.

2.2 By a resolution of the People's Court of Law in Pacov of 28 April 1953, the author's property passed to the State. By Government Order No. 15/1959 and a decision of the Pelhrimov District National Committee of 13 July 1961, the property until then owned by the author's mother also passed to the State.

2.3 Following the enactment of Act No. 229/1991, which allowed for the restitution of agricultural property confiscated by the communist regime, on 26 January 1993 and again on 25 September 1995, the author and his brother filed an application for the restitution of both his and his family's property, which consisted of a flour mill, fields, meadows and woods of about 36 hectares in Kresin (district Pelhrimov). On 23 April 1996, the Pelhrimov District Authority rejected the application on the ground that the petitioners were not citizens of the Czech Republic and thus did not meet the condition laid down in section 4 of the Act.

2.4 Upon appeal filed by the author and his brother, the Supreme Court, by decision of 19 August 1996, referred the case to the Ceske Budejovice Regional Court. On 18 September 1996, the Regional Court quashed the challenged decision and referred the case back to the District Authority for decision. On 4 June 1997, the District Authority again rejected the author's claim on the ground that he and his brother did not meet the condition of citizenship.

2.5 After the author regained Czech citizenship, he and his brother again requested, by application of 26 September 2000, restitution of the family property. On 16 October 2000, the District Authority rejected the application for having been filed after 31 January 1993, the deadline for applications fixed in the law.

2.6 The author states that he is the only heir to the family property since his brother's death in 2001.

## **The complaint**

3. The author claims that he is a victim of discrimination, because the requirement of citizenship for restitution of his family's property is in violation of article 26 of the Covenant.

## **The State party's observations on admissibility and merits**

4.1 In its submission of 8 November 2006, the State party addresses both admissibility and merits of the communication. As to admissibility, the State party notes that the last official decision in the author's case became final on 29 July 1997. Thus, nine years and eight months elapsed before the author turned to the Committee (or five and a half years if the District Authority's decision of 16 October 2000 is taken as last relevant decision). In the absence of any explanation by the author of the reason for the delay and in reference to the Committee's

decision in communication No. 787/1997 *Gobin v. Mauritius*,<sup>2</sup> the State party invites the Committee to consider the communication inadmissible as an abuse of the right to submit a communication, under article 3 of the Optional Protocol.

4.2 As to the merits of the case, the State party refers to its observations submitted to the Committee in similar cases<sup>3</sup> in which it outlined the political circumstances and legal conditions for the Restitution Act. The purpose of the Act was only to eliminate some of the injustices committed by the communist regime as it was not feasible to eliminate all injustices committed at the time. The State party refers to the decisions by the Constitutional Court which repeatedly considered the question of whether the precondition of citizenship complied with the Constitution and the fundamental rights and freedoms and found no reason for abolishing it.

4.3 The State party further explains that the restitution laws were part of the objective to transform society and to carry out economic reform including the restitution of private property. The condition of citizenship was included to ensure that the private owners would take due care of the property. The pre-condition of citizenship has been considered to be in full conformity with the State party's constitutional order.

4.4 Finally, the State party acknowledges that the general principle *pacta sunt servanda* entails an obligation to comply with the provisions of the Covenant. However, in the context of the implementation of the Committee's views the State party notes that the views lack the attributes of a judicial decision and the State party's obligation implies thus little more than a duty to take the views into consideration in the authorities' activities, if possible. The State party believes that in the present case, as in other similar cases, exceptionally serious reasons exist that allow the State party to diverge from the Committee's views without prejudice of the principle *pacta sunt servanda*.

#### **The author's comments on the State party's observations**

5.1 In his comments, dated 28 February 2007, on the State party's submission, the author claims that the Czech Republic has misused the Naturalization Treaty with the United States of America to deny restitutions to anybody who obtained United States of America citizenship and thus lost the Czech one. He refers to the Committee's concluding observations on the initial report of the Czech Republic<sup>4</sup> and its views in similar cases where the Czech Republic was told to change its law and concludes that the State party has never paid much attention to the Committee's decisions,<sup>5</sup> thus violating its Constitution which states that international treaties have preference before domestic laws.

5.2 The author rejects the State party's argument that his communication is inadmissible for abuse. He explains that the delay in submitting the communication was caused by lack of information and states in this respect that the State party does not publish and translate the decisions of the Committee or the concluding observations.

## **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, 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 the communication should be declared inadmissible as an abuse because of the long delay between the last decision in the case and the submission of the communication to the Committee. The author has argued that the delay was caused by the lack of information available. The Committee notes that the Optional Protocol does not establish time limits within which a communication needs to be submitted. It is thus only in exceptional circumstances that the delay in submitting a communication can lead to the inadmissibility of a communication.<sup>6</sup> In this regard, the Committee notes that the author, having been denied restitution of the family property by the Regional Court in September 1996 on the ground that he and his brother did not meet the citizenship condition, regained Czech citizenship in 2000. The author and his brother subsequently applied, once again, for restitution of the family property, which was denied by the District Authority in October 2000. In the circumstances of the present case, the Committee considers that the delay of five and a half years between the last decision of the relevant authority and the submission of the communication to the Committee does not render the communication inadmissible as an abuse under article 3 of the Optional Protocol.

6.4 In the absence of any further objections to the admissibility of the communication, the Committee declares the communication admissible in so far as it may raise issues under article 26 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 The issue before the Committee is whether the denial of the author's request for restitution of his family's property on the ground that he did not fulfill the citizenship requirement contained in section 4 of Act 229/1991 constitutes a violation 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.<sup>7</sup>

7.4 The Committee further recalls its Views in the cases of *Simunek, Adam, Blazek, Des Fours Walderode* and *Gratzinger*,<sup>8</sup> where it held that article 26 of the Covenant had been violated by

the State party's requirement of citizenship for restitution: "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." The Committee further recalls its jurisprudence<sup>9</sup> that the citizenship requirement in these circumstances is unreasonable.

7.5 The Committee considers that the principle established in the above cases also applies to the author of the present communication. Thus, the Committee concludes that the application to the author of the citizenship requirement laid down in Act No. 229/1991 violated his 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 author with an effective remedy, including compensation if the property in question cannot be returned. The Committee reiterates that the State party should review its legislation and practice 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 180 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 present report.]

### Notes

<sup>1</sup> The Optional Protocol entered into force for the State party on 22 February 1993.

<sup>2</sup> Communication No. 787/1997, *Gobin v. Mauritius*, inadmissibility decision adopted on 16 July 2001.

<sup>3</sup> Communication No. 586/1994, *Adam v. the Czech Republic*, Views adopted on 23 July 1996, and communication No. 1000/2001, *Mráz v. the Czech Republic*.

<sup>4</sup> Human Rights Committee concluding observations on the initial report of the Czech Republic, (CCPR/CO/72/CZE).

<sup>5</sup> Communication No. 945/2000, *Marik v. the Czech Republic*, Views adopted on 26 July 2005 and communication No. 1054/2002, *Kríz v. the Czech Republic*, Views adopted on 1 November 2005.

<sup>6</sup> See communication No. 1223/2003, *Tsarjov v. Estonia*, Views adopted on 26 October 2007, para. 6.3; communication No. 1434/2005, *Fillacier v. France*, inadmissibility decision adopted on 27 March 2006, para. 4.3; and *Gobin v. Mauritius* (note 2 above), para. 6.3.

<sup>7</sup> See inter alia communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, para. 13.

<sup>8</sup> Communication No. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, para. 11.6; *Adam v. Czech Republic* (note 3 above), para. 12.6; communication No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, para. 5.8; communication No. 747/1997, *Des Fours Walderode v. Czech Republic*, Views adopted on 30 October 2001, para. 8.3; and communication No. 1463/2006, *Gratzinger v. the Czech Republic*, Views adopted on 25 October 2007, para. 7.4.

<sup>9</sup> See communication No. 516/1992, *Simunek v. Czech Republic* (note 8 above), para. 11.6.

**DD. Communication No. 1486/2006, *Kalamiotis v. Greece*  
(Views adopted on 24 July 2008, ninety-third session)\***

<i>Submitted by:</i>	Mr. Andreas Kalamiotis (represented by the World Organisation Against Torture and the Greek Helsinki Monitor)
<i>Alleged victims:</i>	The author
<i>State party:</i>	Greece
<i>Date of communication:</i>	28 March 2006 (initial submission)
<i>Subject matter:</i>	Alleged ill-treatment of the author
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; case already examined under another procedure of international investigation; abuse of the right of submission
<i>Substantive issue:</i>	Lack of effective remedy regarding the author's complaint of ill-treatment
<i>Articles of the Covenant:</i>	2, paragraph 3 in connection with article 7
<i>Articles of the Optional Protocol:</i>	3; 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 2008,*

*Having concluded* its consideration of communication No. 1486/2006, submitted to the Human Rights Committee on behalf of Mr. Andreas Kalamiotis 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. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, 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.



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

1. The author of the communication is Mr. Andreas Kalamiotis, a Greek national of Romani ethnic origin, born on 7 January 1980. He claims to be a victim of a violation by Greece of his rights under articles 2, paragraph 3, and 7 (separately and read together); 2, paragraph 1; and 26, of the Covenant. He is represented by counsel. The Covenant and the Optional Protocol to the Covenant entered into force for Greece on 5 May 1997.

### **The facts as presented by the author**

2.1 On the evening of 14 June 2001, the author was at home with friends listening to music. At around 1:30 a.m. on 15 June 2001 a police car arrived and an officer asked the author to turn off the music, as it was disturbing his neighbours. The author and his friends agreed that they would do so in five minutes and the police officer left. A few minutes later they switched off the radio and the author saw his friends out to their cars. They were about to leave and the author had already re-entered his house when he heard a noise outside and returned to the doorstep. Several police cars were parked in the street and police officers were pointing their guns. One of the police officers had his gun pointed at the author and was threatening to shoot him. Others came towards him, handcuffed him and dragged him to the police car, where they slammed him against the hood and started beating and kicking him repeatedly in front of his children. He did not see what instruments were used to beat him with but he believed they were truncheons. While he was being beaten some of the police officers searched the house.

2.2 The author was taken to the police station of Aghia Paraskevi, where he was kept handcuffed and refers to an exchange of insults with the police officers. Around 11 a.m. on 15 June 2001, the author was taken to the Athens Police Headquarters, where pictures of him were taken while he was still handcuffed. He was then taken to the Athens Misdemeanours Prosecutor with a lawyer of his choice. He was charged with resisting arrest and insulting and threatening the police authorities. The trial was set for 18 June 2001. On that date, before the hearing, the author and his lawyer went to the Forensic medical services, which refused to examine the author on the grounds that he had first to press charges or submit a complaint to the police station of Aghia Paraskevi. At that point in time, the author hesitated to submit a complaint for fear of retaliation from the police officers who had beaten him.

2.3 The court did not have time to examine the case and the trial was postponed to 25 January 2002. After another postponement the author was tried in absentia on 5 April 2002 and convicted for resisting arrest, insults and threats against police officers. He was sentenced to 1 year and 80 days imprisonment convertible to a fine, suspended pending appeal. The appeal was heard on 19 January 2005 by the Appeals Court of Athens, which upheld the conviction for resisting arrest and insults but acquitted the author of threats against the police officers. The final sentence was one year and one month imprisonment convertible to a fine.

2.4 On 2 July 2001, the author filed a criminal complaint before the Athens Misdemeanours' Prosecutor against police officer Georgios Yannadakis, and constituted himself as a civil claimant, for the offence of simple bodily injuries. On the same day, the Prosecutor transmitted the complaint to the Magistrate of Koropi to conduct a criminal investigation. Following the author's request, the Prosecutor ordered his examination by the Forensic Services. That examination took place on 3 July 2001, i.e. 18 days after the incident. The forensic report

indicated that “because of the long time elapsed since the reported incident and the development of scar tissue it is not possible to further investigate any possible bodily injuries coinciding with the time period of the alleged incident”.

2.5 On 28 September 2001, the Magistrate returned the complaint to the Prosecutor informing him that he had declined to investigate for lack of competence. No other explanation was provided. The Prosecutor then sent the complaint, on 26 July 2002, to the Halandri police station for investigation. This station is subordinate to the police directorate where the police officer concerned served and adjacent to Aghia Paraskevi, where the author was held. The investigation started on 4 November 2002. According to the author, a number of procedural irregularities occurred. Thus, he was never asked to provide the addresses of the witnesses after the police could not find them at the addresses initially given. There was no attempt to obtain a statement from his wife, who was also present at the time of his arrest. The author himself was not summoned to testify for further details. Other police officers involved in the incident were not summoned either. The report of the investigation was sent to the Prosecutor on 25 November 2002.

2.6 In May 2003, the case was heard by the Judicial Council of Misdemeanours of Athens which, upon recommendation by the Prosecutor, decided to drop the charges against the police officer for lack of evidence. The ruling was published on 28 August 2003 and it observed that “since no witnesses for the prosecution give evidence in favour of the plaintiff’s account, because both witnesses named by the plaintiff were not found at the addresses declared as their residence, the defendant’s account and arguments are catalytic, able to shed light, in our opinion, on the true version of the events”. It was served on the author by pasting it on his house door on 8 September 2003. No appeal is permitted against such order under Greek law.

2.7 In addition to the filing of a criminal complaint the author sent a letter to the Greek Ombudsman also on 2 July 2001, complaining about the ill-treatment he had suffered and asking that a formal inquiry - “Sworn Administrative Inquiry” - be conducted. As a result, a Brigadier General of the Northeast Attica Police Headquarters wrote to the author on 28 September 2001 indicating that an informal investigation had been conducted and it was concluded that the police had followed the procedures properly and that the author had, inter alia, resisted arrest, used abusive language and threatened the police officers.

2.8 In two letters subsequently addressed to the Directorate of Hellenic Police Staff and the Ombudsman the author insisted that a Sworn Administrative Inquiry be undertaken. On 6 March 2002 a response was received refusing to initiate such an inquiry since the investigation conducted did not reveal any disciplinary responsibilities. The findings of the investigation referred to in the letter showed discrepancies with the findings set out in the letter of 28 September 2001.

2.9 On 22 January 2004 the Ombudsman wrote to the Hellenic Police Headquarters indicating, inter alia, that an informal investigation cannot act as a substitute for the Sworn Administrative Inquiry when it comes to allegations of bodily harm and cruel behaviour and that such Inquiry provides procedural guarantees, as opposed to the informal methods of an informal investigation.

2.10 On 21 March 2002, the non-governmental organization Greek Helsinki Monitor submitted a report to the prosecutor containing several cases, including the author’s case, of procedural and judicial shortcomings which had resulted in no effective remedies being provided to the victims.

Under Greek law, a prosecutor who receives a report, criminal complaint or any information that a punishable act has been committed, is required to institute criminal proceedings by referring the case for investigation. According to the author, the investigation of the report started only on 12 October 2005 and was summarily dismissed without any real investigation by the Prosecutor, who issued a ruling on 25 November 2005 rejecting all claims of wrongdoing on the part of the police. An appeal was also dismissed by an “Appeals Prosecutor”, without any additional investigation, on 23 September 2006.

### **The complaint**

3.1 The author claims that the facts reveal violations of article 2, paragraph 3, of the Covenant, on its own and in conjunction with article 7, as the State party failed to provide an effective remedy for the acts of torture and ill-treatment to which he was subjected. He recalls the Committee’s jurisprudence and general comment No. 20 (1992) on prohibition of torture, or other cruel, inhuman or degrading treatment, to the effect that complaints of torture and ill-treatment must be investigated promptly and impartially by competent authorities so as to make the remedy effective.

3.2 According to the author, his complaint was not investigated by an independent body with the capacity to impartially examine the allegations against police officers, but by fellow police officers following merely an Oral Administrative Inquiry.

3.3 The author adds that the disciplinary proceedings offer no guarantees of impartiality. The Oral Administrative Inquiry is a closed and internal investigation of the accused police officer conducted by fellow police officers. The evidence and testimonies gathered during this investigation remain inaccessible to the complainant, leaving victims of alleged police misconduct powerless to contest the findings and conclusion. Usually the investigation is limited to a questioning of the police officers involved and, as in the case of the author, neither the victim of ill-treatment nor his witnesses are examined.

3.4 The Sworn Administrative Inquiry is also an internal and confidential police procedure whose safeguards aim to protect the rights of the officer under investigation, rather than those of the complainant. Thus, the inquiry guarantees the right of the “accused” officer to nominate witnesses, to request the postponement of proceedings or the exclusion of the investigating officer, as well as the right of access to the evidence and the right of appeal. By contrast, there are no provisions setting out the rights of the complainant, who does not have the right of access to the hearings and cannot appeal against the findings. In common with the Oral Administrative Inquiry, the complainant only has the right to be informed of the outcome, which consists of a mere paragraph without any reference as to the type of disciplinary penalties imposed, if any. The complainant is usually not entitled to ask for copies of documents gathered in the course of the inquiry.

3.5 As for the judicial investigation, it was initiated over one year after the incident and was neither prompt nor effective, as it included merely the defendant’s statement. The author’s version and the testimony of his witnesses were never requested. Further, the medico-legal examination was futile, as the Forensic Services abstained from making any objective comments upon the author’s injuries.

3.6 Under Greek law, individuals do not have direct access to examination by forensic services. Such an examination can only be obtained by order of investigating officials on the basis of a request by a victim who has filed a complaint of ill-treatment or upon order by the public prosecutor. The requirement of first filing a complaint restricts access to an effective forensic medical examination. Normally, a victim of ill-treatment will need time to consider the repercussions of filing a formal complaint and this may take weeks and even years, whereas some injuries caused by ill-treatment heal relatively quickly. Consequently, any failure on the part of the competent authorities to ensure prompt forensic examination may effectively result in the complete or partial loss of crucial evidence.

3.7 The treatment of the author amounts to a breach of article 7 of the Covenant. Apart from the beatings, the fact of having a gun pointed at him caused him to fear for his life. He also feared for the security of his wife and children, as they were defenceless against the acts of the police. For example, his wife was insulted when she tried to give her husband his shoes before being taken to the police station, and his children were crying at the sight of their father being beaten. Further, he was subjected to degrading treatment. For instance, while in police custody, he asked for a glass of water and the police officer responded that he could drink water from the toilet. He was also threatened and insulted. These acts are aggravated by the fact that they were committed with a significant level of racial motivation.

3.8 Finally, the author invokes violations of articles 2, paragraph 1; and 26, as he was subjected to discrimination on the basis of his ethnic Roma origin. The police officers used racist language and referred to his ethnic origin in a pejorative way. This fact should be reviewed in the broader context of systematic racism and hostility which law enforcement bodies in Greece display against Roma, as documented by non-governmental organizations and intergovernmental organizations. Despite the information in this regard submitted to the Greek authorities, there is no evidence that the judicial investigation or the administrative inquiry carried out by the public prosecutor or the police ever addressed this question. No information was provided concerning steps taken to verify that police officers had inflicted racial verbal abuse upon the author.

#### **State party's observations on admissibility and merits**

4.1 On 15 September 2006, the State party objected to the admissibility of the communication. It argues that when two policemen arrived at the house and asked the author to stop disturbing the peace, he reacted threateningly and refused to comply. At the same time, shots were fired from an unidentified source. These events obliged the officers to leave the settlement in order to return with reinforcements. Subsequently, six patrol cars arrived and the author came out of his house cursing the officers. In their efforts to restrict him and take him to the police station he reacted violently and resisted. As a result, he fell and his hands and face were scratched. This attitude continued at the police station, where he tried to attack the officers and refused to comply with their orders. A private citizen who happened to be at the police station at that time testified in this regard. Three other individuals who were at the author's house were also taken to the police station. However, they did not resist and after identity checking they were released without any charges.

4.2 Following these events, the Police filed charges against the author for threatening, insulting and resisting authority and he was brought before the Public Prosecutor, accompanied by a lawyer. He did not complain of any beating by the police officers. Neither did the Public Prosecutor observe any injuries so as to initiate a preliminary investigation procedure. After

requesting a three-day postponement he appeared again before the Prosecutor on 18 June 2001, this time accompanied by his lawyer. Again, he failed to report his alleged ill-treatment. Instead, he waited until 2 July 2001 to file a complaint, making claims against only one officer for simple bodily injury under article 308, paragraph 1 of the Criminal Code. It was only then that he referred, in a vague manner, to beatings and blows to various parts of his body and asked for a forensic examination. The Prosecutor immediately instituted criminal proceedings for bodily injury, forwarded the case file to the Magistrate of Kropia for a preliminary investigation and asked the Forensic Services to examine the author.

4.3 The forensic report indicates that, as a long time had elapsed since the alleged incident, it was impossible to investigate the possible bodily injuries consistent with the allegations. In view of such findings, the fact that the witnesses proposed by the author had not been located at their residence and had therefore not testified and the author's conviction for resisting the authorities, insulting and threatening police officers, the Indictment Chamber of the First Instance Criminal Court of Athens dropped the charges against the police officer concerned.

4.4 The State party argues that, by not reporting the ill-treatment when he appeared before the Public Prosecution on 15 and 18 June 2001, the author did not provide the State, at least not in a timely manner, the opportunity to redress any violation of the Covenant by way of the institution of criminal proceedings by the Public Prosecutor. The Prosecutor was unable to initiate ex officio any investigation procedure, as he had no other sources of information apart from the author and his wife.

4.5 When the author filed a complaint on 2 July 2001 he did so only with respect to one officer. Instead of accusing him of serious bodily injury, under articles 309 and 310 of the Criminal Code, he accused him of simple bodily injury (carrying a lighter penalty), under article 308, paragraph 1, and he only stated his position in the proceedings as civil claimant. As a result, the author turned the prosecution authorities' attention towards the investigation of a minor case and rendered the prosecution of the accused impossible, since the forensic examination was carried out eighteen days after the incidents. Thus, the identification of credible findings after such a long period was impossible, and the Public Prosecutor of the First Instance Criminal Court had to introduce the case to the Indictment Chamber with a motion to acquit. The issue of an acquittal decision renders the criminal judge unable to deal with the civil action.

4.6 The above shows that the author failed to exhaust effective remedies in a timely and consistent manner, and therefore his communication must be considered inadmissible.

4.7 The State party also notes that the communication had been submitted under the 1503 procedure and discontinued. Accordingly, it should be declared inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

4.8 Finally, the State party argues that the submission of the communication to the Committee some three years after the acquittal decided by the Indictment Chamber of the First Instance Criminal Court of Athens should be considered abusive.

4.9 On 15 February 2007, the State party submitted observations on the merits of the communication. It argues that the evidence in the case file dealt with by the domestic judicial and police authorities does not show the minimum level of cruelty required to establish a violation of article 7 of the Covenant. The author complained on 2 July 2001 before the

Public Prosecutor of the Misdemeanours' Court of Athens about an assault by police officer Georgios Yannadakis which, however, resulted in a simple bodily injury. This offence is provided for by article 308, paragraph 1 of the Criminal Code. It is the mildest form of bodily injury provided for and punished by the criminal legislation, contrary to the offence of dangerous and grave bodily injury contained in articles 309 and 310 of the Code. He also notified the Public Prosecutor of the names and addresses of two prosecution witnesses. However, although they were sought in order to testify during the preliminary investigation of the case, they could not be located at the addresses given by the author.

4.10 The author alleges that he stayed in bed at home for 12 days after the events of 15 June 2001. However, instead of going to the forensic service immediately after that, he did so only 18 days later, thus making his examination impossible. According to the report established, no injuries were observed other than some circular scars in the palm of his hands and left elbow. The summary investigation of the case was completed without testimonies by prosecution witnesses. By contrast, the police officers who had participated in the event and testified in the context of the administrative inquiry confirmed that the author had repeatedly resisted their orders so that he was handcuffed and led to the police station. In none of the five police officers' testimonies was there any evidence of use of force by the police against the author. The latter was arrested, committed for trial on charges of resistance, disobedience and insult and sentenced to 14 months and 15 days imprisonment.

4.11 During the informal administrative inquiry by the Deputy Director of the North-Eastern Attica Police Directorate, a citizen who was at the Police Station of Agia Paraskevi on personal business when the author was brought there testified that the author looked like a person who had consumed alcohol and caused havoc at the police station, despite which the police officers were patient with him. The author made no complaint against the police officers and did not file charges against them while at the police station.

4.12 According to the evidence in the case file established during the preliminary investigation at both the judicial and administrative level, any mild bodily injury the author suffered was the result of his resistance to his arrest and did not exceed the minimum level of severity required by article 7 of the Covenant. The judgment of the domestic judicial authorities could only be reviewed by the Committee for manifest arbitrariness or denial of justice, neither of which were evident in this case.

4.13 In addition to the author's complaint of 2 July 2001, a second complaint was filed on 12 October 2005, by the Hellenic Helsinki Monitor against police officers and judicial personnel for violation of their duties in relation with this case. The Public Prosecutor of the Piraeus Court of Appeal dismissed the complaint as she considered that in the author's case no punishable act had been committed by police officers or members of the Judiciary. Although a criminal investigation was conducted against the competent state organs, it was found that they had dealt with the case without any indication of arbitrariness or denial of justice.

4.14 Regarding the author's allegations of violation of article 2, paragraph 3, of the Covenant, the State party explains that a sworn administrative inquiry is ordered together with the institution of disciplinary proceedings against police officers for the verification of offences, such as causing bodily injuries. By contrast, where the evidence is insufficient to initiate disciplinary proceedings a preliminary investigation is ordered. The issuance of an order for a

preliminary investigation is not equivalent to the institution of disciplinary proceedings, and its ultimate object is to carry out an informal but objective and impartial investigation, by collecting the necessary evidence. If sufficient evidence is collected, disciplinary proceedings will be instituted against the responsible officer. In the context of the preliminary investigation all acts required to establish the truth are carried out, such as examination of the complainant and witnesses, on-site inspection or expert investigation, as well as collection of documentary evidence. Because of the informal nature of the preliminary investigation, no administrative/investigative reports are prepared and witnesses are not examined under oath. The informal preliminary investigation and the formal sworn administrative inquiry by the Police provide equivalent guarantees of a reliable and effective investigation of a case. They differ only from a procedural point of view, since the latter is only ordered following the institution of disciplinary proceedings, while the former merely determines whether the conditions are fulfilled for the institution of such proceedings.

4.15 The informal preliminary investigation was carried out by a senior officer of the Hellenic Police who served at another police directorate (North-Eastern Attica Police Directorate), to which the police station where the officers involved serve is hierarchically inferior. His independence should be therefore taken for granted. If the case had been investigated by any other administrative authority it would not have gathered any different evidence.

4.16 In order for an examination under article 2 of the Covenant to be carried out, there should be a violation of article 7. However, in this case there has been no such violation, since the author's mistreatment, if any, did not rise to the minimum level of severity for establishing an offence to human dignity. Consequently, it is not possible to examine independently the author's complaint about lack of effective remedies that could lead to the identification and punishment of those responsible, since no violation of article 7 can be found. If the Committee were to find a violation of article 7, it should be pointed out that the investigation of the case at both the administrative and the judicial level was thorough, effective and capable of leading to the identification and punishment of those responsible. Therefore, the allegation of a violation of article 2 is ill-founded.

4.17 Regarding the author's allegations of discriminatory treatment, they were first raised before the Committee. He did not make any such complaint before any of the competent judicial and police authorities. The force used by the police during the arrest and transport of the author was within legal limits and proportional to the resistance he offered. The author's treatment was not based on his racial origin but on the strength and form of his resistance against the police officers' efforts to arrest him. Accordingly, this part of the communication should be considered as ill-founded on the merits as well.

#### **Author's comments**

5.1 In comments dated 18 June 2007, counsel rejects the version of events of the State party. He states that the police officer against whom the author filed a complaint, in his defence testimony dated 4 November 2002, did not refer to any threatening behaviour by the author and that the reinforcements were requested not because of the author's attitude but because of the gunshot. As to the cause of the author's injuries, police documents indicate that they were the result not of a fall but of the struggle with police officers while the author was resisting arrest. Regarding the testimony of the private citizen who was at the police station when the author was taken there, the State party fails to provide evidence of that testimony, which is simply

mentioned as having being given orally to the police investigator. Accordingly, the author expresses doubts about its veracity. Such testimony is allegedly mentioned in the report of the police officer of the Directorate of North-Eastern Attica. However, this report was never provided to the author or the Committee.

5.2 When he appeared before the Prosecutor on 18 June 2001, the author had no opportunity to refer to the ill-treatment, as the hearing was postponed *ex officio*. It was on that same date that he went to the forensic service, but was refused examination.

5.3 The author recalls that neither he nor any of his friends who were eye witnesses were asked to give testimony during either the police or the judicial investigation and maintains his version of the facts as presented in his initial communication.

5.4 Regarding the alleged failure to exhaust domestic remedies, the author recalls that he did not complain about ill-treatment on 15 June 2001 because he was in police detention and feared reprisals. Moreover, the State claims inaccurately that he was taken before the Prosecutor on 18 June 2001. On that date he was scheduled to be tried, but the hearing was postponed. That is why he went to a forensic expert, hoping to get an examination that would strengthen his case.

5.5 The State party claims that the author did not exhaust domestic remedies because in his complaint he referred only to simple bodily injuries. However, according to Greek law, the Prosecutor does not need a complaint by the victim but can investigate *ex officio* any act of unprovoked bodily injury, grave bodily injury and dangerous bodily injury. Likewise, the prosecutor can investigate *ex officio* violations of the anti-racist Law and torture and other related offences against human dignity. The author expected that a proper investigation, once all facts were established, would include some or all of these *ex officio* prosecutable offences. He therefore reaffirms that he exhausted domestic remedies.

5.6 Regarding the State party's argument that the case was dealt with under the 1503 procedure, the author disagrees that this should be a valid reason for inadmissibility. He also objects that the communication should be considered abusive because it was submitted some three years after the final domestic decision and invokes the Committee's jurisprudence in that regard.

5.7 Regarding his claims of violation of article 7 of the Covenant, the author recalls that no court ever ruled on his complaint. The Judicial Council of Misdemeanours that decided not to press charges following a motion of the prosecutor is not a court that holds public hearings where both sides can argue their cases. It meets *in camera*, hears only the prosecutor and its ruling is not public. It can decide that there will be no trial when convinced that the complaint is "factually unfounded". In the two years following the incident neither he nor any of his witnesses were called to testify by any investigating officer in either the administrative or the judicial investigation. The whole investigation consisted of a sole defence statement the defendant gave to fellow police officers. The police ignored the Ombudsman's insistence that a sworn administrative investigation be carried out. In the context of such an investigation the complainant and his witnesses had to be summoned.

5.8 The State party's comments that the author was convicted by the Athens Misdemeanours Court also for disobedience is defamatory, as he was never charged with such a crime.



5.9 The State party admits that the investigating police officer belonged to the regional North-East Attica Police Directorate to which the Aghia Paraskevi police station is inferior. Yet, it is inaccurate to claim that this was another police directorate. The Aghia Paraskevi police station is one of the 35 police stations administratively subordinated to the North-East Attica Police Directorate; so is the Halandri police station which conducted the judicial investigation on behalf of the prosecutor. Actually, the Aghia Paraskevi police station is in the same building as the North-East Attica Police Directorate. So the “independent” investigating officer was an immediate superior of the officers involved and had an office one floor above them in the same building. In fact, police disciplinary law has since changed and no longer allows a Police Directorate to launch an investigation into alleged wrong-doings of an officer subordinated to it. Rather, it has to be assigned to an officer of a separate Police Directorate.

5.10 According to the author, the State party misleadingly claims that the author first complained of racial discrimination in his communication before the Committee. He did complain before the Ombudsman on 2 July 2001 and such complaint was sent to the Hellenic Police. However, this claim was ignored.

## **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 article 93 of its rules of procedure, 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 As to the State party’s argument that the communication should be considered inadmissible because the case was submitted under the procedure established on the basis of Economic and Social Council resolution 1503 (XLVIII), the Committee recalls its constant jurisprudence that such procedure does not constitute another international procedure within the meaning of article 5, paragraph 2 (a), of the Optional Protocol. This preliminary contention of the State party must therefore be rejected.

6.4 The State party claims that the author did not exhaust domestic remedies, as he filed a complaint only on 2 July 2001 rather than immediately after the incidents, and also did not invoke the proper article of the Criminal Code. The Committee considers that the delays referred to by the State party and the manner in which the complaint was formulated are best dealt with when considering the merits of the case. Furthermore, the State party does not identify any additional remedies that the author should have availed himself of. Accordingly, the Committee considers that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met.

6.5 Regarding the State party’s contention that the communication should be considered an abuse of the right of submission because it was submitted some three years after the acquittal

decision, the Committee recalls that there are no fixed time limits for the submission of communications under the Optional Protocol, and considers that the delay in this case was not so unreasonable as to amount to an abuse of the right of submission.

6.6 Regarding the author's claim under articles 2, paragraph 1, and 26 of the Covenant the Committee considers that it has not been sufficiently substantiated for purposes of admissibility and concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.7 There being no other obstacles to the admissibility the Committee concludes that the communication is admissible as it raises issues under articles 7 and 2, paragraph 3 of the Covenant and proceeds to its examination 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, as provided under article 5, paragraph 1, of the Optional Protocol.

7.2 With regard to the alleged violation of article 2, paragraph 3 in conjunction with article 7 of the Covenant, the Committee notes that the author filed a criminal complaint before the Athens Misdemeanours' Prosecutor on 2 July 2001 and that the Prosecutor forwarded the complaint to the Magistrate of Koropi to conduct a criminal investigation. However, the Magistrate declined to investigate for lack of competence without providing any explanation for his decision. The Committee also notes that disciplinary proceedings were not instituted either and that the only inquiry carried out was in the form of a preliminary police investigation. As confirmed by the State party, such investigation was of an informal nature, and neither the author nor the witnesses cited by him were ever heard. Finally, the case was disposed of by the Judicial Council of Misdemeanours which, on the basis of the police investigation, decided not to file charges against the accused. This decision was taken following a procedure in which the author was not allowed to participate and the concerned police officer's statement was used as the principal basis for coming to a decision.

7.3 The Committee recalls its jurisprudence that complaints against maltreatment must be investigated promptly and impartially by competent authorities and that expedition and effectiveness are particularly important in the adjudication of cases involving allegations of torture and other forms of mistreatment.<sup>1</sup> In view of the manner in which the author's complaint was investigated and decided, as described in the previous paragraph, the Committee is of the view that the requisite standard was not met in the present case. Accordingly, the Committee finds that the State party has violated article 2, paragraph 3, read together with article 7 of the Covenant. Having come to this conclusion the Committee does not consider it necessary to determine the issue of a possible violation of article 7 read on its own.

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 article 2, paragraph 3, read together with article 7 of the Covenant.

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 and appropriate reparation. The State party is also under an obligation to take measures 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 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 180 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 present report.]

#### **Note**

<sup>1</sup> General comment No. 20 (1992) on article 7 (Prohibition of torture or other cruel, inhuman or degrading treatment or punishment), para. 14. See also communication No. 1426/2005, *Banda v. Sri Lanka*, Views adopted on 26 October 2007, para. 7.4.

**EE. Communication No. 1488/2006, *Süsser v. The Czech Republic*  
(Views adopted on 25 March 2008, ninety-second session)\***

<i>Submitted by:</i>	Mr. Miroslav Süsser (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Czech Republic
<i>Date of communication:</i>	30 June 2006 (initial submission)
<i>Subject matter:</i>	Discrimination on the basis of citizenship with respect to restitution of property
<i>Procedural issue:</i>	Abuse of the right of submission
<i>Substantive issues:</i>	Equality before the law; equal protection of the law
<i>Article of the Covenant:</i>	26
<i>Article of the Optional Protocol:</i>	3

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

*Meeting on 25 March 2008,*

*Having concluded* its consideration of communication No. 1488/2006, submitted to the Human Rights Committee by Mr. Miroslav Süsser 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 of the communication (dated 30 June and 2 July 2006) is Mr. Miroslav Süsser, a naturalized American citizen currently residing in the United States of America and born

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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, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

on 14 May 1934 in Prague. He claims to be a victim of a violation by the Czech Republic of article 26 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

1.2 The Optional Protocol to the International Covenant on Civil and Political Rights (Optional Protocol) entered into force for the Czech Republic on 22 February 1993.

### **Facts as presented by the author**

2.1 The author's mother owned an apartment building no. 67, and a parcel of land and garden in Michle, a community which is part of the city of Prague. On 21 December 1962, the mother transferred the building and land under pressure to the Czechoslovak State. The author's father owned one half of the buildings Nos. 67, 68 and 69, and three land parcels in the cadastral territory of Soběslav. The other half belonged to the author's father's brother, Rudolf Süsler.

2.2 The author escaped to the United States on 6 October 1969 and subsequently obtained United States citizenship. His mother died on 8 August 1978, his father died on 23 January 1987. The author and his sister Jiřina Hrbatová are the only surviving heirs.

2.3 With regard to the properties in Prague, Czechoslovak Law 119/1990 cancelled all transfers which had been made under pressure. The author filed a suit against the City of Prague and against his sister because the City of Prague awarded the building in its entirety to her. On 20 March 1996, the Regional Court for Prague rejected the author's claim because he had become a United States citizen. Indeed, according to the Czechoslovak law 87/1991, the author did not meet the continuous nationality criterion and restitution was denied. The author appealed. On 18 April 1997, the Court of Appeal/City Court rejected the appeal on the same ground that the author was a foreign citizen. The author made an "extraordinary appeal" to the Supreme Court. This appeal was rejected on 30 November 1998.

2.4 The author initiated proceedings with the Constitutional Court which decided on 18 May 1999 that the decision of the Court of Appeal/City Court of 18 April 1997 and the decision of the Regional Court for Prague of 20 March 1996 should both be cancelled. The case was sent back to the Regional Court for Prague which decided on 8 June 2000 that the defendant Jiřina Hrbatová had to cede to the author half of the building, half of the parcel of land and half of the garden within 15 days. On 15 March 2001, the Court of Appeal/City Court cancelled the decision of the Regional Court and sent back the case to the Regional Court.

2.5 On 30 October 2001, the Regional Court decided that its previous decision should be annulled. Upon investigation by the Department of Citizenship, Ministry of the Interior, which notified the Court by letter of 21 August 2001, it appeared that the author was a Czechoslovak and Czech citizen until 10 December 1984 and that on 11 December 1984, he obtained United States citizenship and thus lost his Czechoslovak and Czech citizenship under the Treaty of Naturalization entered into by the former Czechoslovak Republic and the United States of America in 1928 (the Treaty of Naturalization). The Regional Court concluded that the author could not be entitled to restitution.

2.6 With regard to the properties in Soběslav, upon the author's father death in 1987, the one half of the properties that belonged to him was transferred to the author's sister. The author stated that he was "bypassed" because he had become a United States citizen. The author brought a claim to the District Court in Tábor which rejected it on 31 December 1997 because he was not a Czech citizen. The author appealed to the Regional Court in České Budějovice which confirmed the decision of the District Court on 6 November 1998 based on the provisions of Act No. 87/1991. The author went to the Constitutional Court which rejected his case on 10 April 2001.

2.7 The same matter has been considered by the European Court of Human Rights (case No. 71546/01) which found on 16 October 2002 that the facts did not reveal any violation of the provisions of the European Convention. The Czech Republic has not entered a reservation to article 5, paragraph 2 (a) of the Optional Protocol.

### **The complaint**

3. The author claims to be a victim of a violation of article 26 of the Covenant, as the citizenship requirement of the Act No. 87/1991 constitutes unlawful discrimination.

### **The State party's observations on the admissibility and merits of the communication**

4.1 By note verbale of 7 February 2007, the State party made its submission on the admissibility and merits of the communication. It challenged the admissibility of the communication on the ground that it constitutes an abuse of the right of submission of communications within the meaning of article 3 of the Optional Protocol. It invokes the Committee's jurisprudence, in particular in *Gobin v. Mauritius*.<sup>1</sup> In the present case, the State party argues that the author petitioned the Committee in July 2006, three years and nine months after the decision of the European Court of Human Rights of 3 October 2002, without offering any explanation for this time lapse.

4.2 The State party recalls that the author, as well as other persons requesting property restitution, could have applied to the Czech national authorities for citizenship in 1990 and 1991 and that they stood a realistic chance of acquiring this citizenship and thereby meeting the conditions set forth in Act No. 87/1991. By failing to apply for Czech citizenship during this period, the author deprived himself of the opportunity to meet the Restitution Act's requirements in good time.

4.3 The State party further refers to its earlier submissions in similar cases, and indicates that its restitution laws, including Act No. 87/1991, were part of two-fold efforts: to mitigate the consequences of injustices committed during the Communist rule, on one hand, and to carry out speedily a comprehensive economic reform with a view to introducing a well-functioning market economy, on the other. Since it was not possible to redress all injustices committed earlier, the restrictive preconditions were put in place, including that of citizenship, which was envisaged to ensure that due professional diligence would be devoted to returned property. According to the State party, the citizenship requirement has always been considered as in conformity with the Czech Republic's constitutional order by the Constitutional Court.

4.4 Finally, the State party underlines that the disputed properties did not stay in the State's hands but were surrendered to an entitled person in the restitution process as early as 1991. Hence, the author's sister became the owner of the properties as the original owner's legal successor satisfying all the conditions required by the law.

### **Authors' comments**

5.1 On 16 May 2007, the author commented on the State party's response. Regarding the argument that the submission of his communication amounts to an abuse of the right of submission, the applicant denies the existence of such abuse and recalls that there is no deadline for submitting a communication. He also makes reference to the fact that he is not a lawyer.

5.2 The author reiterates that the condition of citizenship in Act No. 87/1991 violates the Czech Constitution and article 26 of the Covenant.

### **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, 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.

6.3 The Committee notes also the State party's argument that the communication should be considered inadmissible as constituting an abuse of the right to submit communications under article 3 of the Optional Protocol, in view of the delay in submitting the communication to the Committee. The State party asserts that the authors waited three years and nine months after the decision of the European Court of Human Rights before submitting their complaint to the Committee. The Committee reiterates 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 in itself constitute an abuse of the right to submit a communication. In the instant case, the Committee does not consider a delay of over three years since the decision of another procedure of international investigation or settlement as an abuse of the right of submission.<sup>2</sup> It therefore decides that the communication is admissible in as far as it appears to raise issues under article 26 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 The issue before the Committee is whether the application to the author of Act No. 87/1991 amounted to discrimination, in violation of article 26 of the Covenant. 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.<sup>3</sup>

7.3 The Committee recalls its Views in the cases of *Adam, Blazek, Marik, Kriz, Gratzinger and Ondracka*<sup>4</sup> where it held that article 26 had been violated. Taking into account that the State party itself is responsible for the departure of the author from the former Czechoslovakia to another country, where he eventually established permanent residence and obtained that country's citizenship, the Committee considers that it would be incompatible with the Covenant to require the authors to meet the condition of Czech citizenship for the restitution of their property or alternatively for its compensation.

7.4 The Committee considers that the principle established in the above cases also applies in the case of the author of the present communication, and that the application by the domestic courts of the citizenship requirement violated his 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 Covenant.

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, including compensation if the properties cannot be returned. 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 that a violation has been established, the Committee wishes to receive from the State party, within 180 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 present report.]



## Notes

- <sup>1</sup> Communication No. 787/1997; inadmissibility decision of 16 July 2001, para. 6.3.
- <sup>2</sup> See communication No. 1305/2004, *Victor Villamon Ventura v. Spain*, Views of 31 October 2006, para. 6.4, communication No. 1101/2002, *Alba Cabriada v. Spain*, Views of 1 November 2004, para. 6.3.
- <sup>3</sup> See communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, para. 13.
- <sup>4</sup> 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, para. 5.8; communication No. 945/2000, *Marik v. Czech Republic*, Views adopted on 26 July 2005, para. 6.4; communication No. 1054/2002, *Kriz v. Czech Republic*, Views adopted on 1 November 2005, para. 7.3; communication No. 1463/2006, *Gratzinger v. Czech Republic*, Views adopted on 25 October 2007, para. 7.5; and communication No. 1533/2006, *Ondracka v. Czech Republic*, Views adopted on 2 November 2007, para. 7.3.

**FF. Communication No. 1497/2006, *Preiss v. The Czech Republic*  
(Views adopted on 17 July 2008, ninety-third session)\***

<i>Submitted by:</i>	Mr. Richard Preiss (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Czech Republic
<i>Date of communication:</i>	22 March 2006 (initial submission)
<i>Subject matter:</i>	Discrimination on the basis of citizenship with respect to restitution of property
<i>Procedural issues:</i>	Abuse of the right of submission; non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Equality before the law and equal protection of the law
<i>Article of the Covenant:</i>	26
<i>Articles of the Optional Protocol:</i>	3, 5, paragraph 2 (b)

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

*Meeting* on 17 July 2008,

*Having concluded* its consideration of communication No. 1497/2006, submitted to the Human Rights Committee by Mr. Richard Preiss 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. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, 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 Richard Preiss, a naturalised American citizen residing in Arizona, United States of America, born on 1 April 1935 in Prague, Czechoslovakia. He claims to be a victim of a violation by the Czech Republic of article 26 of the International Covenant on Civil and Political Rights.<sup>1</sup> He is not represented by counsel.

### Factual background

2.1 The author states that he fled the communist regime in Czechoslovakia in April 1966. In 1972 he obtained the citizenship of the United States of America and as a result lost his Czechoslovakian citizenship, in accordance with the Bilateral Treaty of Naturalization of 1928. He re-acquired Czech citizenship on 17 December 1999.

2.2 The author owned one-eighth of a house and a building in Vinohadry, Prague, and under duress transferred his share of these properties to the Czechoslovak State by a deed of gift on 15 September 1961.

2.3 Under Act No. 87/1991, restitution or compensation was provided for certain property injustices committed between 25 February 1948 and 1 January 1990. Section 3 of the Act required that applicants need to have Czech citizenship in order to be eligible for restitution or compensation.<sup>2</sup> Section 5 of the Act established a time limit of six months following 1 April 1991 for the filing of claims by eligible persons. On the basis of an agreement executed pursuant to Act No. 87/1991, the state-owned Prague 3 Housing Enterprise returned the above properties to the original owners or their heirs, by deed of 25 March 1992, acknowledging that the deed of gift of 1961 had been executed under duress. The author was not a party to the agreement and his property therefore remained in State ownership.

2.4 On 15 September 1993 the author brought an action for nullity of the above agreement before the Prague 3 District Court. On 18 May 1994, the District Court rejected the author's case for lack of *locus standi*, on the ground inter alia of his lack of Czech citizenship.

2.5 On 8 April 1994, the owners of the properties sold their shares for the price of CZK 8,000,000. The author sought the surrender of one-eighth of these properties and on 26 October 1995 instituted proceedings before the Prague 2 District Court, which were however discontinued on 4 January 1996.

2.6 On 9 November 1999, the author sought payment of CZK 1,000,000 compensation in a case brought against the Prague 3 Municipal District before the Prague 3 District Court on the grounds of unjust enrichment. On 3 July 2003, the Court rejected his claim, noting that the author's right to the properties had lapsed as he had failed to raise his claim for restitution within the statute of limitation. The author filed an appeal against the District Court's judgement but withdrew his appeal on 17 October 2003, after which the proceedings were discontinued by the Court on 28 November 2003.

2.7 The author states that some of the Court decisions did not reach him so that he was unable to contest them in time and he explains that he was advised by his Czech lawyers that any further appeals to the courts would be ineffective because of his loss of Czech citizenship.

## **The complaint**

3. The author claims that he is a victim of discrimination, as Act No. 87/1991 makes restitution of his property conditional on having Czech citizenship and the courts rejected his claims on this basis.

## **The State party's observations on admissibility and merits**

4.1 In its submission of 30 April 2007, the State party addresses both admissibility and merits of the communication. As to admissibility, the State party states that the Prague 3 District Court's decision of 18 May 1994 should be seen as the last substantive decision in the author's case and that thus almost twelve years elapsed before the author resorted to the Committee. The author's action on the basis of unjustified enrichment should be regarded as a repetition of the same claim. In the absence of any explanation by the author of the reason for the delay and referring to the Committee's decision in communication No. 787/1997 *Gobin v. Mauritius*,<sup>3</sup> the State party argues that the communication is inadmissible as an abuse of the right to submit a communication under article 3 of the Optional Protocol.

4.2 The State party further claims that the communication is inadmissible for non-exhaustion of domestic remedies as the author failed to submit a request for restitution of his properties under Act No. 87/1991. The State party states that all the author's motions were rejected by the courts primarily because his rights to the properties had become extinct for failure to exercise them within the time limit laid down in the Act. According to the State party, the author thus failed to use the legal means provided to him by Czech law for exercising his rights. Moreover, the State party notes that the author failed to appeal the judgement of the District Court of 18 May 1994 which rejected his claim for nullity of the agreement of restitution of the properties. As to the action for unjustified enrichment which the author instituted, the State party submits that this cannot be regarded as a domestic remedy within the meaning of the Optional Protocol.

4.3 As to the merits of the case, the State party refers to its observations submitted to the Committee in similar cases<sup>4</sup> in which it outlined the political circumstances and legal conditions for the Restitution Act. The purpose of the Act was only to eliminate some of the injustices committed by the communist regime as it was not feasible to eliminate all injustices committed at the time. The State party refers to the decisions by the Constitutional Court which repeatedly considered the question of whether the precondition of citizenship complied with the Constitution and the fundamental rights and freedoms and found no reason for abolishing it.

4.4 The State party further explains that the restitution laws were part of the objective to transform society and to carry out economic reform including the restitution of private property. The condition of citizenship was included to ensure that the private owners would take due care of the property and has been considered to be in full conformity with the State party's constitutional order.

4.5 The State party explains that the author could have re-acquired Czech citizenship as of 1990 on the basis of an application. This could have been done within the time-limit for submitting a restitution claim under Act No. 87/1991. According to the State party 72 persons thus became Czech citizens during the course of 1991. The State party argues that since the author failed to re-acquire Czech citizenship at the time, he deprived himself of the opportunity

to meet the requirement of Act No. 87/1991 in time. In this context, the State party reiterates that citizenship was a legitimate, reasonable and objective criterion that could have been met by the author through the simple submission of a request.

### **The author's comments on the State party's observations**

5.1 In his comments, dated 2 July 2007, on the State party's submission, the author states that Act No. 87/1991 contains discriminatory provisions which violate the Covenant and that he had no *locus standi* before the courts because he failed to meet the citizenship requirement laid down in the law. He further states that there was no need for Act No. 87/1991, as Act No. 119/1990 had already invalidated *ex tunc* the extorted gifts of property like the author's one.

5.2 The author reiterates that the courts in their decisions all made reference to the fact that he had lost his Czech citizenship. He rejects the State party's statement that he could have regained Czech citizenship in 1990 or 1991 since Act No. 88/1990 prevents the acquisition of Czech citizenship in cases where an international treaty would be violated, which according to the author refers to the Treaty on Naturalization.

5.3 The author argues that it has been shown that the citizenship requirement was illegitimate, unreasonable and biased and in violation of international treaties. He further states that the State party knowingly continues to act against the Human Rights Committee's views.<sup>5</sup>

### **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, 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 the communication should be declared inadmissible as an abuse of the right of submission of communication because of the long delay between the last decision in the case and the submission of the communication to the Committee. The Committee notes that the Optional Protocol does not establish time limits within which a communication must be submitted. It is thus only in exceptional circumstances that the delay in submitting a communication would lead to inadmissibility of the communication.<sup>6</sup> In the circumstances of the present case, in view of the fact that the author adopted several actions to claim his rights before the courts and that the latest court decision rejecting the author's claim was some time in November 2003, the Committee considers that the delay is not such as to render the communication inadmissible as an abuse under article 3 of the Optional Protocol.

6.4 The State party has argued that the communication is inadmissible for failure to exhaust domestic remedies. In support of its argument, the State party has noted that the author failed to file an application for restitution of his properties within the time limit established by Act No. 87/1991. Moreover, although the author filed different claims before the courts in an

attempt to receive compensation for his loss of property, the State party has noted that he failed to appeal any of the first instance court judgements, or when he did, he abandoned the appeal. The author himself has claimed that he was informed by his lawyers that appeals against the Court decisions would have been ineffective because of his lack of Czech citizenship at the time.

6.5 The Committee refers to its established jurisprudence that, for purposes of the Optional Protocol, the author of a communication need not exhaust domestic remedies when these remedies are known to be ineffective. The Committee notes that because of the preconditions of law No. 87/1991, the author could not claim restitution at the time because he no longer had Czech citizenship.<sup>7</sup> In this context, the Committee notes that other claimants have unsuccessfully challenged the constitutionality of the law in question; that earlier views of the Committee in similar cases<sup>8</sup> remain unimplemented; and that even despite those complaints, the Constitutional Court has upheld the constitutionality of the Restitution Law. The Committee therefore concludes that no effective remedies were available to the author.

6.6 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 author, since under the explicit terms of the law he was excluded from the restitution scheme from the outset.<sup>9</sup>

6.7 In the circumstances, the Committee finds that article 5, paragraph 2 (b), of the Optional Protocol does not preclude the Committee's consideration of the present communication.

6.8 For the above reasons, the Committee declares the communication admissible in so far as it may raise issues under article 26 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 With regard to the author's claim that he is a victim of discrimination, since Act No. 87/1991 makes restitution of his property conditional on having Czech citizenship, 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.<sup>10</sup>

7.3 The Committee further recalls its Views in the cases of *Simunek, Adam, Blazek, Des Fours Walderode* and *Gratzinger*,<sup>11</sup> where it held that article 26 of the Covenant had been violated and that it would be incompatible with the Covenant to require the authors to meet the condition of Czech citizenship for the restitution of their property or alternatively for its compensation. The Committee considers that the principle established in the above cases equally applies to the author of the present communication and that the application to the author of the citizenship requirement laid down in Act No. 87/1991 violated his 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 author with an effective remedy, including compensation if the property in question cannot be returned. The Committee reiterates that the State party should review its legislation and practice 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 180 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 present report.]

#### Notes

<sup>1</sup> The Optional Protocol entered into force for the State party on 22 February 1993.

<sup>2</sup> A requirement of permanent residence in the Czech Republic was struck out as unconstitutional by the Supreme Court.

<sup>3</sup> Communication No. 787/1997, *Gobin v. Mauritius*, inadmissibility decision adopted on 16 July 2001.

<sup>4</sup> Communication No. 586/1994, *Adam v. the Czech Republic*, Views adopted on 23 July 1996 and communication No. 1000/2001, *Mráz v. the Czech Republic*.

<sup>5</sup> The author refers to the Committee's Views in communications No. 945/2000, *Marik v. the Czech Republic*, Views adopted on 26 July 2005; communication No. 516/1992, *Simunek v. the Czech Republic*, Views adopted on 19 July 1995, and communication No. 1054/2002, *Kríz v. the Czech Republic*, Views adopted on 1 November 2005.

<sup>6</sup> See communication No. 1223/2003, *Tsarjov v. Estonia*, Views adopted on 26 October 2007, para. 6.3; communication No. 1434/2005, *Fillacier v. France*, inadmissibility decision adopted on 28 April 2006, para. 4.3; and communication No. 787/1997, *Gobin v. Mauritius* (note 3 above), para. 6.3.

<sup>7</sup> See also communication No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, para. 5.3.

<sup>8</sup> See *Simunek v. Czech Republic* (note 5 above), *Adam v. Czech Republic* (note 4 above), *Blazek v. Czech Republic*, (note 7 above); communication No. 747/1997, *Des Fours Walderode v. Czech Republic*, Views adopted on 30 October 2001; *Marik v. Czech Republic*, (note 5 above), and *Kriz v. Czech Republic* (note 5 above).

<sup>9</sup> See also communication No. 857/1999, *Blazek v. Czech Republic* (note 7 above), para. 5.9.

<sup>10</sup> See inter alia communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, para. 13.

<sup>11</sup> *Simunek v. Czech Republic* (note 5 above); *Adam v. Czech Republic* (note 4 above), para. 12.6; *Blazek v. Czech Republic* (note 8 above), para. 5.8; *Des Fours Walderode v. Czech Republic* (note 8 above), para. 8.3; and communication No. 1463/2006, *Gratzinger v. the Czech Republic*, Views adopted on 25 October 2007, para. 7.4.



**GG. Communication No. 1533/2006, *Ondracka v. The Czech Republic*  
(Views adopted on 31 October 2007, ninety-first session)\***

<i>Submitted by:</i>	Mr. Zdenek and Mrs. Milada Ondracka (represented by counsel, Mr. James R. Shaules)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Czech Republic
<i>Date of communication:</i>	17 April 2006 (initial submission)
<i>Subject matter:</i>	Discrimination on the basis of citizenship with respect to restitution of property
<i>Procedural issue:</i>	Abuse of the right of submission
<i>Substantive issues:</i>	Equality before the law; equal protection of the law
<i>Article of the Covenant:</i>	26
<i>Article of the Optional Protocol:</i>	3

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

*Meeting on 31 October 2007,*

*Having concluded* its consideration of communication No. 1533/2006, submitted to the Human Rights Committee by Mr. Zdenek and Mrs. Milada Ondracka, 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 Sánchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

A dissenting opinion signed by Committee member Mr. Abdelfattah Amor is appended to the text of the present Views.

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

1.1 The authors of the communication (dated 17 April and 14 August 2006) are Mr. Zdenek Ondracka and Mrs. Milada Ondracka, United States and Czech Republic citizens, born in 1929 and 1933, respectively, in the former Czechoslovakia, currently residing in the United States. They claim to be victims of a violation by the Czech Republic of article 26 of the International Covenant on Civil and Political Rights (the Covenant). They are represented by a counsel, Mr. James R. Shaules.

1.2 The Optional Protocol to the International Covenant on Civil and Political Rights (Optional Protocol) entered into force for Czech Republic on 22 February 1993.

### **Facts as presented by the author**

2.1 During the communist regime, the authors purchased a vacant plot of land in Uherske Hradiste, Czech Republic, where they built their home with the financial and physical assistance of the family. Due to political repression of the communist regime, the authors, using Czechoslovak passports, left Czechoslovakia in 1981 for a twenty-one day long vacation in Bulgaria and Yugoslavia from where they did not return by the required date. Subsequently, and without the authorization of the public authorities, they emigrated to the United States. In 1982, a Czechoslovak court sentenced them in absentia to three years imprisonment and confiscation of their property for abandoning the country. In 1988, the authors obtained United States citizenship. By virtue of a Naturalisation Treaty between the United States and Czechoslovakia from 1928, they lost their Czechoslovakian citizenship.

2.2 In 1991, Act No. 87/1991 on extra-judicial rehabilitation was adopted by the Czech Government, spelling out the conditions for recovery of property for persons whose property had been confiscated under the Communist rule. Under the Act, in order to claim entitlement to recover of his or her property, a person claiming restitution of the property had to be, inter alia, (a) a Czech-Slovak citizen, and (b) a permanent resident in the Czech Republic. These requirements had to be fulfilled during the time period in which restitution claims could be filed, between 1 April and 1 October 1991. A judgment of the Czech Constitutional Court of 12 July 1994 (No. 164/1994) annulled the condition of permanent residence and established a new time-frame for the submission or restitution claims by persons who had thereby become entitled persons, running from 1 November 1994 to 1 May 1995.

2.3 In 1991, pursuant to Act No. 119/90, by a decision of a Czech court (No. Rt 177/91-4), the authors were rehabilitated and consequences of the convicting judgment annulled. On 31 October 1995, the authors sought the restitution of their confiscated property before the District Court in Uherske Hradiste. This court rejected their restitution claim on 4 February 1998 (No. 5C 224/95-29) on the ground that they did not fulfil the citizenship requirement during the period in which the new restitution claims could be made (which ended on 1 May 1995). The authors did not appeal the rejection of their restitution claim because they were advised that it would be a futile attempt to appeal the court's decision. The reason for this was because the Constitutional Court of the Czech Republic had already issued a decision (Pl. US 33/96-41, Exhibit K) upholding the constitutionality of the discriminatory application of paragraph 1 of the

Act No. 87/1991 in a case with a substantially identical fact pattern, as well as the decision of the same court in case No. 185/1997 stating that it considers the requirement of citizenship for restitution to be reasonable. The authors thus claim to have exhausted all domestic remedies which were available and effective.

### **The complaint**

3. The authors claim to be victims of a violation of article 26 of the Covenant, as the citizenship requirement of the Act No. 87/1991 constitutes unlawful discrimination. They invoke the jurisprudence of the Committee in the cases of *Adam v. Czech Republic*, *Blazek v. Czech Republic*, *Marik v. Czech Republic* and *Kriz v. Czech Republic*, in which the Committee found a violation of article 26 by the State party.

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

4.1 On 1 June 2007, the State party commented on the admissibility and merits of the communication. It challenged the admissibility of the communication on the ground that it constitutes an abuse of the right of submission of communications within the meaning of article 3 of the Optional Protocol. It invokes the Committee's jurisprudence, in particular in *Gobin v. Mauritius*.<sup>1</sup> In the present case, the State party argues that the authors petitioned the Committee on 17 April 2006, eight years and two months after the judgment of the District Court in Uherske Hradiste of 4 February 1998, without offering any explanation for this time lapse.

4.2 The State party recalls that the author only obtained Czech citizenship on 23 June 2000. It argues that the authors were not subjected to a differential treatment, but that they were treated in the same way as all other persons who failed to meet the citizenship requirement by 1 October 1991, as provided for in the Act No. 87/1991. Since the authors only acquired Czech Republic citizenship on 23 June 2000, they failed to satisfy this condition. According to the State party, this is the established interpretation of this Act, followed also by the Supreme Court.

4.3 The State party further refers to its earlier submissions in similar cases, and indicates that its restitution laws, including Act No. 87/1991, were part of two-fold efforts: to mitigate the consequences of injustices committed during the Communist rule, on one hand, and to carry out a comprehensive economic reform with the objective of introducing a well-functioning market economy, on the other. Since it was not possible to redress all injustices committed earlier, the restrictive preconditions were put in place, including that of citizenship, its main objective being to incite owners to take good care of the property in the process of privatization. According to the State party, the citizenship requirement has always been in conformity with the Czech Republic's constitutional order by both the Parliament and the Constitutional Court.

4.4 Finally, the State party underlines that Act No. 87/1991, in addition to the citizenship requirement, set out other conditions that had to be met by claimants for them to be successful with their restitution claims. In particular, one of the conditions laid down in the section 5, subsection 2, of this Act was that the person entitled had to call upon the liable person to return the property within six months of the entry into force of the Act, i.e. until 1 October 1991, otherwise the claim would expire. The State party argues that the authors failed to do so, but rather that they brought their claim directly before the District Court on 31 October 1995, after

the expiration of the one-year time-limit set forth in the section 5, subsection 4 of this Act, providing that should the liable person reject the request made according the subsection 2, the entitled person may bring its claims before the court within one year, i.e. until 1 April 1992.

### **Authors' comments to the State party's observations**

5.1 On 29 August 2007, the authors commented on the State party's response. Regarding the argument that the submission of their communication amounts to an abuse of the right of submission, the applicants assert that the delay was due to the fact that their lawyer in the Czech Republic failed to inform them about the possibility to seek a remedy before the Committee. In fact, after the Czech court ruled against their claim for restitution in 1998 the lawyer recommended that they should abandon the case. The authors, who were 78 and 74 years old respectively and do not have legal training, only learned about the Committee's jurisprudence regarding restitution of property through internet, in 2005. On 30 March 2006 they wrote to the Committee, who requested them to submit additional information. Immediately afterwards, they hired a lawyer in the United States to bring the case before the Committee.

5.2 The authors reiterate that in view of the Committee's clear jurisprudence on the subject matter of the case, there was a violation of article 26 by the State party.

### **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 is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a) of the Optional Protocol.

6.3 With respect to the requirement of exhaustion of domestic remedies, the Committee notes that the State party has not contested the authors' argument that in their case there are no available and effective domestic remedies. In this context, the Committee recalls that only such remedies have to be exhausted which are both available and effective. The applicable law on confiscated property does not allow for the restoration or compensation to the authors. After the judgment of the District Court in Uherske Hradiste of 4 February 1998 which rejected the authors' restitution claim, there was no effective or truly available remedy for the authors to pursue within the Czech legal system. By decision No. 185/1997, the Constitutional Court of the Czech Republic confirmed that it considers the requirement of citizenship for restitution to be reasonable.<sup>2</sup> In this regard, the Committee reiterates that when the highest domestic court has ruled on the matter in dispute, thereby eliminating any prospect that a remedy before the domestic court may succeed, the author is not obliged to exhaust domestic remedies for the purposes of the Optional Protocol.<sup>3</sup> Therefore, the Committee considers that the authors have sufficiently substantiated that it would have been futile for them to challenge the judgment in their case.

6.4 The Committee has noted the State party's argument that the communication should be considered inadmissible as constituting an abuse of the right to submit communications under article 3 of the Optional Protocol, in view of the excessive delay in submitting the communication to the Committee. The State party asserts that the authors waited eight years and two months after the date of the District Court judgment before submitting their complaint to the Committee. The Committee reiterates 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 in itself constitute an abuse of the right to submit a communication. In the instant case, where the authors had been advised by their lawyer to abandon the case in 1998 and only learned about the Committee's jurisprudence on restitution of property in 2005, the Committee does not consider the eight-year delay as an abuse of the right of submission.<sup>4</sup> It therefore decides that the communication is admissible in as far as it appears to raise issues under article 26 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 The issue before the Committee is whether the application to the authors of Act no. 87/1991 amounted to discrimination, in violation of article 26 of the Covenant. 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.<sup>5</sup>

7.3 The Committee recalls its Views in the cases of *Adam, Blazek, Marik, Kriz, and Gratzinger*<sup>6</sup> where it held that article 26 had been violated. Taking into account that the State party itself is responsible for the departure of the authors from the former Czechoslovakia in seeking refuge in another country, where they eventually established permanent residence and obtained that country's citizenship, the Committee considers that it would be incompatible with the Covenant to require the authors to meet the condition of Czech citizenship for the restitution of their property or alternatively for its compensation.

7.4 The Committee considers that the principle established in the above cases also applies in the case of the authors of the present communication, and that the application by the domestic courts of the citizenship requirement 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 Covenant.

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, including compensation if the property cannot be returned. 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 that a violation has been established, the Committee wishes to receive from the State party, within 180 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 present report.]

### Notes

<sup>1</sup> Communication No. 787/1997; inadmissibility decision of 16 July 2001, para. 6.3.

<sup>2</sup> “The International Covenant on Civil and Political Rights stipulates the principle of equality in its Article 2, para. 1 and its Article 26. The right to equality stipulated in Article 2 is of the accessory nature; e.g. it applies only in conjunction with another right enshrined in the Covenant. The Covenant does not contain the right to property. Article 26 stipulates the equality before the law and the prohibition of discrimination. Citizenship is not listed among the demonstrative enumeration of the grounds on which discrimination is prohibited. The Human Rights Committee repeatedly admitted differentiation based on reasonable and objective criteria. The Constitutional Court considers the consequences of Article 11 para. 2 of the Charter of Fundamental Rights and Freedoms (2) as well as the objectives of the restitution legislation and also the legislation concerning the citizenship as being such reasonable and objective criteria.”

<sup>3</sup> Communication No. 1095/2002, *Bernardino Gomariz Valera v. Spain*, Views adopted on 22 July 2005, para. 6.4.

<sup>4</sup> See communication No. 1305/2004, *Victor Villamon Ventura v. Spain*, Views adopted on 31 October 2006, para. 6.4, communication No. 1101/2002, *Alba Cabriada v. Spain*, Views adopted on 1 November 2004, para. 6.3.

<sup>5</sup> See communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, para. 13;

<sup>6</sup> 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, para. 5.8; Communication No. 945/2000, *Marik v. Czech Republic*, Views adopted on 26 July 2005, para. 6.4; Communication No. 1054/2002, *Kriz v. Czech Republic*, Views adopted on 1 November 2005, para. 7.3; Communication 1463/2006, *Gratzinger v. Czech Republic*, Views adopted on 25 October 2007, para. 7.5.

## APPENDIX

### Dissenting opinion by Mr. Abdelfattah Amor

Eight years and two months after they exhausted all available effective remedies, the authors submitted a communication to the Committee. In the opinion of the Committee and contrary to the State party's contention, this delay does not constitute an abuse of the right of submission. The communication is therefore declared admissible.

I do not share the Committee's assessment, which leads me to make three observations.

First, while it is true that the Optional Protocol does not establish any deadline for the submission of communications, article 3 of the Optional Protocol states that the Committee "shall consider inadmissible any communication ... which it considers to be an abuse of the right of submission of such communications". Clearly, the Protocol, without deciding the question of the time lapse between the exhaustion of available effective domestic remedies and the submission of communications, invites the Committee to consider cases of abuses the assessment of which is part of its mandate. This means that, not only is the Committee not prohibited from establishing deadlines for the submission of communications, it is positively invited to do so. And the Committee has done so on many occasions, within the framework of its jurisprudence, as will be indicated below. I believe that the Committee, which has control over its rules of procedure, which is basically a set of regulations, can establish precise and formal rules concerning the question of time limits, both with regard to the exhaustion of domestic remedies and to the conclusion of the procedure of international investigation or settlement by a body other than the Committee. It is advisable that the Committee do so as soon as possible.

It is a question of interest to complainants, who will receive clear and timely instructions concerning their rights and the limitations on those rights.

It is a question of legal guarantees, which cannot continue to be unreasonably exposed to uncertainties, and it is no accident that the admissibility of procedures is subject, both in domestic law and very often in international law, to deadlines and time limits. In this regard, it is useful to recall that the deadline for the submission of applications to the European Court of Human Rights is six months following the exhaustion of domestic remedies.

Lastly, it is a question that concerns the credibility of the Committee itself, access to which cannot be left to temporal and personal equations that conjugate the past - even the remote past - in the present perfect and the objectivization of the right, if not in a subjective manner then at least in a highly relative manner. It is time to rationalize this aspect of the Committee's procedure, and time to put aside hesitation and establish the necessary consistency.

Secondly, in the framework of its jurisprudence, the Committee has been faced with the question of deadlines in connection with the abuse of the right of submission.

In communication No. 1076/2002, *Kasper and Sopanen v. Finland*, the Committee, after noting that the authors had submitted their communication one year after the European Commission on Human Rights declared their application inadmissible

*ratione temporis*, considered that, in the particular circumstances of the case, that “it is not possible to consider the time that passed before the communication was filed was so unreasonable as to make the complaint an abuse of the right of submission”.

In communication No. 1101/2002, *Alba Cabriada v. Spain*, the Committee considered that the period of time that elapsed before the submission of the communication (in this case, two and a half years), “other than in exceptional cases, does not of itself constitute an abuse of the right to submit a communication”. The Committee added that “neither has the State party duly substantiated why it considers that a delay of more than two years would be excessive in this case”.

In a third communication, where the delay was three years and five months (communication No. 1445/2006, *Polacková and Polacek v. the Czech Republic*), the Committee declared the communication admissible on the grounds that the delay was not “so unreasonable as to amount to an abuse of the right of submission”.

On the other hand, some communications have exceeded the time limit that the Committee considers reasonable, and have been considered inadmissible. This has occurred in a number of cases.

In communication No. 1434/2005, *Fillacier v. France*, the Committee noted that the Council of State had handed down its ruling on 8 June 1990, over 15 years before the communication was submitted to the Committee, and considered that such a long delay amounted to an abuse of the right of submission. It decided that “the communication is inadmissible under article 3 of the Optional Protocol ...”.

In communication No. 1452/2006, *Chytil v. the Czech Republic*, the Committee, after noting that the author “waited for nearly ten years before bringing his claims to the Committee”, stated that it “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”.

Lastly, in communication No. 787/1997, *Gobin v. Mauritius*, the Committee considered that “submitting the communication after such a time lapse [five years] should be regarded as an abuse of the right of submission, which renders the communication inadmissible under article 3 of the Optional Protocol”.

It will be noted that time lapses of 15, 10 and 5 years were considered by the Committee to be unreasonable and excessive and were deemed to constitute an abuse of the right of submission, resulting in inadmissibility. On the other hand, in the Committee’s view, time lapses of three years and five months, two years and one year are neither unreasonable nor excessive and therefore do not constitute an abuse of the right of submission and do not pose an obstacle to admissibility.

However, in the present case (*Ondracka*), the Committee “does not consider the eight-year delay as an abuse of the right of submission. It therefore decides that the communication is admissible”.



Thirdly, the Committee rightly considers that, in cases where the time lapse between the exhaustion of available effective remedies and the submission of the communication is justified, abuse of the right of submission cannot be invoked. The lack of an explanation does not pose an obstacle to admissibility when the State party does not cooperate, as was the case in communication No. 1134/2002, *Fongum Gorji-Dinka v. Cameroon*, where there was a 12-year delay. The justification is essentially based on the explanation provided by the author of the communication.

In the *Chytil* case, the author “has not explained or justified why he waited for nearly ten years before bringing his claims to the Committee”. The same reproach - lack of an explanation - is indicated in the *Gobin* and *Fillacier* cases. In the latter two cases, and also in the *Fongum Gorji-Dinka* case, the Committee states that the explanation must be convincing, which was not the case in every instance where an abuse of the right of submission was found. The Committee does not provide an a priori definition of what makes an explanation convincing. However, its consideration of the facts and of the elements adduced in support of admissibility leads it to form an opinion with regard to whether or not an explanation is convincing. However, the Committee is on very slippery ground here and is not free from subjective and variable assessments, so much so that some could say that, in the Committee’s eyes, a delay of eight years and two months is less than a delay of five years. Thus, in the *Gobin* case, the explanation provided by the author was based on the discovery by his son in the course of his law studies, of the procedure for submitting individual complaints to the Committee. In the present communication (*Ondracka*), the Committee considers that there was no abuse of the right of submission and declares the communication admissible since “the authors had been advised by their lawyer to abandon the case in 1998 and only learned about the Committee’s jurisprudence on restitution of property in 2005”. A strange explanation! Who gives the Committee the right to evaluate advice given by lawyers? Who decides that the discovery of the Committee’s jurisprudence is a convincing argument?

There will always be sincere and well-intentioned people who discover, in the near or distant future, the Committee’s jurisprudence. In short, no one is supposed to be aware of the law, and no one is supposed to be aware of the Committee’s jurisprudence ... until a person discovers that it can be used to support his or her interests. The Committee will decide. And it has decided in this case; in a strange way ... a way in which objectivity and reasonableness are, in my view, far from evident. In other words, it is imperative that the Committee steer clear of questionable assessments and avoid inconsistencies by establishing - as is its right - formal and clear rules regarding time limits for submitting communications.

(Signed): Mr. 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 present report.]

**HH. Communication No. 1542/2007, *Hassan Aboushanif v. Norway*  
(Views adopted on 17 July 2008, ninety-third session)\***

<i>Submitted by:</i>	Mr. Abdeel Keerem Hassan Aboushanif (represented by counsel, Anders Ryssdal)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Norway
<i>Date of communication:</i>	20 November 2006 (initial submission)
<i>Subject matter:</i>	Decision to deny leave to appeal not reasoned
<i>Procedural issue:</i>	Substantiation of claim
<i>Substantive issues:</i>	Right to review of conviction and sentence by higher tribunal
<i>Article of the Covenant:</i>	14, paragraph 5
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 17 July 2008,*

*Having concluded* its consideration of communication No. 1542/2007, submitted to the Human Rights Committee by Mr. Abdeel Keerem Hassan Aboushanif 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, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

Two individual opinions signed by Committee members Mr. Ivan Shearer and Ms. Ruth Wedgwood are appended to the present decision.

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

1. The author of the communication, dated 20 November 2006, is Mr. Abdeel Keerem Hassan Aboushanif. The author, who was born in 1946, came to Norway from Egypt in 1970. He has been serving a 20-month prison sentence since 23 November 2006. He claims to be a victim of a violation by Norway of article 14, paragraph 5, of the International Covenant on Civil and Political Rights. The Optional Protocol to the International Covenant on Civil and Political Rights entered into force for Norway on 23 March 1976. The author is represented by counsel, Mr. Anders Ryssdal.

### **The facts as presented by the author**

2.1 The author owns a number of restaurants in Norway. On 11 January 2006, he was convicted by the Sarpsborg District Court of fraud and several breaches of the Norwegian Act on Value Added Tax and the Norwegian Accounting Act.<sup>1</sup> He was sentenced to 20 months imprisonment and to pay damages to the Østfold revenue and social security offices. On 3 February 2006, he lodged an appeal on grounds of procedural errors, including on the ground that the District Court based its decision on documents which were not presented to the parties.

2.2 On 1 June 2006, the Borgarting Court of Appeal denied leave to appeal. The author claims that no reason was given for the denial; the Court simply stated that it was clear that the appeal would not succeed. The author appealed against this decision to the Appeal Committee of the Supreme Court (*Kjæremåsutvalget*). The appeal was dismissed on 19 July 2006.

2.3 The author indicates that under the Norwegian Criminal Procedure Act,<sup>2</sup> leave to appeal can only be denied when the Court of Appeal considers that an appeal will not succeed. Moreover, the decision of denial does not need to be substantiated. It can be challenged before the Appeal Committee of the Supreme Court, but only on grounds of procedural errors. According to the Supreme Court's jurisprudence, these provisions do not violate the requirements of the right to a fair trial. However, it has recognized that, in certain circumstances, the Court of Appeal may have to provide reasons for the denial of leave to appeal.

### **The complaint**

3. The author claims that Norway violated his rights under article 14, paragraph 5, of the Covenant to have his criminal conviction and sentence reviewed by a higher tribunal according to law because the Court of Appeal did not provide any argument for the denial of leave to appeal against his conviction and sentence. Therefore, it cannot be ascertained that there has been a substantive examination of his appeal. He claims that, due to the nature and the complexity of his case, reasoned arguments for the preliminary dismissal of his appeal were required in order to ascertain that his appeal had been adequately reviewed in accordance with the requirements of article 14, paragraph 5, of the Covenant.

### **State party's observations on the admissibility and the merits of the communication**

4.1 On 24 September 2007, the State party made its submission on the admissibility of the communication and on 23 November 2007, it made its submission on the merits. The State party

maintains that the communication lacks sufficient substantiation and is therefore inadmissible under article 2 of the Optional Protocol. Alternatively, the State party argues that the leave to appeal proceeding complies with article 14, paragraph 5, of the Covenant.

4.2 The leave to appeal system was introduced in Norway in 1993 for felonies punishable by law with imprisonment for a term not exceeding six years. The requirements to disallow an appeal are strict: The Appeals Court, sitting with three professional judges, may only refuse an appeal if it unanimously determines that the appeal would not succeed. In making such determination, all three judges review the substance of the case. The decision of the Court of Appeal is made without oral hearings. However, the parties may express their views in writing and they may introduce new evidence.

4.3 The State party submits that the leave to appeal system constitutes a review within the meaning of article 14, paragraph 5, of the Covenant. Consequently, the Court of Appeals decision - albeit summarily reasoned - does not amount to a breach of the author's right to have his sentence reviewed. It states that the question whether the current system satisfies the requirements of article 14, paragraph 5, of the Covenant, was thoroughly assessed during the drafting of the bill amending the Criminal Procedure Act in 1993, including by an independent human rights expert, the Ministry of Justice and the National Assembly. The State party maintains that the leave to appeal system in Norway ensures a thorough review of the substance of all cases while taking procedural economy into consideration.

4.4 The State party refers to the Committee's Views in the case of *Bryhn v. Norway*,<sup>3</sup> where the Committee decided that the leave for appeal system did not breach article 14, paragraph 5, of the Covenant. In accordance with this decision, article 14, paragraph 5, does not require written decisions to be reasoned beyond the summary reasons given in this case, and that the totality of the review process must be scrutinized. The State party adds that if all decisions in appeal proceedings have to be reasoned, this would jeopardize the role of the jury.

4.5 The State party maintains that there is no reason to assume that the author did not have his case reviewed in substance, as all his arguments were thoroughly commented on and refuted by the Prosecuting Authority before the Court of Appeal decided not to grant the leave to appeal. Furthermore, the wording of the Court of Appeal's decision indicates that the Court has considered the appeal in detail. Lastly, the fact that the Supreme Court's Appeal Committee - which also had all documents available - upheld the decision of the Court of Appeal, even though the author pointed to the lack of reasoning in that decision, confirms that no errors have occurred and that the Borgarting Court of Appeal thoroughly and objectively reviewed each appeal ground.

4.6 On the merits, the State party argues that article 14, paragraph 5, of the Covenant does not require the Court of Appeal to provide detailed reasons for its decision in order to ascertain that a substantive review has taken place. It adds that this provision aims at securing the effective exercise of the right to appeal. As a reasoned, written judgment of the trial courts forms the basis for most appeals, the right to a review would naturally be hampered without it.<sup>4</sup> Reasoned decisions from the appellate courts may be necessary when there is a further avenue of appeal, to form the basis for such an appeal.<sup>5</sup> In the present case, however, the decision of the Court of Appeal was final, as the author has no further avenue of appeal concerning the sufficiency of the evidence or the application of the law. The interlocutory appeal to the Supreme Court was limited by law to procedural errors made by the Court of Appeal. Thus, even if the Court of

Appeal had provided detailed comments on the issues that formed the basis for the author's appeal, i.e. the facts (calculation of mark-up rates), the law (correct standard of proof) or alleged procedural errors of the District Court (the evidentiary basis for the conviction), those grounds would fall outside the scope of the review by the Supreme Court. Hence, the appellate court's reasoning could not have formed the basis for a further appeal and was thus unnecessary to secure an effective exercise of the right to appeal within the meaning of article 14, paragraph 5, of the Covenant.

4.7 The State party submits that the Borgarting Court of Appeal was the most appropriate body to determine whether or not there were sufficient grounds for granting leave to appeal in this case. The State party makes reference to a statement by the Chief Judge of the Borgarting Court of Appeal where he confirms that the appellate judges will always consider the decision of the District Court, the reason provided for the appeal and all investigation documents, including police reports and statements from witnesses. Furthermore, the Chief Judge controlled the judges' notes and confirmed that the case was handled procedurally correctly.

4.8 The State party invokes decisions by both the former European Commission of Human Rights and the European Court of Human Rights, which accepted that the leave to appeal procedure conforms with the European Convention on Human Rights and its Protocol 7. It also compared the Norwegian system with the Swedish system, where decisions not to grant leave for appeal are, in practice, never reasoned.

#### **Author's comments on the State party's observations**

5.1 On 16 May 2007, the author submitted comments on the State party's response. He states that the proceedings before the Sarpsborg District Court were long and complex, and that it is impossible for any appellate tribunal to establish without doubt that the appeal could not succeed, simply by reading the judgement and the appeal. He maintains that the trial court consistently adopted the prosecution's view, even if a number of issues required assessment and discretion by the court. Furthermore, the author states that the trial court based its decision on evidence that had not been presented to the court and that the sentence imposed was extremely harsh.

5.2 The author submits that the court did not apply the correct standard of proof in its judgement: it used the civil law "balance of probabilities" threshold, rather than the criminal law "beyond reasonable doubt" standard. Moreover, the court adopted the County Tax Office statements without conducting its own independent evaluation of the facts. In addition, no expert judges were elected to sit on such a difficult and complex financial case. The Court of Appeal could not conclude, simply by reading the judgment and the appeal and without reviewing the parties' evidence, that the appeal would certainly fail on all counts.

5.3 The author argues that there was a breach of the rules on evidence at the trial court, as it contains factual errors, which discredit the lower court proceedings generally and calls for a hearing *de novo*. As to the punishment imposed, the author believes that his sentence was much more severe than the ones rendered in similar cases, which entitles him to a new examination of his case in appeal.

5.4 The author states that, in cases where the lower court judgment reveals deficiencies as regards due process, the Norwegian Supreme Court has required that appeal rejections be

reasoned. The fact that the Supreme Court did not detect the errors in the case of the author demonstrated that the Norwegian system failed. He refers to a number of Norwegian judicial decisions, where the Supreme Court has stated that the appellate court should provide justification for rejecting an appeal.<sup>6</sup> As regards the jurisprudence of the Committee,<sup>7</sup> the author disagrees with the interpretation of the *Bailey* case<sup>8</sup> made by the State party and submits that in that case, unlike his, the author was indeed provided with a reasoned decision. With respect to the *Bryhn* case,<sup>9</sup> the author argues that this decision is irrelevant, as it is outdated and as the issue of the need for a reasoned decision was not discussed by the Committee.

5.5 The author submits that procedural economy cannot constitute a valid argument to limit the right to appellate review. As regards the State party's contention that a decision in his favour would jeopardize the role of the jury, the author contends that jury decisions are reasoned and that they maintain important legal safeguards.

## **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, 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.

6.3 The Committee notes the State party's argument that the communication should be considered inadmissible under article 2 of the Optional Protocol due to lack of sufficient substantiation. The Committee considers that the author's allegations have been sufficiently substantiated, for purposes of admissibility. It therefore decides that the communication is admissible in as far as it appears to raise issues under article 14, paragraph 5, 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 The Committee notes the author's claim that his rights under article 14, paragraph 5, to have his conviction and sentence reviewed by a higher tribunal was violated, because the decision of the Court of Appeal did not disclose the reasons for disallowing his appeal against the District Court. The Committee also notes that the decision to reject the appeal was unanimous and subscribed to by three professional judges, and that the decision was later appealed and subjected to the scrutiny of the Supreme Court, albeit only on procedural grounds. The Committee recalls its jurisprudence, according to which, while States parties are free to set the modalities of appeal, under article 14, paragraph 5, they are under an obligation to review substantially the conviction and sentence.<sup>10</sup> In the present case, the judgment of the Court of Appeal does not provide any substantive reason at all as to why the court determined that it was

clear that the appeal would not succeed, which puts into question the existence of a substantial review of the author's conviction and sentence. The Committee considers that, in the circumstances of the case, the lack of a duly reasoned judgment, even if in brief form, providing a justification for the court's decision that the appeal would be unsuccessful, impairs the effective exercise of the right to have one's conviction reviewed as required by article 14, paragraph 5, 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 14, paragraph 5, 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, including the review of his appeal before the Court of Appeals and compensation. The State party is also under an obligation to take measures to prevent similar violations in the future.

10. By becoming a party to the Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and, pursuant to article 2 of the Covenant, the 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. In this respect, the Committee wishes to receive from the State party, within 180 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 present report.]

### Notes

<sup>1</sup> He was convicted for breaches of the Norwegian Penal Code (*straffeloven*) section 270 (1), para. 2; section 271; the Norwegian Act on Valued Added Tax (*merverdiafgiftloven*) section 72, para. 1, Nos. 1 and 3; and para. 2, Nos. 2 and 3; the Norwegian Accounting Act (*regnskapsloven*) section 8-5, para. 1.1; section 1-2, chapter 2, section 10-2; and the Norwegian Accounting Law of 1977, chapter 2, sections 5, 6, 8 and 11, in connection with the Norwegian Penal Code, section 62 (1).

<sup>2</sup> Section 321, second paragraph of the Norwegian Criminal Procedure Act reads. "An appeal to the Court of Appeal may otherwise be disallowed if the court finds it obvious that the appeal will not succeed (...)."

<sup>3</sup> Communication No. 789/1997, *Bryhn v. Norway*, Views of 29 October 1999.

<sup>4</sup> The State party refers to general comment No. 32 (2007), article 14: Right to equality before courts and tribunals and to a fair trial.

<sup>5</sup> The State party refers to communication No. 709/1996, *Bailey v. Jamaica*, Views of 21 July 1999.

<sup>6</sup> Cases HR-1998-00227 - Rt-1998-710 (207-98); HR-2001-01409 - Rt-2001-1635 (295-2001); HR-2002-01401 - Rt-2002-1733 (382-2002); HR-2006-01949-U - Rt-2006-1445; and HR-2007-00880-U - Rt-2007-789.

<sup>7</sup> The author refers, inter alia, to communication No. 355/1989, *Reid v. Jamaica*, Views adopted on 8 July 1994; communication No. 662/1995, *Lumley v. Jamaica*, Views adopted on 31 March 1999; and communication No. 230/1987, *Henry v. Jamaica*, Views adopted on 1 November 1991.

<sup>8</sup> *Bailey v. Jamaica*, op. cit.

<sup>9</sup> *Bryhn v. Norway*, op. cit.

<sup>10</sup> *Reid v. Jamaica* (note 7 above), para. 14.3.



## APPENDIX

### Individual opinion of Committee member Mr. Ivan Shearer (concurring)

I agree with my colleagues in the result of this communication, but I wish to state my understanding of the meaning of the words “even if in brief form” contained in paragraph 7.2 of the Views of the Committee. In my opinion article 14, paragraph 5 of the Covenant does not require courts of appeal, and especially final courts of appeal, to state reasons at length when considering applications for leave to appeal against conviction or sentence, either orally or on the papers. Indeed such a requirement would impose an intolerable burden on the higher courts of populous states. On the other hand, something more is required than a formulaic response to the effect that the appeal has no prospect of success. However briefly stated, the Court should indicate to the appellant the main reasons why the Court cannot entertain the appeal. I draw to the State party’s attention a useful reflection by a serving judge of a final court of appeal on the general problem, not limited to criminal cases, raised by the present communication: M.D. Kirby, “Maximizing Special Leave Performance in the High Court of Australia”.<sup>1 2</sup>

(Signed): Mr. Ivan Shearer

[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 present report.]

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<sup>1</sup> *University of New South Wales Law Journal*, vol. 30 (2007), pp. 731-752.

<sup>2</sup> Examples of brief reasons typically given by the High Court of Australia in particular cases rejecting applications for special leave to appeal are to be found on the web site <http://www.austlii.edu.au/au/cases/cth/HCASL>.

### **Individual opinion of Committee member Ms. Ruth Wedgwood (dissenting)**

The author of this communication is a trained economist and experienced restaurant owner, who had previously developed and sold various restaurant establishments.

In July 2005 he was charged with significant financial offenses in relation to two of his restaurants. In January 2006, after a five-week trial before a three-judge court composed of professional judges, the author was found guilty of evading Norway's Value Added Tax by filing incorrect tax returns that underreported actual sales, as well as by failing to file required VAT returns. In addition, he was convicted of failing to maintain the required documentation of accounting information. And finally, he was convicted of fraudulent receipt of sickness and rehabilitation benefits during a period when he was in fact working. He was acquitted on a charge of receiving the proceeds of a criminal act. The court imposed a sentence of twenty months in jail.

Norway accompanied its ratification of the International Covenant on Civil and Political Rights, in 1972, with a general reservation in regard to article 14, paragraph 5 of the Covenant, concerning the right to appeal criminal convictions. However, in 1995, the State party amended its judicial code to provide for the possibility of review of criminal convictions in all ordinary cases, through a "leave to appeal" system. With this change, Norway preserved its article 14, paragraph 5, reservation for two situations only: the trial of public officials in courts of "impeachment", and the entry of a conviction by an appellate court following an initial judgment of acquittal below.

Under the Covenant, the case of Mr. Aboushanif is one that falls on the margin. The Norwegian trial court wrote a 28 page single-spaced opinion explaining the basis for the conviction and the sentence, including rarified details of the methodology used in the calculation of actual restaurant receipts. The three-judge panel of the Court of Appeals received briefs from both sides, and then denied the application for leave to appeal, concluding in three operative paragraphs that it was "clear that the appeal will not succeed". This was a unanimous decision, and had a single judge disagreed, the case would have gone forward for a full review. The Court of Appeal noted that the issues it had considered addressed matters of "the procedure, the application of law and the assessment of the sentence", as well as the calculation of the amount of VAT evaded and the extent of the National Insurance fraud.

The Committee now concludes that this abbreviated opinion constitutes a violation of article 14, paragraph 5 of the Covenant.

It is plain that the exercise of writing an opinion is a useful discipline for every conscientious judge. It helps to guarantee fairness and the appearance of fairness to the parties. An esteemed common law judge in the American system, Judge Henry J. Friendly, famously remarked that there are times when "the opinion will not write". Indeed, it is the task of setting pen to paper that may frame the problems of a case most cogently for a reviewing judge.

Nonetheless, this good practice must be squared against the language and intention of the Covenant. Article 14, paragraph 5, states that "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." Article 14, paragraph 5, does not speak, as such, of the procedural requirements of an appeal, though these

may be grounded on general principles of law. But it is notable that shortly after Norway's "leave to appeal" system was instituted, the Human Rights Committee concluded that article 14, paragraph 5, was satisfied, even where no oral hearing was provided to the parties.<sup>1</sup>

So, too, in July 2007, the Committee issued the final text of general comment No. 32 (2007), on the scope of article 14. This summary of Committee jurisprudence states that "The right to have one's conviction reviewed can only be exercised effectively if the convicted person is entitled to have access to a duly reasoned, written judgement *of the trial court*, and at least in the court of first appeal *where domestic law provides for several instances of appeal ...*"<sup>2</sup>

We do not have at hand any survey of how many States parties have a "leave to appeal" system. And certainly, there are State systems that use abbreviated opinions in disposing of appeals on the merits, restricting full opinions to the cases that present novel issues of law or have significant public import. The view may be taken that the parties are familiar with the facts as found below, and that the case is therefore not worthy of extended exegesis.

In the system of the State party in this case, the scope of review provided at the level of the third instance court, in the Norwegian Supreme Court, is seemingly confined to procedural errors that occur in the Court of Appeals, rather than in the trial court. Hence, there may not be the additional level of appeal that would, under the contemplation of general comment No. 32, require the publication of a "duly reasoned" and "written" exegesis by the appellate court.

In any event, the Committee should exercise some caution in this area. Caseloads can be crushing in a great many legal systems. The liberality of the Norwegian system, in permitting a party to seek leave to appeal on any point of law or fact, would be discouraged by a requirement of elaborate opinions. And the State party has noted that the role of the jury system in the adjudication of some appeals in the Norwegian system may effectively preclude the use of written opinions. This Committee, too, has pressed many States parties on the importance of the speedy disposition of appeals, as much as speedy trials. And certainly, it would not have added much if the Court of Appeals in this case had said, "For the reasons adduced by the Trial Court, we affirm." Thus, though it is hardly a surprise, it will often be difficult to strike the right balance between the various demands of fairness in a criminal justice system.

(Signed): Ms. 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 present report.]

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<sup>1</sup> See *Bryhn v. Norway*, No. 789/1997, Views adopted on 29 October 1999.

<sup>2</sup> This may reflect the view that a written opinion is necessary in part to permit another court to review the proceedings below. But it does not, as such, require more than one level of review. General comment No. 32 (2007), paras. 45-51.

## Annex VI

### 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. 1031/2001, *Weerasinghe v. Sri Lanka* (Decision adopted on 31 October 2007, ninety-first session)\*

<i>Submitted by:</i>	Amaranada Banda Weerasinghe (represented by counsel, Mr. Elmore M. Perera)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Sri Lanka
<i>Date of submission:</i>	18 January 2001 (initial submission)
<i>Subject matter:</i>	Fair trial in Supreme Court following labour complaints.
<i>Procedural issue:</i>	Sufficient substantiation for purposes of admissibility.
<i>Substantive issue:</i>	Fair trial
<i>Article of the Optional Protocol:</i>	2
<i>Article of the Covenant:</i>	14

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

*Meeting on 31 October 2007,*

*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, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

## Decision on admissibility

1. The author of the communication, initially dated 18 January 2001, is Amaranada Banda Weerasinghe, a Sri Lankan citizen, who claims to be a victim of a violation by Sri Lanka of article 14 of the International Covenant on Civil and Political Rights. The author is represented by counsel, Mr. Elmore Perera.

### Factual background

2.1 The author worked for the Mahaweli Authority of Sri Lanka (“the Authority”), a statutory body charged with undertaking large-scale integrated rural development based on water resources of the Mahaweli and six other river basins. From 11 August 1988, he worked as Project Manager on Victoria and Randenigala projects. On 1 April 1992, the author was transferred to another project, “System L”, as project manager. On 5 September 1992, the author held an inquiry into an allegation that a colleague mechanic had misappropriated State property, who was later convicted in Magistrate’s Court. The mechanic assaulted the author, as a result of which he began to suffer from ill health. In September 1992, he submitted a medical certificate requesting leave for 3 months from 15 September 1992. The author was later informed that the medical certificate had not been received. On 21 October 1992, he was served with a vacation of post notice, informing him that he was treated as having vacated his post with effect from 10 September 1992, as he had neither reported for work from that day on, nor submitted valid reasons (such as a medical certificate) for his absence. The author submitted an appeal for reinstatement to the President of the Republic, and sent many letters and subsequent reminders to the Authority, requesting a review of the decision.

2.2 In a letter dated 28 June 1994, and having discovered that the medical certificate *had* in fact been received, the Authority reinstated the author as Victoria project manager. This letter also stated that he would be paid the same salary as previously earned and that the period during which he was not working would be treated as leave without pay. On 30 June 1994, the author reported for duty, whereupon he requested to be paid his back wages from 9 September 1992 to 28 June 1994 and granted increments, promotions and other benefits due to him. Although the author was formally reinstated as project manager, he states that he was effectively only acting as an additional project manager as another colleague had taken over the responsibilities normally assigned to the project manager.

2.3 By letter of 1 August 1994, the Authority transferred the author to a Colombo head office position, with immediate effect, to function in the personal staff of the then Minister of Mahaweli Development. The State party disputes as a factual matter whether he in fact assumed duties in this position. On 14 August 1994, the author was released from his duties on the Minister’s staff and instructed to return to his previously-assigned head office duties, it again being contested whether he in fact resumed those new functions. On 24 August, the author applied for an extension of sick leave, with a medical certificate apparently to follow. On 25 August 1994, the author was again treated as having vacated his post with effect from 1 August 1994 for failure to report to duty. On 30 August and 17 October 1994, he appealed to the managing director, and on 23 September 1994 to the relevant Minister, without response.

2.4 On 8 November 1994, the author filed a claim with the Labour Tribunal under the Industrial Disputes Act, which considered his case on 11 January 1997. After three years of inquiries, on 11 November 1997, the Tribunal found for the author, deciding that he should be

reinstated with effect from 1 December 1997 and compensated, and that the period during which he was not working should not be counted as a break in service. The author appealed the decision to the Provincial High Court on the point that back wages for two years had not been awarded. The author states that the appeal had been “laid by”, pending conclusion of the Supreme Court litigation, although the State suggests the author has not shown due diligence in pursuing the appeal.

2.5 On 1 December 1997, and following the decision of the Labour Tribunal, the author resumed his duties at the Colombo head office. However, he was not paid any salary until February 1998 (and was then paid the same salary he had received in August 1994); he was not provided a table or chair; and was not offered voluntary early separation, offered to all other employees. On 27 March 1998, the author learnt that two of his colleagues, who were his juniors, were promoted to project managers of “System L”. On 30 March 1998, he protested against these matters.

2.6 By letter dated 23 April 1998, the author was directed to transfer to “System L” as an additional project manager to a recently appointed acting project manager. On 4 May 1998, the author requested a review of this decision, on the basis among others that as the most senior project manager in the division, it was unfair to assign him as an additional project manager to an acting project manager who had only just commenced his probation period. He argued that, having been a project manager for the same project in 1992, his present assignment was tantamount to a demotion and unwarranted humiliation, and that there had never been any allegation of unsatisfactory conduct in respect of his long service with the Authority. The author did not receive a review of the transfer decision.

2.7 The author therefore sent another complaint to the Authority on the conditions to which he was subjected since his reinstatement on 1 December 1997. The author repeated his complaints, and requested acceptance of his resignation under the voluntary early separation plan, with effect from 1 June 1998. The author states that the Authority assured him that his retirement request would be accepted upon provision of the relevant documents, which he provided.

2.8 The author did not receive a response to his request for resignation but on 21 August 1998, received a letter from the Authority stating that he was being treated as having vacated his post on 1 June 1998, because he had not proceeded on the transfer directed in the letter of 23 April 1998.

2.9 On 18 September 1998, the author filed an application to the Supreme Court under the jurisdiction of article 126 of the Constitution for leave to proceed; for a declaration that his constitutional rights under article 12 (I)<sup>1</sup> of the Constitution had been violated and for compensatory damages; to direct the Authority to restore all appropriate salary, increments and promotions due him and to accept his retirement under the voluntary early separation; and for costs and any other relief. On 23 September 1998, the Supreme Court referred the case to the Human Rights Commission of Sri Lanka under section 12 of the Human Rights Commission of Sri Lanka Act 1996, to inquire into the matter and to report its findings.

2.10 On 3 September 1999, after hearing the parties, the Human Rights Commission forwarded its report of 20 August 1999 to the Supreme Court. On the issue of voluntary early separation plan, it found it “clear that the [author] did not make a proper application and in due time to get the benefit of the [voluntary early separation] scheme”. It found however that there were arrears

of salary and promotions due to the author, which should be paid upon the author's statement of arrears and increments due. It also found "ample facts" to indicate that article 12 (I) of Constitution had been violated by executive and administrative actions of the Authority. On compensation for these constitutional violations, the Commission regretted that it was unable to assess the amount of compensation that could be paid, being unaware of any rules promulgated by the Supreme Court for this purpose.

2.11 On 2 November 1999, the Supreme Court granted leave to proceed. On 6 July 2000, following the Commission's findings, the Supreme Court heard arguments of the parties on the substantive petition and dismissed the petition without costs. In a judgment of Amerasinghe J. with which Wijetunga and Weeraskara J.J. agreed, the Court held that the author had not made the necessary application for retirement before 31 December 1997, and therefore had acted out of time. On the argument that the Authority's failure to assign suitable work made his transfer discriminatory and in breach of article 12 (I) of the Constitution, the Court held that the vacation of post notice made upon his failure to transfer "was not mala fide or without justification" and there was "no evidence whatsoever" that the Authority "had failed to observe the rules of natural justice and had acted for a collateral, illegal purpose". In the circumstances, there was thus no violation of article 12 (I) of the Constitution.

### **The complaint**

3. The author claims that the State party violated his rights under article 14 of the Covenant. He states that without his counsel being afforded a proper hearing, the Supreme Court summarily and unjustly decided that his fundamental rights had not been violated, despite the Commission's finding that his rights under the Constitution had been violated.

### **State party's submissions on admissibility and merits**

4.1 By submissions of 7 March 2002, the State party argued that the communication should be declared inadmissible *in limine* for patent error on the basis that the author had intentionally misrepresented the position before the Committee by failing to provide it with the Court's reasoned judgment and suggesting that the Supreme Court had improperly dismissed the petition. The State party also argues that, the author having provided no material on exhaustion of his appeal to the Provincial High Court, the complaint should be declared inadmissible for failure to exhaust domestic remedies.

4.2 The State party also argues that although invoking article 14 of the Covenant, the author has failed to place before the Committee any material indicative of the manner or nature in which this provision was allegedly violated. In any event, the State party had not, either directly or through its agents, violated this right, and the claim was misconceived in law.

### **Author's comments on the State party's submissions**

5. By letter of 17 February 2003, the author responded, amplifying the factual record and disputing factual aspects of the State party's submissions. He also argues that the short judgment of the Supreme Court precludes recourse to the writ jurisdiction of the Court of Appeal, as well as any relief being granted in the High Court in his case.

## 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 notes that the State party has supplied it with a copy of the reasoned judgment of the Supreme Court, dismissing the author's application following a defended hearing with the author represented by counsel. The Committee recalls its prior jurisprudence that it is generally for the courts of States parties to the Covenant to interpret domestic law and to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation by the domestic tribunal was clearly arbitrary or amounted to a denial of justice.<sup>2</sup> The material before the Committee does not show that the proceedings before the Supreme Court suffered from such defects. In the circumstances, the Committee considers that the author has failed to substantiate his claim under article 14 of the Covenant, for purposes of admissibility, and the claim is accordingly inadmissible under article 2 of the Optional Protocol.

6.3 In light of that finding, the Committee need not assess the State party's other objections to the admissibility of the communication.

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 English text being the original version.  
Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

### Notes

<sup>1</sup> Article 12 (I) provides: "All persons are equal before the law, and are entitled to the equal protection of the law."

<sup>2</sup> Communication No. 541/1993, *Errol Simms v. Jamaica*, declared inadmissible on 3 April 1995, para. 6.2.



**B. Communication No. 1141/2002, *Gougnin and Karimov v. Uzbekistan*  
(Decision adopted on 1 April 2008, ninety-second session)\***

<i>Submitted by:</i>	Rima Gougnina (not represented by counsel)
<i>Alleged victim:</i>	Mr. Evgény Gougnin (the author's son) and Mr. Ilkhomdzhon Karimov
<i>State party:</i>	Uzbekistan
<i>Date of communication:</i>	13 December 2002 (initial submission)
<i>Subject matter:</i>	Imposition of death sentence after unfair trial with resort to torture during preliminary investigation.
<i>Procedural issue:</i>	Evaluation of facts and evidence.
<i>Substantive issues:</i>	Torture; unfair trial; arbitrary deprivation of life.
<i>Articles of the Covenant:</i>	6; 7; 9; 10; 14 and 16
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 1 April 2008,*

*Adopts the following:*

**Decision on admissibility**

1.1 The author of the communication is Rima Gougnina, a national of Uzbekistan born in 1962. She is submitting the communication on behalf of her son, Evgeny Gougnin, and an acquaintance of her son's, Ilkhomdzhon Karimov,<sup>1</sup> both of whom are nationals of Uzbekistan born in 1980. At the time when the communication was submitted to the Committee, the alleged victims were facing execution, as they had been sentenced to death by Tashkent city court on 28 October 2002. The author claims that her son and Mr. Karimov are victims of violations by Uzbekistan of articles 6, paragraphs 1, 4 and 6; 7; 9; 10; 14, paragraphs 1 to 3; and 16 of the Covenant. The author 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. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanut, 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. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

1.2 When registering the communication on 13 December 2002, the Committee, acting through its Special Rapporteur on new communications and interim measures, and in pursuance of rule 92 of its rules of procedure, requested the State party not to execute the alleged victims while their case was under examination. On 11 December 2003 and 25 May 2004, the State party informed the Committee that, by decision of the Supreme Court, the death sentences imposed on Mr. Karimov and Mr. Gougnin had been commuted to 20 years' imprisonment on 18 February 2003 and 26 March 2004 respectively.

### **The facts as submitted by the author**

2.1 On 28 October 2002, Tashkent city court found Mr. Gougnin, Mr. Karimov and a certain Ismailov guilty of planning and carrying out an armed attack in the flat of a certain Chakirov on 8 April 2002 with the aim of stealing money. Chakirov died from knife wounds sustained during the attack. His partner, Akhundzhanova, also died, one week later, from injuries received while trying to intervene.

2.2 Tashkent city court sentenced the alleged victims to death. Mr. Ismailov was sentenced to 20 years' imprisonment. This ruling was upheld on appeal on 10 December 2002 by the appeals chamber of the same court, sitting with different members. On 18 February 2003, the Supreme Court also reviewed the case and upheld the sentences.

2.3 The author acknowledges that her son and Mr. Karimov took part in the attack, but contends that they did not commit the murder. They confessed as a result of coercion and torture following their arrest. According to the author, the alleged victims were beaten and tortured not only by police officers, but also by relatives of Chakirov, the victim.

2.4 The author adds that her son, Karimov and Ismailov had agreed to carry out the theft. The plan was reportedly prepared by a certain Pokrepkin, a friend of Chakirov's son, who knew that Chakirov's father had large sums of money. On the evening of 8 April 2002, Pokrepkin, the author's son and Ismailov went to Chakirov's home; Karimov, it seems, did not go. Pokrepkin and the author's son had previously obtained kitchen knives. When Pokrepkin rang at the door and Mr. Chakirov opened it, Pokrepkin tried to knock him out with a punch, but without success. Chakirov reportedly took refuge within the flat, and Pokrepkin followed him. According to the author, her son and Ismailov then fled.

2.5 Later, Pokrepkin allegedly contacted them in Karimov's flat and arranged to meet them in a house in the country, where it is claimed he told them that he had killed Chakirov and his partner. He allegedly told them that if the police managed to trace them, they should claim that it was Karimov who had organized the crime, and that Gougnin had committed the murder. Pokrepkin is also said to have told them that the court would sentence them to 15 years' imprisonment at most.<sup>2</sup> The three did not want to accept these proposals, but Pokrepkin is said to have threatened them with reprisals and to have said that he would also take it out on their families, "since he had nothing left to lose".

2.6 The author points out that the preliminary investigation was superficial and was carried out "in a particularly accusatory manner". She then cites a court ruling dating from 1996 in which the Supreme Court is said to have held that evidence obtained through unlawful methods was inadmissible. The author claims that this principle was not respected in the case of her son and

Mr. Karimov, since they were beaten and forced to confess. She says that her son had not mentioned the acts of torture and the forced confession in court because he feared that his family would be subjected to reprisals by Pokrepkin.

2.7 According to the author, it was only after the appeal court ruling, and after he had arranged a visit from his mother, at which he learned that his family had not received any money from Pokrepkin, that her son had decided to tell the truth. He allegedly then explained in a letter what had really happened.<sup>3</sup> This letter was attached to the complaint which Mr. Gougnin's lawyer lodged with the Supreme Court with an application for judicial review under the *nadzor* (judicial supervision) procedure.

2.8 According to the author, under questioning by the investigators, Pokrepkin said that Gougnin, Ismailov and Karimov had told him that they had beaten Chakirov, but that they had not found any money at his home. According to the author, at the appeal stage, Karimov said that Pokrepkin had paid the investigator US\$ 1,000.

2.9 In the author's view, the investigators did not perform a reconstitution of the crime, and hence had been unable to check properly the role played by each of those present at the scene of the crime.

2.10 Article 23 of Uzbekistan's Code of Criminal Procedure does not require accused persons to prove their innocence, and they must be given the benefit of any doubt. However, according to the author, her son's conviction was based on indirect evidence collected by the investigators that could not be confirmed in court, or on forced confessions obtained from her son and his co-accused, whereas other evidence that could have demonstrated their innocence was simply lost during the investigation. In particular, the author emphasizes that since her son had allegedly inflicted several knife wounds on his victims, traces of blood should have been present on his hair, hands and clothes. Yet no examination of his hair or hands, or of substances under his nails, which would have been vital in order to establish his guilt, was ever carried out.

2.11 According to the author, the facts as described above show that the courts considered this case in a purely formal manner. The sentence imposed on her son does not correspond to his personality. In particular, the file contained several positive character assessments supplied by his neighbours. According to the author, the court, in the absence of evidence and ignoring doubts which should have benefited the accused, handed down an "unlawful" decision. The court thus neglected its obligation to be impartial and objective, and took the side of the victims of the murder, by openly supporting the arguments of the prosecution.

2.12 The author points out that her son's conviction ran counter to the Supreme Court's ordinance of 2 May 1997 relating to court rulings, under which decisions imposing the death penalty must be substantiated in all cases, taking into account all the circumstances of the crime, its causes and motivations, and also information which describes not only the guilty party, but also the victim. The author cites a further Supreme Court ruling of 20 December 1996 in which, she says, the Court drew the attention of the courts to the fact that the death penalty is an exceptional punishment, and that the law does not make it obligatory to impose such a punishment.

2.13 On 24 November 2003, the author reported that she had received a negative response from the Supreme Court to her request for a pardon for her son. The Court is said to have informed her that the request for a pardon had been passed to it by the office of the President, and that, after studying the file, the Court had found no grounds for modifying the verdict.

### **The complaint**

3. The author claims that the facts as presented reveal a violation by Uzbekistan of the rights of Mr. Gougnin and Mr. Karimov under article 6, paragraphs 1, 4 and 6; article 7; article 9; article 10; article 14, paragraphs 1 to 3; and article 16 of the Covenant.

### **State party's observations**

4.1 By note verbale of 11 December 2003, the State party pointed out that on 18 February 2003, the Supreme Court commuted the death penalty imposed on Mr. Karimov and substituted a prison term of 20 years. It also indicated that the Supreme Court had taken all necessary steps to suspend the application of the death penalty imposed on Mr. Gougnin, in response to the Committee's request.

4.2 On 25 May 2004, the State party submitted additional information on the case of Mr. Gougnin. First of all, it noted that on 26 March 2004, the Supreme Court had commuted the death penalty imposed on him and substituted a prison term of 20 years.

4.3 The State party recapitulates the facts of the case: on 28 October 2002 Mr. Gougnin, who had already been sentenced to three years' punitive deduction of earnings for theft earlier in the year, was found guilty by Tashkent city court of attempted theft and murder, and sentenced to death. On 10 December 2002, the death sentence was upheld on appeal. The Supreme Court considered his case on 18 February 2003, and upheld the sentence.

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

5.3 The Committee notes that the author claims, without supplying further details, that her son and Mr. Karimov were deprived of their rights under articles 9 and 16 of the Covenant. In the absence of any other pertinent information in this respect, it considers that this part of the communication is inadmissible as insufficiently substantiated for purposes of admissibility under article 2 of the Optional Protocol.

5.4 The Committee notes that the author's allegations concerning the manner in which the courts handled the case of Mr. Gougnin and Mr. Karimov and qualified their acts may raise issues under article 14, paragraphs 1 and 2, of the Covenant. It observes, however, that 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 demonstrated that the evaluation was clearly arbitrary or amounted to a denial of justice.<sup>4</sup> In this case, the Committee considers that given the absence in the case file of any court records, trial transcript, or other similar information which would have made it possible to verify whether the trial in fact suffered from such defects, this part of the communication is inadmissible under article 2 of the Optional Protocol as insufficiently substantiated.

5.5 The Committee notes that the author's allegations concerning the forced confessions obtained from Mr. Gougnin and Mr. Karimov raise issues under articles 7, 10 and 14, paragraph 3 (g), of the Covenant. It also notes that the State party has not submitted observations on this matter. At the same time, it notes that the author's allegations in this connection are very broadly worded. For example, the author does not supply a specific description either of the methods of torture which are claimed to have been suffered by the alleged victims, or of the exact identity of those responsible for acts of torture. No supporting medical certificate in this regard has been submitted. The Committee also notes that these allegations were made for the first time only in the present communication, and that no mention of torture or ill-treatment in respect of the author's son appears in the copies of the appeal lodged in the appeal court or the application lodged with the Supreme Court. The only document containing an allegation of this nature, although it was made in still briefer terms than in the present communication, is the request for a Presidential pardon, signed by the author of the communication at an unknown date. In these circumstances, the Committee considers that the author has not succeeded in substantiating this allegation sufficiently for purposes of admissibility, and finds this part of the communication inadmissible under article 2 of the Optional Protocol.

5.6 Concerning the author's allegations under article 6 of the Covenant, the Committee notes that the death sentences imposed on the alleged victims were both commuted in 2003 and 2004. Consequently, it considers that this complaint no longer applies. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6. 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 English text being the original version. The text will also be translated into Arabic, Chinese and Russian as part of the present report.]

## Notes

<sup>1</sup> At the time of registration of the complaint, Mr. Karimov was on death row and risked execution, and no contact details with his family were available.

<sup>2</sup> Pokrepkin allegedly also promised to give each of the three large sums of money and to provide them with help during the trial and support in prison.

<sup>3</sup> A copy of the letter is attached to the file. In fact, the author explains in the letter that Pokrepkin was the actual murderer, but that Pokrepkin had threatened him and told him to claim that he (Gougnin) had committed the murder. The author's son explains that he had lied during the preliminary investigation and in court for fear that Pokrepkin would carry out his threats. Nevertheless, the letter makes no reference to acts of torture or ill-treatment.

<sup>4</sup> See, for example, communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, para. 6.2.

**C. Communication No. 1161/2003, *Kharkhal v. Belarus*  
(Decision adopted on 31 October 2007, ninety-first session)\***

<i>Submitted by:</i>	Mr. Dimitry Kharkhal (represented by the Belarusian Helsinki Committee)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	6 February 2003 (initial submission)
<i>Subject matter:</i>	Death sentence pronounced after allegedly unfair trial.
<i>Procedural issues:</i>	Evaluation of facts and evidence; substantiation of claim.
<i>Substantive issues:</i>	Arbitrary deprivation of life; right to have one's conviction reviewed by a higher tribunal.
<i>Articles of the Covenant:</i>	6; paragraph 1; 14; paragraph 5
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 31 October 2007,*

*Adopts the following:*

**Decision on admissibility**

1.1 The author of the communication is Mr. Dimitry Kharkhal, a Belarusian national born in 1970, who, at the time of submission of the communication, was awaiting execution in Minsk, pursuant to a death sentence pronounced by the Minsk City Court on 20 March 2002. He claims to be a victim of violations by Belarus of his rights under article 6, paragraph 1; and article 14, paragraph 5, of the Covenant. The author is represented by the Belarusian Helsinki Committee.

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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 Chanut, 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.

1.2 Pursuant to rule 92 of its rules of procedure, while registering the communication on 10 February 2003, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party not to carry out the author's death sentence, pending consideration of his case. On 2 July 2003, the State party informed the Committee that, on 24 March 2003, the Belarus Supreme Court had commuted the author's death sentence to 15 years' imprisonment, with confiscation of his property.

### **The facts as presented by the author**

2.1 The author was arrested on 17 September 1997, in St. Petersburg (Russian Federation), at the demand of Belarusian authorities, as a suspect for thefts and other crimes committed in Belarus. He was transferred to Minsk on 18 September 1997. On 21 April 1999, the Minsk City Court sentenced him to 13 years' imprisonment for theft and attempted murder. On 20 March 2002, the same court found him guilty of murdering one Mrs. Puchkovskaya and her acquaintance Grebenkin, on 3 November 1994 in Minsk, and unlawfully taking possession of Puchkovskaya's car, jewellery, and other items. On 30 August 2002, the Supreme Court of Belarus upheld the Minsk City Court's judgment of 20 March 2002 and confirmed the author's death sentence. In March 2003, the author's death sentence was commuted to 15 years' imprisonment by the Supreme Court.

2.2 The author claims that he is innocent, and that although he had planned to unlawfully take possession of Puchkovskaya's car in order to sell it, it was his cousin, Tatarinovich, who actually killed the victims when the author tested the car before taking it, and the victims and his cousin were his passengers.

2.3 According to the author, the Russian authorities handed him over to their Belarus counterparts under the terms of the 1993 Commonwealth of Independent States' Convention on Legal Assistance and Legal Relations in Civil, Family, and Criminal cases (hereafter LAC). Under the LAC provisions, an individual can only be prosecuted in the receiving country in relation to crimes that are specifically mentioned in the extradition request. To prosecute an individual for crimes others than those listed in the extradition request, the receiving State requires the express agreement of the extraditing State. In the author's case, the extradition request addressed to the Russian authorities did not mention the two murders for which he was convicted in 2002. Thus, he allegedly was unlawfully prosecuted and sentenced to death in this respect.

2.4 The author asserts that his right to have his sentence reviewed by a higher tribunal was violated, as some of the arguments contained in his appeal remained unanswered by the Supreme Court. In particular, he challenges the conclusion of the initial expert report (No. 2667), by which a forensic medical expert affirmed that Grebenkin had died as a result of a single shot gun injury to the head and the neck, which had damaged his brain. The author told the Supreme Court of the existence of another bullet in Grebenkin's body that was not revealed and examined by the expert, and that as a result, the first instance court had been misled when establishing his guilt. The first instance court did not examine this argument because the author raised it only on appeal, as he only then recollected the exact sequence of the events. The Supreme Court, however, did not examine this argument in its decision but instead noted that in his appeal, the author contended that the subsequent experts' conclusions in a complementary expert report contradicted the initial forensic medical expert's conclusions and therefore could not be used for his conviction. According to the author, his appeal was not "examined". Similarly, on the issue



of the applicability of the LAC in his case, he contends that the Supreme Court has merely rejected the claim, without providing an argumentation on its merits.

2.5 In light of the above, the author contends that in the event of his execution, Belarus would violate article 6 of the Covenant, by arbitrarily depriving him of his life.

### **The complaint**

3. The author claims that the above facts amount to a violation by Belarus of his rights under article 6, paragraph 1; and article 14, paragraph 5, of the Covenant.

### **State party's observations**

4.1 On 2 July 2003, the State party informed the Committee that on 24 March 2003, the Presidium of the Supreme Court of Belarus had commuted the author's death sentence to 15 years' imprisonment.

4.2 On 1 October 2003, the State party noted that the General Prosecutor's Office had verified the file and established that Mr. Kharkhal was subject to an arrest warrant in 1997, as a suspect for different crimes, including the murders of Ms. Puchkovskaya and Mr. Grebenkin. He was located in St. Petersburg by an official of the Belarus Criminal Search Department (Ministry of Internal Affairs, Minsk City Executive Committee). He agreed to return to Minsk voluntarily.

4.3 Pursuant to part 1 of article 80, of the LAC, all communications in relation to extradition requests are handled by the General Prosecutors' Offices concerned. In the present case, no such request was ever addressed from the Belarus General Prosecutor's Office to its Russian counterpart, and no extradition proceedings were in fact initiated. Accordingly, the author was lawfully prosecuted in Belarus in relation to the murders he was accused of.

### **Author's comments**

5.1 The author presented comments on 1 August 2006. He maintains that he is innocent and affirms that he was arrested in St. Petersburg by the Russian police at the demand of Belarus authorities, as a theft suspect. According to him, immediately upon his arrest, the Belarus authorities sent an extradition request to the Russian authorities, and this request did not mention any murder charges. He drew the Supreme Court's attention to this issue during the appeal, but the Court rejected the claim. He quotes from the court's decision to the effect that no violation of the law occurred in bringing him to account for the murders after his extradition by the Russian authorities.

5.2 The author invokes the Supreme Court's decision of 11 June 2003, where the court noted that the circumstances of the disappearance of Puchinskaya and Grebenkin only became known after the author's confessions. He reiterates that the LAC should have been applied in his case, and adds that article 301 of the Criminal Procedure Code delimits the scope of criminal pursuit and provides that the content of the extradition order is also to be taken into account when deciding an individual's criminal liability.

5.3 The author quotes from a judgment of the Supreme Court in relation to one “Sh.,” where the court observed that in order to define the scope of criminal jurisdiction, it must not only take into account the charges, but also the content and terms of the extradition order which had been addressed to the extraditing country. After his extradition, Sh. had been convicted in Belarus of murder committed with particular violence, in a group. The Supreme Court quashed the first instance judgment and excluded the murder with particular violence count, as it had not been listed in the extradition request.<sup>1</sup> According to the author, this judgment is wholly pertinent to his own case.

## **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, 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 notes that it is uncontested that domestic remedies have been exhausted.

6.3 The Committee has noted the author’s claim under article 6 of the Covenant, that after his return from the Russian Federation to Belarus, he was unlawfully charged with murder in Belarus and subsequently sentenced to death, in violation of the LAC, and that in the event of his execution, the State party would arbitrarily deprive him of his life. The Committee notes however, that the State party’s Supreme Court commuted the author’s death sentence on 24 March 2003. In these circumstances, it considers that the author’s claim has become moot. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.4 As to whether the LAC should have been applied to the author’s case, the Committee notes the apparent contradiction between the author’s claim and the information submitted by the State party. In the absence of any other pertinent information or documents in the case file that would allow the Committee properly to evaluate the circumstances of the case, it considers that this part of the communication is insufficiently substantiated, for purposes of admissibility, and therefore inadmissible under article 2, of the Optional Protocol.

6.5 The author claims that the way in which the Supreme Court handled his appeal constituted a violation of article 14, paragraph 5, of the Covenant. The Committee observes that the right to a review of a criminal conviction by a higher tribunal, as secured by article 14, paragraph 5, implies that the tribunal of review adequately addresses those issues that are pertinent, having regard to such reasonable conditions as are applicable to appeals under the State party’s laws. Where, as in the present case, the review allows for a re-examination of facts and evidence, the same principle guides the Committee as in other proceedings, namely 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 conduct of the trial or the evaluation of facts and evidence or interpretation of legislation was clearly arbitrary or amounted to a denial of justice.<sup>2</sup> In the absence of any other pertinent information indicating that the evaluation of evidence in the case

indeed suffered from such deficiencies, the Committee considers that the requirements of article 14, paragraph 5, have been fulfilled and therefore this part of the communication is inadmissible 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 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 present report.]

#### **Notes**

<sup>1</sup> It appears from the extracts submitted by the author, that the Belarusian request on Sh.'s extradition mentioned only article 139 part 2, al. 15, of the Criminal Code (murder, committed in a group).

<sup>2</sup> See, inter alia, communication No. 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision adopted on 3 April 1995, para. 6.2.

**D. Communication No. 1358/2005, *Korneenko v. Belarus*  
(Decision adopted on 1 April 2008, ninety-second session)\***

<i>Submitted by:</i>	Viktor Korneenko (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	10 November 2004 (initial submission)
<i>Subject matter:</i>	Denial of possibility of candidacy for lower chamber of Belarus Parliament.
<i>Procedural issue:</i>	Non-substantiation of claims.
<i>Substantive issues:</i>	Right to be elected without unreasonable restrictions and without distinction; access to court; right to have one's rights and obligations in a suit at law determined by a competent, independent and impartial tribunal established by law.
<i>Articles of the Covenant:</i>	14, paragraph 1; 25; 26
<i>Article of the Optional Protocol:</i>	2

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

Meeting on 1 April 2008,

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication is Viktor Korneenko, a Belarusian citizen born in 1957, residing in Gomel, Belarus. He claims to be a victim of violations by Belarus<sup>1</sup> of article 14, paragraph 1; article 25; and article 26 of the International Covenant on Civil and Political Rights. He is not represented.

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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.

## **The facts as presented by the author**

2.1 From 1996 to 2002, the author was Chairperson of the Gomel regional association “Civil Initiatives”. Since 2001, he has been an activist of the United Civil Party, and since 2003, Chairperson of the Foundation for Assistance to Local Development. On an unspecified date, he was nominated as a candidate for the 2004 elections to the House of Representatives (lower chamber) of the Belarus National Assembly (Parliament), as representative of the Gomel-Industrial electoral constituency No. 37. On 6 September 2004, he submitted to the District Electoral Commission (DEC) 142 lists of signatures in support of his candidature, containing 1080 signatures. These had been collected by an initiative group created to this end.

2.2 On 16 September 2004, the DEC refused to register the author as a candidate, on the grounds that 57 (representing 16.2 per cent) of the total number of signatures submitted in his support were invalid.<sup>2</sup> It was further noted in extract No. 5 of the DEC’s decision of 16 September 2004, that two voters, Kontsevoy and Kontsevaya, requested the DEC to have their signatures withdrawn from the lists submitted in the author’s support. The author submits that under article 67, part 5, of the Belarus Electoral Code, Procedural Recommendations entitled “Organisational and Legal Aspects of the Activities of District Electoral Commissions on the Elections of Deputies to the House of Representatives of the National Assembly of the Republic of Belarus”, approved by decision No. 5 of the Central Electoral Commission on 20 May 2004, the DEC had to prepare a statement on the results of the signature verification, giving reasons for finding signatures invalid. This, however, was not done. The author claims that, in fact, the decision not to register him as a candidate was adopted by the DEC solely on the basis of uncorroborated report of the DEC Secretary.

2.3 On 17 September 2004, the author, in the presence of an election observer from the Office for Democratic Institutions and Human Rights, Organisation for Security and Co-operation in Europe (OSCE), requested the DEC Secretary to be allowed to see the written record of the results of the signature verification. His request was refused by the DEC Secretary, since, according to her, the entire list of signatures together with the record requested by the author, had already been transmitted to the Chief Election Commissioner. The author submits that under article 66, part 6, of the Belarus Electoral Code, lists of signatures had to be kept by the DEC until the termination of its functions.

2.4 The author submits that the DEC Secretary, who was at the same time the Administrator of the Executive Committee of the Soviet District of Gomel, was biased against the author from the very moment that his group approached her with a request to certify the list of signatures collected in support of a candidate with the seal of approval of the Executive Committee. At that time, the DEC Secretary spoke publicly about the author, using false information that allegedly discredited his honour, dignity and professional reputation.

2.5 The author explains that on 7 September 2004, he complained about the DEC Secretary’s actions to the Prosecutor of the Soviet District of Gomel. He did not receive a reply to his complaint within three days, as provided by article 49, part 7, of the Belarus Electoral Code. On 21 September 2004, he complained about the inaction of the Prosecutor of the Soviet District of Gomel to the Prosecutor’s Office of the Gomel Region. On 29 September 2004, the Prosecutor of the Gomel Region replied that, under article 8 of the Law “On Citizens’ Petitions”, the author’s complaint of 7 September 2004 had to be considered within one month; and that there was no evidence of either an administrative or a criminal offence in the DEC Secretary’s

actions. A similar reply from the Prosecutor of the Soviet District of Gomel to the author's complaint was dated 27 September 2004. On 6 October 2004, the author appealed against the decision of the Prosecutor of the Gomel Region to the Belarus Prosecutor's Office. On 20 October 2004, that office confirmed the decision of the Prosecutor of the Gomel Region in relation to the DEC Secretary; but noted that the author's complaint should have been considered within the deadline envisaged by the Belarus Electoral Code.

2.6 On an unspecified date, the author requested the DEC Secretary to refer to the written petitions from the two voters, who allegedly requested that their signatures be withdrawn from the lists submitted in his support (see paragraph 2.2 above), but this request was rejected. The author submits that, according to the copies of the lists of signatures submitted in his support, the voter Kontsevaya in fact had never supported his candidacy and there was accordingly no question of her withdrawing her signature.

2.7 On an unspecified date, the author appealed the DEC decision of 16 September 2004 to the CEC. He claimed in the appeal that he was deprived of the possibility to present evidence of the validity of signatures submitted in his support since he had been denied access both to the written petitions (see paragraph 2.6 above) and to the DEC written statement on the results of the verification of signatures (see paragraph 2.3 above). On 23 September 2004, the CEC dismissed the author's appeal, without giving him an opportunity of hearing. Shortly after the appeal was dismissed, the author was allowed to consult the case file, including the written statement on the results of the signature verification, documenting allegedly invalid signatures. He notes that the petitions from the two voters who allegedly requested that their signatures be withdrawn from the lists submitted in his support were not in the case file.

2.8 The author provides the names of 11 voters whose signatures were considered by the DEC to be invalid. The DEC concluded that these voters had not signed the lists in the author's support, and that they refused to provide written explanations on the issue when asked to do so by DEC officials. The author contacted all 11 voters and was reassured by them that they had never denied signing the lists in question, and that no one from the DEC had approached them to verify their signatures. They sent written statements to this effect to the DEC, most of which were certified by a notary public.<sup>3</sup>

2.9 On an unspecified date, the author appealed the CEC ruling of 23 September 2004 to the Supreme Court. On 30 September 2004, his appeal was dismissed, The Supreme Court's decision became final on its announcement and it could not be appealed on cassation. The Supreme Court held, inter alia, that there was no basis to overturn the CEC's ruling to refuse registration, and that the written statements from the voters submitted by the author (paragraph 2.8 above) were untrustworthy, as they had been obtained contrary to article 181 of the Civil Procedure Code.<sup>4</sup> The Supreme Court based its decision on the invalidity of signatures submitted in the author's support on the basis of examination of handwritings dated 29 September 2004 that was made by the Bureau of Criminal Expertise of the Department of Internal Affairs of the Soviet District of Gomel. The author notes that the voters' signatures in his support were declared invalid on 16 September 2004, i.e., two weeks before the author submits that he should have been registered as the candidate and that if he had been so registered, he would have been able to compete for a seat in the House of Representatives with the Deputy Minister of Internal Affairs. Moreover, on the exact date when the examination of the list of signatures in question was allegedly made, the lists were in fact with the CEC. The author objects to the passage in the Supreme Court's decision, in which it is stated that he did not deny

in court that there were invalid signatures in the lists he submitted to the DEC. He refers to the written statements of the 11 voters attached to the case file in corroboration of his claim. He submits that for these reasons, he was refused access to the transcript of court hearing.

2.10 On an unspecified date, the author appealed the Supreme Court's decision of 30 September 2004 to the Chairperson of the Supreme Court. This appeal was dismissed by the Deputy Chairperson of the Supreme Court on 13 October 2004.

### **The complaint**

3.1 The author claims that he was denied the right to equality before the courts and to the determination of his rights and obligations in a suit at law (article 14, paragraph 1, of the Covenant).

3.2 The author claims that he was denied the right, guaranteed under article 25 of the Covenant, to be elected a deputy of the House of Representatives of the Belarus National Assembly during genuine elections conducted by universal and equal suffrage, and that the guarantee of free expression of the will of the electors was violated.

3.3 Finally, the author alleges that the State party's authorities violated his right to equal protection of the law under article 26 of the Covenant, as he was discriminated against on the ground of his political opinion.

### **State party's observations on admissibility and merits**

4.1 On 25 September 2006, the State party recalls the chronology of the case. It specifies that the CEC examined the list of signatures submitted in the author's support, the voters' testimonies, the DEC's written statements and the expert opinion, and concluded that the DEC had properly excluded 57 signatures as invalid (paragraph 2.7 above). Among them, 27 signatures were invalid as the voters either have not signed the lists themselves or had not dated their signature; 17 signatures were invalid because the lists of voters contained false information; 12 - because of the absence of required data in the lists of signatures; and 1 because the voter in question did not reside in the author's electoral constituency.

4.2 When it examined the author's complaint about the DEC ruling of 16 September 2004 and the CEC ruling of 23 September 2004 on the refusal to register him as a candidate, the Supreme Court affirmed the invalidity of signatures in question (paragraph 2.9 above) on the basis of the DEC protocol and the written statements that had been drawn up by DEC members in conformity with the powers given to them by the electoral law. In court, the author did not contend that there were no invalid signatures in the lists by claiming that they were less than 15 per cent of the overall number of signatures verified. He submitted certified written statements from the voters whose signatures were considered to be invalid in support of his position. This evidence was rejected by the court since it was obtained in violation of the principle set out in article 181 of the Civil Procedure Code.

### **Author's comments on State party's observations**

5. On 3 April 2007, the author refutes the State party's argument that he did not contend in court that there were no invalid signatures in the lists submitted in his support. He recalls his

initial complaint in which he specifically contested this passage in the Supreme Court's decision of 30 September 2004. He reiterates that he provided the court with 11 written statements certified by a notary from those voters whose signatures were considered to be invalid. This number of statements was sufficient to register him as a candidate. The author submits that the Supreme Court rejected these statements only because it was not independent from the executive branch. In support of his claim, he refers to the conclusion of the Special Rapporteur on the independence of judges and lawyers, contained in his report on the mission to Belarus in 2001, to the effect that the President has an absolute discretion to appoint and remove judges.<sup>5</sup>

## **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) and (b), 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 has not contested that domestic remedies have been exhausted.

6.3 The author claims that his right, under article 25, to be elected a deputy of the House of Representatives of the Belarus National Assembly, was violated, because he was denied registration as a candidate. The Committee notes that the author also challenges the manner in which the State party's courts examined his complaint relating to the refusal to register him as a candidate, as well as the refusal by the courts to give due weight to the notary certified statements of the voters whose signatures were considered to be invalid by both the DEC and the CEC. 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 observes that 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.<sup>6</sup> The Committee considers that the facts as presented by the author do not permit it to conclude that the court proceedings in his case have in fact suffered from such defects. The author has failed to refute the State party's argument that the Supreme Court properly applied article 181 of the Civil Procedure Code as regards the invocation of the statements of certain signatories supporting his candidacy concerning the validity of their signatures. Accordingly, the Committee considers that the author's allegations under article 14, paragraph 1 of the Covenant are insufficiently substantiated for purposes of article 2 of the Optional Protocol and are therefore inadmissible. It follows that the author also cannot claim to have been unfairly denied the opportunity to run for a seat in the House of Representatives of the Belarus National Assembly, in violation of article 25. Accordingly, the Committee concludes that this part of the communication is also inadmissible under article 2 of the Optional Protocol.

6.4 The author claims that his right to equal protection of the law under article 26 of the Covenant was violated, as he was discriminated against on the ground of his political opinion. The Committee notes, however, that the author has failed to provide any details or any supporting evidence in substantiation of this claim. In addition, it remains unclear whether these



allegations were ever raised in the domestic courts. In these circumstances, the Committee considers that this part of the communications is unsubstantiated, for purposes of admissibility, and must therefore be held to be inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under 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 present report.]

### Notes

<sup>1</sup> The Covenant and the Optional Protocol thereto entered into force for Belarus on 23 March 1976 and 30 December 1992 respectively.

<sup>2</sup> Article 68, part 8, of the Belarus Electoral Code establishes that, in order to qualify for registration, no more than 15 per cent of signatures in support of a candidate may be found to be invalid.

<sup>3</sup> Copies of 16 written statements addressed to the DEC, including 11 from the voters listed by the author, are available on file.

<sup>4</sup> Article 181 of the Civil Procedure Code “Admissibility of evidence” reads: “Facts that by law should be corroborated by specific evidence cannot be corroborated by any other evidence.”

<sup>5</sup> E/CN.4/2001/65/Add.1.

<sup>6</sup> See, inter alia, communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, para. 6.2.

**E. Communication No. 1375/2005, *Subero Beisti v. Spain*  
(Decision adopted on 1 April 2008, ninety-second session)\***

<i>Submitted by:</i>	José Luis Subero Beisti (represented by counsel, Mr. Marino Turiel Gómez)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	7 January 2003 (initial submission)
<i>Subject matter:</i>	Evaluation of evidence and scope of the review of criminal cases on appeal by Spanish courts.
<i>Procedural issue:</i>	Failure to substantiate claims.
<i>Substantive issues:</i>	Right to have the sentence and conviction reviewed by a higher tribunal according to law.
<i>Article of the Covenant:</i>	14, paragraph 5
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 1 April 2008,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication, which is dated 7 January 2003, is José Luis Subero Beisti, a Spanish national, born in 1964 and currently in prison. He alleges 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, Mr. Marino Turiel Gómez.

**The facts as presented by the author**

2.1 On 13 April 2000, the Logroño Provincial Court sentenced the author to nine years' imprisonment for sexual assault with oral penetration, and unlawful detention. According to the

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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 Chanut, 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. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

evidence given by the victim of the assault, in the early hours of 5 April 1997, the author had insulted him in the bar where they were. When the victim left the bar the author followed him, detained him for some time, hit him in the face several times and dragged him to a park where he forced him to perform fellatio on him. The victim managed to get away and asked a workman for help. At the trial the author admitted that he had had an altercation with the victim but denied sexually assaulting him. The author believes he was convicted in the absence of sufficient evidence against him.

2.2 The author lodged an appeal in cassation with the Criminal Division of the Supreme Court, alleging violation of his right to the presumption of innocence and errors in the appraisal of evidence. The author maintained that the victim's statement was not sufficient evidence against him, that the Court's assessment of the evidence had been arbitrary, and that it had erred in its evaluation of an expert report that had found that there were no traces of blood or saliva on the underclothes the author had been wearing on the day in question.

2.3 In a ruling dated 6 July 2001 the Criminal Division of the Supreme Court denied the appeal in cassation. On the alleged violation of the presumption of innocence, the Court ruled that, in accordance with its settled case law, the scope of review by the court of cassation in respect of the right to presumption of innocence covers only the existence of evidence for the prosecution, i.e., the factual aspects of the alleged offence and the accused's involvement therein, and excludes the assessment of that evidence by the sentencing court. The Criminal Division found that evidence of guilt existed and that it was sufficient to set aside the right to presumption of innocence. As to the alleged error in the evaluation of the evidence, the Court ruled that, in accordance with its settled case law, an error of fact must be substantiated by a document providing evidence of the error and which is of sufficient probative value in itself, is not contradicted by other evidence and contains significant information that affects one or more of the points in the judgement. In the view of the Criminal Division these criteria were not met in the author's case.

2.4 On 20 May 2002 the Constitutional Court rejected the author's application for *amparo*. In its view the Supreme Court ruling examined and answered all the alleged grounds for cassation and found no irregularities. The Constitutional Court also considered that there was sufficient evidence against the author.

### **The complaint**

3. The author claims that he was deprived of his right to have his conviction and sentence reviewed by a higher court. In his view the right contained in article 14, paragraph 5, of the Covenant includes a re-evaluation of the evidence produced at trial, and that was not done by the Supreme Court. The author refers to the position taken by the Supreme Court plenary in response to the Committee's Views in *Gómez Vázquez*,<sup>1</sup> finding that the Spanish remedy of cassation does not constitute an effective remedy within the meaning of article 14, paragraph 5, of the Covenant.

### **State party's observations on admissibility**

4.1 In a note dated 7 June 2005 the State party submitted its comments on the admissibility of the communication. It argued that the domestic courts had evaluated the facts in a legitimate manner and with due care and diligence. The Supreme Court ruling testifies to a thorough and

careful review of the evidence. As to the lack of evidence of guilt, the State party points out, citing the Court's ruling, that there was sufficient evidence apart from the victim's testimony. In the State party's view, therefore, the communication is unfounded and constitutes an abuse of the right to submit communications.

4.2 Furthermore, the author has failed to exhaust domestic remedies, since he has not brought any complaint alleging lack of remedy before the Supreme Court or the Constitutional Court, notwithstanding the doctrine of the Constitutional Court requiring that the remedy of cassation should have sufficient scope to meet the criteria of article 14, paragraph 5, of the Covenant.

### **Author's comments**

5. On 29 July 2005 the author contested the State party's observations. He states that it is not true to say that the Supreme Court reviewed the evidence, for, as the Committee's case law shows, the remedy of cassation does not permit it to do so. He restates his view that the evidence was not assessed logically or rationally and that the Supreme Court failed to give due weight to the evidence for the defence. As to the exhaustion of domestic remedies, the author maintains that he exhausted them with his application for *amparo* in the Constitutional Court.

### **Considerations of admissibility**

6.1 Pursuant to rule 93 of its rules of procedure, before considering any claim contained in a communication, the Human Rights Committee must determine whether it is admissible under the Optional Protocol to the Covenant on Civil and Political Rights.

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 notes the State party's observation that the author failed to exhaust domestic remedies, since he has not brought any complaint alleging lack of remedy before the Supreme Court or the Constitutional Court. The Committee observes, however, that the State party does not provide sufficient information on the kinds of remedies it is referring to, or on their effectiveness. Consequently and in the light of its jurisprudence, nothing prevents the Committee from finding that domestic remedies have been exhausted.

6.4 With regard to the alleged violation of article 14, paragraph 5, it transpires from the text of the Supreme Court judgement that the Court dealt extensively with the assessment of all the evidence by the court of first instance. In this regard, the Supreme Court considered that the evidence presented against the author was sufficient to outweigh the presumption of innocence, according to the test established by jurisprudence to ascertain the existence of sufficient evidence for the prosecution in certain types of crime such as sexual assault. The claim regarding article 14, paragraph 5, therefore, is insufficiently substantiated for purposes of admissibility. The Committee concludes that this claim is inadmissible under article 2 of the Optional Protocol.<sup>2</sup> In the light of this conclusion, the Committee believes that it is not necessary to refer to the State party's argument that the communication constitutes an abuse of the right to submit communications.

6.5 The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 2;
- (b) That this 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 present report.]

#### Notes

<sup>1</sup> Communication No. 701/1996, *Gómez Vázquez v. Spain*, Views of 20 July 2000.

<sup>2</sup> See communications Nos. 1399/2005, *Cuartero Casado v. Spain*, decision of 25 July 2005, para. 4.4; and 1059/2002, *Carvallo Villar v. Spain*, decision of 28 October 2005, para. 9.5.

**F. Communication No. 1429/2005, A., B., C., D. and E. v. Australia  
(Decision adopted on 1 April 2008, ninety-second session)\***

<i>Submitted by:</i>	A., B., C., D., and E., represented by the Franciscan Missionaries of Mary
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Australia
<i>Date of communication:</i>	2 February 2005 (initial communication)
<i>Subject matter:</i>	Deportation, risk of persecution upon return to the country of origin
<i>Procedural issue:</i>	Non-substantiation of claim
<i>Substantive issues:</i>	Cruel, inhuman or degrading treatment; detention, protection of children as minors
<i>Articles of the Covenant:</i>	7; 9, paragraphs 1 and 4; and 24.
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 1 April 2008,*

*Adopts the following:*

**Decision on admissibility**

1.1 The authors of the communication are A. (first author), born in 1957, her husband B. (second author), born in 1964, their daughters D. and E., born respectively in 1991 and 1993 and the second author's mother, C., born in 1945. They are all Colombian nationals, born in Colombia, currently residing in Australia and awaiting deportation from Australia to Colombia.

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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 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.

They claim to be the victims of violations by Australia<sup>1</sup> of article 7; article 9, paragraphs 1 and 4; and article 24, paragraph 1, of the International Covenant on Civil and Political Rights. They are represented by the Franciscan Missionaries of Mary.

1.2 On 20 September 2005, the Special Rapporteur on new communications and interim measures denied the authors' request for interim measures of protection.

### **Facts as presented by the authors**

2.1 From 1976 to 1996, the second author worked in Cali in Colombia, as a waiter in nightclubs. From December 1994 to March 1996, he worked in a nightclub owned by a local Mafia leader, who was involved in illicit drug-trafficking. Because of his job, the second author knew many things on the Mafia's operations and the leaders' identities. During that period, he witnessed several Mafia meetings in the club. On 25 December 1995, the police raided the club during such a meeting, and arrested Mafia leaders. The employer believed that the raid occurred because there was a police informer among the staff. A waiter suspected to be the informer was killed by the employer after the incident.

2.2 After the incident, the second author started to work for another nightclub, where he also observed illegal activities. He made a number of anonymous calls to the police to report on those activities. He was warned to keep quiet. On 22 April 1996, he was the victim of assault and lost consciousness. One of the men who assaulted him was a policeman he had seen at the nightclub. On 29 April 1996, he left Colombia for Israel. In March 1997, he travelled to Australia.

2.3 The second author arrived in Australia on 7 March 1997 and applied for a protection visa on 29 May 1997. This was denied by a delegate of the Minister for Immigration and Multicultural Affairs on 17 September 1997, on the ground that the harm feared was criminal in intent, and was not based on a reason listed by the Convention relating to the Status of Refugees.

2.4 After the second author's departure, the remaining authors moved to different places and finally moved in with the first author's sister in La Pradera in Decepaz. The first author received threats and questions about her husband's whereabouts. In April 1998, her sister was raped and killed, and a note was found indicating: "We are sorry we got mixed up. Next time we will not fail". The first author believes that she was the intended target and that her sister was killed by mistake.

2.5 The first author, her daughters and mother-in-law arrived in Australia on 20 April 1998 and applied for a protection visa on 4 June 1998. On 29 June 1998, a Minister's delegate denied their application. On 13 May 1999, the Refugee Review Tribunal (RRT) confirmed the delegates' decision in both the cases of the husband and the rest of the family. The RRT considered that the authors' account appeared plausible, including that the second author had made phone calls to the police to inform them about illegal activities that he had witnessed. The RRT found, however, that the authors' fears were not based on any of the grounds listed in the 1951 Refugee Convention.

2.6 On 20 October 1999, the Federal Court set aside the RRT's decisions on both applications, which were sent back to the RRT for review. On 26 February 2001, a differently constituted RRT confirmed the Minister delegate's decisions not to grant protection visas to the authors. The RRT considered that the second author was not a credible witness and that important elements of

his story were implausible and contradictory. It noted that the information the second author claimed to have passed on to the police was vague and general and not threatening to anyone. The Rodriguez brothers he claimed to have seen in the club has been arrested many months earlier. It noted that the message in the threats was inconsistent, in that some requested him to return while others said he should disappear. The RRT noted that the claims in his initial application were considerably different to his later claims. It found his oral evidence to the RRT to be often hesitant or evasive. The RRT explored the information allegedly provided by the author to the authorities, which was vague and general. It found it implausible that he would have taken steps to inform of matters that were so completely unhelpful or already in the public domain. Because his claim to be an informant was inconsistent and the details about this were vague and unconvincing, the RRT was not satisfied that he was a police informant, or that he had been the victim of an attempted kidnapping or of assault. It also considered that the authors had the possibility of relocating elsewhere in Colombia if they feared to live in Cali. On 12 December 2003, the Federal Court dismissed the authors' appeal. On 2 July 2004, the Full Federal Court dismissed their leave to appeal. On 5 July 2002 and 17 January 2005, the Minister of Immigration declined to intervene in their case under section 417 of the Migration Act 1958.

### **The complaint**

3.1 The authors claim that they are actual or potential victims of a breach of article 7 of the Covenant. The first author was intimidated by officers of the Department of Immigration and Multicultural Affairs (DIMA). The second author was "treated as a liar" by the State party's authorities, which is a violation of his dignity and individual integrity. The children have experienced adverse psychological effects as a result of the authorities' denial of a protection visa.

3.2 Furthermore, a necessary and foreseeable consequence of the authors' detention and removal to Colombia would be of a violation of their rights under article 7. The authors fear revenge for the second author's actions while in Colombia, in particular in the form of kidnap, disappearance or murder. It is referred to the jurisprudence of the Committee against Torture, according to which the Committee is not bound by findings of fact made by national authorities and may freely assess the facts of a case. The authors point out that there is no evidence that the second author relied on forged documents in support of his claims. The RRT simply did not believe him. They claim that the Committee can make its own conclusions as to the plausibility of the authors' account. The fact that the authors are of a high religious moral and that the second author reported illegal activities are alone sufficient to establish that they are at risk of torture or similar treatment if returned to Colombia. This is a country in which there is a consistent pattern of gross, flagrant or mass violation of human rights. Finally, the authors claim that the government of Colombia would not be able to afford them the protection needed.

3.3 The authors claim that if they were to be detained under section 189 (1) of the Migration Act, which allows the detention of persons whose bridging visas have expired or whose protection applications have been denied, that would entail a violation of article 9, paragraphs 1 and 4, of the Covenant, because they do not intend to abscond or fail to cooperate.

3.4 The authors claim a violation of article 24, paragraph 1, of the Covenant, because there is no indication that the Minister for Immigration committed himself to comply with the requirement of the adoption of special measures to protect children, pursuant to article 24. No consideration was given to whether it was in the best interest of the children to grant them or



their family a protection visa. The children are in constant fear of what would happen to their physical safety if they were to return to Colombia, because they are members of their father's family. Relatives of parties to a conflict are often targeted by irregular armed groups on grounds of revenge. If they were detained or removed to Colombia, they would be the victims of a violation of article 24.

### **The State party's observations**

4.1 On 26 October 2006, the State party commented on the admissibility and merits of the communication. It indicates that the children and mother-in-law of the author made a separate application for protection visas, which were denied by the DIMA on 23 December 2005, and by the RRT on 8 June 2006.<sup>2</sup> It specifies that the authors have been granted bridging visas pending their removal.

4.2 On the authors' claim that they have been subjected to treatment contrary to article 7 while in Australia, the State party submits that it is inadmissible. It notes that this claim was not raised at the domestic level and argues that they have failed to provide sufficient evidence to substantiate their claim. While it accepts that the authors might be suffering from psychological distress, there is no evidence to show that the treatment received at the hands of the State party's authorities caused their condition. On the merits of this claim, the State party argues that the treatment allegedly experienced by the authors in Australia did not involve the infliction of severe pain and suffering or practices aimed at humiliating the authors and as such could not constitute a breach of article 7.

4.3 With respect to the authors' claim that they are risk of a violation of article 7 if returned to Colombia, the State party submits that they have provided insufficient evidence to substantiate such claim. There is no evidence to support statements made about treatment the authors have allegedly suffered, or fear that they might suffer in Colombia upon their return.

4.4 On the merits, the State party points out that its authorities have fully reviewed the authors' claims on several occasions and concluded that torture or cruel, inhuman or degrading treatment would *not* be a necessary or foreseeable consequence of their return to Colombia. The Committee should accept the findings of fact of domestic tribunals in the case. There is no evidence to dispute the RRT's findings that the second author was not a credible witness and that his claims of being an anonymous police informant were implausible. The authors' concerns of removal to Colombia are underpinned by the second author's claim that he was a police informant. As the RRT did not find this claim credible, it follows that all further claims arising from this premise are implausible. This includes the first author's claim of her sister's murder being a case of mistaken identity and an indicator of a potential threat to her life. While the RRT accepted that her sister was murdered, it concluded that neither the motive for the murder nor the identity of the murderer was known. The authors' removal to Colombia would therefore not expose them to a real risk of violation of their rights under the Covenant.

4.5 The State party submits that the authors' allegations of a potential violation of article 9, paragraph 1, should be declared inadmissible for lack of substantiation, as they do not provide any evidence that they would be detained if they were removed, or that such detention would be arbitrary. On the merits of this claim, the State party notes the Committee's jurisprudence<sup>3</sup> that the detention of asylum seekers is not arbitrary per se. Any decision to detain the authors pending removal would be made in accordance with the law. The authors have been liable for

removal on various occasions during their stay in Australia. Although the second author was initially detained for a two-month period, all were subsequently granted bridging visas.

4.6 With respect to the authors' claim under article 9, paragraph 4, the State party argues that it should be declared inadmissible as unsubstantiated. Although not directly asserted by the authors, the State party presumes that their claim is that if they were to be detained prior to removal, they would be denied the right to have the lawfulness of such detention determined. The communication provides no evidence to support such a claim. The State party further submits that this claim is without merit. It provides an overview of Australian legislation and argues that persons in detention have the possibility to test the lawfulness of their detention.

4.7 The State party maintains that the authors failed to substantiate their claims under article 24, paragraph 1, on behalf of the children. They provided no details or evidence that the State party has acted in such a way as to deny the children their right to such measures of protection as are required by their status as minors. The authors have provided no argument demonstrating why or how their removal would violate this article. On the merits of this claim, the State party refers to the Committee's general comment No. 17 (1989) on article 24, and points out that it is for each State to determine which measures are to be adopted, in the light of the protection needs of children in its territory.

#### **Authors' comments**

5.1 On 7 January 2007 the authors submitted comments on the State party's observations. With respect to the State party's observations on the claim under article 7 of treatment in the State party, she explains the asylum process the authors went through. She indicates that although the second author's application for a protection visa was refused on Refugee Convention grounds, it was recognised that there was a risk of serious harm for humanitarian reasons.<sup>4</sup> However, the law does not allow the recognition of humanitarian considerations which fall outside the scope of the Convention relating to the Status of Refugees, thereby discriminating against people in need of security who do not meet the definition of a refugee. An appeal to the RRT is considered only in the light of the Refugee Convention, and there are no accessible alternatives. The Federal Court can only decide on jurisdictional errors of the RRT. It cannot decide on the merits of a humanitarian claim filed by a non-convention asylum seeker.

5.2 During the second author's detention, the first author experienced pressure in the context of the uncertainty of her husband's condition and the necessity to keep the family together. Because they were not allowed to work, the authors encountered financial hardship. They had difficulties in supporting the family and in obtaining basic social services, such as seeing a doctor or providing the children, who had poor eyesight, with glasses. They had to ask friends to pay their bills. Their debts remained unpaid, resulting in stress for the family.

5.3 With respect to the claims of arbitrary detention, the authors refer to the second author's two-month detention and claim that "for a period of 5 days he was probably unlawfully detained". As a result, the authors fear further detention. In addition, they argue that persons who do not fall within the scope of the Refugee Convention may remain in detention indefinitely awaiting removal, if such *refoulement* appears to be "too dangerous".

5.4 With respect to article 24, the authors point out that the children have now lived in Australia for longer than in their country of birth. They are now teenagers and in an important stage of their development.

### **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 Committee notes that the State party has challenged the admissibility of the entire communication. With respect to the authors' claim that they were treated in violation of article 7 while in Australia, the Committee notes the State party's contention that this claim was not raised at the domestic level and that it is insufficiently substantiated. The Committee observes that the authors refer in general terms to mistreatment by the Australian authorities, to their distress during the immigration proceedings, and to their inability to work and earn their living. The Committee nevertheless considers that the authors have failed to sufficiently substantiate this claim and thus finds this claim to be inadmissible under article 2 of the Optional Protocol.

6.3 On the claim that the authors' removal would amount to a violation of article 7 of the Covenant, 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*.<sup>5</sup> The Committee notes the finding by the RRT that such a risk could not be established for lack of credibility of the authors. It also notes that the authors have not demonstrated the existence of a real risk of being deprived of their life or exposed to torture or cruel, inhuman or degrading treatment in case of their return to Colombia. The Committee considers that the authors have failed to sufficiently substantiate their claims under article 7, for purposes of admissibility, and concludes that this claim is inadmissible under article 2 of the Optional Protocol.

6.4 With respect to the author's claims under article 9, paragraphs 1 and 4, the Committee notes that the second author was detained for two months on one occasion. The authors have not demonstrated how this detention should be deemed to have been unlawful or arbitrary. The rest of the authors have not been detained. Moreover, the authors do not provide any evidence supporting the allegation that, if the State party were to detain them, that detention would be arbitrary or unlawful. The Committee accordingly finds that the claims of violation of article 9 of the Covenant have been insufficiently substantiated, for purposes of admissibility, and is thus inadmissible under article 2 of the Optional Protocol.

6.5 With respect to the authors' claim under article 24 on behalf of the children, the Committee finds that the authors have failed to substantiate why their removal with their parents would violate their rights under this article. It concludes that this claim is 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 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 present report.]

### Notes

<sup>1</sup> The Covenant and the Optional Protocol entered into force for Australia respectively on 13 November 1980 and 25 December 1991.

<sup>2</sup> In its decision of 19 May 2006, the RRT discussed the credibility of the second author. It found that while he may well have been aware of some mafia activity in the clubs, he has exaggerated, or at least has been confused, with regard to what he saw. The tribunal expressed considerable doubt that the second author had given information anonymously to the police. It concluded that the authors were not at risk of being persecuted by members of the Colombian mafia. It affirmed the decision not to grant protection visas.

<sup>3</sup> See Communication No. 560/1993, *A. v. Australia*, para. 9.3.

<sup>4</sup> The RRT decision of 13 May 1999 reads:

“I am sympathetic to the applicants’ situation. Their lives have been dramatically altered by circumstances over which they have had little control. I also accept that they have a strong subjective fear of harm in Colombia and that their fear is well-founded. However, I am not satisfied that their fear of harm is owing to a Convention reason. As this is an essential element of the Convention definition of a refugee, I am not satisfied that they are refugees.

In the light of the violence which has been perpetrated on those close to the applicants and the power of the agents of harm in a country such as Colombia in my view this is a case in which compelling humanitarian grounds are raised. However, my role is limited to determining whether the applicants satisfy the criteria for the grant of protection visas. A consideration of their circumstances on other grounds is a matter solely within the Minister’s discretion.”

<sup>5</sup> See communication No. 1302/2004, *Khan v. Canada*, inadmissibility decision of 25 July 2006, para. 5.4

**G. Communication No. 1481/2006, *Tadman and Prentice v. Canada*  
(Decision adopted on 22 July 2008, ninety-third session)\***

<i>Submitted by:</i>	Grant Tadman and Jeff Prentice (represented by Mr. Brian N. Forbes)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Canada
<i>Date of communication:</i>	17 November 2005 (initial submission)
<i>Subject matter:</i>	Alleged improper preference by denominational schools of teachers sharing same denominational beliefs, to detriment of authors.
<i>Procedural issues:</i>	Standing; exhaustion of domestic remedies; sufficient substantiation, for purposes of admissibility.
<i>Substantive issues:</i>	Discrimination on basis of religion; right to have children educated in accordance with parental preferences; effective remedy; application throughout federal States.
<i>Articles of the Covenant:</i>	2, paragraphs 1, 2 and 3; 26; and 50
<i>Articles of the Optional Protocol:</i>	1; 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 22 July 2008,

*Adopts the following:*

**Decision on admissibility**

1.1 The communication, initially dated 17 November 2005, is submitted by Grant Tadman and Jeff Prentice. They claim to be victims of violations by Canada of article 2, paragraphs 1, 2 and 3; article 26 and article 50 of the Covenant. They are represented by counsel, Mr. Renton Patterson and Mr. Brian Forbes.

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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, 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.

1.2 On 29 September 2006, the Special Rapporteur on new communications decided to separate consideration of the admissibility and merits of the case.

### **The facts as presented**

2.1 The alleged victims are teachers in Ontario, Canada. In 1986, Bill 30 was passed by the province of Ontario, granting full public funding to the separate Roman Catholic elementary and high school system in Ontario. In June 1987, in *Reference Re Bill 30, An Act to Amend the Education Act (Ontario)*, the Supreme Court of Canada held that in light of Canada's constitutional structure, the amendment was permissible. The Ontario Education Act, as amended, also provided that for a ten-year period public school teachers who became surplus to public school requirements as a result of a movement of students to the newly-funded Catholic schools could be transferred, as "designated teachers", to a substantially similar position in the new system.<sup>1</sup> Thereafter, by provisions which were not before the Supreme Court on the occasion of the reference, the Act provided that in order to maintain the distinctiveness of the separate system, school boards could require as a condition of employment that teachers "agree to respect the philosophy and conditions of Roman Catholic Separate Schools in the performance of their duties",<sup>2</sup> although teachers employed by separate schools "will enjoy equal opportunity in respect of their employment, advancement and promotion".<sup>3</sup>

2.2 In December 1997, in *Daly v. Attorney-General*, the General Division of the Ontario Court struck down the equal opportunity provision of section 136 of the Act on the ground that it infringed the right to self-determination guaranteed to denominational schools at the founding of the Union of Canada by section 93 (1) of the Constitution Act 1867.<sup>4</sup> As a result, separate school boards were permitted to prefer co-religionists in employment, advancement and promotion. On 27 April 1999, the Ontario Court of Appeal dismissed an appeal from the General Division's decision, and in October 1999, the Supreme Court of Canada denied leave to appeal.

### **Mr. Tadman's case**

2.3 From 1975, Mr. Tadman as a teacher provided guidance and physical education in the public school system. In 1986, Mr. Tadman was transferred from the North York Board of the public school system to the Metropolitan Separate School Board. In June 1987, September 1987, December 1989, June 1991 and September 1991 he was re-assigned to different posts. He states that over this period he was never given a permanent position to teach in the two areas in which he was certified, as he had earlier had in the public system. He also details four occasions where he states to have made reasonable requests in order to obtain a permanent teaching post, but was turned down for unjustified reasons. He further states that he was subjected to discriminatory treatment on account of his non-Catholic background. He states in this respect that he was subjected to verbal harassment of staff and students, not given appropriate credit for teaching experience and qualifications, prevented from discussing certain health issues with students, and denied the opportunity to be placed in the guidance department as he might make inappropriate comments due to his non-Catholic background.

2.4 As to remedies exhausted by him, in September 1987, Mr. Tadman asked the North York Board, as his former employer, to take him back as for reasons of conscience he could not continue to work in the separate school system. Following the Board's refusal to do so, he filed a grievance before a Board of Arbitration. On 17 August 1988, after hearing evidence, the Board of Arbitration rejected the grievance, finding that (a) the time span after which he had objected to

his transfer was too great to be reasonable; (b) he had had a “change of heart” concerning his ability to work in the separate system; (c) the evidence “falls far short of demonstrating that [he] was inhibited from exercising his personal religious beliefs” by the separate school board; and (d) according to his own evidence he was exempted from religious activities in the school, and “there is nothing in the evidence to suggest that this caused him any difficulties”. An appeal to the Divisional Court was dismissed, with the Court finding that “the Board found as a fact that the Separate School Board had not interfered with his personal freedom of conscience, thought, belief or religion”.

2.5 In 1992, Mr. Tadman applied to file a complaint with the Ontario Human Rights Commission. In April 1992, the Commission responded that it lacked jurisdiction to deal with the matter. In October 1992, the Ontario Ombudsman advised that it would not investigate the complaint, concurring with the Commission’s position. In February 1994, he filed a complaint with the Ontario Human Rights Commission alleging discrimination on the basis of creed against the Metropolitan Separate School Board, denial of a position in the Board, and harassment. No information is available on the outcome of this complaint. Also in February 1994, he filed a note of grievance to the teachers’ union against the Board, alleging denial of equal employment opportunities and subjection to discriminatory statements by Board employees, including teachers at his school. In May 1994, the union decided it would pursue one aspect in relation to whether he should be assigned to a different school within the Board. No information is available on the outcome of this complaint.

2.6 In June 1994, he filed a complaint with the Ontario Labour Relations Board against his union, alleging breach of the latter’s duty of fair representation. In August 1994, that Board dismissed his complaint for want of jurisdiction over disputes between a teacher and the union. In November 1994, he sued the School Board in the Ontario Court (General Division) alleging discrimination in employment, but specifically excluding the general statutory position of the separate schools. On 10 August 1995, the Court struck out the claim on the basis that Mr. Tadman had failed to exhaust the mandatory arbitration process. No appeal was taken from that decision.

2.7 On 29 October 1999, the Human Rights Committee declared inadmissible, on the basis that the authors could not claim to be victims of the alleged discrimination, a communication by Mr. Tadman and others, alleging violations of the same provisions of the Covenant as invoked here.<sup>5</sup> The Committee noted that “the authors while claiming to be victims of discrimination, do not seek publicly funded religious schools for their children, but on the contrary seek the removal of the public funding to Roman Catholic separate schools. Thus, if this were to happen, the authors’ personal situation in respect of funding for religious education would not be improved. The authors have not sufficiently substantiated how the public funding given to the Roman Catholic separate schools at present causes them any disadvantage or affects them adversely”.<sup>6</sup>

### **Mr. Prentice’s case**

2.8 Mr. Prentice taught mathematics and science part-time in a Catholic high school in Ottawa in the 1997-1998 school year. In 1998, he applied but was refused a permanent position. He states that this was on the basis that he was not a practicing Catholic in view of a note received from the School Board that he was not able to so attest.

## The complaint

3.1 The authors allege that the facts disclose discrimination on the ground of religious belief, contrary to article 26 of the Covenant on three bases. Firstly, they claim to have suffered religious discrimination because of the hiring and promotion practices applicable in Ontario's separate school system. Secondly, they contend that public funding of Roman Catholic schools is in breach of the provision in article 26. Thirdly, Mr. Tadman alleges that while he was a teacher in a Catholic secondary school, he was discriminated against for not being a Roman Catholic. The authors invoke the Committee's Views in *Waldman v. Canada*<sup>7</sup> in support of these arguments.

3.2 The authors also contend that in light of the jurisprudence of the State party's courts, they are without any effective remedy contrary to article 2 of the Covenant. Finally, the authors argue that the existence in Ontario of the alleged discriminatory provisions amounts to a breach of article 50 of the Covenant, extending equal protection in federal States.

## State party's submissions on admissibility

4.1 By submission dated 18 September 2006, the State party contested the admissibility of the communication, arguing that it is inadmissible (a) *ratione materiae*; (b) as an abuse of the right of submission on account of delay; (c) for absence of a victim; (d) for failure to exhaust domestic remedies in respect of Mr. Tadman's harassment claims; and (e) for insufficient substantiation of Mr. Tadman's harassment claims.

4.2 The State party submits that the communication is incompatible *ratione materiae* with article 18, paragraph 4, of the Covenant, protecting the rights of persons to have their children educated in conformity with their religious convictions. Preserving the denominational character of a religious school requires, as has been recognized by the courts, the ability to hire teachers preferentially on the basis of religion. All religious schools in Ontario, regardless of denomination, have this right, consistently with article 18, paragraph 4.

4.3 The State party submits that the authors have offered no convincing explanation for the delay in submission of the communication, rendering it an abuse of the right of submission. Even taking the date in October 1999 as the latest possible relevant date since the refusal of the Supreme Court to grant leave to appeal the *Daly* decision, over six years have passed until submission of the communication. No justification has been provided for this delay, which is excessive and hinders the State's ability to determine the certain facts and circumstances of the case which lie outside the records of either federal or Provincial archives.

4.4 The State party also argues, comparing the text of the communication with that already submitted by the author in 1999, that the authors' true complaint remains that Catholic separate schools should not be publicly funded, rather than the ostensible allegation of preferential hiring of Roman Catholics in separate school boards. The Committee rejected the author's standing on this issue in its decision on the original communication. This conclusion remains applicable, as neither author has indicated how public funding violates any of their Covenant rights. The State party also argues that re-submission of the same essential complaint amounts to an abuse of the right of submission.



4.5 The State party also argues that Mr. Tadman has not shown that he has exhausted domestic remedies with respect to the alleged harassment. The *Daly* decision did not foreclose the issues raised in the communication, as that judgment held only that Catholic school boards are permitted to preferentially hire and promote Catholics, but only to the extent necessary to preserve the Catholic nature of the Catholic schools. This rule does not cover the harassment alleged; on the contrary, section 5 of the Ontario Human Rights Code specifically guarantees freedom from harassment in the workplace on account of creed. Mr. Tadman has not shown that he fully pursued his rights under the Code. Moreover, in Mr. Tadman's action in the civil courts, he specifically disclaims the issue that would later be resolved in the *Daly* case.

4.6 Lastly, the State party argues that the two incidents of harassment alleged to have occurred would, even if proven, not amount to discrimination in breach of article 26. In particular, there is nothing inappropriate about children in a religious school asking teachers about religious practices. In addition, Mr. Tadman filed an Education Act grievance and human rights complaint on these issues. The Board of Arbitration found the claims unsubstantiated, and his review of this decision was dismissed. In these circumstances, the Committee should defer to domestic fact-finding.

#### **Authors' comments on the State party's submissions**

5.1 By letter of 17 November 2006, the authors responded, disputing the State party's submissions. As to domestic remedies, the authors argue that in light of *Daly* it would be futile to pursue further proceedings. The authors also dispute that article 18, paragraph 4, of the Covenant covers a right to employ members of a religious denomination in schools of that denomination and argue that it does not permit discrimination against specific teachers. The authors, again invoking *Waldman*, argue that the establishment of the separate system made it inevitable that teachers in the State system would need to be transferred to the separate system, in view of the numbers of transferred students.

5.2 As to the question of delay, the authors argue that the delay in question is imputable to Canada and the absence of appropriate response to the Views in *Waldman*. The authors also dispute that the passage of time has prejudiced the State's capacity to resolve the issues in question. In regard to their status as victims, the authors allege that they are not agitating the same question as was decided in the original *Tadman* communication, but that instead they are claiming personal injury in the form of discrimination suffered as teachers.

#### **Supplementary submissions of the State party**

6.1 On 11 April 2007, the State party responded to the authors' comments. The State party stresses that *Waldman*, repeatedly invoked by the authors, is irrelevant in the present case. *Waldman* addressed the funding of denominational schools, and did not in any way address preferential hiring of co-religionists as teachers in denominational schools. By focusing almost exclusively on *Waldman* and the issue of funding, the authors seek to reargue the different question of public funding for Catholic schools in Ontario, on which the authors have no standing.

6.2 The State party stresses that all denominational schools in Ontario, regardless of denomination, have the right to preferentially hire on the basis of religion in order to preserve the denominational character of their schools, consistent with article 18, paragraph 4, and the values of the Covenant. Nor has Mr. Tadman shown any link between preferential Catholic hiring and the alleged harassment suffered by him. In addition, the passage of time has been prejudicial: the two examples Mr. Tadman has cited occurred almost twenty years ago with anonymous students, making it impossible now to conduct proper investigations.

## **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 The Committee notes its decision on the earlier communication presented by the author (*Tadman No. 1*) to the effect that the author did not have standing as a victim to challenge issues of public funding of denominational schools in Ontario. To the extent that the present communication addresses the same issues which the Committee decided in *Waldman*, the communication is inadmissible under article 1 of the Optional Protocol.

7.3 As to Mr. Tadman's own circumstances, the Committee notes that in the civil proceedings instituted by him in the Ontario courts, he specifically disclaimed any challenge to the general issue of preferential treatment for co-religionists in denominational schools (sections 135 and 136 of the Act). Instead, he confined himself to raising his particular personal difficulties in his own workplace. The Court decided that these difficulties had not been raised in the earlier arbitration, and Mr. Tadman was therefore not entitled to raise them presently. Mr. Tadman did not appeal against this decision. It must therefore be concluded that Mr. Tadman's communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for failure to exhaust domestic remedies. The Committee also notes the earlier findings of fact reached by the Board of Arbitration and the Divisional Court (see para 2.4, above) that Mr. Tadman did not in fact suffer any limitation of his freedom of conscience, thought, belief or religion. The Committee refers to its previous jurisprudence in *Keshavjee v. Canada*,<sup>8</sup> pursuant to which it defers to such findings of fact reached by the domestic authorities, unless manifestly arbitrary or amounting to a denial of justice. This part of Mr. Tadman's communication is therefore inadmissible also under article 2 of the Optional Protocol, for insufficient substantiation.

7.4 As to Mr. Prentice, the Committee notes that the communication discloses no effort by the author to contest or challenge before the State party's authorities or the courts the alleged basis for the refusal of his promotion. The author having failed to make a reasonable effort to substantiate the alleged violation of his rights before the national authorities, Mr. Prentice's communication must be held to be inadmissible, under article 5, paragraph 2 (b), of the Optional Protocol for failure to exhaust remedies.

8. The Committee therefore decides:

(a) That the communication is inadmissible under articles 1, 2 and 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the authors 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 present report.]

### Notes

<sup>1</sup> Section 135 of the Act.

<sup>2</sup> Section 136 (1).

<sup>3</sup> Section 136 (2).

<sup>4</sup> Section 93 (1) provides: “Education: In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:  
(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union.”

<sup>5</sup> Communication No. 816/1998, *Tadman et al. v. Canada*, Decision adopted on 29 October 1999.

<sup>6</sup> *Ibid.*, para. 6.2.

<sup>7</sup> Communication No. 694/1996, Views adopted on 3 November 1999.

<sup>8</sup> Communication No. 949/2000, Decision adopted on 2 November 2000.

**H. Communication No. 1487/2006, *Said Ahmad and Abdol-Hamid v. Denmark*  
(Decision adopted on 1 April 2008, ninety-second session)\***

<i>Submitted by:</i>	Kasem Said Ahmad and Asmaa Abdol-Hamid (represented by counsel, Ms. Zaha S. Hassan)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Denmark
<i>Date of submission:</i>	12 June 2006 (initial submission)
<i>Subject matter:</i>	Publication of illustrations offending religious sensitivities.
<i>Procedural issue:</i>	Exhaustion of domestic remedies.
<i>Substantive issues:</i>	Prohibition of inciting advocacy; freedom of expression; effective remedy.
<i>Articles of the Covenant:</i>	2, paragraphs 3 (a) and (b); 17; 18, paragraphs 3 and 4; 19; 20 and 26
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

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

Meeting on 1 April 2008,

*Adopts the following:*

**Decision on admissibility**

1. The authors of the communication, initially dated 12 June 2006, are Kasem Said Ahmad and Asmaa Abdol-Hamid, both Danish nationals, born on 26 September 1960 and 22 November 1981, respectively. They claim to be victims of violations by Denmark of their rights under articles 2, paragraphs 3 (a) and (b); article 17; article 18, paragraphs 3 and 4; article 19; article 20 and article 26 of the International Covenant on Civil and Political Rights. They are represented by counsel, Ms. Zaha Hassan.

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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.

## **Factual background**

2.1 The authors adhere to the Muslim faith. In 2005, the culture editor for the Danish newspaper “Jyllands-Posten” solicited 40 members of the Danish Newspapers’ Illustrators’ Union to depict the Islamic Prophet Mohammad, as they saw him. Twelve illustrators accepted the invitation. On 30 September 2005, the newspaper published one of the illustrations on the front page with the following caption: “Some Muslims reject modern, secular society. They demand a special position, insisting on special considerations of their own religious feelings. It is incompatible with secular democracy and freedom of expression, where one has to be ready to put up with scorn, mockery and ridicule.”

2.2 A full article was published on page three of the newspaper with the title “The Face of Mohammad” and byline “Freedom of expression”. The introduction to the article read:

“The comedian Frank Hvam recently admitted that he did not dare openly ‘to take the piss out of the Koran on TV’. An illustrator who is to portray the Prophet Mohammad in a children’s book wishes to do so anonymously. As do the Western European translators of a collection of essays critical of Islam. A leading art museum has removed a work of art for fear of reactions of Muslims. This theatre season, three satirical shows targeted at the President of the USA, George W. Bush, are playing, but not a single one about Osama bin Laden and his allies, and during a meeting with Prime Minister Anders Fogh Rasmussen, Denmark’s Liberal Party, an imam urged the government to use its influence over Danish media so that they can draw a more positive picture of Islam. The cited examples give cause for concern, regardless of whether the experienced fear is founded on a false basis. The fact is that the fear does exist and that it leads to self-censorship. The public space is being intimidated. Artists, authors, illustrators, translators and people in theatre are therefore steering a wide berth around the most important meeting of cultures of our time - the meeting between Islam and the secular society of the West, which is rooted in Christianity.”

2.3 A following section, entitled “The Ridicule”, repeated caption on the front page of the newspaper and followed it with:

“It is therefore no coincidence that people living in totalitarian societies are sent off to jail for telling jokes or for critical depictions of dictators. As a rule, this is done with reference to the fact that it offends people’s feelings. In Denmark, we have not yet reached this stage, but the cited examples show that we are on a slippery slope to a place where no one can predict what self-censorship will lead to.”

2.4 The last column of the article, under the heading “12 Illustrators”, stated: “That is why [the newspaper] has invited members of the Danish Newspaper Illustrators’ Union to draw Mohammad as they see him”. It stated that 12 illustrators, whose names are mentioned, has responded to the invitation, whereupon the 12 illustrations are published.

2.5 The authors allege that the illustrations commented on a faulty understanding of Islamic religious teaching. The 12 illustrations in question are as follows:<sup>1</sup>

1. The face of a man whose beard and turban are drawn within a crescent moon, and with a star, symbols normally used for Islam;

2. The face of a grim-looking bearded man with a turban shaped like an ignited bomb;
3. A person standing in front of an identity parade consisting of seven people, including a caricature of leader of the Danish People's Party Pia Kjaersgaard and five men wearing turbans. The person in front of the line-up is saying: "Hmm ... I can't quite recognize him ...";
4. A bearded man wearing a turban, standing with a halo shaped like a crescent moon over his head;
5. Five stylized female figures wearing headscarves, with facial features depicted as a star and a crescent moon. The caption reads: "Prophet! You crazy bloke! Keeping women under the yoke!"
6. A bearded man wearing a turban, standing with the support of a staff and leading an ass with a rope;
7. A man with beads of sweat on his brow, sitting under a lighted lamp and looking over his left shoulder as he draws a man's face with a head covering and beard;
8. Two bearded man wearing turbans and armed with a sword, a bomb and a gun, running towards a third bearded man wearing a turban. He is reading a sheet of paper and gesturing them to hold off, with the words: "Relax folks! It's just a sketch made by an unbeliever from southern Denmark";
9. A teenage boy with dark hair, dressed in trousers and a striped top printed with the text "The Future", standing in front of a blackboard, and pointing with a pointer at the Arabic text written on it. The text "Mohammad, Valby School, 7A" is written in an arrow pointing at the boy;
10. A bearded man wearing a turban and carrying a sword, standing with a black bar covering his eyes. Standing at his sides are two women wearing black gowns, with only their eyes visible;
11. A bearded man wearing a turban, standing on clouds with arms outspread, saying: "Stop, stop, we ran out of virgins!" Waiting in front of him is a row of men in tatters with plumes of smoke over their heads;
12. A drawing of a man wearing glasses and a turban with an orange in it. The turban bears the words "Publicity Stunt". The man is smiling as he shows a picture portraying a "matchstick man" with a beard and wearing a turban.<sup>2</sup>

2.6 On 12 October 2005, senior representatives of twelve States and territories of predominantly Muslim character wrote to the State party's Prime Minister registering concern as to publication of the illustrations and other prominent incidents of public statements directed against Islam, asserting that they would in combination cause reactions within Muslim countries and within European countries with Muslim minorities. On 21 October 2005, the Prime Minister responded that his Government could not influence the press, but that offended persons were free to pursue proceedings in the Danish courts.

2.7 On 27 October 2005, a complaint was filed with the State party's police alleging violations of sections 140<sup>3</sup> and 266 (b)<sup>4</sup> of the Criminal Code on account of publications of various cartoon representations of Mohammad in "Jyllands-Posten". According to the State party, the complaint was filed by "a number of organizations", with the second author being named as contact person, while the communication describes the complainants as "Muslim organizations and individuals including [the second author]."

2.8 On 1 January 2006, the State party's Prime Minister stated: "... it is this unorthodox approach to authorities, it is this urge to question the established order, it is this inclination to subject everything to critical debate that has led to progress in our society. For it is this progress that new horizons open, new discoveries are made, new ideas see the light of day. While old systems and outdated ideas and views fade and disappear. That is why freedom of speech is so vital. And freedom of speech is absolute. It is not negotiable ... . In general we treat others with consideration and have confidence in each other, confidence in a set of principles that are fundamental to our society. We have based our society on respect for the individual person's freedom, freedom of speech, equality between men and women, a distinction between politics and religion. Our point of departure is that as human beings we are free, independent, equal and responsible. We must safeguard these principles."

2.9 On 6 January 2006, the Regional Public Prosecutor of Viborg decided to discontinue the investigation under section 749 of the Administration of Justice Act, stating that in assessing an offence under sections 140 and 266 (b), the right to freedom of expression had to be taken into consideration and that, on overall assessment of the article, there was no reasonable presumption that a punishable offence to be prosecuted by the public had been committed. An appeal was lodged with the Director of Public Prosecutions. According to the communication, this appeal was lodged by the Islamic Community, of which the first author is a member, other organizations and individuals, including the authors, while the State party describes the appeal as "on behalf of a number of organizations and individuals" and which named both authors as contact persons.

2.10 On 13 February 2006, the State party's Prime Minister stated: "Nobody can deny that the caricatures insulted the beliefs of many Muslims. And it's right to show understanding for this. The Government doesn't have any interest in insulting Islam or any other religion. But all of the protesters must understand that the Danish Government has no means of controlling a free press. This is the main problem: we are all talking at cross-purposes."

2.11 On 15 March 2006, the Director of Public Prosecutions decided to address the merits of the appeal due to the public interest in the matter without assessing as a preliminary matter the locus standi of the complainants. On the substance, he declined to reverse the decision of the Regional Public Prosecutor, in a decision not subject to further appeal. The Director noted that, sections 140 and 266 (b) of the Criminal Code restricting the right to freely express opinions, had to be interpreted with due regard for the right to freedom of expression. As to section 140, the Director noted that accepted usage in the State party covered even offensive and insulting expressions of opinion. The practice since adoption of this provision in 1930 had amounted to only three prosecutions, the most recent in 1971 ending in acquittal (of two public service television programme managers who broadcast a song that might be highly offensive to moral or religious feelings of Christians). As to whether the article mocked or scorned "religious doctrines or acts of worship", within the meaning of the section, the Director noted that the religious writings of Islam cannot be said to contain a general and absolute prohibition against drawing Mohammad. Rather, there was a prohibition against depicting human figures. Not all Muslims

consistently complied with the depiction ban, as there were pictures of Mohammad depicted respectfully from earlier times as well as the present. It therefore could not be assumed that a drawing of Mohammad in general would be contrary to religious doctrines and acts of worship, as practiced today. As to whether caricature (rather than depiction) amounted to ridicule or an expression of contempt of religious doctrines and acts of worship depended on the circumstances, including the text accompanying the illustrations.

2.12 In the present case, the Director considered that that text suggested a basic assumption that the newspaper commissioned the drawings for the purpose of debating, in a provocative manner, whether in a secular society special regard should be had to the feelings of some Muslims. The Director considered illustrations (1), (3), (4), (6), (7), (9), (11) and (12) as either neutral in expression or not seeming to be an expression of derision or spiteful ridiculing humour, falling outside the scope of section 140. Drawings (5) and (10) addressed the position of women in Muslim society and concerned social conditions of those societies and the lives of their members, rather than expression about Islamic religious doctrines or acts of worship.

2.13 Drawing (8) could be seen as an illustration of an element of violence in Islam, but the standing man - who could be Mohammad - denies there is any reason for anger and speaks soothingly, which must be taken to be a rejection of violence. There is thus no expression of mockery or scorn of Islamic doctrines or acts of worship. Drawing (2) could be understood as meaning that violence or bomb explosions had been committed in the name of Islam, therefore a contribution to the current debate on terror and as an expression that religious fanaticism has led to terrorist acts. It is thus not contempt for Mohammad or Islam being expressed, but criticism of Islamic groups committing acts of terror in the name of religion. The drawing could also be taken as depicting Mohammad as a violent, or rather intimidating or scary, figure. The Director noted that historical descriptions of Mohammad's life showed violent conflict and armed clashes with non-Muslims in the course of propagation of the religion, and substantial loss of Muslim and non-Muslim life. Even so, the depiction of Mohammad as violent had to be incorrect if shown with a bomb, which today might be understood to imply terrorism. This could with good reason be understood as an affront and insult to Mohammad. It was not however an expression of mockery, ridicule or scorn (covering contempt or debasement) within the meaning of section 140. Taking into account the drafting history and precedents, the section was to be narrowly construed and the affront and insult to Mohammad which could be understood to be conveyed could not be assumed with the necessary certainty to be a punishable offence.

2.14 As to section 266 (b), the Director noted that this provision should likewise be subject to a narrow interpretation out of regard for freedom of expression. As to whether the illustrations "insulted" or "degraded" Muslims on account of their religion, the content of these terms was co-equal with the "mockery" and "scorn" described in section 140. The article's text did not refer to Muslims generally, but to some Muslims, those rejecting modern, secular society and demanding a special position for their own feelings. The text could not be considered scornful or degrading towards this group, even in the context of the illustrations. The drawings depict Mohammad, a religious figure, rather than referring to Muslims in general, and there was no basis for assuming that the intention of drawing (2) was to depict Muslims generally as perpetrators of violence or even as terrorists. The drawings depicting persons other than Mohammad contained no general references to Muslims, and did not depict them in scornful or degrading fashion, even in conjunction with the text.



2.15 In conclusion, the Director noted that although there was no basis for institution of criminal proceedings in the case, both sections 140 and 266 (b) restricted freedom of expression. To the extent publicly made expressions fell within the scope of those rules, there was therefore no free and unrestricted right to express opinions about religious subjects. It was thus not a correct description of the law when the article stated that it was incompatible with the right of freedom of expression to demand special consideration for religious feelings and that one had to be ready to put up with “scorn, mockery and ridicule”.

2.16 Following the decision of the Director of Public Prosecutions, Mr. Ahmad states that his private sector employment was terminated, on the grounds that insufficient work was available. He believes that the actual reason was his activism on the illustrations issue; shortly before his termination, he was approached several times by management to discuss the complaint, to the filing of which he had been a party, and statements he had made to the press. He also states he experienced harassment in the workplace after speaking out against the publication, and that his search for new employment is being hindered by discrimination against him for the same reason.

2.17 On 29 March 2006, the Islamic Community of Denmark, of which the first author is a member, and six other organizations, all represented by the first author by power of attorney, initiated private criminal proceedings against the editor-in-chief and the culture editor of the newspaper, under sections 268<sup>5</sup> (defamation in the form of libel or slander); 21 (attempts); and 267<sup>6</sup> (defamatory statements violating the personal honour of another by offensive words or conduct) of the Criminal Code. The case was heard on 9 October 2006, the author being amongst the witnesses. On 26 October 2006, the District Court of Aarhus ruled against the complainants. The judgment noted that freedom of expression had limits, which fell to the courts to be determined in a modern democratic society. The Court noted that some of the illustrations had no religious content or aim, while others were completely neutral in their presumed message and seemed likely to infringe the ban on depiction only, which the complainants had expressly disavowed as part of the proceedings. Others were ironical illustrations of the consequences of violation of the ban on depiction, did not even depict Mohammad or were satirical about his alleged connection with the suppression of women.

2.18 In the Court’s view, the messages of illustrations intended to depict Mohammad were Danes’ lack of knowledge of Mohammad, a link between him and the suppression of women, making Mohammad to “look (mildly) ridiculous as a rather simple person”, descriptions of connections between Mohammad and terrorism. The Court considered the three cartoons linking Mohammad and terrorism as the only ones that did not clearly fall outside of what might be deemed insulting. As to whether these amounted to criminal defamation, the Court considered that they aimed at social criticism, and would hardly have caused offence if published individually. Although the accompanying text might be read as an invitation to scorn, mockery and ridicule, the illustrations were not of this nature. Obviously it could not be ruled out that the illustrations offended the honour of some Muslims, but there was no basis for an assumption that they were intended to be offensive or that the purpose was to make statements disparaging Muslims in the esteem of their fellow citizens; nor were they suited for that purpose. It followed that no criminal responsibility could be imposed on the defendants. According to the State party, the first author has availed himself of an appeal of the judgment to the High Court of Western Denmark.

2.19 Following publication of the illustrations, demonstrations and riots took place in a number of countries around the world, resulting in over 100 deaths, 800 injured and extensive property damage, including to the State party's embassies in Damascus and Beirut. The illustrations were also reprinted in other European newspapers and magazines.

### **The complaint**

3.1 Under a general reference to articles 2, paragraphs 3 (a) and (b); article 17; article 18, paragraphs 3 and 4; article 19; article 20 and article 26 of the Covenant, the authors allege that in the circumstances of the case they were denied an effective remedy for incitement of hatred against Muslims, prohibited under article 20 of the Covenant, by acts and omissions of the State party's Prime Minister and its Director of Public Prosecutions. This denial has permitted and furthered violations of the Covenant related to protection against attacks on honour and reputation, of public order and safety, against racial and religious discrimination, and against incitement to racial and religious discrimination against Danish Arabs and Muslims, as well as the guarantee of equal protection before the law. The failure to prosecute resulted in serious injuries and trivialization of the controversy, while sending a message that incitement against Arabs and Muslims was acceptable.

3.2 As to the Prime Minister, the authors allege that he facilitated and encouraged the violation of their rights by taking public actions (specifically, failing to meet with the ambassadors and representatives) and making public statements that trivialized and appeared to support the publication of "patently offensive and provocative" illustrations. This contributed to growing volatility of the situation and arguably emboldened other publications to republish the illustrations. He then prejudiced the investigation into the publication of the illustrations by taking an official position against prosecution, in clear misrepresentation of the State party's own laws and its obligations under international treaties, giving a clear signal to police and prosecutors that the Government was not committed to pursuing the case against "Jyllands-Posten".

3.3 As to the Director of Public Prosecutions, the authors argue that he denied an effective remedy by affirming the Regional Public Prosecutor's decision. The authors argue he did not appreciate the full import of message of the illustrations in determining whether there had been a violation of the State party's law and should have forwarded the issue to a tribunal rather than rely on his own questionable interpretations. Specifically, the illustrations were, in the authors' view, by their very definition meant to grotesquely distort and misrepresent their subjects; they were aimed at offending and ridiculing Muslims as a minority group in the State party; the culture editor should have been aware that caricaturing Mohammad would be especially offensive to Muslims; the dominant message was the association and confusion of Islam with terrorism; the culture editor had been placed on notice by the violent reaction to reports of desecration of the Koran at United States military bases in 2005; the stated intention of the article was that Muslims should accept being scorned, mocked and ridiculed; caricaturing Muslims did in fact make a statement about all Muslims and Islam generally; appropriate weight had not been given to international standards on incitement and discrimination against racial and religious groups, and protection of public order; and the narrow interpretations given ran counter to recent Parliamentary efforts to punish more severely crimes with racial, religious or ethnic motivations.

3.4 The authors allege that the illustrations commented on a faulty understanding of Islamic religious teaching, and bore the following messages: (a) that Mohammad is a terrorist and his message, Islam, is the ideology of terrorism; (b) Islam is evil and supports terrorism by offering the promise of virgins to putative suicide-bombers; (c) Mohammad is both a devil and a saint, or a devil disguised as a saint; (d) Islam is strange and paradoxical, prohibiting depiction of Mohammad's face but requiring Muslim women to cover everything but their face; women are subjugated under Islam; (e) Muslims are violent and automatically seek to kill anyone with whom they disagree; (f) Mohammad and Muslims are backwards and simple, not of the civilized, modern age; and (g) Islam calls for the subjugation of women.

3.5 The authors state that the failure of the State party to uphold its obligations under the Covenant had caused the State party's Government to be perceived as supportive of the publication and republication of the illustrations, which had fed and would likely continue to feed violent protests around the world leading to more deaths, bodily injury and property destruction. They also state that Muslim and Arab minorities generally in the State party, and themselves as members thereof, would suffer from a political and social backlash because members of the majority in the State party may believe that incitement and discrimination against Arabs and Muslims in the State party is sanctioned by the manner with which the controversy had been dealt.

3.6 The second author, Ms. Abdol-Hamid, also states that she believes she is injured as all Muslims are by the publication of racist and Islamophobic caricatures of Mohammad and Islam, associated with the fact of the State party's Government apparent sanction of the publication of the illustrations. In her view, this provides licence to non-Muslim Danes to discriminate and engage in further defamatory speech against Muslims and Arabs in the State party.

#### **State party's submissions on the admissibility and merits of the communication**

4.1 By notes verbales of 23 October 2006 and 6 February 2007, the State party disputed the admissibility and merits of the communication. As to admissibility, the State party submits that the case is inadmissible on the basis that no prima facie case had been made out in respect of article 20 of the Covenant, that the communication was manifestly ill-founded as the authors did have access to an effective remedy and that the authors cannot be considered victims. As to the merits, it submits that the communication discloses no violation of the Covenant.

4.2 On the threshold issue of whether the authors can sufficiently be considered victims with standing to bring a claim, the State party refers to the Committee's jurisprudence in questioning the degree to which they have been personally affected to the necessary extent. The State party notes that in the initial communication the authors described their interest in terms of a general perception of the State party's government in the wider world, rather than any reflection of harm or real risk thereof to the authors' enjoyment of Covenant rights. The statement of being at risk of political and social backlash was based on several sets of clearly hypothetical conceptions to the reaction of the majority of the Danish population to the Government's handling of the crisis, rather than the decision of the Director of Public Prosecutions. The statement in no way proves actual effect on the authors of the decisions of the State party's authorities. Only subsequent to a letter by the Committee's Secretariat requesting clarification of this issue were the (entirely undocumented) allegations of individual harm in the employment context to Mr. Ahmad particularised, though at no time have these been presented to the State party's prosecution service for assessment under section 266 (b) of the Criminal Code or otherwise pursued.

4.3 The State party also notes in this respect that its Act on Prohibition against Differential Treatment on the Labour Market prohibits discrimination in hiring and firing on account of, inter alia, race, colour, religion, faith or social or ethnic origin, provides specially relaxed evidentiary rules in this context, and awards compensation for violations thereof. While the allegations raised by the author would fall under this Act, he has not engaged in any proceedings against past or would be employers, and has thus not exhausted domestic remedies in respect of such injury. It was thus impossible for the State party at this point to verify the veracity of these allegations, and it disputes in any event that it was the decisions not to prosecute that caused Mr. Ahmad's dismissal.

4.4 As to the separate injuries advanced by Ms. Abdol-Hamid, the State party argues that these are of such general and abstract character that they cannot fulfil the victim requirement. Furthermore, the allegations of licence of further discrimination are wholly unsubstantiated and purely speculative, insufficient to sustain a claim as the author's risk of being affected is more than a theoretical possibility.

4.5 The authors have thus not shown that the decision not to prosecute has had an adverse effect, or real risk thereof, on enjoyment of their Covenant rights and the communication is inadmissible for want of victim status.

4.6 On the substance of the case, firstly, the State party submits that the illustrations in question did not fall within the scope of application of article 20, paragraph 2, of the Covenant, in no way advancing religious hatred. Decisive emphasis must be placed on the context - illustrating a newspaper article intended to launch a debate on self-censorship in the State party, as recognized by the Director of Public Prosecutions. The newspaper thus did not intend to incite discrimination against certain Muslims, but to point out that a group of Muslims who "reject modern society" must be treated like all others in the State party regardless of beliefs. There is thus a crucial difference between initiatives intended to put an end to what the newspaper considered self-censorship and those intended to incite religious hatred, and the article's statements need to be seen in that light. The inclusion of "humoristic and satirical" illustrations, including of the illustrators themselves, supports the claim that they were not designed to incite religious hatred. For example, the portrayal of a bearded man with a staff leading an ass seems only to show the illustrator's view what Mohammad might have looked like at the time, just as Jesus is often depicted in flowing robes and sandals, rather than raising negative inferences. While other illustrations may be perceived as provocative, the purpose was to direct focus to the issue of self-censorship, an issue attracting broad public interest at home and abroad.

4.7 The State party notes that the Committee has yet to find a breach of article 20 of the Covenant. In the three cases in which it expressed views on this provision, the authorities had interfered with expressions of unambiguously anti-Semitic nature. In each case, the Committee concluded that the authors' rights had not been violated by the interferences because the expressions were so racist in character that they were covered directly by article 20, or were justified as a permissible limitation on freedom of expression under article 19, paragraph 3. The cases therefore provide no guidance on the interpretation of article 20 where, as presently, the State party has *not* interfered with freedom of expression, and in which the expressions in dispute are not in the same nature of advocacy of national, racial or religious hatred. Article 20 sets a high threshold, requiring not only such advocacy, but advocacy constituting incitement to

discrimination, hostility or violence. As noted, the purpose of the article was not thus, but to launch a debate on self-censorship, and the resulting violence in certain countries outside the State party does not change that.

4.8 The drawings and text falling not being published for the purpose of inciting racial hatred, they fall outside article 20, paragraph 2, and the claim is both inadmissible for insufficient substantiation and discloses no violation on the merits.

4.9 Even if the claim is arguable in respect of article 20, the State party emphasizes that the authors did have access to an effective remedy as required by article 2, and the claim is therefore manifestly ill-founded and discloses no violation on the merits. The authors had access to the police and prosecutorial system, which they exercised. The prosecuting authorities at two levels issued prompt, thorough and reasoned decisions, including assessment of international human rights instruments. There being no doubt on the facts, the prosecutor's task was solely legally to assess the article and illustrations against sections 140 and 266 (b) of the Criminal Code. Although the authors did not achieve the outcome they wanted, the Covenant does not guarantee a specific outcome to investigations. The State party notes that article 2, as further explained in general comment No. 31 (2004), on the nature of the general legal obligation imposed on States parties to the Covenant, explicitly permits States parties to provide remedies to administrative authorities, with no requirement necessarily to have subsequent recourse to courts. If no violations of Covenant rights have been shown following prompt and effective investigation, there can be no obligation to engage a prosecution in the courts. A decision to prosecute must, to protect the rights of accused, be based only on objective soundness and likelihood of procuring a conviction, rather than to respond to public controversy or the desires of a sector of the public. In this respect the State party refers to an opinion of the Committee on the Elimination of Racial Discrimination, reaffirming its view that "the freedom to prosecute criminal offences - commonly known as the expediency principle - is governed by considerations of public policy and not[ing] that the Convention cannot be interpreted as challenging the *raison d'être* of that principle."<sup>7</sup>

4.10 In cases of discrimination, States parties must investigate with due diligence and expedition, rather than commence prosecution in all cases where discriminations is alleged. Nor does the Covenant imply any unconditional requirement that allegations must be prosecuted if the prosecuting authorities fairly determine that the objective facts clearly fall outside the scope of applicable criminal law.

4.11 The State party emphasizes that the Covenant does not contain a positive obligation to interfere in a debate on a topical subject taken up by the press in furtherance of its watchdog functions in a democratic society, provided it does not amount to advocacy of national, racial or religious hatred inciting to discrimination, hostility or violence. The relevant publication here was made with no such purpose, but to launch debate on a potential problem of self-censorship in the State party. Given the value of free expression in a democratic society, the media must be able to take up even touchy issues and make provocative statements on potential societal problems without State intervention, subject to the limit described.

4.12 Extremely weighty reasons are therefore required to restrict the press' right and duty to inform and provide information and ideas on all matters of public interest, even if there has been possible recourse to a degree of exaggeration or even provocation. The demands of pluralism, tolerance and broadmindedness without which there would be no democratic society protects

information and ideas that may offend, shock or disturb, subject to the bounds of criminal law and thorough assessment of prosecutors that they have been respected. Free expression must be carefully balanced against regard for the protection of religious feelings of others. However, persons manifesting their religion, whether as a majority or minority, cannot reasonably expect to be exempt from, for example, articles or papers intended to launch a critical debate on their religion, and have to tolerate and accept the dissemination of attitudes that may be perceived as criticism of their religion.

4.13 In addition, Mr. Ahmad *has* had access to the courts, as organizations in which he is a member and represented by him have instituted private criminal proceedings against the newspaper for violations of injury to feelings, in violation of articles 267 and 268 of the Criminal Code. These proceedings are no less effective merely because the proceedings had been privately instituted rather than by the prosecution service. He gave evidence in those proceedings, with judgment given in October 2006 and now under appeal. As a result, the State party's courts have indeed had the opportunity meticulously to assess from a legal perspective whether a punishable offence had been committed. Apart from showing that the article 2 claim is both inadmissible for insufficient substantiation and discloses no violation on the merits, this raises a separate issue of non-exhaustion of domestic remedies.

#### **Authors' comments on the State party's submissions**

5.1 By letter of 26 April 2007, the authors responded to the State party's submissions, arguing that the State party has failed to provide an effective remedy under article 2, paragraph 3, of the Covenant.

5.2 On the issue of sufficient victim status, the authors argue that whether Mr. Ahmad filed a complaint in respect of workplace discrimination is irrelevant to the State party's Covenant obligations and is not in substitution of its obligation to penalize incitement to racial hatred and violence. Filing of such a complaint against third parties is not required by the Committee's jurisprudence. In any event, such complaints would only constitute further evidence of his injury. That apart, the Committee has recognized admissibility of communications in case of "a real threat" that a State party's act or omission will affect enjoyment of a Covenant right.<sup>8</sup> Moral injury may also be sufficient to establish standing,<sup>9</sup> which is consistent with the Committee's efforts to give effect to remedies for violations of the Covenant. In incitement cases, the only injury may be moral, and in view of the serious practical consequences that occurred in this case, allegations of moral injury and threat of injury should be seen as sufficient for standing.

5.3 On the sufficiency of administrative remedies, the authors argue that ineffectual administrative remedies are no substitute for judicial review, and that the availability of an administrative remedy alone is insufficient. In this case, the State party failed in its obligations to adequately investigate. The Prime Minister's public statements and comments prejudiced the investigation from the outset. The prosecuting authorities also accepted as fact that the newspaper's intent was not to incite racial hatred or violence, rather than going beyond the text to assess from the overall facts surrounding publication whether this might have in fact been the case. The claim that prosecutors only prosecute cases that would lead to conviction also overstates the legal threshold, with the Committee's jurisprudence extending Covenant protection to claims "sufficiently well-founded to be arguable under the Covenant".<sup>10</sup> If there was sufficient evidence to support a conviction, as here, prosecution ought to proceed. Indeed,

there was a strong likelihood of success on the merits had that happened, given previous convictions under section 266 (b) for much less virulent statements and assessments of Danish legal commentary that “entirely non-objective, generalizing allegations of serious crime and immorality” are at the “core” of statements covered by section 266 (b). The prosecuting authorities also completely failed to achieve the import and effect of the messages, and were not culturally competent to do so. Accordingly, the authors were denied a competent and impartial investigation and the possibility of a judicial remedy.

5.4 On alternative remedies, the authors argue drawing on the Committee’s general comment No. 11 that the availability of a civil cause of action for defamation, libel or slander is not a substitute for compliance with article 20 requirement that certain advocacy be affirmatively prohibited by law. Nor is the ability to privately engage criminal prosecutions, as occurred in this case, a replacement for the State’s own responsibility to pursue the behaviour at issue.

### **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 notes that both authors have been closely involved, in varying capacities and at differing stages, in the course of pursuit of domestic remedies before the police, prosecutorial authorities and the State party’s courts (see paras. 2.7, 2.9 and 2.17 above). The Committee notes that after the Director of Public Prosecutions decided against bringing criminal prosecutions in respect of the publications at issue in respect of section 140 and 266 (b) of the Criminal Code, the same subject matter was advanced to the State party’s courts by way of a private criminal prosecution under sections 21, 267 and 268 of the Criminal Code, resulting in a judgment assessing at length criminal responsibility under these provisions of senior managers of the publishing newspaper. That judgment is currently under appeal. Assessing as a whole the close involvement of the authors with each other in the course of the proceedings before the State party’s prosecutorial and judicial authorities, the Committee recalls its constant jurisprudence that when authors of a communication seize a State party’s authorities of the subject matter likewise presented to the Committee, that such proceedings must be pursued to their conclusion before the Committee can assess the claim.<sup>11</sup> The Committee notes in this respect that, even though the first author is before the domestic courts by virtue of his membership in a body with legal personality (the Islamic Community organisation), its jurisprudence recognises an author’s personal status before the Committee in circumstances such as the present where the individual’s rights are directly and personally affected.<sup>12</sup> It follows that, at the present time, the communication is inadmissible for failure to exhaust domestic remedies, under article 5, paragraph 2 (b), of the Optional Protocol.

6.3 In light of that conclusion, the Committee need not assess other objections to the admissibility of the communication, including with respect to the *locus standi vel non* of the authors as victims within the meaning of article 1 of the Optional Protocol, that have been presented.

7. The 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 authors 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 present report.]

### Notes

<sup>1</sup> The descriptions are taken from the decision of the Director of Public Prosecutions attached to the communication.

<sup>2</sup> The authors describe what they consider the most seven most offensive illustrations as follows: (1) a sinister-looking man with dark eyes and a dark beard wears a bomb-shaped turban with a lit fuse. The turban has a central tenet of Islam written on it in Arabic; (2) a man looking like a devil holds a grenade while standing in paradise offering virgins as a reward to fighters who have smoke coming out of them and are suggested to be suicide bombers; (3) a man stands wearing a turban that has ambiguous pointed ends coming out of it, which could be viewed either as devil's horns or points of a crescent moon forming a halo; (4) a man with a dark and unkempt beard and a black censor's bar over his eyes stands in front of two woman wearing black niqabs with large eyes only showing. He carries a sword in one hand and the other hand is spread out to his side in front of the two women in an apparent effort to protect them; (5) two bearded and turbaned men are running with swords towards another bearded man in a turban whose different dress distinguishes him from the other two men, making him appear in a position of authority. The latter man holds a piece of paper in one hand at which he looks, while the other hand is spread out to the side apparently to hold back the two other men from going on an attack, as he says: "Relax folks! It's just a sketch made by an unbeliever from southern Denmark"; (6) a bearded and turbaned man walks with a staff, leading an ass on a rope; and (7) five stylized female figures, wearing hijabs with facial features made with stars and crescent moons, bear the caption: "Prophet! You crazy bloke! Keeping women under the yoke."

<sup>3</sup> Section 140 provides: "Any person who, in public, ridicules or insults the dogmas or worship of any lawfully existing religious community in this country shall be liable to imprisonment for any term not exceeding four months or, in mitigating circumstances, to a fine."

<sup>4</sup> Section 266 (b) provides: "Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding two years."

<sup>5</sup> Section 268 provides: "If an allegation has been made or disseminated in bad faith, or of the author has had no reasonable ground to regard it as true, he shall be guilty of defamation, and the punishment mentioned in section 267 may then be increased to imprisonment for two years."



<sup>6</sup> Section 267 provides: “(1) Any person who violates the honour of another person by offensive words or conduct or by making or spreading allegations of an act likely to disparage him in the esteem of his fellow citizens, shall be liable to a fine or to imprisonment for any term exceeding four months.”

<sup>7</sup> Case No. 4/1991, *L.K. v. The Netherlands*, Opinion of 16 March 1993, para. 6.5.

<sup>8</sup> Case No. 645/1995, *Bordes et al. v. France*, Views adopted on 22 July 1995, para. 5.4.

<sup>9</sup> Committee on the Elimination of Racial Discrimination, Case No. 34/2004, *Gelle v. Denmark*, Opinion of 6 March 2006, para. 9.

<sup>10</sup> Case No. 972/2001, *Karantzis v. Cyprus*, Decision adopted on 7 August 2003.

<sup>11</sup> Case No. 1045/2002, *Baroy v. The Philippines*, Decision adopted on 31 October 2003, para. 8.3. (“The Committee observes, however, with respect to the exhaustion of domestic remedies, that the author has filed a ‘partial motion for reconsideration’, currently pending before the Supreme Court, requesting the Court to reconsider its treatment of his minority in its judgment of 9 May 2002. ... In the present case, accordingly, the Committee considers that the questions of the authors’ age and the means by which it was determined by the courts are, by the author’s own action, currently before a judicial forum with authority to resolve definitively these particular claims.”); Case No. 1272/2004, *Benali v. The Netherlands*, Decision adopted on 23 July 2004, para. 6.3 (“The Committee observes however that the issues which the author, by her own action, has presented to the authorities in her renewed application, are of substantial import to any decision of the Committee on these claims, as the Committee’s decision would be based on assessment of the author’s situation as it stands at the time of decision. The Committee refers to its jurisprudence that, where an author has lodged renewed proceedings with the authorities that go to the substance of the claim before the Committee, the author must be held to have failed to exhaust domestic remedies as required by article 5, para. 2 (b), of the Optional Protocol. The Committee thus declares the communication inadmissible on this basis.”); Case No. 1289/2004, *Osivand v. The Netherlands*, Decision adopted on 27 March 2006, para. 8 (“The Committee recalls its constant jurisprudence that where an author has lodged renewed proceedings with the authorities that go to the substance of the claim before the Committee, the author must be considered to have failed to exhaust domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol.”); and Case No. 1040/2001, *Romans v. Canada*, Decision adopted on 9 July 2004.

<sup>12</sup> Communication No. 1002/2002, *Wallman v. Austria*, Views adopted on 1 April 2004, para. 8.9; see also Communication No. 455/1991, *Singer v. Canada*, Views adopted on 26 July 1994, para. 11.2.

**I. Communication No. 1492/2006, *van der Plaats v. New Zealand*  
(Decision adopted on 22 July 2008, ninety-third session)\***

<i>Submitted by:</i>	Ronald van der Plaats (represented by counsel, Mr. Tony Ellis)
<i>Alleged victim:</i>	The author
<i>State party:</i>	New Zealand
<i>Date of communication:</i>	7 April 2006 (initial submission)
<i>Subject matter:</i>	Adjustment of sentencing and parole schemes after conviction and sentence
<i>Procedural issues:</i>	Sufficient status of victim - sufficient substantiation, for purposes of admissibility
<i>Substantive issues:</i>	Retrospective imposition of heavier sentence - discrimination - arbitrary detention
<i>Article of the Covenant:</i>	2
<i>Articles of the Optional Protocol:</i>	9, paragraphs 1 and 4; 15; and 26

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

Meeting on 22 July 2008,

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication, initially dated 7 April 2006, is Ronald van der Plaats. He claims to be a victim of violations by New Zealand of article 9, paragraphs 1 and 4; article 15 and article 26 of the Covenant. He is represented by counsel, Mr. Tony Ellis.

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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, 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.

## **The facts as presented**

2.1 On 18 October 2000, the author was found guilty by a jury of two representative charges of rape, one representative count of indecent assault and three representative counts of unlawful sexual connection committed against his daughter, spanning a 10-year period. He was sentenced to a total of 14 years imprisonment. In the light of evidence described in the Court of Appeal as “overwhelming”, he withdrew an appeal against sentence on the advice of his then counsel on the ground that it had no chance of success, and instead appealed against his sentence only on the ground that it was manifestly excessive considering his advanced age, at the time of sentence, of 66 years. The Court of Appeal dismissed the appeal on 1 August 2001 stating that the author’s age had been expressly taken into account as a mitigating factor. His appeal to the same court against the conviction was withdrawn on the advice of his then counsel that it had no chance of success.

2.2 At the time of the author’s conviction and sentence, the applicable terms of the Criminal Justice Act 1985 entitled the author to release on conditions after serving two-thirds of his sentence, that is, on 18 February 2009 after having served nine years and four months of the 14-year sentence.

2.3 After both the commission of the offences (August 1983-October 1992) and the author’s conviction and sentence (2000-2001), the relevant provisions of the Criminal Justice Act 1985 governing both sentencing and release were repealed and replaced with the Sentencing Act 2002 and the Parole Act 2002, which entered into force on 30 June 2002.

2.4 Under the old provisions, prior to 30 June 2002, which remained applicable to the author, an offender was entitled to be released after serving two-thirds of a determinate sentence (unless release was postponed due to prison disciplinary offences, or an order was sought that a full term of imprisonment be served). Under the new provisions, after 30 June 2002, there would be eligibility for parole, where a minimum term of imprisonment had been imposed, after two-thirds of that term had been served; if no minimum term was imposed, eligibility for parole would accrue after one-third of the sentence had been served.

2.5 Were that latter rule applied to the author, he contends that he would have been eligible for parole four years and eight months earlier than under the previous legislation, that is, on 18 June 2007. The Sentencing Act and the New Zealand Bill of Rights Act both contain the right to a lesser penalty if the penalty for an offence is reduced between the time of commission of the offence and sentencing.

## **The complaint**

3.1 The author claims that the facts disclose violations of article 9, paragraphs 1 and 4; article 15 and article 26 of the Covenant. The principal claim is that the sentencing regime applied to him breaches articles 15 and 26, and that in consequence his detention is arbitrary in breach of article 9, paragraphs 1 and 4.

3.2 With regard to the claim under article 15, the author argues that the lighter penalty provided by the 2002 Act subsequent to the commission of the offence should have been applied to him. He considers that minimum non-parole periods are “sentences” and that this is confirmed by the wording contained in the Sentencing Act 2002. He acknowledges that there is relevant

jurisprudence by the Committee, but invites it to adopt a “purposive approach” to the application of article 15 (1) and to apply in particular a broad interpretation of the term “penalty”.

3.3 The author notes that the Committee’s jurisprudence provides little guidance on the matter, as the two cases which squarely raised the current point were resolved on other grounds. In *Van Duzen v. Canada*,<sup>1</sup> the author was released on mandatory supervision rather than serving a full term, while in *MacIsaac v. Canada*<sup>2</sup> the author had failed to prove that retroactive application of more liberal parole laws would have resulted in his being released earlier. Nor does academic commentary offer guidance.<sup>3</sup>

3.4 With regard to article 26, the author claims that there is discrimination between those offenders who were sentenced before 30 June 2002 (date of the entry into force of the Parole Act 2002) and those offenders sentenced after that date.

3.5 By way of consequential violations, the author claims that, if breaches of article 15 and 26 are found, his detention is necessarily arbitrary and in breach of article 9; paragraphs 1 and 4.

3.6 As to the exhaustion of domestic remedies, the author claims that at the time of the original dismissal of his appeal the only available option would have been an appeal against sentence to the Privy Council, a form of appeal which in 150 years had not been successful in such cases and would not have been legally aided, and therefore futile.

3.7 With respect to the actual claim before the Committee, the author has not pursued any claim before the courts. He refers to a May 2005 decision of the Supreme Court of New Zealand,<sup>4</sup> interpreting section 6 of the Sentencing Act 2006 which provides that anyone convicted of “an offence in respect of which the penalty has been varied between the commission of the offence and sentencing” has “the right ... to the benefit of the lesser penalty”. The Court concluded, by a majority, that a statutory change from a regime of mandatory release on conditions (and subject to recall) after two-thirds of sentence, to a regime of release after full sentence was not a change in “penalty”; the penalty as prescribed by law for the underlying conduct had remained unchanged. In light of this jurisprudence, the author argues it would be futile to pursue an appeal to the Supreme Court to argue for the meaning that he contends in this communication.

#### **State party’s submissions on the admissibility and merits**

4.1 By notes verbales of 3 November 2006 and 6 March 2007, the State party contested both the admissibility and merits of the communication.

4.2 The State party disputes that the author is a victim in terms of article 2 of the Optional Protocol, as it is in fact hypothetical and purely speculative that the author will spend longer in prison as a result of having been sentenced before the Sentencing and Parole Acts of 2002 came into force. Firstly, under the new regime, the author would no longer have been entitled to early release after two-thirds of sentence, but only been eligible for parole after two-thirds of an imposed minimum sentence (had the sentencing judge exercised the power of imposing a minimum sentence), or alternatively after having served one-third of the actual sentence imposed. Secondly, there is no guarantee that the Parole Board would in fact have exercised its discretion and granted the author’s release; on the contrary, it would have been highly unlikely,

given the extreme nature of the crimes, the need to protect the public, and his attitude to the victim even in prison (including the institution of criminal proceedings against her).

4.3 On the merits, in terms of article 15, the State party submits that its parole regime is not a “penalty”, within the meaning of the Covenant. The penalty for the offence is that imposed on sentencing, with article 15 directed at the maximum penalty applicable in law for the offence in question. The sentencing court does not take parole provisions into account at the point of sentencing. By contrast, parole is simply the administration of the penalty imposed at sentencing, resulting in a shorter sentence being served, where possible in terms of public safety, in the community rather than in custody.

4.4 As to article 9, the State party argues that the author’s detention until the expiry of his 14 year sentence cannot be said to be arbitrary. Referring to the Committee’s jurisprudence that “deprivation of liberty until the expiry of the sentence, notwithstanding the remission [an author] may have earned, do[es] not in any way affect the guarantees ... set out in article 9 of the Covenant”,<sup>5</sup> the State party considers that this sentence was determined by the sentencing courts as the appropriate penalty for the serious offences committed.

4.5 As to article 26, the State party refers to its submissions under article 15 and disputes in any event that a date of sentence is a sufficient “other status” within the meaning of article 26. It notes the House of Lords’ recent rejection of length of sentence as being such a status in terms of article 14 of the European Convention.<sup>6</sup> Even if “other status” were applicable, the differentiation would be reasonable and objective, applying only to persons sentenced after new legislation entered into force, and would pursue a legitimate Covenant purpose.

#### **Author’s comments on the State party’s submissions**

5.1 By letter of 10 December 2007, the author disputed the State’s submissions on admissibility and merits. As to the State party’s argument that the author has not shown that had he been sentenced under the new laws, he would have had a lighter penalty to serve, the author argues that is not possible for him to substantiate that he would be released after one-third of his sentence, for it lies with the Parole Board to so determine. Rather, he suggests the onus should be on the State party to show otherwise. The author cites in his favour overall statistics of the Parole Board that the chances of being released on parole have progressively dropped from 48.5 per cent in 2003 to 27.5 per cent in 2006, the most recent year cited.

5.2 The author also argues that the State party improperly speculates that even if the author was eligible for parole after serving one-third of sentence, it would be “highly unlikely” for him to be granted parole, on the basis that a lower risk of offending must nonetheless be viewed against the very serious nature of offending against his daughter. The author argues that the paramount statutory criterion for Parole Board action is the safety of the community, which he argues is measured simply by the level of risk of reoffending.

5.3 In any event, the author argues on the facts that he is not a risk to his daughter, given that he has no wish to contact her and never will, as he has no knowledge of her location. He argues that the State party’s assertion that he has continued to harass his daughter is irrelevant for current purposes. He submits that given his claim of innocence, he is entitled to pursue legitimate

means of clearing his name. He accepts however that his application for judicial review of 11 August 2004 was dismissed, and does not intend to pursue the matter further. He also argues that his continued denial of having offended should not be regarded as a bar to being granted parole.

5.4 The author also expands on his original submissions in respect of the merits of the communication.

### **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 author's claim is that the inapplicability to him of a new sentencing regime introduced after his conviction and sentence, causes direct and consequential breaches of a variety of provisions of the Covenant. The Committee notes that under the former sentencing rules applicable to him, he is entitled to early release after serving two-thirds of his sentence, subject to postponement of release for prison disciplinary offences or an order under the Criminal Justice Act that an offender serve a full term. Under the new sentencing rules applicable to persons sentenced later than the author, prisoners in principle must serve a full sentence without any entitlement to early release, but are eligible for discretionary parole after serving one-third of their sentences if no minimum term is imposed.

6.3 The Committee notes its jurisprudence on changes in sentencing and parole regimes that "it is not the Committee's function to make a hypothetical assessment of what would have happened if the new Act had been applicable to him", and that it cannot be assumed what a sentencing judge applying new sentencing legislation would in fact have concluded by way of sentence.<sup>7</sup> The Committee's jurisprudence has also noted the relevance of a prediction as to the author's own future behaviour to the duration of imprisonment.<sup>8</sup>

6.4 Applying those principles in the present case, the Committee is of the view that even assuming for the purposes of argument that changes in parole entitlements amount to a penalty within the meaning of article 15, paragraph 1, of the Covenant, the author has not shown that sentencing under the new regime would have led to him serving a shorter time in prison. The contention that the author would have been released earlier under the new regime speculates on a number of hypothetical actions of the sentencing judge, acting under a new sentencing regime, and of the author himself. The Committee notes in this respect that the Sentencing Act 2002 significantly expanded the power of the courts to impose minimum periods of imprisonment (non-parole periods) for long-term sentences, and parole conditions varied significantly depending on whether a minimum period of imprisonment was stipulated or not. The Committee also notes in this respect that release on parole in the State party's criminal justice scheme is neither an entitlement nor automatic, and is in part dependent on the author's own behaviour.

6.5 In terms of the claim under article 26, the author has not shown how he is victim, beyond the analysis under article 15, of any further distinction amounting to "other status" within the meaning of article 26. The author's claim under article 9 resting entirely on breaches of articles 15 and 26, that claim must fail under article 1 of the Optional Protocol for the same reasons.

6.6 The Committee therefore concludes, consistent with its earlier jurisprudence, that the author has not shown that he is a victim of the alleged violations complained of, and the communication is inadmissible under article 1 of the Optional Protocol.

7. The Committee therefore decides:

- (a) That the communication is inadmissible under article 1 of the Optional Protocol;
- (b) That this decision shall be communicated to the 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 present report.]

### Notes

<sup>1</sup> Communication No. 50/1979, Views adopted on 18 May 1979.

<sup>2</sup> Communication No. 55/1979, Views adopted on 14 October 1982.

<sup>3</sup> Opsahl, T., and De Zayas, A.: “The uncertain scope of article 15 (1) of the International Covenant on Civil and Political Rights”, [1983] *Canadian Human Rights Yearbook* 237, at 243: “The precise scope of article 15 (1) remains to be clarified. Doubts persist as regards both its applicability in time and stage of process, and the meaning of some its terms, such as ‘offender’, ‘penalty’ and ‘lighter penalty’.”

<sup>4</sup> *Morgan v. The Superintendent of Rimuka Prison*; judgment of 19 May 2005 (Elias C.J., Gault, Blanchard, Tipping and Henry J.J.).

<sup>5</sup> Communication No. 91/1981, *A.R.S. v. Canada*, decision adopted on 28 October 1981.

<sup>6</sup> *Clift v. Secretary of State for the Home Department* [2007] 2 WLR 34.

<sup>7</sup> *MacIsaac v. Canada*, (note 2 above) paras. 11 and 12.

<sup>8</sup> *Van Duzen v. Canada*, (note 1 above) para. 10.3.

**J. Communication No. 1494/2006, *Chadzjian et al. v. The Netherlands*  
(Decision adopted on 22 July 2008, ninety-third session)\***

<i>Submitted by:</i>	Ms. Arusjak Chadzjian (represented by counsel, Mr. Michel Arnold Collet)
<i>Alleged victim:</i>	Arusjak Chadzjian and her children, Sarine, Meline and Edgar Barsegian
<i>State party:</i>	The Netherlands
<i>Date of communication:</i>	20 July 2006 (initial submission)
<i>Subject matter:</i>	Deportation to Armenia
<i>Procedural issues:</i>	Substantiation - Exhaustion of domestic remedies
<i>Substantive issues:</i>	Right not to be subjected to cruel, inhuman or degrading treatment or punishment - Right to a fair and public hearing by an independent and impartial tribunal Right not to be subjected to arbitrary or unlawful interference with one's privacy - Protection of the family - Right of the child to protection
<i>Articles of the Covenant:</i>	7; 14; 17; 23 and 24
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b)

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

*Meeting on 22 July 2008,*

*Adopts the following:*

**Decision on admissibility**

1.1 The author of the communication is Arusjak Chadzjian, an Armenian national, born  
on 1 August 1955, who has submitted the communication on her own behalf and on behalf of her

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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, 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.



children, Sarine, Meline and Edgar Barsegian born in 1989, 1990 and 1993, respectively. She claims that her deportation to Armenia with her children would violate their rights under articles 7, 14, 17, 23 and 24 of the International Covenant on Civil and Political Rights. The author is represented by counsel, Mr. Michel Arnold Collet.

1.2 On 12 December 2006, the Special Rapporteur for new communications, acting on behalf of the Committee, confirmed to the State party that the admissibility of this case would not be considered separately from the merits.

### **The facts as presented by the author**

2.1 The author's husband, Zjora Basegian, born on 8 December 1950, had actively participated in the Nagorno-Karabakh conflict. After the conflict, foreign aid did not reach the local people and was diverted by the local authorities. The author's husband, together with two friends and a member of parliament, Armenak Armenakian, wrote letters to foreign aid agencies claiming that aid was being used for private matters by parliament. Armenak Armenakian was shot dead on 27 October 1999 together with several other members of parliament.

2.2 The author's husband was continuously harassed by "henchmen" of President Kotsjarian, but continued to make similar claims in letters to foreign aid agencies. On 24 May 2002, the author's husband came back home from work, took some documents and left the house, saying that he would be gone for two days. A couple of hours later, two men came to the house looking for him and left. They came back the next day and assaulted the author. They searched the house and found a letter which they took. They also threatened to kill her. From several remarks made by the men, the author concluded that they were President Kotsjarian's "henchmen". They took the author to the police station where she was accused of having collaborated with her husband by writing the letter in question. She was assaulted, threatened and raped by the two men.

2.3 On 28 May 2002, some friends of the author's husband came to pick her up at the police station and told her that her husband had been killed the day before and that their house had been set on fire. Together with her children and these friends, the author left the country on the same day. On 6 June 2002, she and her children arrived in the Netherlands where she reported to the authorities.

2.4 On 13 June 2002, the author and her children applied for asylum. On 17 September 2002, the Immigration and Naturalisation Department (IND) rejected the application. On 10 October 2002, the author appealed and the IND decision was withdrawn on 14 August 2003. The Dutch Foreign Affairs Department issued a report on the author's case on 19 March 2003. On 13 May 2004, the IND issued a second negative decision on the author's application. On 4 June 2004, the author appealed the decision and on 25 August 2005, the Court of The Hague residing in Groningen rejected her appeal. The author appealed the decision and on 18 January 2006, the Council of State, the highest court in immigration affairs, rejected her appeal.

### **The complaint**

3.1 The author argues that the IND decision is solely based on the report of the Foreign Ministry and the lack of identity papers. This led the IND to conclude that the author's account was not credible and to dismiss the application without examining the merits. She refers to a case

in which the European Court of Human Rights ruled on admissibility that an account of an asylum seeker cannot immediately be deemed as unbelievable if the story at first hand seems logical.<sup>1</sup> Subsequently, the European Court found on the merits<sup>2</sup> a violation of article 3 of the European Convention of Human Rights which is, according to the author, comparable to article 7 of the Covenant. She argues that sending her and her children back to Armenia would constitute a violation of article 7 of the Covenant. She further claims that sending them back would also constitute a violation of article 23, as the State party would violate its duty to protect family life. It would further also constitute an interference with the private life of the family and a violation of article 17.

3.2 The author further claims a violation of article 14, because the IND decision was mostly based on the report of the Foreign Ministry, which is considered as an expert opinion. Details of the individuals who provided the information for the report are kept confidential, which the author regards as understandable, but leads to an unfair situation, as the author cannot challenge the credibility of the report. The IND simply sent a letter on 25 March 2004 to the Foreign Ministry, stating that it had seen the background information which forms the basis of the report, and concluded that the preparation of the report had been correct and just. This statement cannot be verified since the background information is not available publicly. There is no remedy and the author has not had a “fair trial”. According to the author, the report is based on statements made by “(scared) inhabitants of the area and of a Government agency that is part of a regime of which Chadzjian fled from in the first place” (sic).

3.3 Finally, the author claims a violation of article 24. Her children are young and they have been living in the Netherlands for four years, have learnt Dutch and are integrated into Dutch society. They have no close connection with Armenia. Sending them back would not be in their best interests. According to the author, this has not been taken into account by the IND.

#### **Additional information from the author**

4. The author submitted medical evidence on 26 July 2006 from a doctor and a psychologist. The doctor’s medical report, dated 28 November 2005, concluded that the author needs medical treatment which is very unlikely to be found in Armenia and that, apart from her fear of death, it is anticipated that her health will deteriorate rapidly after a forced return. The psychiatric report, dated 6 July 2005, states that the author is suffering from post-traumatic stress disorder (PTSD) because of what happened to her in Armenia, but also because of the anxiety linked to her impending expulsion.

#### **State party’s observations on admissibility and merits**

5.1 On 1 December 2006, the State party challenged the admissibility of the communication. With regard to the allegations in respect of article 7, that the Dutch authorities were wrong in failing to examine the author’s asylum application on its merits because they deemed it to be implausible, and with regard to the alleged violation of article 14, the State party argues that the Dutch authorities carefully investigated the author’s asylum application. Her account in support of her asylum application was heard twice on 13 June 2002 and 8 July 2002. An investigation in Armenia was initiated by the Ministry of Foreign Affairs on the basis of the author’s statements, the results of which are set out in the report itself. The State party contends that it was only after

a careful investigation that the author's account was declared implausible, the author having failed to provide any documentation substantiating her identity, her nationality or her reasons for requesting asylum. There was therefore no reason to examine the merits of the application. The State party further contends that the European Court of Human Rights findings in the case of *Said v. the Netherlands* does not suggest otherwise. In this case, the European Court took into account the author's persuasive argument rebutting the Government's claim that his account lacked credibility.<sup>3</sup> No comparable situation exists in the case under consideration. The official report indicates that the investigation in Armenia found no evidence to support the author's account, including her claims that her house had burnt down, and that neither the authorities nor her alleged neighbours knew of anyone of her identity at the home address she gave. The State party adds that the author did not provide any objective evidence that the information in the official report was unreliable. In light of the above, the author's claims under article 7 and 14 are inadmissible on the grounds that they are not sufficiently substantiated.

5.2 With regard to the alleged violation of article 14, the State party further points out that the author was given, at her request, copies of the documents underlying the official report. Information concerning the sources and methods of investigation were omitted pursuant to a decision taken in conformity with section 10, subsection 2 of the Government Information (Public Access) Act, which allows information to be withheld for various reasons, including protection of sources and of investigative methods and techniques. The State party notes that the author did not exercise her right to ask an independent court to assess the legitimacy of the decision to withhold information concerning investigative sources and methods. It therefore concludes that the author failed to exhaust domestic remedies, as required by article 5, paragraph 2 (b) of the Optional Protocol.

5.3 The State party takes note of the additional information provided by the author on 26 July 2006, by which the author claims that she requires medical treatment unlikely to be available in Armenia, and that her health will deteriorate rapidly without such medication. It interprets this as a claim that due to the author's medical condition, there is a real risk that her rights under article 7 will be violated if she is forcibly expelled to Armenia. With regard to this claim, as well as the claims under articles 17 and 23, the State party notes that the author has not brought any of these matters before the domestic courts and that, as a consequence, the State party was denied the opportunity to respond to them. The State party concludes therefore that these aspects of the communication are inadmissible under article 5, paragraph 2 (b) of the Optional Protocol for non-exhaustion of domestic remedies.

5.4 Similarly, the State party submits that the claims under article 24 were not brought before the domestic courts. The author's only contention during the domestic proceedings was that by finding her account of events implausible and thus not evaluating it on the merits, the Dutch authorities risk exposing her children to danger in Armenia. These claims are therefore inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for failure to exhaust domestic remedies.

5.5 In its observations dated 27 March 2007, the State party indicated that its observations on admissibility may be regarded as equally pertaining to the merits of the communication.

## **The author's comments on the State party's submissions on admissibility and merits**

6.1 In her comments dated 2 May 2007, the author responds to some aspects of the State party's submissions. She reiterates that she had to flee Armenia with her children after her husband and the father of her children was shot dead and their house burnt down by the Armenian authorities. This explains why she arrived without her documents. The explanation as to why no one in the neighbourhood, nor the Armenian authorities, said anything to the Dutch authorities investigating the case in Armenia can be explained by the author's and her children's background, as associated with her husband's political activities. She further contends that by applying Dutch standards to this investigation, the State party arrived at the wrong conclusions. Those conclusions, which were used to deny the author a decision on the merits of her asylum claim, will lead to a violation of article 7 should the author and her children be returned to Armenia.

6.2 Regarding the State party's argument that the author did not take advantage of the opportunity to ask an independent court to assess the legitimacy of the decision to withhold information concerning investigative sources and methods, the author submits that this procedure would not be effective, as there is no possibility for an asylum-seeker to obtain more information. The author further submits that asylum proceedings, in which the investigation conducted by Dutch authorities in Armenia played an important role, have been exhausted which, by itself, is enough for admissibility of the communication.

6.3 In support of her claim under article 24, the author reiterates that sending her children back to Armenia would put them in danger. She claims that she raised this argument several times throughout the proceedings, and refers to the Committee's jurisprudence in which it held that the children's interests were of primary importance.<sup>4</sup>

## **Additional submissions by the author**

7.1 On 7 February 2008, the author provided the Committee with a summary of the Dutch ombudsman's report concerning reports by the Ministry of Foreign Affairs based on investigations conducted in the countries of origin of asylum-seekers. According to the ombudsman's report, the reliability of these investigations has decreased and it is unrealistic to expect from people interrogated that they will report what they know since those people are enemies of the State they still live in. The author argues therefore that the State party's authorities should not have based their decision not to examine the author's asylum claim on the merits of such unreliable investigations.

7.2 By letter of 18 February 2008, the author submitted drawings by her children, which she claims represent in detail the neighbourhood they used to live in Armenia. She argues that those maps establish the veracity of her account and that, combined with the information provided on 7 February 2008, demonstrate that the investigation carried out by the State party's authorities are not trustworthy.

## **Issues and proceedings before the Committee**

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 The Committee notes that the State party challenges the admissibility of the entire communication. With regard to the author's claim under article 7, the Committee recalls that States parties are under an obligation not to expose individuals to a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment upon entering another country by way of their extradition, expulsion or refoulement.<sup>5</sup> It notes that the IND considered and rejected the author's asylum application for lack of credibility on two occasions, on the second occasion after having received the findings of an investigation that its authorities had undertaken in Armenia itself. It further notes that the author's appeal was considered and rejected by the Court of the Hague residing in Groningen and then subsequently rejected by the *Raad van State*, the highest administrative court of the Netherlands. 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.<sup>6</sup> It also recalls that the same jurisprudence has been applied to removal proceedings.<sup>7</sup> The material before the Committee is insufficient to 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 article 7, for purposes of admissibility, and it concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

8.3 With respect to the alleged violation of article 7, in so far as it relates to the author's medical condition, the Committee notes the State party's argument that the author did not make this claim before the domestic courts. The Committee recalls its jurisprudence, according to which the requirement of exhaustion of domestic remedies, which allows the State party to remedy an alleged violation before the same issue is raised before the Committee, obliges authors to raise the substance of the issues submitted to the Committee before domestic courts. Noting that the author has failed to raise the alleged violation of article 7, insofar as it relates to the author's medical condition, before domestic courts, the Committee concludes that this part of the communication is inadmissible pursuant to article 2, and article 5, paragraph 2 (b) of the Optional Protocol.

8.4 As to the author's allegation under article 14 that she was not afforded an effective remedy to challenge the credibility of the investigative report of the Foreign Ministry, the Committee notes the State party's argument that the author could have exercised the right to ask a court to review the legitimacy of the decision taken under article 10, subsection 2 of the Government Information (Public Access) Act to withhold information concerning investigative sources and methods employed for writing the report. The Committee refers to its jurisprudence that deportation proceedings did not involve either, "the determination of any criminal charge" or "rights and obligations in a suit at law" within the meaning of article 14.<sup>8</sup> It notes that, in the present case, the author was not charged or convicted for any crime in the State party and her deportation and that of her children to Armenia does not constitute a sanction imposed as a result of a criminal proceeding. The Committee further notes 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.<sup>9</sup> In the present case, the proceedings relate to the author's right to receive protection for herself and her children in the State party's territory. The Committee considers that proceedings relating to the expulsion of aliens, the guarantees in regard to which

are governed by article 13 of the Covenant, do not fall within the ambit of a determination of “rights and obligations in a suit at law”, within the meaning of article 14, paragraph 1.<sup>10</sup> The Committee therefore concludes that the author’s claim under article 14 is inadmissible *ratione materiae* pursuant to article 3 of the Optional Protocol.

8.5 As to the author’s claim under articles 17 and 23, the Committee notes that the author did not challenge in her comments dated 2 May 2007 the State party’s argument that the author had not brought this issue before the domestic courts. Given the author’s failure to do so, the Committee considers that this part of the communication is also inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol.

8.6 As to the author’s claim under article 24, the Committee considers that the author has not substantiated, for purpose of admissibility, the reasons why sending her children back to Armenia with her, would amount to a violation of this provision. The Committee therefore considers this claim inadmissible as unsubstantiated within the meaning of article 2 of the Optional Protocol.

9. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2, 3 and 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 present report.]

#### Notes

<sup>1</sup> See application No. 2345/02, *Said v. the Netherlands*, decision of 5 October 2004.

<sup>2</sup> See application No. 2345/02, *Said v. the Netherlands*, judgment of 5 July 2005, at para. 51.

<sup>3</sup> Application No. 2345/05, para. 51.

<sup>4</sup> See communication No. 930/2000, *Hendrick Winata and So Lan Li v. Australia*, views adopted on 16 August 2001, para. 7.3; communication No. 1069/2002, *Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v. Australia*, views adopted on 6 November 2003, paras. 5.15 and 9.7.

<sup>5</sup> See communication No. 1302/2004, *Khan v. Canada*, inadmissibility decision of 25 July 2006, para. 5.4. and communication No. 1234/2003, *P.K. v. Canada*, inadmissibility decision of 20 March 2007, para. 7.2.

<sup>6</sup> See for example communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, para. 6.2 and *P.K. v. Canada*, inadmissibility decision of 20 March 2007, para. 7.2.

<sup>7</sup> See communication No. 1234/2003, *P.K. v. Canada*, inadmissibility decision adopted on 20 March 2007.

<sup>8</sup> *Ibid.*, paras. 7.4 and 7.5.

<sup>9</sup> 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.

<sup>10</sup> See (footnote 7 above) *P.K. v. Canada*, paras. 7.4 and 7.5.

**K. Communication No. 1496/2006, *Stow and Modou Gai v. Portugal*  
(Decision adopted on 1 April 2008, ninety-second session)\***

<i>Submitted by:</i>	Dilwyn Stow (not represented by counsel)
<i>Alleged victim:</i>	Graham Stow, Andrew Stow, Alhaji Modou Gai
<i>State party:</i>	Portugal
<i>Date of communication:</i>	4 May 2006 (initial submission)
<i>Subject matter:</i>	Trial of alleged victims in a foreign country
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies, evaluation of facts and evidence, lack of substantiation
<i>Substantive issue:</i>	Irregularities in the evaluation of evidence
<i>Article of the Covenant:</i>	14, paragraphs 1 and 3 (f)
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b)

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

*Meeting on 1 April 2008,*

*Adopts the following:*

**Decision on admissibility**

1.1 The author of the communication is Mr. Dilwyn Stow. He submits the communication on behalf of his sons Graham and Andrew Stow, and Alhaji Modou Gai. Graham and Andrew Stow are both British citizens, while Alhaji Modou Gai is a Gambian citizen. The original communication is dated 4 May 2006, with further documents received on 5 and 21 July 2006.

1.2 On 19 January 2007, the Special Rapporteur on new communications, on behalf of the Committee, decided that the admissibility of this case 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. 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.



## **The facts as presented by the author**

2.1 The Stow brothers are sailors and scuba-divers. In July 1999 they were exploring the possibility of opening a diving school in the Gambia on a ship named “The Baltic”. On their return journey from the Gambia they arrived, together with Mr. Alhaji Modou Gai who was working for them, on 12 July 1999, at Faro harbour, Portugal. They moored the ship at a place allocated to them by the harbour master. The ship’s hold and compartments were routinely searched by customs officers and nothing suspicious was discovered. On 15 July 1999, the harbour master asked them to move the ship to make way for a larger boat. On 16 July 1999, they raised five packages from the seabed, wrapped in plastic, which they allegedly discovered when carrying out repairs to the ship. They maintain that they did so out of curiosity, not knowing their content and with the full intention of informing the authorities. Around 15 minutes later the *Policia Judiciaria* arrived. The brothers and Mr. Gai were arrested, since the packages contained cannabis.

2.2 On 17 July 1999, they were brought before the examining magistrate at the Olhão court. They were questioned in the presence of an interpreter and a court-appointed lawyer. The magistrate decided that there was enough evidence to keep them in provisional detention on suspicion of drug trafficking. On 6 July 2000, almost one year after their arrest, the Public Prosecutor charged them with drug trafficking. A hearing took place on 7 June 2001 before the Court of Faro. The authors requested that the hearing be taped but the Court refused. On 7 July 2001 the authors were found guilty of drug trafficking and sentenced to 12 years imprisonment (9 years for Mr. Gai). During the trial, the prosecution maintained that the brothers had dragged the cannabis across the sea bed from the Canary Islands, using a trawler net found on board. According to the author, expert witnesses dismissed this possibility. They stated that not only had the net never been used, but that it was not large enough to fit in the total load; furthermore, the net board would be too weak to hold such a weight. The judges nevertheless followed the prosecution hypothesis and found the accused guilty. The trial was conducted entirely in Portuguese.

2.3 On 24 October 2001, the Evora Court of Appeal declared the first instance trial and verdict null and void, as the trial had not been recorded. Accordingly, the Court ordered a retrial by the same court.

2.4 At the retrial two of the original three judges of the panel sat again on the bench, which according to the author compromised the independence and impartiality of the court. The authors lodged a request to replace those two judges, which was refused by the Evora Court of Appeal on 22 January 2002. On 15 July 2002, they were sentenced again to 12 years of imprisonment, and to pay interpretation fees. Again, the trial was held entirely in Portuguese.

2.5 After their second conviction, the authors appealed to the Evora Court of Appeal, arguing that the evidence presented was insufficient to justify the verdict. They argued also that the fact that two judges of the initial trial also took part in the second trial compromised the independence of the Court, in contravention of the Criminal Procedure Code, the Portuguese Constitution and the European Convention on Human Rights. The appeal was rejected on 20 November 2002. According to the Court, the mere fact that two judges had participated in both trials was not sufficient to conclude that they had acted in a partial manner; other evidence

had to be adduced in order to come to such a conclusion. The authors, however, had not provided such evidence. The Court recalled also that the first trial had been declared null and void on technical grounds, and not for reasons linked to the merits of the case.

2.6 The authors lodged an appeal in cassation with the Supreme Court, alleging the lack of impartiality of the Faro Court. They also alleged that the evidence was insufficient to find them guilty, that the judgement of the court of second instance was poorly founded and that the sentences were excessive. On 30 April 2003, the Supreme Court rejected the appeal. It held, inter alia, that the domestic legislation did not forbid the participation of the same judges when the trial had to be repeated for reasons as in the present case, where the decision on the merits of the case was not questioned or even discussed by the Court of Appeal. The Court also decided that there had been no breach of the Constitution or the European Convention on Human Rights.

2.7 In connection with their claims regarding lack of impartiality of the judges, the authors filed an application with the Constitutional Court, claiming the unconstitutionality of articles 40 and 43, paragraphs 1 and 2 of the Code of Criminal Procedure, in order to allow the defendants to be judged by judges who had not taken part in the initial trial at which the sentence was passed. On 13 August 2003, the Court rejected the application.

2.8 The two Stow brothers were transferred to the United Kingdom to serve the remainder of their sentences in January 2005; they were released on parole on 14 July 2005. Mr. Gai was also transferred back to Gambia.

2.9 The author then submitted their case to the European Court of Human Rights (App. No. 18306/04) alleging breaches of articles 5, 6, and 14 of the European Convention on Human Rights. On 4 October 2005, the Court declared the case inadmissible as manifestly ill-founded and for lack of exhaustion of domestic remedies.<sup>1</sup> Portugal has entered no reservation to article 5, paragraph 2 (a), of the Optional Protocol.

### **The complaint**

3.1 The author does not refer to any particular provision of the Covenant. His claims, however, appear to raise issues under article 14 of the Covenant. Thus, he indicates that at the beginning of both trials the alleged victims made statements which were translated into Portuguese and that questions addressed to them by the judge were also translated. However, the rest of both trials were conducted entirely in Portuguese, with no interpretation available. Furthermore, the Faro Court sentenced them to pay the costs of 80,000 escudos for interpretation.

3.2 The author also complains about lack of impartiality of the Faro Court during the retrial, since two of the three deciding judges had also participated in the first trial. He says that it is impossible to ask a judge to forget what he had seen, listened to and decided in the first trial and that such situation was in contravention of a number of provisions of the Code of Criminal Procedure, the Portuguese Constitution and article 6 of the European Convention on Human Rights.

3.3 The author claims that the alleged victims received the written charges only ten and a half months after their arrest, and that the charges were not translated into English. He adds that the accused were sentenced on the basis of insufficient evidence and that expert evidence which proved that the ship could not have transported the cannabis was not taken into consideration.

## **State party's observations on admissibility**

4.1 On 29 November 2006, the State party raised objections to the admissibility of the communication. It submits that the author has not indicated which articles of the Covenant he considers to have been violated. That makes it very difficult for the State party to respond on the admissibility and the merits of the case. The author refers simply to provisions of the European Convention on Human Rights, which shows that he submits to the Committee the same application he had already submitted to the European Court on Human Rights, without making any adjustment. The communication, therefore, is not sufficiently substantiated and does not meet the requirements of rule 96 (b) of the rules of procedure.

4.2 For the State party, the communication constitutes an abuse of the right of submission under article 3 of the Optional Protocol, as it was submitted three years after the adoption of the last decision at the domestic level. The State party is aware that the Optional Protocol does not set any time limit for the submission of communications to the Committee. However, the stability of judicial decisions, the coherence among international bodies and the principle of legal certainty would be damaged if a judicial decision could be challenged at any time and in the absence of new facts. One can argue that the communication was not brought earlier before the Committee because it was being dealt with by the European Court. However, a complaint before the European Court does not constitute a remedy which needs to be exhausted. Accordingly, a three-year delay in submission is not justified.

4.3 Although the rules of procedure do not prevent the examination by the Committee of a case dealt with under another international procedure, the principle of non-examination of a case already examined should be part of the general principles of law and guarantee the consistency of jurisprudence among the international bodies. Having been examined by the European Court, the present case should therefore not be examined by the Committee, even in the absence of a specific reservation to article 5, paragraph 2 (a), of the Optional Protocol. Otherwise, the Committee would become an appeal body with respect to the decisions of other international instances and would generate uncertainty for those countries which have not made a reservation. Furthermore, the fact that a number of countries have made reservations to the above-mentioned provision points towards the existence of a principle according to which the Committee should declare cases already examined by another international body inadmissible. The State party invokes the dissenting opinion of Committee members Palm, Ando and O'Flaherty in communication No. 1123/2002, *Correia de Matos v. Portugal*, expressing concern that two international instances, instead of trying to reconcile their jurisprudence with one another, come to different conclusions when applying exactly the same provisions to the same facts.

4.4 The State party also challenges admissibility on grounds of non-exhaustion of domestic remedies. Among the claims made before the Committee, only that concerning lack of impartiality of the first instance Court was raised at the domestic level. In particular, the claim regarding the absence of free assistance of an interpreter was not made before the Portuguese courts.

4.5 As for the claim concerning lack of impartiality of the first instance court, the fact that two judges participated in both the first and the second trial does not justify the conclusion that the court was partial, in particular when the first trial was declared null and void on purely procedural issues.

## **Author's comments**

5. On 27 March 2007 the author replied to the letter transmitting the State party's observations. However, he does not address the issues raised by the State party and merely repeats his initial allegations.

## **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 does not accept the argument of the State party that the communication is inadmissible because it was already considered by the European Court of Human Rights. On the one hand, article 5, paragraph 2 (a), of the Optional Protocol only applies when the same matter is "being examined" under another procedure of international investigation or settlement; on the other, Portugal has entered no reservation to article 5, paragraph 2 (a), of the Optional Protocol.<sup>2</sup>

6.3 The Committee notes the State party's argument that the communication should be considered inadmissible as constituting an abuse of the right to submit communications under article 3 of the Optional Protocol, in view of the excessive delay in submitting the communication to the Committee. The Committee reiterates 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 in itself constitute an abuse of the right to submit a communication. In the instant case, the Committee does not consider the three-year delay as an abuse of the right of submission.<sup>3</sup>

6.4 In relation to the question of exhaustion of domestic remedies, the Committee notes that no appeals were filed at the domestic level regarding the alleged violation of the right to have the free assistance of an interpreter or with regard to the delays in receiving the written charges. Therefore, the Committee finds that the authors have not exhausted available domestic remedies in these respects and declares this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.5 With respect to the claims that the alleged victims were sentenced on the basis of insufficient evidence, the Committee considers that the allegation relates in substance to the assessment of facts and evidence by the domestic courts. It recalls its jurisprudence and reiterates that it is generally for the courts of States parties to review or to evaluate facts and evidence, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence was manifestly arbitrary or amounted to a denial of justice. The Committee considers that the author has not sufficiently substantiated his claim that the trial and retrial suffered from such defects and consequently finds that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.6 Finally, regarding the allegation that the Faro Court was not impartial because two of the judges who sentenced the alleged victims had also participated in a first trial that was declared null, the Committee notes that this question was dealt with extensively by the Appeal Court, the Supreme Court and the Constitutional Court, in accordance with the applicable Portuguese law. The Committee also notes that the retrial was ordered for a procedural reason and not for reasons

related to the merits of the case. In view of the fact that no new facts or evidence were presented during the retrial, the author has failed to substantiate, for purposes of admissibility, that the two judges were biased when sitting for the retrial. This part of the communication is accordingly inadmissible under article 2 of the Optional Protocol.<sup>4</sup>

7. Accordingly, the Committee decides:

(a) That the communication is inadmissible under articles 2 and 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 present report.]

### Notes

<sup>1</sup> On article 5 (2) ECHR (right to be informed promptly in a language which he understands of the charges against him), the Court held that the authors had been informed of the charges the day after the arrest, in the presence of a lawyer and an interpreter; the claim was therefore manifestly ill-founded. As to article 6 (1) (independent and impartial tribunal), the retrial was ordered for a technical reason, namely because the hearings had not been recorded, and not because of an error by the judges in question; accordingly, the Court considered the allegation manifestly ill-founded as there appeared to be no violation of the provision in question. Regarding other alleged violations raised in connection with articles 6, 14 and 5 of the Convention, the Court considered that domestic remedies had not been exhausted.

<sup>2</sup> See communications No. 1123/2002, *Correia de Matos v. Portugal*, Views adopted on 28 March 2006, paras. 6.2 and 6.4; 1440/2005, *Aalbersberg et al. v. The Netherlands*, Decision adopted on 12 July 2006, para. 6.2.

<sup>3</sup> See communication No. 1533/2006, *Ondracka v. Czech Republic*, Views adopted on 31 October 2007.

<sup>4</sup> Communication No. 802/1998, *Andrew Rogerson v. Australia*, Views adopted on 3 April 2002, para. 7.4.

**L. Communication No. 1505/2006, *Vincent v. France*  
(Decision adopted on 31 October 2007, ninety-first session)\***

<i>Submitted by:</i>	Jean-Pierre Vincent (represented by counsel, Alain Garay)
<i>Alleged victim:</i>	The author
<i>State party:</i>	France
<i>Date of communication:</i>	20 July 2006 (initial submission)
<i>Subject matter:</i>	Revocation of an appeal in cassation on the grounds that the decision under appeal has not been executed
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issue:</i>	Right to a fair trial
<i>Article of the Covenant:</i>	14
<i>Article of the Optional Protocol:</i>	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 31 October 2007,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication, dated 20 July 2006, is Jean-Pierre Vincent, a French national. He claims to be the victim of a violation by France of article 14 of the International Covenant on Civil and Political Rights. He is represented by counsel, Alain Garay. The Covenant and the Optional Protocol 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, 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 Sánchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

1.2 On 5 January 2007, 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.

### **The facts as submitted by the author**

2.1 On 26 January 1994 the author registered the trademark “Global Inquisitive System” (GIS) with the National Intellectual Property Institute in Paris. On 27 January 1994, his company, Féronia, ceded this trademark to the company Radio Video Security, in exchange for a lump-sum royalty payment of 2 million francs: 500,000 francs were deposited on the day that the contract was signed, and the balance was to be paid within the following fortnight. The contract was drawn up by an attorney (Maître Aymes) and was registered on 18 April 1994 at the National Trademark Registry in Paris.

2.2 The first cheque for 500,000 francs drawn by Maître Aymes on his professional account with CARPA (the fund for lawyers’ pecuniary payments), which he held at the Crédit Lyonnais, was cashed by the company Féronia. In order to pay the balance, three further cheques for 500,000 francs each were drawn on the same account by Maître Aymes on 28 February 1994, and handed to Féronia the same day. The first of these cheques was cashed without any difficulty. The other two, however, which were presented for payment on 6 June 1994, were rejected by Crédit Lyonnais. In the meantime, the President of the Rodez bar, to which Maître Aymes belonged, had blocked payment on the grounds of fraudulent use of cheques.

2.3 Féronia and the author, having been defrauded by Maître Aymes, tried to reclaim the outstanding payment. They instituted civil proceedings before the *tribunal de grande instance regional court* in Toulouse, which, on 7 May 2002, ordered them to pay back 1 million francs to CARPA in Toulouse for the two cheques which had already been cashed. This decision was upheld by the Toulouse court of appeal on 24 July 2003. At no point did the courts take cognizance of the accounting records, including Maître Aymes’ bank statements, in the case file. The author did not have access to the records of the disciplinary proceedings of the Rodez Bar Council, or those of the proceedings brought against Maître Aymes for abuse of trust by an attorney and for fraud. These documents would have assisted the author in the preparation of his defence. In a similar case, the courts found for Xavier Barbeau, who had also been defrauded by Maître Aymes, in 1995.

2.4 On 11 February 1997, the author wrote to the investigating magistrate in Rodez who was responsible for the case against Maître Aymes, applying for civil indemnification in the case in accordance with the Code of Criminal Procedure. Following a written reminder dated 18 March 1999, the magistrate replied that he had informed the author by registered post on 4 December 1998 that he was intending to conclude his investigation of the case in which the author had applied for civil indemnification. The author claims to have never received this notification. The author was thus missing crucial information when the civil indemnification proceedings began before the civil court in Toulouse. He tried on several occasions to obtain information on the criminal proceedings against Maître Aymes. On 28 March 2000, the Rodez Government Procurator informed him that there appeared to be “no evidence of fraudulent use of the cheques by Féronia for its own benefit”. The Toulouse judicial authorities did, however, find against Féronia in civil proceedings for an error committed when cashing the cheques concerned.

2.5 On 13 September 2003, the author submitted an appeal to the Court of Cassation against the ruling of the Toulouse court of appeal of 24 July 2003. The legal adviser for Crédit Lyonnais informed him that unless he paid what he owed, Crédit Lyonnais would seek to have his appeal before the Court of Cassation revoked. The author did not respond to this request. By order of 17 November 2003 the Court of Cassation recorded the abandonment of appeal by the claimant party.

2.6 On 13 February 2004 the author took his case to the European Court of Human Rights (application No. 8060/04). On 14 September 2004 this Court declared the application to be inadmissible on the grounds of non-exhaustion of domestic remedies owing to abandonment of the appeal in cassation.

### **The complaint**

3.1 The author considers himself to be a victim of a violation of article 14 of the Covenant, on the grounds of infringement of his right of access to a court. He contends that while the right of access to a court is not absolute, restrictions on that right should never encroach upon its substance. Any limitation should have a legitimate purpose and be reasonably proportionate to that purpose.

3.2 The author also considers himself a victim of a breach of article 14 of the Covenant, owing to the manner in which French proceedings are conducted and the methods of administration of justice from which he has suffered. He contends that he has fallen victim to a serious dysfunction in the administration of justice owing to the obstacles he faced, i.e. the failure to communicate evidence during the civil indemnification proceedings in Toulouse, the failure of the investigating magistrate to pass on the file of the investigation in good time to the author, who had written to apply for civil indemnification in the criminal proceedings, and the failure of the civil courts to pronounce on the position of the Rodez Government Procurator, which had been clearly stated in writing. He therefore considers that his right to a fair trial has been violated.

3.3 On the effects of the State party's reservation to article 5, paragraph 2 (a), of the Optional Protocol, the author recalls that there is nothing to prevent the Human Rights Committee from ruling on the merits if the European Court of Human Rights has not already done so. He decries the briskness of the decision that he received from the Court and contends that the Court has not examined his petition on the merits.

3.4 Regarding the exhaustion of domestic remedies, the author contends that the lack of a procedure for suspending execution of an appeal court decision is contrary to the right to a fair trial, since it was impossible for him to assert his interests and ensure that he was fairly defended before a court. The forced execution of the decision by the Toulouse court of appeal was a genuine financial setback for him. He considers that he has never been fully able to assert his rights or seek redress through the courts as a result of the system of forced execution and the bank's demand.

3.5 The author requests reasonable satisfaction in the form of damages for the material and moral injury he has suffered.



### **The State party's observations on admissibility**

4.1 On 29 December 2006, the State party contested the admissibility of the communication. It invoked its reservation to article 5, paragraph 2 (a), of the Optional Protocol, arguing that the issue has already been examined by the European Court of Human Rights. Should the Committee reason that the Court has not examined the case on its merits, but only on procedural issues, the reservation should nevertheless apply. The consideration of admissibility is a decisive part of the overall examination of a case, and should not be sidestepped. The Committee cannot consider that a case which has been examined and found inadmissible by an international body on procedural grounds has not been examined within the meaning of the reservation to article 5, paragraph 2 (a), without misconstruing that reservation. The point of the reservation is that cases which have been examined in the broad sense, including examination on procedural issues, should not be entertained by the Committee - not just cases that have been examined on the merits.

4.2 With regard to the issue of the exhaustion of domestic remedies, the State party recalls that it was decided to revoke the author's appeal to the Court of Cassation. This decision was taken pursuant to article 1009-1 of the new Code of Civil Procedure, which provides that the first president of the Court of Cassation can, at the request of the respondent, decide to "strike a case off the list if the petitioner cannot demonstrate that he has executed the decision against which he is appealing, unless he has reason to believe that execution would clearly have excessive consequences". The author has refrained from executing the decision of the Court of Appeal, but does not claim to have tried to demonstrate that execution would clearly have had excessive consequences for him. Furthermore, article 1009-3 of the new Code of Civil Procedure allows for a case to be reinstated on the Court of Cassation list if it can be shown that the decision under appeal has been executed. In addition, the Court of Cassation can accept partial execution taking account of the petitioner's circumstances. It can therefore be deduced that the author did not wish to take advantage of a reinstatement and has deliberately chosen not to put his case to the Court of Cassation. The author has therefore not exhausted domestic remedies.

### **The author's comments on the State party's observations**

5.1 In his comments of 26 February 2007, the author repeats his previous arguments on the effects of the State party's reservation to article 5, paragraph 2 (a), of the Optional Protocol. In response to the State party's argument that he has not tried to demonstrate that execution of the Court of Appeal's decision would clearly have excessive consequences for him, he contends that the decision itself clearly had excessive consequences: it found that a perfectly licit contract had become illicit, and that the written determination of the Government Procurator to proceed to examination was null and void. It disregarded a decision of the Court of Cassation fully recognizing an error of management on the part of CARPA and ignored that Court's request for indisputable proof. The author was ordered to repay the considerable sum of nearly 200,000 euros, though his annual income was less than 9,000 euros a year in 2003 and 2004.

5.2 The author stresses that in the context of an attempt at mediation, the mediator stated that "a very long procedure has led Mr. Jean-Pierre Vincent - FERONIA astray because the Rodez Bar Association did not inform him of the remedies available and the lawyers in the region one by one declined to provide any pointers to potential remedies".

5.3 In response to the State party's argument that he could have had his case reinstated on the Court of Cassation's list pursuant to article 1009-3 of the new Code of Civil Procedure, the author contends that this alleged oversight can be taken into consideration only on the formal condition that there is a sufficient degree of certainty, not only in theory but also in practice, and that is not the case here. The State party must demonstrate that the requirements have been satisfied, not simply allege that they have. The successive lawyers to whom the author has turned have not provided regular assistance. From June 1999 onwards the author has been contacting lawyers from the Toulouse area who have never followed up his request to take on his case. On 19 June 2000, he alerted the First President of the Toulouse regional court to the fact that he could not get the chairman of the Toulouse bar to designate a lawyer to represent him. It was not until 4 August 2000 that a lawyer was finally appointed. The author subsequently consulted nine lawyers from the *Conseil d'État* and the Court of Cassation who refused to register an appeal for him, telling him first to comply with the financial order handed down by the Toulouse court of appeal. Only Maître Boullez finally agreed to assist him, while clearly stating that pursuant to article 611-1 of the new Code of Civil Procedure, he could not lodge an appeal until the ruling by the Toulouse court of appeal had been officially announced. The author therefore went back to his solicitor at the Toulouse court of appeal for an original copy of the Court's decision. The solicitor refused to produce any documents because the author had not paid the fees owed to him. Thus, article 1009-3 of the new Code of Civil Procedure cannot apply without a real denial of justice if there are oversights in the judicial administration of an appeal or circumstances make it unreasonable to insist on exhausting all remedies.

5.4 The author points out that he did nevertheless lodge an appeal before the Court of Cassation on 13 September 2003 against the decision of the Toulouse court of appeal but that the Court of Cassation struck the case off its list on 17 November 2003.

6. On 5 September 2007, the author stated that it was his counsel, the Nicolas Boullez civil-law professional partnership, which had requested abandonment of the proceedings. This was further proof of the inadequate legal advice he had been given. He had reasonably followed the advice of his lawyers not to continue with his appeal, which they had been led to believe - and themselves implied - was sure to fail. Although articles 1024 ff. of the new Code of Civil Procedure restrictively lay down the strict conditions relating to "abandonment", the author had received impartial advice. He maintains he will find himself in a legal impasse if the Committee finds that he has not exhausted domestic remedies without looking into the reasons why.

### **Issues and proceedings before the Committee**

7.1 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.

7.2 In accordance with article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that a similar complaint filed by the author (complaint No. 8060/04) was found inadmissible by the European Court of Human Rights on 14 September 2004 because domestic remedies had not been exhausted. The Committee also recalls that on acceding to the Optional Protocol, the State party entered a reservation to article 5, paragraph 2 (a), of that 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, however, that the

European Court has not “examined” the case in the sense of article 5, paragraph 2 (a), of the Optional Protocol, inasmuch as its decision pertained only to an issue of procedure.<sup>1</sup> There is therefore no impediment arising out of article 5, paragraph 2 (a), of the Optional Protocol as modified by the State party’s reservation.

7.3 Regarding the exhaustion of domestic remedies, the Committee notes that the author’s appeal to the Court of Cassation led to a decision by the First President of the Court of Cassation to strike it off the list on 17 November 2003. It takes note of the State party’s argument that the author refrained from executing the decision of the Toulouse court of appeal dated 24 July 2003, but does not claim to have tried to demonstrate that its execution would clearly result in excessive consequences for him. It also notes that article 1009-3 of the new Code of Civil Procedure allows a case to be reinstated on the Court of Cassation’s list upon demonstration of execution, albeit partial, of the decision under appeal. Although the author pleads before the Committee a lack of the financial wherewithal to execute the decision of the Toulouse court of appeal (see 5.1 above), the case file shows that the author did not state or provide evidence of his financial situation to the Court of Cassation when he lodged his appeal, even though he carried the burden of proof that the decision to be executed was such that it would clearly have excessive consequences. The Committee also notes that after the appeal had been struck off the list, the author did not ask the First President of the Court of Cassation for the case to be reinstated and that, on the contrary, the author maintains that it was his own lawyer who requested abandonment of the proceedings. In these circumstances, the Committee considers that the author has not exhausted domestic remedies.

8. As a result, the Committee decides:

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

(b) That the present decision will be communicated to the State party and to the author.

[Adopted in English, Spanish and French (original). The text will also be translated into Arabic, Chinese and Russian, as part of the annual report.]

#### Note

<sup>1</sup> See communication No. 1389/2005, *Bertelli Gálvez v. Spain*, inadmissibility decision adopted on 25 July 2005, para. 4.3; and communication No. 1446/2006, *Wdowiak v. Poland*, inadmissibility decision adopted on 31 October 2006, para. 6.2.

**M. Communication No. 1513/2006, *Fernandes et al. v. The Netherlands*  
(Decision adopted on 22 July 2008, ninety-third session)\***

<i>Submitted by:</i>	Vital Maria Fernandes et al. (represented by counsel, Mr. Bjorn van Dijk)
<i>Alleged victim:</i>	The authors and their children
<i>State party:</i>	The Netherlands
<i>Date of submission:</i>	12 January 2005
<i>Subject matter:</i>	Deportation of family members; separation of children from their parents
<i>Procedural issue:</i>	Sufficient substantiation for purposes of admissibility
<i>Substantive issues:</i>	Right to privacy; protection of the family
<i>Articles of the Covenant:</i>	17, paragraph 1; 23
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 22 July 2008,*

*Adopts the following:*

**Decision on admissibility**

1. The authors of the communication are Vital Maria Fernandes, a Cape Verdean national, submitting the communication on his own behalf and on behalf of his three children, all of Dutch nationality; his wife Maria Jose Pereira Monteiro Fernandes, a Cape Verdean national; and Walter Hugo Monteiro Semedo, son of the latter and also a Cape Verdean national. They claim to be victims of a violation by the Netherlands<sup>1</sup> of article 17, paragraph 1 and article 23 of the International Covenant on Civil and Political Rights. The authors are represented by counsel, Mr. Bjorn van Dijk.

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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, 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.

## **The facts as presented by the authors**

2.1 Mr. Fernandes worked on Dutch commercial vessels since the late 1980s. Pursuant to the Dutch Aliens Act, individuals are eligible for a residence permit if they, inter alia, have worked on Dutch ships for seven years. Mr. Fernandes stopped working before completing this seven-year term, due to back problems. He received benefits in accordance with the Disablement Benefits Act (WAO) and has not worked since that time.

2.2 Mr. Fernandes resides in the Netherlands with his wife, Ms. Monteiro Fernandes, whom he married in 1995 in the Netherlands, and their four children. Three of the children are minors and Dutch nationals. They have all lived in the Netherlands since birth. Mr. Monteiro Semedo, born on 5 October 1985, is the son of Ms. Monteiro Fernandes from a previous marriage.

2.3 On 13 November 1995, Mr. Fernandes submitted an application for a residence permit to the Commissioner of the Groningen District Police, in order to be able to obtain employment on board a Dutch vessel and spend his leave in the Netherlands. This application was rejected on 16 July 1996. His administrative appeal against this decision was declared inadmissible by decision of 9 October 1996. A further appeal was filed in The Hague District Court (Zwolle branch) on 6 November 1996. The appeal was dismissed on 2 May 1997.

2.4 On 6 May 1997, Mr. Fernandes submitted a new application for a residence permit “without restrictions” to the Commissioner of the Groningen District Police. This was rejected on 7 May 1999. On 1 June 1999, the complainant filed an objection and requested an interlocutory decision on 29 June 1999. The Hague District Court (Zwolle branch) denied the request on 31 August 2000, and declared the objection of 1 June 1999 unfounded. A new application for a residence permit was then submitted to the Commissioner of the Groningen District Police on 10 July 2000. This request was focused on enabling Mr. Fernandes to stay with his children. The request was not accepted. An objection was filed on 7 August 2000 and declared well-founded on 8 January 2001.

2.5 On 12 September 2000, the Groningen District Police Commissioner proposed that Mr. Fernandes be declared an “undesirable person”, as he had committed criminal offences and had been sentenced on at least three occasions in 1996, 1999 and 2000 for violations to the Opium Act and the Road Traffic Act. On 20 February 2003, the application of 10 July 2000 was rejected by the Minister for Aliens Affairs and Integration and Mr. Fernandes was declared “an undesirable person”.<sup>2</sup> The decision explicitly stated that the refusal to grant the author a residence permit did not constitute a violation of his right to respect for his family life, as defined by article 8 of the European Convention of Human Rights. Although the matter involved respect for the family life of the complainants, the refusal to grant Mr. Fernandes a residence permit in the Netherlands was not aimed at depriving him of any entitlement to temporary residence, enabling him to live with his family in the Netherlands. The decision indicates that Mr. Fernandes and his wife were illegal residents when they started their family life in the Netherlands, and that they knew or should have known of the risks their choices entailed. The decision stipulated that the minor children with Dutch nationality could opt for Cape Verdean nationality, under Cape Verdean law. Thus, no objective obstacles existed that would prevent the complainants from leading a family life outside the Netherlands. An objection was lodged with

the Minister for Aliens Affairs, as well as a request for a provisional ruling from the Hague District Court (Aliens Chamber). The request and the following objection were dismissed on 3 February 2004. The Hague Court decision was not subject to appeal.

2.6 On 30 March 2004 a complaint was filed with the European Court of Human Rights. On 7 September 2004 the European Court of Human Rights declared the authors' application inadmissible because it did not comply with the requirements set out in articles 34 and 35 of the European Convention on Human Rights.<sup>3</sup>

### **The complaint**

3. The authors claim that the Netherlands violates article 17, paragraph 1, and article 23 of the Covenant, by refusing the complainants residence permits, since three of their children are Dutch nationals. Being Dutch citizens, they cannot be deported. The three children were born and raised in the Netherlands and they do not have any connection with Cape Verde. The complainants are being forced to make an unacceptable choice, either to remain in the Netherlands, without legal residence status, or to return to Cape Verde with their children, who are fully integrated into Dutch society.<sup>4</sup>

### **The State party's submissions on admissibility and merits**

4.1 On 21 February 2007, the State party made its submission on the admissibility of the communication. On 16 April 2007, the State party confirmed that its admissibility submission also pertained to the merits of the communication.

4.2 The State party considers that the authors have insufficiently substantiated their claim. They failed to provide specific information and arguments in support of their claim that provisions of the Covenant have indeed been violated. The only substantiation provided is a mere assertion that the three minor children are integrated into Dutch society and that their return to Cape Verde would cause them problems.

4.3. The State party indicates that Mr. and Mrs. Fernandes established a family in the Netherlands without being legal residents in that country. They knew, or at the very least should have known, that the question of whether they would be able to continue their family life in the Netherlands would depend on whether they received a residence permit. The State party points to Mr. Fernandes' criminal record, which resulted in him being declared an "undesirable alien". It notes that, as the children are eligible for Cape Verdean nationality, nothing would prevent them from living with their parents in Cape Verde.

### **The author's comments on the State party's submissions**

5. On 28 November 2007, the authors reiterate that their communication is admissible and that their three Dutch children cannot be asked to relocate to a country to which they do not belong. They indicate that an attempt to move to Cape Verde in October 2006, where the children spent four months, not in the company of their father, failed because their links to the Netherlands proved to be too strong and they were not able to adjust to life in Cape Verde.

## 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 the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that this matter was already considered and decided by the European Court of Human Rights on 7 September 2004. However, it recalls its jurisprudence<sup>5</sup> 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. Thus, article 5, paragraph 2 (a), does not prevent the Committee from considering the present communication.

6.3 In relation to the alleged violation of article 17, paragraph 1, and article 23 of the Covenant, the Committee notes that other than statements on the alleged hardship that the children, who were born and raised in the Netherlands, would suffer if they follow their parents to their country of origin, the authors have provided no arguments on how their rights under these provisions would allegedly be violated.<sup>6</sup> In addition, the authors have not demonstrated why, in these particular circumstances, their deportation to Cape Verde would constitute an unlawful or arbitrary interference with their family relations.<sup>7</sup> Consequently, the Committee is of the view that the authors have failed to sufficiently substantiate their claim for purposes of admissibility, that they or their children are victims of violations of article 17, paragraph 1, and article 23 of the Covenant. It thus finds that the communication is inadmissible under article 2 of the Optional Protocol. The Committee notes that its conclusion takes account of the paucity of information provided by the authors, despite its requests for additional information on the status of the children as well as on the difficulties they would face if relocated to Cape Verde.

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 English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

### Notes

<sup>1</sup> The Covenant and the Optional Protocol thereto entered into force for the State party on 11 March 1979.

<sup>2</sup> Ms. Monteiro Fernandes and Mr. Monteiro Semedo submitted applications for temporary residence permits on 10 July 2000 for the purpose of “staying with her children” and “family reunification with parents” respectively. The Minister for Alien Affairs and Integration rejected both applications by decisions dated 20 February 2003.

<sup>3</sup> ECHR, *Fernandes and others v. the Netherlands*, Application No. 11347/04.

<sup>4</sup> Authors refer to the Committee's views in communication No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004.

<sup>5</sup> See communication No. 824/1998, *Nicolov v. Bulgaria*, inadmissibility decision adopted on 24 March 2000.

<sup>6</sup> See communication No. 820/1998, *Rajan v. New Zealand*, inadmissibility decision adopted on 6 August 2003.

<sup>7</sup> See communication No. 1222/2003, *Byahuranga v. Denmark*, Views adopted on 1 November 2004, para. 11.7; communication No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004, paras. 9.7 and 9.8; communication No. 538/1993, *Stewart v. Canada*, Views adopted on 1 November 1996, para. 12.10.



**N. Communication No. 1515/2006, *Schmidl v. The Czech Republic*  
(Decision adopted on 1 April 2008, ninety-second session)\***

<i>Submitted by:</i>	Herbert Schmidl (not represented by counsel)
<i>Alleged victims:</i>	The author
<i>State party:</i>	The Czech Republic
<i>Date of communication:</i>	4 January 2002 (initial submission)
<i>Subject matter:</i>	Discrimination on the basis of Sudeten German descent with respect to the restitution of property
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Equality before the law and equal protection of the law, access to courts
<i>Articles of the Covenant:</i>	2; 26; 14
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

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

*Meeting on 1 April 2008,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication is Herbert Schmidl, born in 1923 in the former Czechoslovakia, now residing in Germany. He claims to be a victim of a violation by the Czech Republic<sup>1</sup> of articles 2, 14, paragraph 1, and 26 of the Covenant. The author is not represented.

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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, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

## **Facts as presented by the author**

2.1 The author's uncle and aunt owned an agricultural estate in the region of the Sudetenland, which was incorporated into the territory of the German Reich between 1938 and 1945. In May 1945, the estate was occupied by the Red Army and subsequently confiscated by the post-war Czechoslovak administration. In 1946, the author and his family were expelled from Czechoslovakia. The property in question is alleged to have been confiscated prior to Presidential Decree No. 12/1945 (the "Beněš Decree") and thus was illegal. No compensation was paid for the property in question, for which the author claims to be the sole heir.

2.2 The author wrote to the Czech Minister of Finance ("the Minister") on three occasions, 18 February and 26 April 1992, and 2 August 1998, requesting the return of his property. On 25 August 1998, the Minister informed the author that the restitution law in place<sup>2</sup> applied only to property confiscated between 1948 and 1989, that similar restitution claims to property owned by Germans had been rejected in the past, and that the State authorities would not reply to any further correspondence on the matter. In the same letter (responding to the author's letter of 2 August 2007) it was also stated that as the will upon which the land in question was allegedly devolved, was invalid, the author had never become the legal owner of the property.

2.3 According to the author, both the Czech Supreme Court and Constitutional Court declared the failure to compensate for the expropriation of property owned by Germans and Hungarians prior to 1948 as "lawful and legitimate". He submits that Sudeten Germans could be compensated if they could prove their fidelity to the Czech Republic, which was not the case for Czech nationals requesting compensation. He alleges that former Prime Minister Klaus has stated that, although the restitution to German and Hungarian victims might be possible by virtue of law, it was politically unacceptable.

## **The complaint**

3.1 The author argues that domestic remedies were inaccessible to him and ineffective in his case. The Minister failed to respond to his requests to be informed of applicable procedures to challenge the view that his case did not comply with the law on restitution and refused to transfer the author's complaint to the competent court. In this way, the Czech authorities prevented him from judicially pursuing the restitution of his property. In addition, by failing to respond to the author between 1992 and 1998, the Minister is responsible for unduly prolonging exhaustion of domestic remedies. Without knowing the competent court in which to make his application, the author alleges he would have been unable to secure counsel to represent him. In addition, he adds that the exhaustion of remedies would have been ineffective given the decisions of the Supreme Court and the Constitutional Court, which declared the restitution act lawful.

3.2 The author claims that his complaint is admissible *ratione temporis*, because his complaint is not about the actual confiscation of property in 1945, but about the State party's refusal to return it. He argues that the State party's denial of compensation was not confirmed until the Minister's letter of 25 August 1998, which was after the entry into force of the Optional Protocol. Prior to that date, restitution was not excluded in principle, but depended on "intergovernmental agreements"<sup>3</sup> between the Czech Republic and Germany.

3.3 The author claims a violation of article 2, as the State party has not paid him adequate compensation for the loss of his property.<sup>4</sup> He claims that the denial of his right to access to the courts violates article 14. He also alleges that proceedings have been unduly delayed within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, as his efforts over several years to obtain clarification concerning applicable remedies have not led to a response from the Czech authorities.

3.4 The author alleges a violation of his right to non-discrimination, under article 26, as the restitution laws currently in force in the Czech Republic discriminate against him on the basis of his Sudeten German descent. He claims that the restitution law excludes Sudeten Germans from restitution claims due to (a) the fact that the law only considers confiscations that were made between 1948 and 1989, and (b) the condition that only Czech nationals may claim such compensation. The author further alleges discrimination with respect to the necessity for German citizens to “prove their loyalty”,<sup>5</sup> a condition which is not necessary for Czech nationals. Further, German and Hungarian nationals have to bring evidence of continuous Czech citizenship from the end of the war to 1990, whereas Czech nationals only have to prove their citizenship at the date of their application. The fact that other groups of victims have obtained adequate compensation constitutes discrimination against the Sudeten Germans as a group.

3.5 The author claims that the property in question was confiscated illegally and that for this reason he, as sole beneficiary of his uncle and aunt’s estate, remains the owner of the property in question. According to Governmental Decree No. 8/1928 GBI, any confiscation had to be preceded by the delivery of “an individual notice”. The author claims that no such notice was delivered with respect to the property in question. He claims that the confiscation occurred prior to the entry into force of the Beněš Decree, which was alleged to have constituted the legal basis for the confiscation. Even if the confiscation is considered to have taken place in light of the decree, it remains illegal as the original owner was antifascist and employed Czech citizens on his farm, against the will of the Nazis. According to subsection 2 of the Presidential Decree, land from any persons of German or Hungarian nationality who actively participated in the fight to preserve the integrity and liberation of Czechoslovakia should not have been confiscated. Finally, he argues that the confiscation was illegal as it coincided with the crime of genocide - which he claims arose from the expulsion of the Sudeten Germans.

### **The State party’s submission on admissibility and merits**

4.1 On 17 May 2007, the State party commented on the admissibility and merits of the communication. It submits that the communication is inadmissible for: non-exhaustion of domestic remedies; *ratione temporis*; an abuse of the right of submission; and incompatibility *ratione materiae*. As to non-exhaustion, it submits that the author never raised any of these claims before the competent authorities. It assumes that the confiscation of the property in question is alleged to have taken place under Presidential Decree No. 12/1945, which entered into force on 23 June 1945. However, as the Covenant did not enter into force until 23 March 1976, it submits that the communication is *ratione temporis*.

4.2 The State party invokes to the jurisprudence<sup>6</sup> of the Committee by arguing that the submission of the communication is an abuse of the right of submission. The author’s initial letter to the Committee was dated 4 January 2002, i.e. nine years after the Optional Protocol entered into force, which is an unacceptable length of time to wait before addressing the

Committee. It also submits that the right to property is not guaranteed under the Covenant, let alone its recovery and that the communication is thus inadmissible *ratione materiae* with the provisions of the Covenant.

4.3 On the merits, the State party submits that the communication is “ill-founded”, as the will upon which the author is alleged to have become the owner of the property was made on 9 March 1956. Given that the property is alleged to have been confiscated in 1945, it claims that he could not have become the rightful owner of the property. It also submits that said will was invalid *ab initio*, as according to section 535 of the then Civil Code, only an individual testator could have made such a disposition. Two individuals could not have made a will jointly as occurred in this case.

### **The authors’ comments**

5.1 On 12 November 2007, the author reiterates that the expropriation took place at the beginning of May 1945, prior to the entry into force of Presidential Decree No. 12/1945. According to a report dated 8 August 1945 from the author’s uncle, a Czech administrator appeared together with Czech militia men to seize his estate. The author disputes the claim that he made no effort to request restitution of his property and points to the letters written to the Minister (see paragraph 2.2). He reiterates his claim that the restitution laws discriminate against him under article 26 for the reasons set out in paragraph 3.4 above.

5.2 The author reiterates his arguments on the admissibility of the communication *ratione temporis*, and that the confiscation of the property was not legitimate and that the Minister’s refusal to return his property on 25 August 1998 is dated after the entry into force of the Optional Protocol. In this context, he invokes the Committee’s jurisprudence<sup>7</sup> to the effect that the violations complained of continued after the entry into force of the Optional Protocol and are thus *ratione temporis*. As to the State party’s arguments on abuse, he submits that apart from his efforts to exhaust domestic remedies through his correspondence with the Ministry, he attempted to resolve the issue by initiatives taken in Germany, including his attempts to seek “diplomatic protection”<sup>8</sup> through various applications through the administrative courts<sup>9</sup> which were all very time consuming.

5.3 As to the State party’s arguments on the merits, he reiterates that the confiscation in question was invalid and thus his uncle and aunt remained the rightful owners until their death. As to the will, the author disputes the State party’s argument that it is invalid, and refers to the legitimacy of German certificates of inheritance dated 17 January 1997 and 12 March 1998, pursuant to which the author was designated as the sole heir to his uncle’s and aunt’s estate. He also states that, under German law, spouses are allowed to make their will jointly.

### **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 State party has argued that the communication is inadmissible, inter alia, for non-exhaustion of domestic remedies. It also notes that the State party contests the author's claim that he was the lawful beneficiary of his aunt and uncle's estate, as the will upon which he relies was considered invalid. The Committee notes that the only efforts made by the author to exhaust domestic remedies in the State party were several letters addressed to the Czech Ministry of Finance, in which he requested the Ministry to forward his complaint to the competent court. The Committee observes that the author has failed to raise any of the claims made in the present communication before any court in the State party. As to the claim that the exhaustion of remedies would have been ineffective, the Committee notes that the pursuit of a court action would have, inter alia, clarified the contested facts in the author's case, upon which the Committee is not in a position to evaluate, notably, the actual ownership of the land in question and whether the author was the lawful beneficiary of his aunt and uncle's estate. It recalls that article 5, paragraph 2 (b) of the Optional Protocol, by referring to "all available domestic remedies", refers in the first place to judicial remedies.<sup>10</sup> The Committee considers that it was the author's own duty to take all reasonable steps to identify the court with the appropriate jurisdiction or to demonstrate the absence of such a court. Accordingly, the Committee concludes that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for failure to exhaust domestic remedies.

6.3 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 present report.]

### Notes

<sup>1</sup> The Optional Protocol entered into force for the Czech Republic on 1 January 1993, as a consequence of the Czech Republic's notification of succession of the international obligation of Czechoslovakia, which had ratified the Optional Protocol in March 1991.

<sup>2</sup> It is assumed that the author is referring to Law No. 87/1991.

<sup>3</sup> It is not specified which "intergovernmental agreements" the author refers to.

<sup>4</sup> The author refers to the Committee's jurisprudence in communication No. 747/1997, *Des Fours Walderode v. Czech Republic*, Views adopted on 30 October 2001.

<sup>5</sup> The author does not provide further detail on this point.

<sup>6</sup> Communication No. 787/1997, *Gobin v. Mauritius*, decision of 16 July 2001, para. 6.3.

<sup>7</sup> Communication No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996; communication No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001; communication No. 945/2000, *Marik v. Czech Republic*, Views adopted on 26 July 2005; communication No. 1054/2002, *Kriz v. Czech Republic*, Views adopted on 1 November 2005; communication 1463/2006, *Gratzinger v. Czech Republic*, Views adopted on 25 October 2007.

<sup>8</sup> The author did not specify what he meant by “diplomatic protection”.

<sup>9</sup> Communication No. 1516/2006, *Schmidl v. Germany*, decision of 31 October 2007.

<sup>10</sup> Communication No. 262/1987, *R.T. v. France*, decision of 30 March 1989.

**O. Communication No. 1516/2006, *Schmidl v. Germany*  
(Decision adopted on 31 October 2007, ninety-first session)\***

<i>Submitted by:</i>	Mr. Herbert Schmidl (not represented)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Germany
<i>Date of communication:</i>	4 January 2002 (initial submission)
<i>Subject matter:</i>	State party failure to “legally protect” the author in relation to his restitution claim before the Czech Republic
<i>Procedural issues:</i>	Admissibility; reservation to the Optional Protocol; non-substantiation
<i>Substantive issues:</i>	Discrimination on the basis of Sudeten German descent
<i>Articles of the Covenant:</i>	2; 6; 7; 8; 9; 10; 12; 13; 14; 17; 26
<i>Articles of the Optional Protocol:</i>	2; 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 2007,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication is Herbert Schmidl, born in 1923 in former Czechoslovakia, now residing in Germany. He claims to be a victim of a violation by Germany<sup>1</sup> of article 2, read in conjunction with article 26, of the International Covenant on Civil and Political Rights. The author is not represented by counsel. The Committee’s Special Rapporteur on new communications decided that the question of the communication’s admissibility 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. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanut, 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.

## Factual background

2.1 The author's uncle owned agricultural real estate in the region of the Sudetenland, which between 1938 and 1945 was incorporated into the territory of the German Reich. In May 1945, the estate was occupied by the Red Army and subsequently confiscated by the post-war Czechoslovak administration. In 1946, the author and his family were expelled from Czechoslovakia. The author's family had to perform forced labour on the farm before they were expelled, and no compensation was paid for the lost property by Czechoslovakia or the Czech Republic. The author claims to be the sole heir of the expropriated property.

2.2 On 3 June 1971, the author received DM 40,000 under the German Compensation Act (*Lastenausgleichsgesetz*) for losses suffered in the Second World War. However, this payment should, in the author's view, be regarded as social and economic assistance rather than as compensation for lost property, for the following reasons: the amount paid equalled the profits generated by the agricultural estate for one year only; the money has to be paid back to the State in the event that the former owner either has his or her property returned or receives adequate compensation; and the preamble of the Compensation Act clearly states that the payment of compensation does not constitute a waiver of the right to restitution of property.

2.3 On 6 May 1993, the author filed a complaint with the District Administrative Court (*Verwaltungsgericht*) of Cologne, claiming a violation by the German Government of his constitutional right to effective diplomatic protection against the Czech Republic. On 31 January 1995, the Court dismissed the complaint on the ground that the Government has broad discretion in matters of foreign policy. The author appealed this decision to the Upper Administrative Court (*Oberverwaltungsgericht*) of Münster which, on 26 September 1996, confirmed the judgment of the District Court and refused leave to appeal to the Federal Administrative Court (*Bundesverwaltungsgericht*). The author argues that he has therefore exhausted domestic remedies.<sup>2</sup>

2.4 The author submits that in a 23 January 1997 Joint Declaration of Germany and the Czech Republic, the State party refused to clarify political and legal questions of the past with the Czech Republic, to avoid straining political relations. Further, in a letter dated 12 April 1999, the Federal Government of Germany confirmed that it was not willing to comply with the author's request to lodge - by way of diplomatic protection - claims against the Czech Republic on account of the expulsion and uncompensated expropriation. Finally, the author submits that in 1999, the newly elected German Government revised Germany's policy regarding restitution of property formerly owned by Sudeten Germans. While it had previously left the question open,<sup>3</sup> it now declared that henceforth, the Federal Republic of Germany would "neither today nor in the future raise any questions related to property or make any claims".<sup>4</sup>

2.5 On 10 April 1997, the author filed a complaint before the European Court of Human Rights (Application No. 38252/97), claiming a violation by Germany of his right to life (article 2), freedom from torture and ill-treatment (article 3), freedom from slavery (article 4), right to liberty and security (article 5), right to a fair trial (article 6) and right to an effective remedy (article 14) of the European Convention on Human Rights, as well as of his right to property (article 1 of the First Protocol) and of his rights to be protected against an expulsion of nationals (article 3) and the collective expulsion of aliens (article 4) of the Fourth Protocol to the Convention, alleging that Germany had failed to espouse his restitution claim against the Czech Republic by exercising its diplomatic protection. On 13 June 2000, the Court declared his



application inadmissible under article 35 (4) of the European Convention, arguing that it did “not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols”.

2.6 In January 2005, the author submitted that the German Government continued to utter “discriminations and the detrimental utterances” with regard to his ethnic minority. He argues that the German Chancellor discriminated against the Sudeten Germans, “humiliating them as an unimportant marginal group of Germany” and as referring to their claims for restitution as “being without legal ground”.<sup>5</sup> The author further submits that the German Chancellor thus denied the “genocide” committed against the Sudeten Germans, an estimated 241,000 of whom died in the course of their expulsion, according to the author. He further alleges that the Chancellor and others denied the Sudeten Germans their right to restitution and that they aided and abetted genocide.

2.7 In various submissions, the author replied to correspondence from the Secretariat reminding him of the German reservation to article 5, paragraph 2 (a) of the Optional Protocol. He argues that the reservation is in principle not permissible since, according to international law experts, the Czech expropriation and expulsion of the Sudeten Germans constituted genocide. He claims that the reservation made by Germany preserves impunity for this genocide and is thus in violation of the principle of *jus cogens*. He also states that according to article 25 of the Basic Law (*Grundgesetz*) the Covenant is superior law, granting rights to citizens, which could not be repealed by way of a reservation. Regarding the consideration of his case by the European Court of Human Rights, the author underlines that the Optional Protocol prohibits simultaneous review of the same case, but not subsequent review and states that this “minor German reservation” cannot prevent the application of international law which supersedes German national law.

2.8 Regarding the lack of admissibility of his complaint *ratione temporis*, the author claims that his complaint against Germany dates back to 8 March 1999 when Chancellor Schröder said that he considered the wrong done to the Sudeten German expellees to be “irreversible”, contradicting what all German Governments had stated up to that date, i.e. that the question of Sudeten German properties was open and still to be settled. Therefore, the Optional Protocol was in force and his complaint is admissible *ratione temporis*.

2.9 On 6 January 2006, the author submitted that the current Chancellor has continued to discriminate against the Sudeten German ethnic group by stating repeatedly that her Government would not support complaints concerning the return of expellees’ properties by the Czech Republic. The author affirms that Sudeten Germans are being humiliated as their State does not fulfil its duty to provide them with the same protection as other citizens. He refers to a press clipping which indicates that the Federal Government intervened in favour of reparation claims of Germans who had remained in Romania.<sup>6</sup> The author states that excluding Sudeten Germans from access to diplomatic protection to assert their legal claims is contrary to article 26.

### **The complaint**

3.1 The author alleges a violation of his right under article 26 “to equal and effective legal (diplomatic) protection against discrimination”, based on his Sudeten German descent. He claims that the State party is obliged to take protective steps for all ethnic groups and is not allowed to discriminate against certain groups and refuse to protect them on account of their race, colour or membership of a particular ethnic minority. He refers in particular to the decision of the Münster

Upper Administrative Court, which was confirmed by the statements made by Chancellor Schröder in 1999, the text of the 1997 Joint Declaration, and the letter from the Federal Government received in 1999. In the author's view, these statements prevent him from exercising his economic, social and cultural rights, as mentioned in the Covenant's preamble, by rejecting his claim for property in the Czech Republic.

3.2 He also alleges a violation of article 2 since the State party refused to afford him protection against a violation of his fundamental human rights by another State party. Finally, he refers to violations of articles 6, 7, 8, 9, 10, 12, 13, 14 and 17 of the Covenant for his family, in light of their expulsion due to their national descent, although he does not bring the communication in their name. The author argues that as a result of the acts of genocide committed during the expulsion, the State party is obliged to support the claims of restitution of the Sudeten German expellees against the Czech State.

### **The State party's admissibility submission**

4.1 On 18 January 2007, the State party contested the admissibility of the communication on several grounds. It invokes the reservation made by Germany in relation to article 5, paragraph 2 (a) of the Optional Protocol, to the effect that;

“the competence of the Committee shall not apply to communications:

(a) Which have already been considered under another procedure of international investigation or settlement; or

(b) By means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany; or

(c) By means of which a violation of article 26 of the [Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant”.

4.2 The State party submits that the communication is inadmissible by virtue of the reservations, as the case has already been considered by another international instance (the European Court of Human Rights), and the author complains of a violation of article 26 but does not refer to any rights protected by the Covenant. On the validity of the reservation and the author's claim that article 25 of the German Basic Law renders it invalid, the State party submits that this provision provides that the common rules of international law are part of German Federal Law and take precedence over ordinary laws. The objective of the article is to make sure that customary international law can be invoked in the German courts. The reservation does not deal with the question of applicability of the Covenant but only with the question of jurisdiction, i.e. the competence of the Committee to consider individual communications.

4.3 The State party submits that the individual complaints procedure under the European Convention on Human Rights is a procedure within the meaning of the reservation and article 5, paragraph 2 (a), of the Optional Protocol. The subject matter of the proceedings and the facts of the case before it were identical to the present communication, i.e. that Germany should have taken action on the author's claim against the Czech Republic with respect to his alleged

property rights. The author's argument on the political speech made by Federal Chancellor Schröder on 8 March 1999, does not add any new aspect to the facts which were presented to the European Court of Human Rights. As to the suggestion that the alleged failure of the State party is a continuous violation of his rights and can therefore be raised again under the Optional Protocol, even after the European Court of Human Rights has decided on his claim, is a misinterpretation of the term "the same matter".

4.4 According to the State party, the Chancellor's statement in 1999 was political in nature and has not changed the author's position as regards his claims. The State party had not taken any legal action against the Czech Republic before this statement and did not intend to do so. This was made clear in the proceedings before the administrative courts. The Federal Foreign Office declared in the proceedings before the Cologne Administrative Court that the State party would continue to make political representations, in order to bring an adequate solution for the persons concerned, but that it regarded any legal action as detrimental. This is precisely the point which the author claimed the State party had breached in his application to the European Court. If a "new matter" arose every time the State party confirms its position, the author could bring a communication on the same grounds repeatedly.<sup>7</sup> Such a construction of the Optional Protocol and the State party's reservation cannot be correct.

4.5 With regard to the examination of the same subject matter, it is not a prerequisite to an examination within the meaning of the reservation that the European Court of Human Rights first declares an application to be admissible and initiates an examination of the merits in a technical sense. An "examination" requires that the concrete case has previously undergone a certain consideration of the merits. This can be assumed if, in the course of the examination of admissibility, the relevant circumstances of the case were clarified and a summary examination of the complaint in terms of substantive law in respect of the provisions of the European Court of Human Rights invoked has been made.<sup>8</sup> The European Court can review issues relating to the merits in advance, and consider them in the course of the examination of admissibility, which according to the State party the Court did in fact do in the present case. The decision of the European Court makes it clear that it examined the facts of the case, and having examined the complaint and all the material before it, concluded that the facts "do not disclose any appearance of a violation of the rights and freedoms set out in the Convention". Therefore, the State party's reservation applies.

4.6 In addition, the State party submits that the communication should be inadmissible as it does not disclose a violation of rights protected by the Covenant. The author alleges a violation of article 26, but fails to show with respect to which right the State party is supposed to have acted in a discriminatory way. The State party refers to part (c) of its reservation, and states that the Covenant does not require - as a matter of principle - any State party to take legal action against another State party, and there is no right to "diplomatic protection" in the Covenant in the sense of the communication. As such, and in light of the reservation, the communication is inadmissible. Even if the complaint had been made in relation to another article of the Covenant, the author has not been able to show that the State party has offered support to other Germans with regard to alleged property claims in other countries, and he has failed to show that he has been treated in any way differently compared to other citizens. He has therefore not substantiated any claim of discrimination.

4.7 Finally, the State party submits that the event on which the communication is based occurred long before the Covenant came into force for the State party. The real cause of the dispute is the expropriation of the author's alleged property under the 1945 Beneš decrees, at a time at which the Covenant had not even been drafted. The author cannot rely on the rights set out in the Covenant to claim compensation for any damage he may have suffered prior to its entry into force. Thus, his claim is also inadmissible *ratione temporis*.

### **The author's comments on the State party's submission**

5.1 On 13 March 2007 and 30 August 2007, and as to the State party's objections based on the fact the same "subject-matter" has been examined, the author claims that different arguments were made before the European Court of Human Rights and the Committee. Whereas the case brought to the European Court raised issues based on "article 2 of the good-neighbour agreement as well as article 33 of the Charter of the UN", on violations of the German *Grundgesetz* and the provisions of the European Convention on Human Rights, and on the peaceful settlement of the dispute; the communication before the Committee is based on article 26 of the Covenant. Therefore, the two disputes were based on a different legal basis and on the ground of different legal demands. Whereas before the European Court he was asking for an international agreement between the State party and the Czech Republic relating to the compensation for the expulsion, before the Committee he raises the issue of a violation of individual rights. The author argues that a new matter arose after the European Court decision, in light of the declarations of the Chancellor in 1999: prior to this point, an amicable settlement was considered possible, and this was the aim of the complaint before the European Court. He also reiterates his arguments before the Committee on the expulsion of Sudeten Germans as a form of genocide, which were not part of his complaint to the European Court, to demonstrate that the issues are not the same. Finally, he states that the scope of review of the European Court is different in light of the restrictions contained in article 14 of the European Convention, compared to article 26 of the Covenant.

5.2 As to the State party's interpretation of article 5, paragraph 2 (a), of the Optional Protocol, the author claims that it is incorrectly interpreted. He submits that his case to the European Court is "not being examined" under that organ, but in fact has already been examined. Thus, this article should not preclude the Committee from considering his current communication on the merits. He claims that the State party's observations of 18 January 2007 use "unlawful rewording of the tense prescribed for the inadmissibility of a complaint". Article 25 of the Basic Law expressly states that international law creates its own rights and obligations for residents of Germany. Therefore, residents can rely on the rights contained in the Covenant without reservation. In the author's opinion, the communication concerns a breach of the State party's obligation to protect in cases of genocide or crimes against humanity. In such cases, State parties cannot abstain from their obligation in any way: if the practicability of the Covenant for the purpose of the Committee's jurisdiction were left to the discretion of States parties, by way of reservations, rules of public international law and the Convention on Genocide<sup>9</sup> would no longer be of *cogen* character. Consequently, the reservation is without legal effect.

5.3 The author alleges that the State party has also violated article 2 of the Covenant by refusing him protection and discriminating against him in relation to his property. He refers to a press release dated 15 March 2002, according to which the State party's Federal Minister of the Interior intervened successfully to obtain restitution for German nationals who remained in

Romania. Further, he claims that the communication refers to the inherent dignity and equality of all members of the human family mentioned in the preamble to the Covenant. Finally, he claims that articles 6, 7, 8, 9, 10, 12, 13, 14 and 17 of the Covenant were violated as the State party's rejection of protection means the crimes of expulsion are "irreversible", which amounts to another act of discrimination and aiding and abetting genocide.

### **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 notes that the State party has invoked its reservation to article 5, paragraph 2 (a), of the Optional Protocol, which precludes the Committee from considering claims that: (a) have previously been "examined" under another procedure of international investigation or settlement; (b) are precluded *ratione temporis*; or (c) relate to a violation of article 26 insofar as the alleged violation refers to rights other than those guaranteed under the aforementioned Covenant. The Committee notes that the author claims a violation of article 26 of the Covenant, based on a free-standing claim of discrimination, as the State party failed to grant him what he refers to as "equal and effective diplomatic protection against discrimination", based on his Sudeten German descent. The Committee recalls that the right of diplomatic protection under international law is a right of States, not of individuals. States retain the discretion as to whether or not and in which circumstances to grant and exercise this right. Whilst the Committee does not preclude that a denial by a State party of the right of diplomatic protection could amount, in very exceptional cases, to discrimination, it recalls that not every differentiation of treatment can be considered discrimination within the meaning of article 26, and that this provision does not prohibit differences of treatment which are based on objective and justifiable criteria. In this instance, the author has not shown that persons of Sudeten German descent have been treated in a discriminatory or arbitrary manner incompatible with the legitimate exercise of State discretion in espousing claims under the State party's right of diplomatic protection. In particular, he has failed to show that the decision of the State party not to exercise its right to diplomatic protection in his case was based not on legitimate considerations of foreign policy but exclusively on his Sudeten German descent. The Committee concludes that the author has not sufficiently substantiated, for purposes of admissibility, his claim that he was a victim of prohibited discrimination based on his Sudeten German descent. It follows that this part of the communication is inadmissible under article 2 of the Optional Protocol. In these circumstances, the Committee need not address the issue of applicability of part (c) of the State party's reservation related to article 26.

6.3 The Committee has noted the author's reference to articles 2, 6, 7, 8, 9, 10, 13, 13, 14 and 17 of the Covenant. He refers to alleged violations of these provisions in relation to his family, although he does not advance claims on behalf of members of his family. The Committee considers that the author has not invoked these provisions as free-standing violations of the Covenant, but merely by way of background to his claim of his claim under article 26. Even if they were to be considered as free-standing claims, they have not been substantiated, for purposes of admissibility, and would be 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 English text being the original version.  
Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

### Notes

<sup>1</sup> The Optional Protocol entered into force for Germany on 25 November 1993. Germany entered a reservation to article 5, paragraph 2 (a), of the Optional Protocol “to the effect that the competence of the Committee shall not apply to communications:

(a) which have already been considered under another procedure of international investigation or settlement,

(b) by means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany;

(c) by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant.”[The Committee members should note that the author has also submitted a case against the Czech Republic which has been registered as communication No. 1515/2006.]

<sup>2</sup> He also states that “a review by the Constitutional Court was left undone because the request for the exercise of diplomatic protection was left by that instance at the discretion of the defendant FRG”.

<sup>3</sup> The author submits that the German-Czech Declaration of 21 January 1997 left the matter open.

<sup>4</sup> Statement made by Chancellor Schröder on the occasion of a visit by the Czech Prime Minister on 8 March 1999. The author argues that Chancellor Schröder was duly authorized to make such statements pursuant to article 7 of the Vienna Convention on the Law of Treaties, 23 May 1969.

<sup>5</sup> Author’s translation of press clippings of 2004.

<sup>6</sup> Press clipping dated 15 March 2002.

<sup>7</sup> In this regard, the State party refers to the decision of the International Court of Justice in a case concerning property: *Liechtenstein v. Germany*, decision of 10 February 2005. Liechtenstein claimed that Germany had in 1998 changed its position with regard to certain

property which had been confiscated in the aftermath of the Second World War. The International Court of Justice held that it could only have jurisdiction in this case if Germany had departed from its previous legal position after the State party had accepted the International Court of Justice's jurisdiction. As Germany had only confirmed its former position, there was no "new situation" and therefore no jurisdiction of the ICJ.

<sup>8</sup> The State party refers to communication No. 808/1998, *Rogl v. Germany*, inadmissibility decision of 25 October 2000.

<sup>9</sup> Convention on the Prevention and Punishment of the Crime of Genocide, adopted in resolution 260 (III) A by the United Nations General Assembly.

**P. Communication No. 1524/2006, *Yemelianov et al. v. Russian Federation*  
(Decision adopted on 22 July 2008, ninety-third session)\***

<i>Submitted by:</i>	Mr. Albert Yemelianov et al. (not represented by counsel)
<i>Alleged victims:</i>	Mr. Albert Yemelianov and 33 other individuals
<i>State party:</i>	The Russian Federation
<i>Date of communication:</i>	29 August 2006 (initial submission)
<i>Subject matter:</i>	Right to receive retirement benefits at particular rate, guaranteed by the State
<i>Procedural issue:</i>	Substantiation of claims
<i>Substantive issues:</i>	Fair trial; evaluation of facts and evidence; interpretation of national law
<i>Articles of the Covenant:</i>	2; and 14, paragraph 1
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 22 July 2008,*

*Adopts the following:*

**Decision on admissibility**

1.1 The communication is submitted by Mr. Albert Yemelianov, a Russian national, born in 1936, on his behalf and on behalf of 33 other Russian citizens.<sup>1</sup> The authors claim that they are all victims of violations, by the Russian Federation, of their rights under articles 2, paragraphs 1 and 3; and article 14, paragraph 1, of the Covenant. The authors are unrepresented by counsel.

1.2 The Optional Protocol entered into force for the State party on 1 January 1992.

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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, 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.



## **The facts as submitted by the authors**

2.1 The authors are retired pilots from the Russian civil aviation, currently residing in the Republic of Tatarstan in the Russian Federation. Upon retirement, they became entitled to a pension paid by the State. The quantum of their retirement benefit under the pension was calculated under Law No. 340-1 of 20 November 1990, “*On State Pensions in the Russian Federation*” (“the Pension law”). The pension benefit included an additional bonus related to the specificity of the author’s work (*пенсия за выслугу лет*).

2.2 On 25 February 1999, a new law was passed<sup>2</sup> which amended the 1990 Pension law (“the Amending law”). The Amending law set a new maximum pension to which a retired civil aviation pilot in the alleged victims’ situation could receive, namely a pension equal to 2.2 times the “average monthly salary” in the Russian Federation, and was thus more favourable to the authors. The Amending law also provided, however, that henceforth, only part of the retirement pensions would be covered by the State budget (equal to three and a half times the minimum pension provided to those who have attained pension age). The rest would be covered by the contributions received from relevant airline companies - the exact amount per month dependant upon the amount of contributions made per quarter.

2.3 The authors state that they have not received the full benefit to which they are entitled under the Amending law, as the Tatarstan’s Department of the Pension Fund of the Russian Federation did not interpret correctly the provisions of the Amending law when applying it to their cases in recalculating their pensions.

2.4 On an unspecified date, Mr. Yemelianov brought two identical proceedings (one on his behalf, and the other as a collective complaint on behalf of the 33 other authors) in the State party’s domestic courts against the Pension Fund of the Russian Federation, seeking to recover what they consider their full pension entitlement. On 6 April 2000, the Soviet District Court of Kazan rejected his application.<sup>3</sup> On 27 April 2000, the Moscow District Court of Kazan rejected the collective application. In each case, the courts found that the Pension Fund had correctly calculated and paid the alleged victims’ pensions under the new law. No violations of the State party’s laws were found to have occurred.

2.5 The authors filed appeals against these decisions in the Supreme Court of the Republic of Tatarstan. On 16 May 2000 and 4 July 2000 respectively, the Supreme Court of Tatarstan rejected the appeals.<sup>4</sup> The authors submit that the Supreme Court of Tatarstan did not conduct a legal evaluation of the relevant laws nor did it determine whether the conclusions of the courts of first instance were correct. Subsequent petitions to the Supreme Court of Tatarstan for supervisory review of the first instance courts’ decisions were dismissed in 5 July 2000 and 18 August 2000.

2.6 The authors also made applications in the Supreme Court of the Russian Federation for a supervisory review of the first instance decisions. On 3 July 2001 and 15 April 2002, respectively, their requests were rejected by the Supreme Court.<sup>5</sup>

2.7 A new law on the State pensions of the Russian Federation was adopted in 2001 and entered into force on 1 January 2002. According to its provisions, the authors’ maximum pension entitlement remained unchanged and could not exceed 2.2 times the average salary in the Russian Federation.

2.8 According to the authors, at this point in 2002, they realised that their previous right to have an additional pension benefit related to the specific nature of their profession (see paragraph 2.1 above) was not abolished by the Amending law (1999), and they were of the view that, since 1999, they have been arbitrarily deprived of this benefit by the Pension Fund. On an unspecified date, they wrote to the Pension Fund in Tatarstan in this regard. On 4 December 2002, the Deputy Chairman of the Fund informed them that their pensions had been calculated correctly.

2.9 The authors then requested to have their cases re-examined on the basis of new circumstances<sup>6</sup> and filed (exact dates not specified) applications in the Moscow and Soviet District Courts of Kazan. On 28 February 2003 and 27 March 2003, respectively, their appeals were rejected. The authors appealed these decisions with the Supreme Court of Tatarstan, which were dismissed on 24 March and 28 April 2003.<sup>7</sup>

2.10 On an unspecified date, the authors submitted new applications to the Moscow District Court of Kazan, claiming that the Pension Fund Department of Tatarstan incorrectly applied both the provisions of the 1999 and 2001 pension laws to their cases. On 26 June 2003, the Court refused to act on their complaints and gave the authors up to 10 July 2007, to clarify and substantiate their claims. Given that this was not done, the Court returned the authors' claims on 14 July 2007. The authors have sent numerous subsequent appeals to the Supreme Court of Tatarstan and the Supreme Court of the Russian Federation, for supervisory review, which were dismissed. They have also sent unsuccessful complaints to the Ombudsman, and to other institutions, including to the Constitutional Court of the Russian Federation.

2.11 The authors add that many of them are elderly and in poor health and they cannot afford their medical needs.

2.12 On 10 December 2001, they applied to the European Court of Human Rights invoking a violation of their rights under Russian pension laws as well as their rights to a fair trial. On 11 March 2004, the Court declared the application inadmissible, on the basis that it did not disclose any violation of the rights as protected by the European Convention on Human Rights.

### **The complaint**

3. The alleged victims claim a violation of their rights under article 2, paragraphs 1 and 3, and article 14, paragraph 1, as they have been denied justice because the courts, when assessing their claims on the alleged incorrect interpretation of the law by the Pension Fund of Tatarstan in recalculating their pensions, failed to reply to their numerous questions, and as they had no recourse to an effective remedy in respect to the breach of their pension rights. They claim that the State party has failed to provide them with the full amount of the pension benefits they consider they are entitled to under law as they did not receive the maximum pension. In addition, they claim that they have been deprived, without legal grounds, of the additional payment in relation to the specific nature of their profession. They also affirm, without providing clarification, that the courts which examined their cases were not established by law.

### **The State party's observations on admissibility and merits**

4.1 In its submissions dated 15 February 2007 and 30 July 2007, the State party recalls the facts of the case. Mr. Yemelianov's claim against the Russian Federation's Pension Fund Department in Tatarstan to receive an additional pension amount and compensation, was rejected by the Soviet District Court of Kazan. This decision was confirmed by the Supreme Court of Tatarstan on 16 May 2000.

4.2 On 27 April 2000, the Moscow District Court of Kazan rejected an identical collective complaint made on behalf the 33 remaining alleged victims. This decision was confirmed by the Supreme Court of Tatarstan on 4 July 2000.

4.3 On 27 March 2003, the Soviet District Court of Kazan rejected Mr. Yemelianov's complaint to have the case re-opened on the basis of new evidence; this decision was confirmed by the Supreme Court of Tatarstan on 28 April 2003. On 25 September 2003, the Supreme Court of Tatarstan rejected Mr. Yemelianov's request for a supervisory review in this regard. An identical request was rejected by the Supreme Court of the Russian Federation on 8 August 2005.

4.4 On 28 February 2003, the Moscow District Court of Kazan rejected the remaining 33 authors' request to have the case re-examined on the basis of new evidence; this decision was upheld by the Supreme Court of Tatarstan on 24 March 2003. On 10 October 2003, the Supreme Court of Tatarstan rejected their request for a supervisory review in this respect. This decision was confirmed by the Supreme Court of the Russian Federation, on 26 October 2004.<sup>8</sup>

4.5 The State party submits that all of the authors' numerous complaints were properly examined by its authorities and domestic courts. The Pension legislation in force was applied lawfully to the cases of the alleged victims and the amount of their pension benefits was correctly calculated. The case was equally examined on several occasions by the Prosecutor's Office and the Ombudsman.

4.6 The State party adds that in relation to certain decisions of its domestic courts, the alleged victims could have, but did not, make applications for supervisory review.

### **The authors' comments on the State party's observations**

5. By letters of 10 April 2007 and 18 November 2007, the authors reiterated their previous allegations. They add, in particular, that the Office of the Ombudsman has in fact refused to examine their complaints by explaining that it was not competent to act.

### **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 although the authors previously submitted an application to the European Court of Human Rights, this application has been determined and is no longer before the Court. The State party has not entered any reservation concerning complaints, the subject matter of which has been submitted for examination under another procedure of international investigation or settlement. Accordingly, the requirements of article 5, paragraph 2 (a) of the Covenant are satisfied in this case. It also appears to the Committee that domestic remedies have been exhausted. Whilst the State party contended that the alleged victims failed to apply for supervisory review in respect of certain decisions, the Committee recalls its jurisprudence and its general comment No. 32, according to which supervisory review does not constitute an effective remedy, for purposes of article 5, paragraph 2 (b).<sup>9</sup>

6.3 The Committee notes the authors' mere allegation that their complaints were examined by tribunals that were not established by law. In the absence of any other pertinent information in this respect, the Committee considers that this part of the communication is inadmissible under article 2, of the Optional Protocol, as insufficiently substantiated.

6.4 The Committee takes note of the authors' claim that they have been denied justice because the courts, when assessing their claims, did not correctly apply the relevant laws, and failed to reply to their numerous questions. As a consequence, they have had no recourse to an effective remedy in respect of the breach of their pension rights. The Committee observes that in the present case, the substance of the authors' communication seeks to challenge the evaluation of facts and evidence, and the interpretation of domestic law, as made by the State party's courts. It recalls its jurisprudence and notes 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 relevant proceedings or the evaluation of facts and evidence or interpretation of legislation was manifestly arbitrary or amounted to a denial of justice.<sup>10</sup> The material before the Committee does not permit it to conclude that the conduct of the judicial proceedings in the alleged victims' case suffered from such deficiencies. Accordingly, and in the absence of any other pertinent information, the Committee considers the authors' claims are insufficiently substantiated and thus inadmissible under article 2 of the Optional Protocol.

7. Therefore, the Human Rights Committee decides:

- (a) That the communication is inadmissible pursuant to article 2 of the Optional Protocol; and
- (b) That this decision shall be communicated to the authors 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 present report.]

## Notes

<sup>1</sup> Mr. Yemelianov provides signed authorizations from the other 33 alleged victims, namely: 1. Mr. Mikhail Borisov; 2. Mr. Genady Volkov; 3. Mr. Gumer Gibadullin; 4. Mr. Anatoly Golyudov; 5. Mr. Vyacheslav Zaikov; 6. Mr. Shaukat Zakirov; 7. Mrs. Zaytuna Ziyatdnova (on behalf of Mr. Baki Ziyautdinov); 8. Mr. Ivan Illarionov; 9. Mr. Alexandre Isaev; 10. Mrs. Asiya Ismagilova (on behalf of Mr. Talgat Ismagilov); 11. Mr. Oleg Kovalenko; 12. Mr. Evgeny Kozlov; 13. Mr. Alexei Konyaev; 14. Mr. Vassily Lemenkov; 15. Mrs. Zoya Listkova (on behalf of Mr. Mikhail Listkov); 16. Mr. Alexandre Maslenkov; 17. Mr. Gabdulgilem Nabiullin; 18. Mr. Evgeny Nikiforov; 19. Mr. Yuri Nikonov; 20. Mr. Sergei Ogarkov; 21. Mr. Valery Ogurtsov; 22. Mr. Anatoly Ozerkin; 23. Mrs. Nina Parfenova (on behalf of Mr. Genady Parfenov); 24. Mr. Vladimir Podkatilov; 25. Mrs. Natalya Radosteva (on behalf of Mr. Anatoly Radostev); 26. Mr. Vladimir Rachkov; 27. Mr. Talfat Safin; 28. Mr. Alexander Tanygin; 29. Mr. Damir Khabibullin; 30. Mrs. Lyudmila Khabibullina (on behalf of Mr. Rinat Khabibullin); 31. Mr. Vassily Kholod; 32. Mr. Leonid Shabolin; and 33. Mr. Eduard Shaykhutdinov.

<sup>2</sup> Federal law No. 37 amending the Law on State pensions.

<sup>3</sup> The Court noted that under the Amending Law “On State pensions” of 25 February 1999, the maximum pension benefit for retired civil aviation pilots cannot exceed 2.2 times the average monthly salary in the State. The pensions are financed as follows: the State Budget ensures the part of the benefit that does not exceed 3.5 times the minimum pension provided to those who have attained pension age, and the part that exceeds this amount is financed on a pro rata basis from the additional contributions received to the Pension Funds of the aviation companies; this second amount is adjusted every quarter. The Court maintained that the authors have received all their entitlements from the State budget and have received additional amounts as per the complementary contributions effectively made to the Pension Fund of the aviation companies.

<sup>4</sup> The Supreme Court of Tatarstan noted the authors’ claims that the first instance courts’ decisions were groundless, but rejected them, confirmed the legality of previous decisions and affirmed that the recalculation of the pensions was made in accordance with the provisions of the Amending law.

<sup>5</sup> The authors also requested to have their cases examined under the supervisory proceedings to the Office of the Prosecutor General (exact dates not specified). Their requests were rejected on 14 April 2002.

<sup>6</sup> The authors’ requests were dismissed as the courts decided that their applications did not conform with the regulations for re-opening cases on the basis of new elements.

<sup>7</sup> The courts concluded that the authors’ claims were identical to those examined in April 2000.

<sup>8</sup> The State party points out, in respect to the requests of the authors that the courts rejected their claims as none of the grounds listed in article 392 of the Civil Procedure Code of the Russian Federation, which could have permitted the reopening of their case on the basis of new evidence, was ever invoked in their claims.

<sup>9</sup> See the committee's general comment No. 32 (2007), on the right to equality before courts and tribunals and to a fair trial, para. 50: "A system of supervisory review that only applies to sentences whose execution has commenced does not meet the requirements of article 14, para. 5, regardless of whether such review can be requested by the convicted person or is dependent on the discretionary power of a judge or prosecutor"; and, for example, communication No. 836 of 1998, *Gelazauskas v. Lithuania*, Views adopted 17 March 2003.

<sup>10</sup> See, inter alia, communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision of 3 April 1995.

**Q. Communication No. 1527/2006, *Conde Conde v. Spain*  
(Decision adopted on 1 April 2008, ninety-second session)\***

<i>Submitted by:</i>	Mario Conde Conde (represented by counsel, José Luis Mazón Costa)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	1 September 2006 (initial communication)
<i>Subject matter:</i>	Submission of the same case already examined by the Committee but under a different claim
<i>Procedural issue:</i>	Abuse of the right to submit a complaint
<i>Substantive issue:</i>	None
<i>Article of the Covenant:</i>	14, paragraph 1
<i>Article of the Optional Protocol:</i>	3

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

*Meeting on 1 April 2008,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication, dated 1 September 2006, is Mario Conde Conde, a Spanish citizen born in 1948. He claims to be a victim of a violation by Spain of article 14, paragraph 1, of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. He is represented by counsel, José Luis Mazón Costa.<sup>1</sup>

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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 Chanut, 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.

## **Factual background**

2.1 The author, former chairman of the *Banco Español de Crédito* (Banesto), was convicted on 31 March 2000 by the Spanish National High Court (*Audiencia Nacional*) on two counts of misappropriation and fraud. On appeal, the Supreme Court partly reversed this decision convicting him on an additional counts of misappropriation and forgery and increasing the sentence accordingly.

2.2 The author submitted a communication under the Optional Protocol on 7 January 2003, alleging a violation of article 14, paragraph 5, because (a) the Supreme Court did not secure a full review of the decision handed down by the National High Court and dealt only with procedural issues, and (b) he was denied any kind of review in relation to his conviction and increased sentence imposed by the Supreme Court. On 31 October 2006, the Committee found the first claim inadmissible in light of the judgement of the Supreme Court, which carefully examined in detail the trial court's evaluation of the evidence and diverged to some extent from the High Court's assessment in respect of two of the charges. With regard to the second claim, the Committee found that the author's conviction on two counts for which he had been acquitted in first instance and the consequent aggravation of his sentence without any possibility of further review constituted a violation of article 14, paragraph 5, of the Covenant.

## **The complaint**

3. Referring to the same case, the author now claims to be a victim of a violation of article 14, paragraph 1, of the Covenant, because the witnesses who testified during his trial were allegedly partial as they had already testified before the prosecutor.

## **Issues and proceedings before the Committee**

4.1 Pursuant to rule 93 of its rules of procedure, before considering any claim contained in a complaint, the Human Rights Committee must determine whether it is admissible under the Optional Protocol to the Covenant on Civil and Political Rights.

4.2 The Committee notes that the author had already previously submitted a communication, based on exactly the same facts as set out above and that this communication was considered by the Committee on 31 October 2006. It further notes that the author has neither presented any new facts which occurred since that date nor provided any explanation as to why he was unable to raise the present claim at the time of submitting his initial communication. Under these circumstances, the Committee considers that the author's present claim constitutes an abuse of the right to submit a complaint and declares it inadmissible under article 3 of the Optional Protocol.



4.3 The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 3 of the Optional Protocol;
- (b) That the decision be transmitted to the State party, to the author and to his 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 present report.]

**Note**

<sup>1</sup> The author is currently serving his sentence in a *tercer grado* penitenciario (lowest category within the prison system, which allows for day release).

**R. Communication No. 1528/2006, *Fernández Murcia v. Spain*  
(Decision adopted on 1 April 2008, ninety-second session)\***

<i>Submitted by:</i>	Pedro José Fernández Murcia (represented by counsel, Mr. José Luis Mazón Costa)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of initial communication:</i>	26 July 2006 (initial submission)
<i>Subject matter:</i>	Decision of the Supreme Court to declare inadmissible an appeal in cassation
<i>Procedural issue:</i>	Re-evaluation of the application of domestic legislation
<i>Substantive issue:</i>	Equality before the courts
<i>Articles of the Covenant:</i>	14, paragraph 1; 26
<i>Article of the Optional Protocol:</i>	2

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

Meeting on 1 April 2008,

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication, dated 26 July 2006, is Mr. Pedro José Fernández Murcia, a Spanish citizen born in 1952. He claims to be a 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 counsel, Mr. José Luis 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, 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.

## **Factual background**

2.1 The author of the communication and his wife were the respondents in civil proceedings for the annulment of the registration of ownership of a plot of land acquired in 1987. The persons from whom they had acquired the property (M.R.M. and F.I.D.) were also respondents in the same proceedings. The suit had been brought by Mr. José Torrico, who claimed to have previously purchased the same property from a company by means of a private contract, without registering the purchase with the public registry.

2.2 The civil proceedings had originated in an earlier suit before the same judge in which Mr. Torrico had successfully demanded the recognition of the validity of a private contract regarding the purchase of several plots, some of which had been sold to the author.

2.3 On 8 February 2000, the Murcia court of first instance dismissed the case. Mr. Torrico appealed to the Murcia Provincial Court, which on 23 May 2000 annulled the decision of the court of first instance. According to the Provincial Court, the author had not purchased the plot in good faith, since there was ample evidence that he knew it belonged to Mr. Torrico. The Court therefore ordered that the registration of the property as belonging to the author and his wife be declared null and void. The decision of the Provincial Court specified that the judgement could be appealed in cassation.

2.4 The author lodged an appeal in cassation. However, on 10 June 2003, the Supreme Court declared that the judgement of the Provincial Court did not fall under any of the categories of judgement against which an appeal in cassation could be lodged under article 1687 of the Civil Procedure Act. The Court held that although the judgement, in an ancillary reference, characterized the case as one involving a minor offence - one of the categories included in article 1687 - the case had in fact been heard under article 198 of the Mortgage Regulations, which contains no provision for appeal in cassation.

2.5 The author did not institute *amparo* proceedings before the Constitutional Court. However, the co-respondents in the initial proceedings did so, claiming that the refusal of the Supreme Court to hear the appeal in cassation on the merits amounted to a breach of the constitutional right to due process. The Constitutional Court dismissed the application on 17 January 2005, as it did not find any arbitrary act or manifest error in the Supreme Court's decision. According to the author, this decision proves that the remedy of *amparo* is not an effective remedy and that, in accordance with the Committee's jurisprudence in the *Gómez Vázquez* and *Joseph Semey* cases against Spain, domestic remedies which are not effective do not need to be exhausted.

## **The complaint**

3.1 The author alleges that the Supreme Court's inadmissibility decision breaches his right to equality before the courts provided for in article 14, paragraph 1, and article 26 of the Covenant, because of its discriminatory and arbitrary nature.

3.2 Article 1687 of the Civil Procedure Act stipulates that appeals in cassation may be lodged against orders (*autos*) handed down at the appeal stage in proceedings for the enforcement of judgements against which an appeal in cassation is also possible, when such orders concern substantive issues which were not disputed in the main suit, or had not been resolved in the judgement, or contradict the enforceable judgement.

3.3 In the case under consideration, although the author lodged the appeal in cassation not against a decision (*auto*) but against a judgement, the judgement at issue had nevertheless been handed down in the context of the earlier suit, where Mr. Torrico had secured recognition of the validity of a private contract regarding the purchase of several properties. The judgement dealt with an issue which had not been decided in the main suit, and therefore the Supreme Court should have interpreted article 1687 in a way that would allow the appeal. This would have prevented the discrimination arising from the fact that appeals in cassation are allowed against decisions (*autos*) but not against judgements.

3.4 The author requests the Committee to declare that there was a violation of articles 14, paragraph 1, and 26. The State party should also be requested to respect the right to an effective remedy set forth in article 2, paragraph 3 (a), of the Covenant, by declaring that the author has the right to lodge an appeal in cassation and to receive compensation.

### **Issues and proceedings before the Committee**

4.1 Pursuant to rule 93 of its rules of procedure, before considering any claim contained in a complaint, the Human Rights Committee must determine whether it is admissible under the Optional Protocol to the Covenant on Civil and Political Rights.

4.2 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.

4.3 The issue before the Committee is whether the State party violated the author's rights under the Covenant by virtue of the fact that the Supreme Court declared his appeal in cassation inadmissible. The Committee recalls its constant jurisprudence that it is not a final instance competent to re-evaluate findings of fact or the application of domestic legislation, unless it can be ascertained that the proceedings before the domestic courts were arbitrary or amounted to a denial of justice.<sup>1</sup> The author has failed to substantiate, for purposes of admissibility, that the conduct of the Court was arbitrary or constituted a denial of justice. Accordingly, the communication is inadmissible under article 2 of the Optional Protocol.

4.4 The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That the decision should be transmitted to the State party, to the author and to 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 present report.]

### **Note**

<sup>1</sup> See communications Nos. 541/1993, *Errol Simms v. Jamaica*, decision of 3 April 1995, para. 6.2; 1138/2002, *Arenz et al. v. Germany*, decision of 24 March 2004, para. 8.6; 917/2000, *Arutyunyan v. Uzbekistan*, Views of 29 March 2004, para. 5.7.

**S. Communication No. 1534/2006, *Pham v. Canada*  
(Decision adopted on 22 July 2008, ninety-third session)\***

<i>Submitted by:</i>	The-Trinh Pham (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	18 July 2006 (initial submission)
<i>Subject matter:</i>	Dismissal of the author for discriminatory reasons
<i>Procedural issue:</i>	Re-evaluation of the facts and evidence
<i>Substantive issues:</i>	Right to a fair hearing, discrimination
<i>Articles of the Covenant:</i>	14 and 26
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 22 July 2008,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication received on 18 July 2006 is The-Trinh Pham, a Canadian national, born on 21 July 1951 in Viet Nam. He claims to be a victim of violations by Canada of articles 14 and 26 of the Covenant. The author is not represented by counsel. The Covenant and the Optional Protocol to the Covenant entered into force for Canada on 19 August 1976.

**The facts as presented by the author**

2.1 The author had worked as a computer analyst at Hydro-Québec since May 1981 and, until 1986, had received excellent evaluations from his superiors. After this date, he was accused of having difficulty communicating with his co-workers. In the course of a reorganization of the

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\* The following members of the Committee took part in the consideration of the communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanut, 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, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

enterprise in 1989, he was given leave of absence and invited to transfer to another post within 12 months. Over the course of seven years, he was assigned to a variety of jobs and training courses in the field of information technology. He applied for numerous vacancies, but without success. The reasons given by his superiors varied. Some considered the author's qualifications to be inadequate, others referred to his record of poor evaluations. In certain cases, his handicap was mentioned.<sup>1</sup> Eventually, on 9 February 1996, the author was dismissed. At that point, he decided to initiate three separate proceedings against Hydro-Québec: one before the Labour Standards Commission, one before the Commission on Human Rights and Children's Rights and one for damages in the Superior Court.

2.2 On 20 February 1996, the author lodged an appeal with the Labour Standards Commission under article 124 of Quebec's Act on labour standards. He complained that his dismissal was without just and sufficient cause and sought reinstatement. He said the Labour Commissioner had refused to exercise jurisdiction with regard to discrimination since that complaint had been made to another court (see paragraph 2.3 below), and the question of discrimination had therefore not been addressed. On 10 February 1998 the Labour Commissioner rejected the claim. On 16 June 1998 the Superior Court rejected the author's application for review. On 10 May 2001 the Court of Appeal of Quebec rejected his appeal. On 7 February 2002 the Supreme Court rejected the author's application for leave to appeal.

2.3 On 16 March 1996 the author filed a complaint with the Commission on Human Rights and Children's Rights (CDPDJ). He claims to have suffered discrimination on grounds of race, colour, ethnic or national origin and disability. On 17 February 2000 the CDPDJ decided to close the case on the ground that, on the basis of the same facts, the author had lodged another appeal with the Labour Standards Commission. On 20 March 2000 the author filed for review with the Superior Court, requesting that his case should be transferred to the Human Rights Tribunal.<sup>2</sup> On 31 August 2000 his request was denied. On 27 October 2000 the Court of Appeal of Quebec rejected the author's appeal.

2.4 On 21 January 1999 the author filed a parallel claim for damages against Hydro-Québec before the Superior Court. Following the Superior Court decision of 31 August 2000 in the second set of proceedings mentioned above (para. 2.2), the author amended his statement to the Superior Court to unite the causes of action; these now comprised the period of notice of dismissal, "moral" damages, discrimination and fraud. On 7 May 2003 the Superior Court declared the application inadmissible, finding that the claims regarding period of notice and discrimination were *res judicatae*.<sup>3</sup> The author appealed against this judgement to the Court of Appeal of Quebec. On 13 April 2004 the Court rejected the appeal. On 28 October 2004 the Supreme Court of Canada rejected the author's application for leave to appeal.

### **The complaint**

3. The author considers that he was a victim of discrimination and that the judges used various ruses to block his legitimate access to the courts. He asks the Committee to find that he is a victim of violations by the State party of articles 14 and 26 of the Covenant and that the State party should pay him compensation for all the damages he has incurred.

## **The State party's observations on the admissibility and merits of the communication**

4.1 On 31 July 2007 the State party argued that the communication was inadmissible for the following reasons. First of all, the author has not exhausted domestic remedies because he has not seized the national courts of the rights violations that he is alleging in his communication to the Committee. Regarding the alleged partiality of the Labour Commissioner, the State party considers that the author could have contested this partiality in a variety of ways. He could have applied to have the Commissioner recused; he could have applied to the Office of the General Labour Commissioner for review or revocation of the Commissioner's decision; or he could have applied for a judicial review of the Commissioner's decision. Even though the author had in fact filed for judicial review, his application did not raise the matter of the Commissioner's conduct with either the Superior Court or the Court of Appeal of Quebec. Lastly, he could have challenged the Labour Commissioner's institutional independence.

4.2 With regard to the Human Rights Commission, the State party notes that the Commission is an administrative body to which article 14 of the Covenant does not apply. This characterization of the legal status of the Commission was confirmed in the Superior Court decision of 31 August 2000 and the Court of Appeal ruling of 27 October 2000. The State party notes that the author did not challenge the Court of Appeal decision. It asks the Committee not to consider the author's allegations against the Commission on the grounds that the Commission is not a tribunal within the meaning of article 14 of the Covenant.

4.3 With regard to the judges in the higher courts, the State party asserts that at no time did the author avail himself of domestic remedies against judges of the higher courts in respect of rights under article 14 of the Covenant. He could have filed for recusal of a judge of the Superior Court of Canada or of a judge of the Court of Appeal of Quebec, or complained to the Canadian Judicial Council.

4.4 With regard to article 26, the State party considers that the author fails to adduce in his communication the necessary evidence relating to the rights protected under article 26<sup>4</sup> and that his allegations concern rather the rights protected under article 14. The author has therefore failed to substantiate his claim for the purposes of admissibility. Moreover, he has at no time invoked any remedy under domestic law to challenge a statutory provision that might violate the rights protected under article 26 of the Covenant.

4.5 Secondly, the State party maintains that the author's demands are incompatible with the provisions of the Covenant in that they consist primarily of a request to the Committee to review the national courts' judgements in his case. What the author challenges is basically the Labour Commissioner's assessment of the testimony and evidence in his decision of 10 February 1998. The State party recalls that the Committee is not itself an appellate court.<sup>5</sup> With regard to the author's action for damages in the Superior Court, it notes that the author asks the Committee to determine whether the rules of law have been properly interpreted and applied by the domestic courts, which is not the Committee's role. The author provides no evidence to show that the decisions referred to in his allegations were marred by any irregularity that would warrant the Committee's intervention. The State party considers that the mere fact that the law has not upheld the author's claims does not mean he was deprived of the right to a fair hearing or to equal protection under the law.<sup>6</sup> The communication is therefore inadmissible under article 3 of the Optional Protocol.

4.6 Lastly, the State party contends that the author has not sufficiently substantiated his allegations with regard to the judicial system. These allegations are general in nature, and the author provides no evidence to support them. The author's claims concerning the domestic courts' - and in particular, the Labour Commissioner's - impartiality and independence are general accusations of partiality.<sup>7</sup> As for his allegations regarding access to the courts, a simple perusal of the 11 decisions and judgements handed down in the actions filed by the author shows that he had access to the various domestic authorities and courts. Regarding his claims that the courts did not provide equal treatment under the law, the State party recalls that the communication contains no fact showing that the author has been treated any differently than other litigants in Quebec who are in a similar situation. The author also accuses the Court of Appeal of Quebec of violating his right to a fair hearing. However, the State party notes that the author had ample opportunity to be heard by the Court of Appeal of Quebec, given that the hearing lasted an entire morning instead of an hour. The communication is therefore inadmissible under article 2 of the Optional Protocol.

4.7 Alternatively, the State party contends that the communication is unfounded.

### **The author's comments on the State party's observations**

5.1 On 28 January 2008 the author recalled that his complaint to the Committee was based primarily on the following four claims: his complaint to the Commission on Human Rights and Children's Rights (CDPDJ) of discrimination on grounds of language and disability, and of harassment; his claim regarding discrimination; his claim regarding fraud; and his claim regarding notice of dismissal. He maintains that he has exhausted domestic remedies. He argues that he had no reason to file for recusal of the Labour Commissioner, since it was only after reading the decision that he realized that the Commissioner had not acted impartially. He contested the decision, but to no avail. With regard to domestic remedies against judges in the higher courts, he recalls that the conduct and attitude of the judges were respectful and that there was therefore no basis for filing for recusal. As to the State party's suggestion that he could have complained to the Canadian Judicial Council, the author notes that complaints against judges do not permit court decisions to be overturned. All the remedies proposed by the State party were futile proceedings that had no chance of success. With regard to article 26 of the Covenant, the author recalls that the CDPDJ refuses to exercise jurisdiction in respect of applications on grounds of discrimination. Although the State party argues that the author did not invoke domestic remedies to challenge a statutory provision that might violate the rights protected under article 26, the author recalls that this remedy is no longer available to him since the Court of Appeal and the Supreme Court have already closed the case.

5.2 As to his claim of discrimination in the CDPDJ, the author reiterates that the decision of the CDPDJ to close the case before completing its investigation was arbitrary. He recalls that the Committee has recommended that the State party should amend its legislation to ensure that all complainants in matters relating to discrimination have access to justice and to effective remedies.<sup>8</sup> In his view the CDPDJ has an unchallengeable right of triage and, in the case at hand, the State party has exercised arbitrary control over his access to the Human Rights Tribunal, with no right of appeal. In view of the fact that the assessment of the evidence and the application of domestic law by the courts and the CDPDJ were clearly arbitrary and represented a denial of justice, the Committee is competent to intervene.<sup>9</sup>



5.3 Regarding the claim of discrimination, the author notes that the State party has not commented on the merits of the issue. He recalls that the Superior Court judge made numerous errors in his decision of 7 May 2003. The judge did not review the evidence effectively presented to the Labour Commissioner. He assumed that the Commissioner had dealt with the issue of discrimination. He failed to take into account several pieces of evidence that went in the claimant's favour. Lastly, he alleged that the author claimed compensation for discrimination from the Commissioner, which is incorrect. The author therefore argues that the judge's decision is clearly arbitrary or represents a denial of justice. As to his application to the Court of Appeal, the author recalls that the Court gave no arguments for its rejection of the author's claims and that it was selective in examining the evidence. He considers the Superior Court judgement of 7 May 2003 and the Court of Appeal ruling of 23 April 2004 somewhat cursory and their lack of factual and legal substantiation tantamount to a violation of the rules of natural justice and of article 14 of the Covenant. He maintains that the national courts have arbitrarily denied him access to an effective remedy and a judgement on the merits of his claim of discrimination based on his disability, in violation of articles 2 and 26 of the Covenant.

5.4 Regarding his claim of fraud (concealment of evidence, forgery and obstruction of justice), the author notes that the State party has made no comment on this. He considers that the Court of Appeal decision is clearly arbitrary or represents a denial of justice. He submits that he was the victim of fraud and that he was prevented from gaining access to justice.

5.5 As to his claim regarding notice of dismissal, the author again notes that the State party has made no comment on the merits. He considers the Court of Appeal to have erred in fact and in law.

#### **Additional comments by the State party**

6.1 On 30 June 2008, the State party again argued that the communication was inadmissible. It provided further details about appeals against loss of employment and discrimination under article 124 of the Act on labour standards. This legislative provision allows employees who can show that they have three years of continuous service in the same enterprise and who believe that they have been dismissed without just and sufficient cause to submit a complaint, in writing, to the Labour Standards Commission. The Labour Commissioner must assess all the circumstances of each case in order to determine whether the measure taken by the employer was just and fair. After 11 days of hearings, the Labour Commissioner found that the weight of evidence supported the conclusion that the author had lost his job as a result of administrative dismissal and not discrimination. He concluded that the author was not the victim of a dismissal without just and sufficient cause.

6.2 The State party recalls that the Superior Court also rendered a decision on the question of consideration of the discrimination alleged by the author. It notes that the discrimination issue was frequently discussed at hearings before the Labour Commissioner. The author took the case to appeal several times. He also referred the same issues to other bodies. He therefore had access to effective remedies before domestic courts of law. The State party contends that the author is clearly dissatisfied with the results of the domestic remedies pursued. It nevertheless recalls that the Committee is not an appeal court.

6.3 The State party notes that, as with the allegations set out in the initial communication, the allegations made by the author in his comments are also based on an assessment of the facts and evidence placed before the domestic courts. The author is basically asking the Committee to review the judgements of the domestic courts.

6.4 The State party repeats that the author has not exhausted all the available domestic remedies. The author alleges that all the remedies not pursued were, in his view, ineffective and futile but has not shown in what way the proposed remedies were ineffective.

### **Issues and proceedings before the Committee**

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

7.2 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.

7.3 With regard to the complaint of discrimination, the Committee takes note of the State party's argument that the author fails to adduce in his communication the necessary evidence relating to the rights protected under article 26 and that his allegations concern rather the rights protected under article 14. The Committee notes that the author provides no evidence that he was a victim of discrimination and that he mainly confines himself to contesting the courts' assessment of the evidence and application of domestic law. Consequently, the Committee considers that the author has not sufficiently substantiated his allegations under article 26 for the purposes of admissibility and finds this part of the communication inadmissible under article 2 of the Optional Protocol.

7.4 With regard to the author's claims concerning the assessment of evidence by the domestic courts, the Committee notes that the author basically requests a review of the courts' judgements in his case. The Committee recalls its consistent case law according to which it is generally for the courts of the States parties to the Covenant to evaluate the facts and evidence or the application of domestic law in a particular case, unless it can be established that the evaluation is clearly arbitrary or represents a denial of justice.<sup>10</sup> The evidence submitted to the Committee does not show that the proceedings before the authorities of the State party were marred by such irregularities. Consequently, the Committee considers that the author has not sufficiently substantiated his allegations under article 14 for the purposes of admissibility and finds this part of the communication inadmissible under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That this decision shall be communicated to the State party and to the 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 present report.]

## Notes

<sup>1</sup> In his decision of 10 February 1998, the Labour Commissioner noted, with regard to the reasons for the rejections received by the author over the years, that certain people considered his qualifications to be insufficient; they said that he had an inadequate grasp of Hydro-Québec's information systems. Others pointed to his poor record; his previous evaluations were unfavourable. In some cases, his response was unsatisfactory; in others, it was his handicap. The fact is that Mr. Pham suffers from a severe stammer. Recruitment managers would therefore note some difficulty in communication (p. 6).

<sup>2</sup> As of 24 July 1997, private individuals no longer have direct access to the Human Rights Tribunal. Only the Commission on Human Rights and Children's Rights (CDPDJ) may bring legal action before the Tribunal, on behalf of a victim.

<sup>3</sup> The Superior Court decided that, at the risk of needlessly reopening an 11-day inquiry before the Labour Commissioner, it was clear that the claims in respect of period of notice and discrimination were *res judicatae* in that the parties were the same, there was identity of cause, namely dismissal, and identity of claim, namely reinstatement and compensation on those grounds (decision, para. 14).

<sup>4</sup> See communication No. 802/1998, *Rogerson v. Australia*, Views adopted on 15 April 2002, para. 7.8.

<sup>5</sup> See communication No. 1234/2003, *P.K. v. Canada*, inadmissibility decision of 3 April 2007, para. 7.3.

<sup>6</sup> See communication No. 761/1997, *Singh v. Canada*, inadmissibility decision of 14 August 1997, para. 4.2.

<sup>7</sup> See communication No. 378/1989, *E.E. and M.M. v. Italy*, inadmissibility decision of 28 March 1990, para. 3.2.

<sup>8</sup> See CCPR/C/79/Add.105, para. 9.

<sup>9</sup> See communication No. 1403/2005, *Gilberg v. Germany*, inadmissibility decision of 25 July 2006, para. 6.6.

<sup>10</sup> See, for example, communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision of 3 April 1995, para. 6.2.

**T. Communication No. 1543/2007, *Aduhene and Agyeman v. Germany*  
(Decision adopted on 22 July 2008, ninety-third session)\***

<i>Submitted by:</i>	Aduhene, Claudia and Agyeman, Daniel (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Germany
<i>Date of communication:</i>	14 December 2006 (initial submission)
<i>Subject matter:</i>	Deportation
<i>Procedural issue:</i>	Admissibility
<i>Substantive issues:</i>	Protection of the family, interference of the family
<i>Articles of the Covenant:</i>	6, paragraph 1; 17, paragraph 1; and 23, paragraphs 1 and 2
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b)

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

*Meeting on 22 July 2008,*

*Adopts the following:*

**Decision on admissibility**

1.1 The authors of the communication are Claudia Aduhene and her husband Daniel Agyeman, both citizens of Ghana. Ms. Aduhene is a permanent resident of Germany. Mr. Agyeman was deported back to Ghana on 6 June 2007. The authors claim to be victims of violations by Germany of articles 6, paragraph 1, 17, paragraph 1, and 23, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights. They are not represented.

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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, 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.

1.2 On 23 January 2007, the Human Rights Committee, through its Special Rapporteur on new communications denied a request for interim measures of protection under rule 92 of its rules of procedure. On 27 April 2007, the Special Rapporteur, decided to examine the question of admissibility of this communication separately from the merits.

### **The facts as submitted by the authors**

2.1 In or around 1987, Ms. Aduhene moved to Germany where she was granted a permanent resident permit. In 2002, she met Mr. Agyeman in Ghana and married him in Denmark on 3 November 2005. In 2004, she was diagnosed with a “chronic disease”, which has made her unfit to work. She needs a carer to assist her in her daily life and until his deportation Mr. Agyeman, who is unemployed, fulfilled this role. According to Ms. Aduhene, she cannot go back to Ghana to join her husband, as she cannot get the necessary medical treatment there.

2.2 On 5 December 2005, Mr. Agyeman submitted an application for a residence permit to the Immigration Office in Berlin, as the spouse of his legally resident wife. On 14 February 2006, the Immigration Office refused his application on the grounds that he did not have a secure livelihood, in accordance with S5 Abs. 1 Nr. 1 of the Residence Act - Aufenthaltsgesetz and informed him that he would be deported if he did not leave the State party voluntarily. On 14 March 2006, Mr. Agyeman filed an application against this decision with the Administrative Court of Berlin, and requested the suspension of his deportation. On 25 April 2006, the Administrative Court refused to suspend his deportation on the grounds that he had no legal right to a residence permit. On 26 June 2006, the Higher Administrative Court confirmed this decision. Several further requests to suspend the immediate effect of the Immigration Office’s decision were denied. On 30 August 2006, the Federal Constitutional Court rejected a constitutional complaint. On 17 October 2006, a constitutional complaint filed in the Constitutional Court of Berlin was rejected as inadmissible.

### **The complaint**

3. Ms. Aduhene invokes article 6, claiming a violation of her right to live a “normal life” since the deportation of her husband, who was her chief carer. Both authors claim that Mr. Agyeman’s deportation has interfered with their family life and deprived them of their right to marry and live together, in violation of articles 17, 23, paragraphs 1 and 2.

### **The State party’s submission on admissibility**

4.1 On 24 April 2007, the State party contested the admissibility of the communication on grounds of non-exhaustion of domestic remedies. On the facts, it confirms that Ms. Aduhene has a permanent residence permit to live in the State party, but that Mr. Agyeman has never had such a permit. It submits that it is unclear when and how he entered the State party.

4.2 On admissibility, the State party submits that Ms. Aduhene has not submitted any application or request through the courts on her own behalf and has thus failed to exhaust domestic remedies in this regard. As to the efforts made by Mr. Agyeman, it submits that although he filed a complaint against the decision of the Higher Administrative Court of Berlin of 26 June 2006, to the Constitutional Court, he did so outside the time limit of one month after service of the Administrative Court decision, in accordance with S93 of the Federal Constitutional Court Act (BVerfGG). The decision of the Higher Administrative Court was sent

to Mr. Agyeman's representative on 28 June 2006, but Mr. Agyeman only filed his complaint on 13 August 2006. The Federal Constitutional Court thus refused to accept his complaint. The State party refers to the Committee's jurisprudence,<sup>1</sup> that any failure of a complainant to avail himself in time of the remedies available to him under domestic law renders the communication inadmissible.

4.3 In addition, the State party submits that Mr. Agyeman failed to give even a rudimentary reasoning for his complaint to the Constitutional Court. He merely stated that he wished to pursue his action in the administrative courts but failed to refer to any specific fundamental right he believed to have been violated, nor the nature of the alleged violation. It explains that the Constitutional Court only deals with violations of the Constitution. As Mr. Agyeman did not comply with the procedural requirements of the domestic procedure he is himself responsible for the failure of his submission. The State party also submits that he failed to exhaust domestic remedies with respect to the further proceedings before the administrative courts. He did not file constitutional complaints with respect to the decisions of the Administrative Court of Berlin of 20 September 2006 and the Higher Administrative Court of Berlin of October 2006.

#### **Authors' comments on State party's submission**

5.1. On 25 May and 21 June 2007, the authors responded to the State party's comments. Ms. Aduhene submits that in her application to the Immigration Office requesting a visa for her husband, she mentioned that she was reliant on him to assist her in her daily activities due to her physical incapacity. The German authorities dismissed her request on the basis that although she was sick she was not considered disabled. She denies this assessment and provides a letter, dated 1 April 2007, from the Regional Office, Centre of Berlin, which she purports to demonstrate that she is disabled. She admits that she has been provided with a carer, who comes at specified times of the day, but claims that her husband would be preferable.

5.2 As to her husband, she submits that after spending five months in jail, he was deported on 6 June 2007. He wishes to maintain his complaint. The authors deny that they have not exhausted domestic remedies. They submit that Mr. Agyeman submitted his appeal immediately to the Federal Constitutional Court but that legal representation is compulsory for proceedings before this court and he had to seek legal aid for which he was subsequently denied. As neither he nor his wife is a lawyer, they were unable to represent themselves properly. Mr. Agyeman had requested legal assistance but this was rejected. As to the decisions of 20 September and October 2006, the authors state that it was not possible to appeal these decisions, as they were not subject to appeal.

#### **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 the State party's argument that the authors have not exhausted domestic remedies. It observes that the first-named author, Ms. Aduhene, does not contest that she failed to take any action through the courts on her own behalf. As to the case of the

second-named author, Mr. Agyeman, he appealed the decision of the Higher Administrative Court of Berlin, of 26 June 2006, to the Federal Constitutional Court. However, the Committee notes the State party's argument that the case was not accepted by that court, as Mr. Agyeman had not submitted his application within the requisite deadline and had not referred to the violation of any of his fundamental rights or explained how they had been violated in his application. It would appear from the decision that, although it is not clear in precise terms why the case was not accepted by the Constitutional Court, it is clear that it was dismissed for procedural failure/s. The Committee considers that the fulfilment of reasonable procedural rules is the responsibility of the applicant himself. It finds, therefore, that neither of the authors can be considered to have exhausted the remedies available to them under the law of the State party. For this reason, the Committee finds the communication inadmissible for failure to exhaust domestic remedies 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 present report.]

#### **Note**

<sup>1</sup> Communication No. 26/1978, *N.S. v. Canada*, decision of 28 July 1978.

**U. Communication No. 1562/2007, *Kibale v. Canada*  
(Decision adopted on 22 July 2008, ninety-third session)\***

<i>Submitted by:</i>	Guillaume Kibale (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	23 August 2005 (initial submission)
<i>Subject matter:</i>	Non-appointment of the author for discriminatory reasons
<i>Procedural issue:</i>	Reassessment of the facts and evidence
<i>Substantive issues:</i>	Discrimination; right of access, on general terms of equality, to public service in one's country; right to a fair trial; right to an effective remedy
<i>Articles of the Covenant:</i>	2, 14, 25 and 26
<i>Articles of the Optional Protocol:</i>	2 and 3

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

*Meeting on 22 July 2008,*

*Adopts the following:*

**Decision on admissibility**

1. The author of this communication, which was received on 23 August 2005, is Guillaume Kibale, Canadian by nationality and French-Zairian by origin, who was born in 1941 in Marseilles, France. He claims to be the victim of violations by Canada of articles 2, paragraph 1, 14, 25 (c) and 26 of the International Covenant on Civil and Political Rights. The author is not represented by counsel. The Covenant and its Optional Protocol entered into force for Canada on 19 August 1976.

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\* The following members of the Committee took part in the consideration of the 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, 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.



## **Factual background**

2.1 In 1981 and 1988, the author sat two competitions for recruitment into the public service, following which he did not receive an appointment.

### **Competition in 1981 for posts in the Canadian Department of Transport and related procedures**

2.2 In May 1981, the Public Service Commission of Canada announced a public competition to fill a vacancy for a strategic economist-analyst (“analyst position”) at the Department of Transport. Since there were two other vacancies to be filled in the Department, in the area of systems planning (“administrator positions”), it was decided to call on the same pool of candidates to fill all three. Ten candidates were invited for an interview with a selection panel. On 15 July 1981, the author attended the interview and learned that it would cover all three vacancies to be filled. At the end of the interviews with a two-person panel, the author obtained the highest score. The first member of the panel recommended to his supervisor that the author should be appointed to the analyst position. As the supervisor had not been present at the selection interviews, he called the author in for a meeting on 28 July 1981. The author was informed on 14 August 1981 that the supervisor had decided that neither of the two candidates selected by the first member of the panel was qualified for the analyst position.

2.3 The author lodged a complaint with the Department of Transport, requesting an inquiry on the grounds of racially based discrimination. This complaint was rejected on 25 September 1981. The author then instituted legal proceedings before the Trial Division of the Federal Court. He submitted a writ of *mandamus* requesting that the Department appoint him to the analyst position. On 3 November 1981, the Trial Division of the Federal Court rejected the writ of *mandamus* on the grounds that there was no legal obligation on the Department to fill the position by way of the competition. The author appealed against this decision to the Federal Court of Appeal, but withdrew his appeal on 20 March 1985.<sup>1</sup>

2.4 In February 1982, the author submitted a complaint of discrimination to the Discrimination Prevention Branch of the Canadian Public Service Commission. The deputy director of the branch undertook an investigation, pursuant to which he drew up a report which concluded that the complaint of discrimination was well-founded. By contrast, the deputy under-secretary at the Department of Transport, with administrative responsibility for the personnel unit within the Department, informed the deputy director of the branch that, even though the recruitment procedure adopted in connection with the competition in question had been “unique” and “the facts relating to this particular selection process have neither been documented nor well supervised”, he did not consider that the author had been a victim of discrimination. In November 1983, the Public Service Commissioners decided that the complaint was unfounded.

2.5 The author then submitted a complaint to the Human Rights Commission, alleging that he was the victim of discrimination. The Commission decided to refer the matter to the Human Rights Tribunal, which dismissed the complaint on 5 September 1985 on the grounds that the plaintiff had not proved discrimination. However, the Tribunal noted that the author had identified a number of irregular practices in the recruitment process and described the competition as “irredeemably irregular”. The author lodged an appeal against the decision of the Human Rights Tribunal. The appeal court endorsed the Tribunal’s decision on 27 January 1987, concurring with regard to the selection process but concluding that “the power to monitor and

supervise the operation of the recruitment process does not lie with the Human Rights Tribunal". On 25 March 1988, the Federal Court of Appeal dismissed the author's application to appeal. He then applied for leave to appeal to the Supreme Court, which dismissed the application on 30 June 1988.

2.6 On 6 October 1988, the author brought an action for damages before the Trial Division of the Federal Court. This action was based on the 1970 Crown Liability Act, which provides that the Crown is answerable for a civil wrong committed by a Crown servant during the performance of his or her duties. On 9 December 1988, the Court was petitioned for dismissal on the grounds that the action had been brought more than six years after the origin of the cause of action. On 28 November 1990, the Federal Court of Appeal decided that the petition for dismissal was premature in that prescription does not eliminate the right of action; it merely gives the defendant a defence of a procedural nature. The matter was therefore returned to the Trial Division of the Federal Court for examination proceedings.<sup>2</sup>

2.7 On 2 November 1992, the Trial Division of the Federal Court noted that with regard to the analyst position, the origin of the cause of action occurred at the moment when the author was informed in August 1981 that he was not considered qualified by the supervisor whereas he knew that he had come first in the competition. The Court remarked that the action had become time-barred six years later, i.e. in August 1987, whereas the action before the Federal Court had not been brought until 6 October 1988. The author's appeal concerning the analyst position was therefore rejected by the Federal Court as time-barred. Examining the time limit for the complaint concerning the two administrator positions, the Federal Court took the view that it was only during the hearings before the Human Rights Tribunal in 1985 that the author had learned that he had obtained the highest marks for those positions. The Federal Court therefore concluded that the cause of action concerning the two administrator positions was not time-barred. The Federal Court also expressed a view on observance of the merit principle in the Public Service. It concluded that in the matter of the analyst position, it would have considered that the merit principle had not been observed. In the matter of the administrator positions, the Court concluded that the merit principle had been observed. The Court stressed that it was only by coincidence that the author had had the opportunity to apply for the administrator positions. The Court noted that one of the members of the panel had explained in a letter to his supervisor that although he had assigned the highest mark to the author, he had done so on the basis of his academic standing, whereas the two other candidates had experience that was more in line with the needs of the administrator positions, which was why he had recommended them for those positions.

2.8 The author appealed to the Federal Court of Appeal, which confirmed the decision of the Trial Division of the Federal Court on 8 February 1994. He applied for leave to appeal to the Supreme Court, which dismissed the application on 23 June 1994. Between 1996 and 1997, the author presented four motions for revocation of the judgement of the Trial Division of the Federal Court dismissing his action for damages. All of his motions were dismissed. On 10 March 1998, the Federal Court of Appeal dismissed an appeal against the fourth of these dismissals. The author submitted an application for leave to appeal to the Supreme Court, which dismissed it on 19 November 1998.

2.9 In 1999, the author lodged a complaint with the Inter-American Commission on Human Rights. The Commission concluded its consideration of that complaint in 2000.

## **Competition in 1988 for posts in the Ministry of Supply and Services and related procedures**

2.10 In 1984, the author had himself placed in the Public Service Commission's applicant inventory and in October 1986, in the inventory of members of visible minorities, which had recently been created by the Commission. From 1984 onwards, the Public Service Commission assisted the author in looking for employment. Between 1984 and 1988, those in charge of the two inventories referred the author to 13 competitions for positions in the public service. Staff working with the inventory of visible minorities also had numerous meetings with him in order to help him promote himself on the labour market.

2.11 In 1988, the author sat a recruitment competition for some management consultant positions at the Ministry of Supply and Services. He was not preselected, being said not to have the requisite knowledge and experience in statistics. The author alleges that he did not obtain any of the positions in question because the attorney of the Department of Justice carried out an investigation into his professional and academic life in Canada and Europe in order to prove that he did not have the qualifications required. He lodged a complaint with the Public Service Commission on grounds of racial discrimination. The Commission deemed the complaint unfounded. On 20 November 1989, he brought a new action for damages before the Trial Division of the Federal Court. On 1 February 1990, he submitted a motion for several paragraphs of his statement of claim to be struck out. On 6 March 1990, the motion was dismissed by the Trial Division of the Federal Court, which ordered the statement of claim to be struck out in its entirety. On 12 March 1990, the author submitted a new statement of claim.<sup>3</sup> On 17 August 2000, a prothonotary dismissed the action brought by the author on the grounds of an absence of a valid cause of action.<sup>4</sup> On 12 February 2001, the Trial Division of the Federal Court dismissed the author's motion to appeal. On 4 October 2002, the Federal Court of Appeal dismissed the author's application for leave to appeal. The author petitioned for reconsideration of the judgement of the Federal Court of Appeal, which was rejected on 8 November 2002. He then made an application for leave to appeal to the Supreme Court, which rejected it on 15 May 2003.

### **The complaint**

3.1 The author invokes article 26 because he did not obtain any post in the public service following the competitions in 1981 and 1988. He asserts that he suffered racial discrimination in those two competitions. He also asserts that he has suffered discrimination of a general nature with regard to access to the public service. Additionally, he alleges that he has been the victim of discrimination by the judicial system. He considers that the State party has failed in its obligation to guarantee all persons equal and effective protection from all forms of discrimination, notably racial discrimination.

3.2 The author invokes article 25 (c) because he considers that, despite obtaining first place in the 1981 competition and despite his excellent results in other competitions, for 20 years he has been unable to exercise his right to have access, on general terms of equality and without discrimination, to the public service of his country.

3.3 The author alleges several violations of article 14. He contends that the Supreme Court on several occasions pronounced its judgement in his absence and refused to hear him. He considers that the courts have not been fair and impartial when examining his suits and motions. He contends that their judgements have violated his right to a fair and public hearing by a competent, independent and impartial tribunal. He alleges that, in November 1981, the Federal Court refused him the right to present evidence in support of his affirmations and that his witnesses were not heard.

3.4 The author also invokes article 2, paragraph 1, because the State party refused to appoint him to positions for which he had applied.

3.5 The author explains that he was unable to approach the Committee with the two issues until the Supreme Court had rendered its decision at the end of May 2003.

3.6 The author requests the State party to compensate him for all the harm he has suffered over a period of more than 20 years.

#### **State party's observations on the admissibility and the merits of the communication**

4.1 In its note verbale of 12 November 2007, the State party takes the view that the communication is inadmissible, for the following reasons. Firstly, the author has not exhausted all available domestic remedies, with regard to his allegations of violations of article 14 of the Covenant. He has not approached the Canadian courts of appeal regarding the bias of the judge at the Trial Division of the Federal Court or the judge at the Federal Court of Appeal, whom he now accuses of a lack of impartiality when they ruled on his motions in 1981 and 1990 respectively. Shortly after having lodged an appeal against the decision of 3 November 1981 adopted by the Trial Division of the Federal Court, the author himself withdrew his appeal. Thus no Canadian court has had an opportunity to examine this allegation of bias and discrimination. Nor has the author taken his allegation of discrimination on the part of the Federal Court of Appeal judge to the domestic courts.

4.2 The State party notes the allegations made by the author regarding discriminatory statements by an attorney of the Department of Justice, as well as the allegations that the same attorney, at the request of the Public Service Commission of Canada, carried out an investigation into the author. These allegations have never been submitted to any national body. The State party states that the attorney, who was handling two actions for damages brought by the author, decided on his own initiative to verify the information which the author gave on his various curricula vitae, having found out that some of these items of information were inaccurate. This verification demonstrated that several of the items of information contained in the author's various curricula vitae are false. The State party insists that the attorney from the Department of Justice did not make any discriminatory remarks against the author.

4.3 Secondly, the author is essentially petitioning the Committee to reassess facts already examined by national authorities. The State party recalls that it is not part of the Committee's mandate to substitute its opinion for the judgement of domestic courts.<sup>5</sup>

4.4 Thirdly, the State party asserts that what is involved here is an abuse of the right of submission of communications. It stresses that the author exhausted his domestic remedies relating to the 1981 competition in 1994 when the Supreme Court rejected his application for leave to appeal. It invokes the Committee's jurisprudence which states that, even if there is no time limit for submitting communications, the Committee expects a reasonable explanation in justification of the delay.<sup>6</sup> In the present case, the author exhausted his domestic remedies more than 10 years before submitting his communication to the Committee. The State party takes the view that the explanation given by the author (see paragraph 3.5 above) is not reasonable since the author could not have known in 1994, when he had exhausted his domestic remedies with reference to the 1981 competition, that he was not going to win his action for damages arising out of the second competition. It maintains that the submission of the part of the communication relating to the 1981 competition is an abuse of the right of submission of communications and is therefore inadmissible under article 3 of the Optional Protocol.

4.5 With regard to the allegations of systematic violations of articles 2, paragraph 1, 14, 25 (c) and 26 of the Covenant, the State party asserts that an allegation of systematic discrimination in employment in the public service that is based solely on two failed recruitment competitions constitutes an abuse of the author's right of complaint. The author has not complained about the 13 other competitions to which the Public Service Commission referred him between 1984 and 1988. The public service recruitment processes are very competitive, and it is not unusual for a candidate to be unsuccessful in obtaining a post until he or she has taken part in several competitions. In the view of the State party, the author has not established a single occurrence of discrimination. All of the domestic courts concluded that there had been no discrimination in the 1981 competition. They also rejected the author's suit following the 1988 competition on the grounds that the suit had no hope of success. Furthermore, the author's allegations concerning the justice system and the Supreme Court are purely gratuitous and unsupported. The allegations of a systematic violation of article 14 are vexatious and constitute an abuse of the right of complaint. They should therefore be declared inadmissible under article 3 of the Optional Protocol.

4.6 Fourthly, the State party asserts that the claims of the author are incompatible with the provisions of the Covenant in that the decisions not to grant certain posts to the author are not "determinations of his rights and obligations in a suit at law" and thus do not fall under article 14, paragraph 1. Neither a selection panel nor the Public Service Commission (which is responsible for pre-selection of candidates) is a court. Such bodies do not rule on rights; they assess a person's capacity for meeting the demands of a post. The Committee has already ruled that the recruitment processes in a country's public service are not "determinations of rights and obligations in a suit at law".<sup>7</sup> This part of the communication is thus incompatible with article 14, paragraph 1, and inadmissible under article 3 of the Optional Protocol.

4.7 Furthermore, the State party notes that the Covenant does not provide for a right of appeal to a country's court of last resort, and that therefore the author's allegations concerning the Supreme Court are incompatible with the Covenant. Although article 14, paragraph 5, protects the right of any person convicted of a crime to have his conviction reviewed by a higher tribunal, the Covenant does not guarantee any right of appeal against a decision of a court with regard to a civil dispute. This part of the communication is incompatible *ratione materiae* with article 14 of the Covenant and thus inadmissible under article 3 of the Optional Protocol.

4.8 Lastly, the State party maintains that the author's allegations are not sufficiently substantiated. With regard to the allegations of violations of article 2, paragraph 1, article 25 and article 26, the author has not established that he did not have access to the public service under general conditions of equality. The State party recalls that the right guaranteed by article 25 (c) is not the right to hold a position in the public service, but to be able to have access to the public service under the same conditions as those applying to the other citizens of the country. In its general comment No. 25 on article 25, the Committee stressed that States parties may impose certain restrictions on access to the public service, including the requirement of possessing the necessary skills and experience, provided that the selection criteria are objective and reasonable. The author has not established that the selection in the two competitions at issue was not in line with objective and reasonable criteria or that there was discrimination. He has appealed to several domestic tribunals and courts, all of which concluded that these allegations were unfounded. The State party recalls that, in the 1981 competition, the economist position was not offered to any candidate. As for the two administrator positions in the 1981 competition, the State party notes that the Trial Division of the Federal Court ruled on 2 November 1992 that even if the recruitment had followed the rules, the author would not have obtained either of those posts because he was less qualified for them than other candidates. With regard to the 1988 competition, the author does not present a single fact justifying the conclusion that irregularities were committed in this competition. Consequently, the State party maintains that the author has not established any prima facie violation of article 2, paragraph 1, article 25 (c) or article 26 in the matter of the 1981 and 1988 competitions. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

4.9 With regard to the allegations of violations of article 14, the State party points out that the author was able to appeal against the decisions of the Canadian judicial bodies. He did, in fact, appeal against the decisions of the Trial Division of the Federal Court. He was also able to petition the Supreme Court for leave to appeal against the decisions of the Court of Appeal. The decisions of the Supreme Court to dismiss the author's applications for leave to appeal on the basis of written representations do not contravene article 14 of the Covenant. In general, the Supreme Court does not give explanations for its decisions with regard to applications for leave to appeal and does not permit oral representations on such applications. Consequently, the State party maintains that the author has not established a prima facie violation of article 14. Furthermore, the State party asserts that the allegation of a violation of article 14 on the basis of the striking out of the author's statement of claim by the prothonotary in 2000 is totally devoid of merit. Moreover, the State party recalls that a judgement that is not favourable to the author is not in itself proof of discrimination or of a denial of justice. For these reasons, the communication is inadmissible under article 2 of the Optional Protocol.

4.10 In the alternative, the State party maintains that the communication is devoid of foundation.

### **The author's comments on the State party's observations**

5.1 In his comments of 28 January 2008, the author recalls that the requirements for the administrator positions were the same as for the economist position and that he has indeed studied economics up to doctorate level. He asserts that he has complained about several judges

to the Canadian Judicial Council. He repeats that he wished to present his two matters at the same time and that he therefore waited until he had received the Supreme Court decision on 15 May 2003. He also explains that he suffers from an illness that often keeps him in bed.

5.2 The author repeats that the Supreme Court never gives reasons for its decisions with regard to applications for leave to appeal, in violation of article 14 of the Covenant. He repeats his demand for compensation from the State party, in the amount of 4 million dollars.

### **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 As it is required to do 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 The Committee takes note of the State party's argument that the author has abused the right of submission of communications. With regard to the 1981 competition, the State party maintains that the author exhausted the domestic remedies in 1994 when the Supreme Court rejected his application for leave to appeal. The Committee notes, however, that the Supreme Court decision of 23 June 1994 did not put an end to the procedure, since the author continued to present motions for revocation of the judgement handed down by the Trial Division of the Federal Court on 2 November 1992. Those motions were dismissed. The author appealed to the Federal Appeal Court. He then submitted an application for leave to appeal to the Supreme Court, which dismissed it on 19 November 1998. Hence, in the case of the 1981 competition, the most recent domestic decision dates back to 1998. The Committee also notes that the author took his complaint to the Inter-American Commission on Human Rights, which concluded its consideration of the complaint in 2000. The author finally submitted his complaint to the Committee on 23 August 2005, i.e. five years later. Although it regrets the delay in the submission of the communication, the Committee considers that the author did not abuse the right of submission of communications.

6.4 With regard to the allegations of violations of article 25 (c) and article 26 of the Covenant, the Committee notes that these issues have been examined several times by domestic courts. In the case of the competition in 1981, the Human Rights Tribunal, in its decision of 5 September 1985, took the view that the author had not proved discrimination. That decision was confirmed, following an appeal, by the appeals mechanism of the Human Rights Tribunal on 27 January 1987 and by the Federal Court of Appeal on 25 March 1988 (see paragraph 2.5 above). As for the competition in 1988, the Public Service Commission considered the author's complaint of discrimination to be unfounded. The author's motions submitted to the Trial Division of the Federal Court in 1989 and 1990 were dismissed on the grounds of a lack of valid cause of action. That decision was confirmed on appeal by the Federal Court of Appeal on 4 October 2002 (see paragraph 2.11 above). The Committee notes that the author is

essentially requesting a revision of the judgements of the domestic courts concerning him. The Committee recalls its long-standing case law that it is generally for the courts of the States parties to the Covenant to assess facts and evidence or the application of domestic legislation, in any given case, unless it can be ascertained that the assessment was clearly arbitrary or amounted to a denial of justice.<sup>8</sup> The information supplied to the Committee does not indicate that the proceedings before the authorities of the State party suffered from such defects. Accordingly, the Committee considers that the author has not, for the purposes of the admissibility of his communication, sufficiently substantiated his allegations relating to article 25 (c) and article 26, and concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.<sup>9</sup>

6.5 With regard to the allegations of violations of article 14, the Committee notes that they have to do with the numerous efforts expended by the author to contest the decisions rejecting his applications for employment in the public service. Reiterating its view that the concept of “rights in a suit at law” referred to in article 14, paragraph 1, is based on the nature of the right in question and not on the status of one of the parties, the Committee recalls that this notion encompasses procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, as well as equivalent notions in the area of administrative law.<sup>10</sup> On the other hand, the Committee considers that article 14 does not apply where domestic law does not grant any entitlement to the person concerned.<sup>11</sup> In the present case, the applicable domestic law does not confer any right upon the person concerned to an appointment in the public service. The Committee is therefore of the view that the procedures undertaken by the author to contest the decisions refusing his applications for positions in the public service do not constitute determinations of his rights and obligations in a suit at law within the meaning of article 14, paragraph 1, of the Covenant. Accordingly, this part of the communication is incompatible *ratione materiae* with that provision and inadmissible under article 3 of the Optional Protocol.<sup>12</sup> The Committee therefore considers that it is not necessary to decide on the question of the exhaustion of domestic remedies with respect to his allegations of violations of article 14 of the Covenant.

6.6 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 as recognized [in the Covenant] 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.<sup>13</sup> Considering that the author of the present communication has not substantiated his complaint for the purposes of admissibility under articles 14, 25 and 26, his allegation of a violation of article 2 of the Covenant is also inadmissible, under article 2 of the Optional Protocol.



7. In consequence, the Committee 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 French text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

### Notes

<sup>1</sup> The author subsequently requested that his case be reopened because he had discovered certain documents that might influence the outcome of the appeal. The Federal Court of Appeal refused this request on 31 May 1988, on the grounds that the appellant's affidavit was too vague and imprecise for the Court to be able to say that the documents had been discovered under circumstances that would allow them to be submitted to the Court of Appeal.

<sup>2</sup> Following this decision, the author petitioned the Federal Court of Appeal to order the Department of Transport to pay him damages of 800,000 dollars, which the Court refused on the grounds that the matters at issue had still not been resolved by the Trial Division of the Federal Court.

<sup>3</sup> The State party recalls that, in 1990, the rules of the Federal Court provided that the plaintiff in a lawsuit was responsible for calling a pretrial conference of the parties to the suit within 360 days. The author failed to call such a conference, and took no steps to advance the matter. After several years of inaction, on 22 October 1998 the Trial Division of the Federal Court issued the parties with a notice of status review and ordered the author to supply any reasons why the proceedings should not be dismissed for delay. The author submitted his reasons why the proceedings should be maintained on 26 January 1999.

<sup>4</sup> A prothonotary is an official of the Federal Court who is empowered to hear any motion and make any orders other than certain motions and orders laid down by the rules of the Federal Court.

<sup>5</sup> See for example communication No. 541/1993, *Errol Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995, para. 6.2.

<sup>6</sup> See communication No. 787/1997, *Gobin v. Mauritius*, decision on inadmissibility adopted on 16 July 2001, para. 6.3.

<sup>7</sup> See communication No. 837/1998, *Kolanowski v. Poland*, decision on inadmissibility adopted on 6 August 2003, para. 6.4, and communication No. 972/2001, *Kazantzis v. Cyprus*, decision on inadmissibility adopted on 7 August 2003, para. 6.5.

<sup>8</sup> See for example communication No. 541/1993, *Errol Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995, para. 6.2, and communication No. 958/2000, *Jazairi v. Canada*, decision on inadmissibility adopted on 26 October 2004, para. 7.5.

<sup>9</sup> See communication No. 1210/2003, *Damianos v. Cyprus*, decision on inadmissibility adopted on 25 July 2005, para. 6.3.

<sup>10</sup> See general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 16.

<sup>11</sup> *Ibid.*, para. 17.

<sup>12</sup> See communication No. 837/1998, *Kolanowski v. Poland*, decision on inadmissibility adopted on 6 August 2003, para. 6.4; communication No. 943/2000, *Jacobs v. Belgium*, Views adopted on 7 July 2004, para. 8.7; communication No. 972/2001, *Kazantzis v. Cyprus*, decision on inadmissibility adopted on 7 August 2003, para. 6.5.

<sup>13</sup> See communication No. 972/2001, *Kazantzis v. Cyprus*, decision on inadmissibility adopted on 7 August 2003, para. 6.6, and communication No. 1036/2001, *Faure v. Australia*, Views adopted on 31 October 2005, para. 7.2.

**V. Communication No. 1569/2007, *Kool v. The Netherlands*  
(Decision adopted on 1 April 2008, ninety-second session)\***

<i>Submitted by:</i>	Marcel Schuckink Kool (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Netherlands
<i>Date of communication:</i>	23 January 2007 (initial submission)
<i>Subject matter:</i>	Absence of defendant during appeal hearing
<i>Procedural issue:</i>	Non-substantiation of claim
<i>Substantive issue:</i>	Unfair hearing
<i>Article of the Covenant:</i>	14 paragraphs 1, 3 (b) and (d)
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 1 April 2008,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication is Marcel Schuckink Kool, a Dutch citizen born on 9 February 1969, residing in the Netherlands. He claims to be a victim of violations by the State party of article 14, paragraph 3 (b) and (d), of the International Covenant on Civil and Political Rights. He is not represented by counsel but is himself a lawyer.

**Facts as presented by the author**

2.1 On 30 November 2001, the author was convicted along with others of having committed “public violence” by the Hague Law Court and ordered to pay a fine of 200 Euros.

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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.

2.2 On 30 July 2004, the Amsterdam Appeal Court considered the author's case in his absence and confirmed the judgement of the trial court. The author had requested the court to postpone his hearing, as he was on holiday. The court requested evidence of his holiday, but he was unable to provide it, as it had not been booked by a travel agent. He provided this explanation to the court by telephone. He also claims that the appeal court did not take into account the fact that he had contested a policeman's evidence given in relation to the case. On 4 October 2005, the Court of Cassation, the *Hoge Raad*, rejected his complaints of an unfair hearing.

2.3 On 12 September 2006, the European Court of Human Rights found his case inadmissible, as not disclosing any appearance of a violation of the Convention.<sup>1</sup>

### **The complaint**

3.1 The author claims that the refusal of the Amsterdam Appeal Court to postpone his case, despite his telephone call to the court that he was on holiday, violated his rights under article 14, to a fair trial, article 14, paragraph 3 (b), to have adequate time and facilities to prepare his defence and article 14, paragraph 3 (d), to be tried in his presence.<sup>2</sup>

3.2 The author claims that he exhausted domestic remedies by the decision of 4 October 2005 of the highest court of the State party, the *Hoge Raad*.

### **Issues and proceedings before the Committee**

4.1 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.

4.2 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 international procedure of investigation or settlement. It notes that this case was already considered by the European Court of Human Rights on 12 September 2006, but that in accordance with its jurisprudence,<sup>3</sup> the prior examination by another body does not preclude it from considering the claims raised herein.

4.3 The Committee notes the author's claims of violations under article 14, as the Amsterdam Appeal Court refused to adjourn the hearing of the appeal in his case because of his absence on holiday. As noted by the author himself, the Committee observes that the Court did not automatically refuse the adjournment request but merely asked for evidence of his holiday. The Committee considers the author's explanation, as to why he could not provide such evidence, to be unreasonable in the circumstances of the case. It notes that the author has not explained why he could not have returned from his holiday to attend the hearing or how his rights were violated if a request for postponement was rejected in the absence of serious circumstances. In addition, he does not further substantiate his claim that his absence in court for the appeal hearing, as opposed to the trial hearing, violates his rights under article 14. For these reasons, the Committee finds that his claims are insufficiently substantiated and thus inadmissible under article 2 of the Optional Protocol.

5. 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, 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 present report.]

#### **Notes**

<sup>1</sup> It is noted that the Netherlands has not made a reservation to the effect of excluding a case which has already been examined by the European Court of Human Rights.

<sup>2</sup> The author does not state whether he is claiming a violation with respect to the substance of the court's decision.

<sup>3</sup> *Aalbersberg and 2,084 other Dutch citizens v. the Netherlands*, communication No. 1440/2005, decision of 12 July 2006.

**W. Communication No. 1591/2007, *Brown v. Namibia*  
(Decision adopted on 23 July 2008, ninety-third session)\***

<i>Submitted by:</i>	Mr. Gordon Brown (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Namibia
<i>Date of communication:</i>	12 September 2007 (initial submission)
<i>Subject matter:</i>	Unfair trial relating to criminal charge and sentence of five years
<i>Procedural issues:</i>	Inadmissible - exhaustion of domestic remedies, <i>ratione temporis</i>
<i>Substantive issues:</i>	Unfair trial, arbitrary or unlawful interference with correspondence
<i>Articles of the Covenant:</i>	2, paragraphs 1 and 3; 14, paragraphs 1, 2, and 3 (a), (b), (d), and (e); and article 17, paragraph 1.
<i>Articles of the Optional Protocol:</i>	1; and 5, paragraph 2 (b)

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

Meeting on 23 July 2008,

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication is Mr. Gordon Brown, a British citizen. He claims to be a victim of violations by Namibia of his rights under article 2, paragraphs 1 and 3, article 14, paragraphs 1, 2, and 3 (a), (b), (d), and (e), and article 17, paragraph 1, of the Covenant.

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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, 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 co-signed by Committee members Mr. Michael O'Flaherty and Mr. Prafullachandra Natwarlal Bhagwati is appended to the present decision.

1.2 On 27 March 2008, the Special Rapporteur on new communications, acting on behalf of the Committee decided to examine first the admissibility of the communication.

### **The facts as presented by the author**

2.1 The author provides details of his work in the field of diamond mining from 1968; his experiences in Namibia, which included testimony he gave in 1982 before a Government judicial commission on corruption and malpractices, for which he claims to have lost his job with the diamond company Anglo-De Beers; his subsequent move to South Africa where he was charged with but acquitted of illicit diamond mining in 1991, and his return to Namibia in 1993. Throughout this period he claims to have been persecuted by both the Namibian and South African State authorities, in particular, due to his testimony before the judicial commission as well as his attempts to introduce more productive and fairer employment conditions in the diamond mining industry.

2.2 On 10 March 1994, the High Court of Namibia found the author and a co-accused guilty of illicit purchase of unpolished diamonds (IBD), and of unlawful possession of unpolished diamonds, and sentenced them to five years' imprisonment (two and a half of which were suspended). The author claims that his arrest and prosecution on wrongful and unlawful charges, including attempted extortion and attempting to defeat or obstruct the course of justice, were brought against him by the Namibian authorities with malicious intent. He alleges having been charged pursuant to an entrapment operation, and claims that the individuals who participated in the operation committed perjury. Although, the author alleges, it is standard practice to record/video tape arrests during entrapment operations, the police stated in court that it was unclear whether such recordings were made. The police informer, who owned the house where the author was arrested, initially testified that recordings had been made, but when he arrived in court to testify to this effect, he was "chased away" by a senior police official.

2.3 The author submits that he was unable to choose counsel, his initial (court-appointed) lawyer withdrew at the last moment without any plausible explanation, and a new lawyer was appointed at "the last minute", as a result of which the author was denied adequate time and facilities to brief him and to prepare his defence properly. In addition, he submits that he was denied access to basic information. Key witness statements were withheld from him and he was refused access to the contents of the police "docket file", which would have allowed him to understand the evidence upon which he was arrested.

2.4 During the trial, he claims that his lawyer was constantly challenged by the judge and was treated differently by him to the prosecution. The author claims that the failure, in his case, to respect the principle of equality of arms, fair representation, and access to evidence and witness statements is particularly serious, given that the Namibian judicial system does not provide for a jury trial. In this regard, the author claims that a witness for the defence was chased away by a police officer shortly before his scheduled appearance. According to the author, the prosecution had only one witness who provided an uncorroborated testimony but was believed by the judge. Since then the author claims that this key witness has withdrawn his testimony and confirmed under oath that he and other prosecution witnesses were under instructions to lie in court. The author claims that the trial judge applied the principle of "police docket privilege" or State privilege" and left it to the prosecution to decide what, if any, further particulars should be made available to the defence, thus shifting the burden of proof on the accused in violation of his

presumption of innocence. In addition, such privilege unfairly advantaged the State party by allowing it to monopolize all the important information, witness statements and identities contained in the police docket.

2.5 According to the author, the presiding trial judge was not impartial. He failed to consider a possible conflict of interest on the part of the prosecuting attorney, whose wife, during the author's trial, had been arrested and charged with illicit diamond buying. He failed to identify material inconsistencies or contradictions in the author's own evidence, and ignored the fact that the author's testimony was in fact corroborated and that State witnesses contradicted themselves.

2.6 The author was detained at Windhoek Central Prison for an unspecified period of time. According to him, the prison's capacity was for 25 prisoners, but in fact it housed 50. The prisoners slept on the floor with only a thin blanket for cover in winter. The prison had only one shower, the food was poor and consisted mainly of porridge. There was little exercise, education, or entertainment. On 26 April 1994, the author was released on bail, pending the examination of his appeal against sentence and decided to investigate "what was really going on" in the Diamond and Gold Police Department Branch. He claims to have discovered that certain officers, as well as the prosecutor's wife were involved inter alia in the illicit purchase of diamonds. He further suggests that he has information compromising the Namibian prosecutor-general and that the chief of the Diamond and Gold Branch of the Police was also a "problematic person". He claims to have reported his findings to the Namibian Prime Minister, to the chief of the police, Minister of Justice, and to the President, and received promises that his case would be investigated.

2.7 In September 1994, realising that he would find no justice in his appeal against his conviction, as he believes the Namibian judicial system to be lacking impartiality and "fearing for his life", he left for South Africa. In this regard, he alleges that he was advised by two well-informed sources to leave the country. Since his arrival in South Africa, he has been trying to clear his name. He requested the police to inquire into the involvement of the police and De Beers' company officials in perverting the course of justice in his case, but received no reply.

### **The complaint**

3.1 The author claims that he is a victim of violations by Namibia of his rights under article 2, paragraphs 1 and 3, article 14, paragraphs 1, 2, and 3 (a), (b), (d), and (e), and article 17, paragraph 1, of the Covenant.

3.2 On exhaustion of domestic remedies, the author submits that he had complained to the chief of the Namibian police, asking for a proper investigation, and to the prosecutor's office, for further particulars about the charges against him. At the beginning of his trial, he vainly notified the judge that he and his new lawyer had not had the necessary time to prepare their defence; he requested the Deputy Commissioner of the Namibian Police Criminal Investigation Department to investigate his claims; he had addressed written and oral requests to the Namibian President, Prime Minister, and Minister of Justice; he complained to several individuals, NGOs, lawyers, and other institutions, as well as to politicians and religious leaders in various countries, and to the South African Truth and Reconciliation Commission. According to the author, the very fact that the State party was preventing and, he claims, continues to prevent him from having access to vital evidence and other documents in his criminal case file, demonstrates that he could not obtain an effective remedy through the State party and thus there are no "effective" remedies



available. He also refers to the conduct of his trial itself, the failure of Government officials to investigate evidence of criminal behaviour and serious irregularities in the Namibian justice system and outcome of the inquest into the death of a lawyer and political activist with whom the author is alleged to have had some contact.

3.3 Regarding the question of delay, *ratione temporis*, the author acknowledges that both the Covenant and the Optional Protocol entered into force for Namibia on 28 February 1995, and that the events he is complaining about occurred prior to the entry into force of both of these treaties. He argues that an exception to the *ratione temporis* rule applies if the events complained of have continuing effects that violate the Covenant. In his case, the continuing effects arise from the fact that he was wrongly sentenced following an unfair trial, which amounted to a miscarriage of justice. His criminal record has affected his personal and business life, as his business ventures have ended, he has had many job applications rejected and has had and continues to suffer from financial difficulties. He also argues that new evidence on his innocence, namely a declaration under oath by the principal witness against him to the effect that his testimony was a perjury, was obtained after the entry into force of the Optional Protocol. He claims that he sent this affidavit to the executive, legislature and judiciary but never received a response.

#### **The State party's submission on admissibility and the authors comments thereon**

4.1 On 25 March 2008, the State party contested the admissibility of the communication. As to the facts, it submits that the author was arrested and prosecuted in full compliance with due process of law. He was granted bail pending his appeal. Following his release, he absconded from the jurisdiction of the State party and since then has failed to appear in court and failed to complete his sentence. Because he absconded, the author's bail was cancelled and his bail money was forfeited to the State. He has since become a fugitive in Namibia and an arrest warrant was issued against him.

4.2 The State party submits that the communication is inadmissible for failure to exhaust domestic remedies, as the author's appeal remains pending in the State party. In addition, the author could have instituted legal proceedings through the State party's courts to enforce any alleged violation of his rights, as provided for under articles 5, 7, 8, 12 and 18 of the Constitution. He could also have filed a complaint to the Ombudsman who is mandated to investigate complaints concerning, inter alia, alleged or apparent instances of violations of fundamental human rights and freedoms, as well as abuse of power or corruption by State officials. The State party also submits that the author presented voluminous documents, but that his claims are vague and there is no causal link between the documents and the claims made.

5. On 26 May 2008, the author responded to the State party's comments and reiterated his claims and arguments previously made. He complains generally about the lack of a separation of powers in the State party, the justice system, and the relationship between the Government and De Beers diamond mining company. He claims that the false conviction against him removed him as a threat to what he refers to the "monopolistic mismanagement" of the State party's diamond industry by De Beers. He argues that all of the documents provided by him have a direct bearing on his case and demonstrate evidence of "repeated human rights violations" against him. As to the State party's arguments on non-exhaustion, the author submits that without access to witness statements and other material evidence held by the State party these

remedies were not available to him. He also reiterates that they would not have been effective given the “dysfunctional” judicial system in the State party. In his view, the abuse of due process has been such that his case must be heard by an independent party.

## **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.

6.2 The Committee notes that the author left the State party in September 1994, and that he did not submit his communication to the Committee until 12 September 2007, that is 13 years later. While acknowledging that there are no fixed time limits for submission of communications under the Optional Protocol, the Committee recalls its jurisprudence<sup>1</sup> that it is entitled to expect a reasonable explanation justifying such a delay. In the present case, no convincing explanation has been provided. In the absence of an explanation, the Committee considers that submitting the communication after such a long delay amounts to an abuse of the right of submission, and finds the communication inadmissible under article 3 of the Optional Protocol.

7. The 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 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 present report.]

## APPENDIX

### **Individual opinion signed by Committee members Mr. Michael O’Flaherty and Mr. Prafullachandra Natwarlal Bhagwati (dissenting)**

1. We consider that this communication does not constitute an abuse of the right of petition, that the author has taken all reasonable steps to exhaust local remedies and that it should be declared admissible.

2. We observe that the author left the State party in September 1994, and that he did not submit his communication to the Committee until 12 September 2007, that is 13 years later. While acknowledging the lengthy delay prior to submission, we recall that there are no fixed time limits for submission of communications under the Optional Protocol and note that the State party has raised no arguments on abuse of the right of petition subsequent to which the author could have provided an explanation justifying the delay.

3. We note the author’s claim that the available domestic remedies in the State party were ineffective and the numerous ways by which he attempted to seek redress for the alleged violation of his rights, including making complaints to the police and the public prosecutor. We observe that the State party does not dispute the efforts made by the author but argues, inter alia, that he could have made a complaint to the Ombudsman. We recall the jurisprudence of the Committee that complaints to the Ombudsman, which have only recommendatory rather than binding effect and thus may be disregarded by the Executive, would not amount to an effective remedy within the meaning of the Optional Protocol.<sup>2</sup> We note that although the author absconded, thereby failing to pursue an appeal to the Supreme Court, he had been advised by two well-informed sources that his life was in danger and was of the belief that the State party’s authorities would not ensure his security of person. The State party has put forward no arguments to the effect that his fear was either unreasonable or irrational. We consider furthermore that given that the effectiveness of the domestic remedies are intimately connected with the author’s claims, in particular those relating to article 14, these issues should be considered together in the context of a consideration on the merits.

(Signed): Mr. Michael O’Flaherty

(Signed): Mr. Prafullachandra Natwarlal Bhagwati

[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 present report.]

### Notes

<sup>1</sup> Communication No. 1434/2005, *Claude Fillacier v. France*, decision of 27 March 2006.

<sup>2</sup> Communication no. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002.

**X. Communication No. 1607/2007, *Sanjuán Martínez et al. v. Uruguay*  
(Decision adopted on 22 July 2008, ninety-third session)\***

<i>Submitted by:</i>	Alfonso Sanjuan Martínez, Myriam Piñeyro Martínez, Patricia Piñeyro Martínez and Yolanda Filpi Funicello
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Uruguay
<i>Date of communication:</i>	6 December 2006 (initial submission)
<i>Subject matter:</i>	Determination of amount of compensation for violations of human rights
<i>Procedural issue:</i>	None
<i>Substantive issue:</i>	Violation of the right to an effective remedy
<i>Articles of the Covenant:</i>	2, paragraph 3; 7

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

*Meeting on 22 July 2008,*

*Adopts the following:*

**Decision on admissibility**

1.1 The authors of the communication, dated 6 December 2006, are Alfonso Sanjuan Martínez, Myriam Piñeyro Martínez and Patricia Piñeyro Martínez (as heirs of Plácido Piñeyro) and Yolanda Filpi Funicello (as heir of Héctor Marcenaro Blundis),<sup>1</sup> Uruguayan nationals who claim to be the victims of a violation by Uruguay of article 2, paragraph 3, read together with article 7 of the Covenant. The Optional Protocol entered into force for the State party on 23 March 1976. The authors are not represented by counsel.

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\* The following members of the Committee took part in the consideration of the 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, 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.

1.2 On 11 December 2007, the Special Rapporteur on new communications and interim measures decided that the admissibility of the communication should be considered separately from the merits.

### **The facts as submitted by the authors**

2.1 Messrs. Alfonso Sanjuan Martínez, Plácido Piñeyro and Héctor Marcenaro Blundis, employees of the National Port Administration, were detained on 4 April 1975 by members of the armed forces, who did not present any warrant. They were taken to Infantry Battalion No. 2, where they were interrogated and subjected to torture, including beatings, electric shocks, simulated drowning and food deprivation, as well as being forced to take hallucinogenic drugs. A month later they were brought before the military courts; not having found any evidence that a military offence had been committed, the military justice system then referred the case to the ordinary courts.

2.2 They were released on 31 July of the same year, having been found not guilty of all the charges against them (arms smuggling and theft in the port). Nonetheless, the Government of the day ordered that they be disqualified from holding public office, which prevented them from returning to their jobs after their release.

2.3 Once normal democracy had been restored in the country in 1985, the men returned to their jobs. On 26 May 1989, together with others in the same situation, they filed a complaint against the State of Uruguay (Ministry of National Defence and National Port Administration), claiming compensation for the harm they had suffered as a result of their detention and disqualification. On 22 October 1998, nine years after the complaint was filed, a decision was handed down by the court of first instance sentencing the State to pay compensation to the plaintiffs. In its decision, the court found that the fact that they had been deprived of their jobs, the injuries they allegedly sustained as a result of torture, and the fact that they had been isolated, ostracized and suspected of theft constituted compensable moral injury. It therefore set the amount of compensation at 10,000 pesos per day for each of the 117 days they had been held in prison and the after-effects each had suffered, taking into account the fact that they had been deprived of decent employment after their release. As a result, each plaintiff was to be paid 1,170,000 pesos, and this sum was to be adjusted from the date of the complaint to the date of payment, and interest paid at the legal rate.

2.4 According to the authors, the adjustment referred to in the judgement is provided for in Legislative Decree No. 14,500 of 8 March 1976, which lays down the rules for the settlement of obligations consisting of the payment of a sum of money. The aim of the Decree is to ensure that the initial value of the claim is not affected by devaluation that might occur while the judicial proceedings are under way. Hence the Decree refers to the value of the currency in relation to changes in the cost of living in the country.<sup>2</sup>

2.5 The Government of Uruguay lodged an appeal against the decision with the Fourth Rota Civil Court of Appeal, which upheld the decision of the court of first instance on 3 November 1999, but annulled the part of the decision referring to the amounts of compensation for moral injury. This resulted in a substantial reduction in the amount of compensation, which was fixed at 210,600 Uruguayan pesos for each person, based on the values on the date of the judgement, without prejudice to the interest accruing since the date of the complaint. This reduction in value was based on the court's special interpretation of Legislative Decree

No. 14,500, which set different dates for the purposes of adjustment of the amount of compensation fixed. The date of the appellate decision (3 November 1999) was thus taken as the basis for adjustment, and the date on which the complaint was filed (26 May 1989) as the basis for the payment of accrued interests. This is not the interpretation given in the Decree, which provides that the adjustment of compensation and payment of interests shall begin from the date on which the complaint was filed.

2.6 The authors filed an application for review with the Supreme Court of Justice, alleging that the Legislative Decree, among others, had been infringed and/or misapplied. In a judgement handed down on 29 July 2002, the Court found that the method used by the Court of Appeal to adjust the amount of compensation was lawful, but increased the compensation to 800,000 pesos. That amount was to be adjusted as from the date of the appellate decision, until the date on which it was paid. The judgement added that, contrary to the appellants' view, the method of calculating the amount of compensation based on the amount estimated on the date of the appellate decision was lawful, because the Court had already tacitly taken devaluation into account when it had set the amount.<sup>3</sup>

2.7 The authors contest the fact that the Court upheld the interpretation of the Court of Appeal, which set 3 November 1999 as the basis for adjustment of the new amount that had been fixed and 26 May 1989, the date on which the complaint was filed, as the basis for payment of the interests that had accrued while the proceedings were under way. This misinterpretation of the Legislative Decree had resulted in a difference of 10 years and 5 months in the adjustment, and hence a devaluation of 95 per cent compared to the amount that would have resulted from a correct application of the Decree.

### **The complaint**

3. The authors maintain that the arbitrary interpretation of Legislative Decree No. 14,500 by the Supreme Court constituted a violation of article 2, paragraph 3, read together with article 7 of the Covenant. As a result, despite the time that has elapsed, the State party has not met its obligation under the law to compensate the harm caused.

### **State party's observations on admissibility**

4.1 In its observations of 4 December 2007, the State party questions the admissibility of the communication on the grounds that the issue had been thoroughly examined by the competent authorities and that the claimants had received the compensation awarded by the court as full reparation for the harm suffered, including the adjustments due under Legislative Decree No. 14,500. The Ministry of Defence had taken all the necessary steps to ensure that the claimants in the domestic proceedings and their successors would receive the amounts awarded as compensation in the judgement, which were as follows (in Uruguayan pesos):<sup>4</sup>

- Mr. Alfonso Sanjuan received 1,379,492 pesos
- Ms. Yolanda Filpi received 1,379,667 pesos
- Ms. Myriam Piñeyro received 587,559.50 pesos
- Ms. Patricia Piñeyro received 527,863.50 pesos

4.2 These amounts were disbursed in staggered payments. Mr. Sanjuan received payments on 15 different dates between February 2001 and May 2006. Ms. Filpi received 10 payments between March 2002 and May 2006. Ms. Myriam Piñeyro received 13 payments between December 2002 and May 2006. Ms. Patricia Piñeyro received 11 payments between December 2002 and May 2006.

4.3 As regards the application of Legislative Decree No. 14,500, which the complainants called into question, the State party adds that the Uruguayan legal system does not contain any provision requiring judges to grant specified amounts as compensation for harm suffered in the case of moral injury. Accordingly, each judge, and even the Supreme Court, as is clear from the judgements cited, applied different criteria when assessing the harm suffered and used different methods of calculation, all equally valid and duly reasoned. In its ruling, the Supreme Court expressly acknowledges the claimants' suffering; moreover, when it set the amount of compensation, it did not fail to take account of devaluation up to the time the compensation was awarded, and thus tacitly applied the adjustment provided for in the Legislative Decree.

4.4 Moreover, once the judgement had become enforceable and up to the time at which the compensation was actually paid, the amount awarded was adjusted according to the consumer price index, as provided by the Legislative Decree, in addition to the accrued interest at the legal rate. In addition, when the Court set the amount it deemed adequate at the time the judgement was handed down, it applied the principle of full reparation for the harm suffered, which enabled it to assess the compensation appropriate in this case, with the obvious intention of including devaluation in the amount of compensation awarded.

4.5 The legal system empowers judges to determine, to the best of their knowledge and belief, how the application of the principle of full reparation for harm suffered translates into purely monetary terms. This was taken into account throughout the judgement in question and in the amounts paid to the claimants. The amount of compensation awarded is in the same range as that set by the courts in similar cases, taking into consideration economic and social conditions in Uruguay.

#### **The authors' comments**

5. On 14 January 2008, the authors stated that what they were claiming was not specific amounts of compensation, but strict compliance with the legislation in force, which prescribed the time from which the amount of compensation was to be adjusted. Moreover, if the Supreme Court had increased the amount of compensation, that was the result of 14 years of legal proceedings. They repeat that misapplication of the Legislative Decree had deprived them of 10 years' compensation.

#### **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 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.

6.3 The issue before the Committee is whether the State party violated the authors' rights under the Covenant when the Supreme Court of Justice set the amount of compensation to be paid to them in respect of acts of arbitrary detention, torture and disqualification for which the domestic courts had sentenced the State of Uruguay. The Committee observes that the Supreme Court of Justice, when it set the amount of compensation, deemed that the Court of Appeal had rightly interpreted Legislative Decree No. 14,500 when it fixed the compensation based on the amount estimated on the date of the appellate decision, and not the date of the complaint, as submitted by the authors. The Supreme Court considered that this approach already tacitly took account of any devaluation since the date of the complaint.

6.4 The Committee recalls that it has repeatedly held that it is not a final instance competent to re-evaluate findings of fact or the application of domestic legislation, unless it can be ascertained that the proceedings before the domestic courts were arbitrary or amounted to a denial of justice.<sup>5</sup> The Committee considers that the authors have failed to substantiate, for purposes of admissibility, that the conduct of the Supreme Court amounted to arbitrariness or a denial of justice. Accordingly, the communication 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 of the Optional Protocol;
- (b) That this decision be transmitted 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 present report.]

### Notes

<sup>1</sup> Ms. Myriam Piñeyro Martínez and Ms. Patricia Piñeyro Martínez provided a copy of a notarized document certifying that they are the heirs of Plácido Piñeyro Bandera, who died intestate on 2 May 1996, being his daughters. Ms. Yolanda Filpi Funicciello, sister-in-law of Mr. Héctor Marcenaro Blundis, presented a notarized document certifying that she is the successor creditor in respect of the debt owed to Mr. Héctor Marcenaro Blundis and his wife, both deceased, by the National Port Administration and the Ministry of Defence.

<sup>2</sup> According to article 2 of the Legislative Decree, “variations in the value of the currency shall be determined in the light of changes in the general consumer price index fixed every month by the Ministry of the Economy and Finance. To that end, a comparison shall be made between the index for the month in which the obligation was incurred or fell due, as appropriate, and that fixed for the month preceding the date on which the obligation was extinguished”. Under article 686 of Act No. 16,170, the date of extinction of an obligation should be understood to mean the date on which the settlement is deposited.

<sup>3</sup> The Court ruled that “although generally speaking, under the system established by Legislative Decree No. 14,500, the amount of compensation should be set at the date on which the obligation to pay was incurred, and the statutory adjustment should be applied from that date (as maintained by the plaintiff), when the court fixes the amount of such compensation on the date of the



judgement, as in this case, it obviously takes into account devaluations that have occurred up to the time at which the amount is set, thus tacitly applying the adjustment provided for in Legislative Decree No. 14,500. This method enables the judge to determine the amount deemed fair in the circumstances, by bringing the time of the decision closer to the date that serves as the basis for determining the monetary value of the compensation due, and does not, in the view of the Court, involve the breach of the law invoked”.

<sup>4</sup> The State party points out that, on the date of its reply to the Committee, 1 United States dollar was worth 22.52 Uruguayan pesos.

<sup>5</sup> See communications No. 541/1993, *Errol Simms v. Jamaica*, decision of 3 April 1995, para. 6.2; 1138/2002, *Arenz et al. v. Germany*, decision of 24 March 2004, para. 8.6; 917/2000, *Arutyunyan v. Uzbekistan*, Views of 29 March 2004, para. 5.7; 1528/2006, *Fernández Murcia v. Spain*, decision of 1 April 2008.

**Y. Communication No. 1745/2007, *Mazón Costa v. Spain*  
(Decision adopted on 1 April 2008, ninety-second session)\***

<i>Submitted by:</i>	José Luis Mazón Costa (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of initial communication:</i>	16 November 2007
<i>Subject matter:</i>	Compatibility of the Spanish monarchy with article 25 of the Covenant
<i>Procedural issue:</i>	Incompatibility of the claim with the provisions of the Covenant
<i>Substantive issue:</i>	None
<i>Articles of the Covenant:</i>	2, paragraph 3; 14; 25 and 26
<i>Articles of the Optional Protocol:</i>	1; 3; 5, paragraph 2 (b)

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

*Meeting on 1 April 2008,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication, dated 16 November 2006, is José Luis Mazón Costa, a Spanish citizen born in 1948. He claims to be a victim of a violation by Spain of articles 2, paragraphs 3, 25, and 26, read together with 14 of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. He is not represented.

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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, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

## **The complaint**

2.1 The author claims to be a victim of a violation of article 25, because the Spanish monarchy is not subject to free and public elections. As a Spanish citizen, his right to vote and to be elected King of Spain is therefore violated. He contends that the monarchy was institutionalized by former dictator Francisco Franco y Bahamonde in 1936, when he came to power as a result of a military coup d'état. He notes that, unlike other countries, Spain has not made any reservations to article 25 of the Covenant.

2.2 He claims that article 2, paragraph 3, is also violated because there is no effective remedy against this violation.

2.3 Finally, he contends that the recognition in the Spanish Constitution of the inviolability of the monarch grants the king an unacceptable privilege and violates article 26, read together with article 14.

## **Issues and proceedings before the Committee**

3.1 Pursuant to rule 93 of its rules of procedure, before considering any claim contained in a complaint, the Human Rights Committee must determine whether it is admissible under the Optional Protocol to the Covenant on Civil and Political Rights.

3.2 The Committee recalls that the right to take part in the conduct of public affairs directly or through freely chosen representatives referred to in article 25, paragraph (a), of the Covenant relates to the exercise of political power.<sup>1</sup> However, this article does not impose a specific political model or structure. The Committee notes, in particular, that a constitutional monarchy based on separation of powers is not in itself contrary to article 25 of the Covenant. While article 25, paragraph (a), alludes to the election of representatives, paragraph (b) of the same provision, while guaranteeing the right to vote and to be elected at genuine periodic elections, does not grant a right to elect a head of State or to be elected to such position. Therefore, the Committee considers that the author's complaint is incompatible *ratione materiae* with the provisions of the Covenant and declares it inadmissible under article 3 of the Optional Protocol. The same is true for the author's allegations under article 2, paragraph 3, of the Covenant. The Committee recalls that the rights referred to in this provision are accessory in nature and can be invoked only in conjunction with another provision of the Covenant.<sup>2</sup>

3.3 As regards the claim that the inviolability of the monarch grants the king an unacceptable privilege and violates article 26, read together with article 14 of the Covenant, the Committee considers that the author has not shown that he is a victim of the alleged violation in accordance with article 1 of the Optional Protocol.

3.4 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 present report.]

#### Notes

<sup>1</sup> General comment No. 25 (1996) on participation in public affairs and the right to vote, para. 5.

<sup>2</sup> See among others, *C.E.A. v. Finland* (communication No. 316/1988), decision of 10 July 1991, para. 6.2; *Rogerson v. Australia* (communication No. 802/1998), Views of 3 April 2002; and *Sastre Rodríguez et al. v. Spain* (communication No. 1213/2003), decision of 28 March 2007, para. 6.6.

## Annex VII

### 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/62/40).

<b>State party</b>	<b>ALGERIA</b>
<b>Case</b>	<b>Medjnoune, 1297/2004</b>
<b>Views adopted on</b>	14 July 2006
<b>Issues and violations found</b>	Arbitrary and unlawful arrest and detention, incommunicado detention, trial undue delay, failure to inform him of charges against him - articles 7, 9, paragraphs 1, 2 and 3, and 14, paragraph 3 (a) and (c).
<b>Remedy recommended</b>	An effective remedy, which includes bringing Malik Medjnoune immediately before a judge to answer the charges against him or to release him, conducting a full and thorough investigation into the incommunicado detention and treatment suffered by Malik Medjnoune since 28 September 1999, and initiating criminal proceedings against the persons alleged to be responsible for those violations, in particular the ill-treatment. The State party is also required to provide appropriate compensation to Malik Medjnoune for the violations.
<b>Due date for State party response</b>	27 October 2006
<b>State party response</b>	None
<b>Author's comments</b>	On 27 February 2008, the author submitted that the State party had not implemented the Views. In light of the fact that the author's case had still not been heard, he began a hunger strike on 25 February 2008. The <i>procureur général</i> visited him in prison to encourage him to end his strike and stated that although he could not fix a date for a hearing himself he would contact the "appropriate authorities". In the author's view, according to domestic law, the <i>procureur général</i> is the only person who can request the president of the criminal court to list a case for hearing.
<b>Committee's Decision</b>	The Committee considers the dialogue ongoing.

<b>State party</b>	<b>AUSTRIA</b>
<b>Case</b>	<b>Lederbauer, 1454/2006</b>
<b>Views adopted on</b>	23 July 2007
<b>Issues and violations found</b>	Delay in proceedings relating to disciplinary complaint - article 14, paragraph 1.
<b>Remedy recommended</b>	An effective remedy, including appropriate compensation.
<b>Due date for State party response</b>	11 December 2007
<b>Date of reply</b>	3 December 2007
<b>State party response</b>	The State party states that the Views were published in the original English version as well as in an unofficial German translation on the website of the Austrian Federal Chancellery. Subsequent to an exchange of views held with all authorities involved in the case, it was decided to invite the complainant to a meeting with Austrian Government representatives. The meeting was to take place before the end of 2007 and the State party states that it will inform the Committee of any new developments in due course.
<b>Committee's Decision</b>	The Committee considers the dialogue ongoing.
<b>State party</b>	<b>AUSTRALIA</b>
<b>Case</b>	<b>Winata, 930/2000</b>
<b>Views adopted on</b>	26 July 2001
<b>Issues and violations found</b>	Removal of the authors from the country constituted arbitrary interference with family life. Articles 17, 23, paragraph 1, 24, paragraph 1.
<b>Remedy recommended</b>	Effective remedy, including refraining from removing the authors from Australia before they have had an opportunity to have their application for parent visas examined, with due consideration given to the protection required by Barry Winata's status as a minor.
<b>Due date for State party response</b>	October 2001
<b>Date of reply</b>	Several responses provided from December 2001; last one dated 15 October 2007

<b>State party response</b>	Mr. Winata and Ms. Li are in contact with the Department of Immigration and Citizenship of the Australian Government and are currently residing lawfully in the community on Bridging E visas. Barry Winata, their son now aged 19, is an Australian citizen. Further dialogue on the matter “is not considered to be fruitful” by the State party.
<b>Author’s comments</b>	Not yet received.
<b>Committee’s Decision</b>	The Committee considers that no further dialogue is necessary on this case and decided that this case should not be considered any further under the follow-up procedure.
<b>Case</b>	<b>Young, 941/2000</b>
<b>Views adopted on</b>	6 August 2003
<b>Issues and violations found</b>	Discrimination on grounds of sexual orientation in provision of social security benefits, article 26.
<b>Remedy recommended</b>	Effective remedy, including the reconsideration of his pension application without discrimination based on his sex or sexual orientation, if necessary through an amendment of the law.
<b>Due date for State party response</b>	1 December 2003
<b>Date of reply</b>	October 2006 and 15 October 2007
<b>State party response</b>	The State party recalls its previous refusal to accept the Committee’s findings and recommendations. It states that “further dialogue on this matter would not be fruitful and declines the offer to provide more information”.
<b>Author’s comments</b>	Not yet received.
<b>Committee’s Decision</b>	The Committee regrets the State party’s refusal to accept the Views and recommendations. It considers the dialogue ongoing.
<b>Case</b>	<b>Shafiq, 1324/2004</b>
<b>Views adopted on</b>	31 October 2006
<b>Issues and violations found</b>	Arbitrariness of mandatory immigration detention for a period of over seven years; denial of right to have his detention reviewed by a court. Article 9, paragraphs 1 and 4.
<b>Remedy recommended</b>	Effective remedy, including release and appropriate compensation.

<b>Due date for State party response</b>	February 2007
<b>Date of reply</b>	25 May 2007, 15 October 2007
<b>State party response</b>	<p>During the ninetieth session the Committee decided: “while welcoming the author’s release from detention, the Committee regrets the State party’s refusal to accept the Views, notes that no compensation has been provided, and considers the dialogue ongoing”.</p> <p>In October 2007, the State party reported that Mr. Shafiq’s visa status remained unchanged since the information provided earlier, i.e. he remains in the community on a Removal pending bridging visa. “Further dialogue on the matter will not be fruitful”, according to the State party.</p>
<b>Author’s comments</b>	Not yet received.
<b>Committee’s Decision</b>	The Committee regrets the State party’s refusal to accept the Views. It considers the dialogue ongoing.
<b>Case</b>	<b>Dudko, 1347/2005</b>
<b>Views adopted on</b>	23 July 2007
<b>Issues and violations found</b>	Absence of unrepresented defendant during appeal - article 14, paragraph 1.
<b>Remedy recommended</b>	Effective remedy.
<b>Due date for State party response</b>	13 November 2007
<b>Date of reply</b>	27 May 2008
<b>State party response</b>	<p>On 27 May 2008, the State party informed the Committee of new rules of court adopted by the High Court in 2004, which took effect from 1 January 2005. In recognition of the nature of special leave applications, these rules give primary emphasis to written arguments. If an applicant for special leave to appeal is not represented by a legal practitioner that applicant must present his or her argument to the Court in the form of a draft notice of appeal and written case. These documents are considered by two justices who decide either that the papers should be served on the respondent or that the application should be dismissed without calling on the respondent to answer. Any application for special leave that has been served on the respondent (whether represented by a lawyer or not) may be decided without listing the application for hearing. Most applications for special leave are now decided</p>



by the Court without oral hearing. If the application reveals that the Court may be assisted by oral argument, the application will be listed for hearing. In that event, if one of the parties is not represented by counsel, the Court will generally seek to arrange for counsel to appear for the party concerned without charging a fee. According to the State party, these changes reduce the likelihood of a situation such as the author's arising again. The State party also reaffirms that the outcome of the author's case was not affected by her absence or the absence of counsel appearing on her behalf.

<b>Author's response</b>	None
<b>Committee's Decision</b>	The Committee considers the dialogue ongoing.
<b>Case</b>	<b>D. &amp; E., 1050/2002</b>
<b>Views adopted on</b>	11 July 2006
<b>Issues and violations found</b>	Arbitrary detention of asylum-seekers, including children - article 9, paragraph 1.
<b>Remedy recommended</b>	An effective remedy, including appropriate compensation.
<b>Due date for State party response</b>	
<b>Date of reply</b>	July 2007
<b>State party response</b>	The State party informed the Committee that it does not accept its view that there has been a violation of article 9, paragraph 1 of the Covenant and reiterates its submission that the detention was reasonable and necessary. It does not accept the Committee's view that it should pay compensation to the authors. It reiterates its arguments provided on the merits as well as recent decisions of the High Court, which upheld the validity of sections 189, 196 and 198 of the Migration Act. The authors were granted Bridging visas E (subclass 051) in January 2004. They were released from detention on 22 January 2004, as they satisfied one of the criteria under regulation 2.20 of the Migration Regulations 1994. They were granted Global Special Humanitarian visas as a result of Ministerial intervention on 13 March 2006. The State party informs the Committee of subsequent changes to its Migration Amendment (Detention Arrangement) Act 2005, which amended the Migration Act 1958 with effect from 29 June 2005. (See the State party's response to Saed Shams, Kooresh Atvan, Shahin Shahrooei, Payam Saadat, Behrouz Ramezani, Behzad Boostani,

Meharn Behrooz, and Amin Houvedar Sefed, 1255/2004, 1256/2004, 1259/2004, 1260/2004, 1266/2004, 1268/2004, 1270/2004, 1288/2004, below for details.)

<b>Author's response</b>	None
<b>Case</b>	<b>Saed Shams, Kooresh Atvan, Shahin Shahrooei, Payam Saadat, Behrouz Ramezani, Behzad Boostani, Meharn Behrooz, and Amin Houvedar Sefed, 1255/2004, 1256/2004, 1259/2004, 1260/2004, 1266/2004, 1268/2004, 1270/2004, 1288/2004</b>
<b>Views adopted on</b>	20 July 2007
<b>Issues and violations found</b>	Arbitrary detention and review of lawfulness - article 9, paragraphs 1 and 4, and article 2, paragraph 3.
<b>Remedy recommended</b>	An effective remedy should include adequate compensation for the length of the detention to which each of the authors was subjected.
<b>Due date for State party response</b>	11 December 2007
<b>Date of reply</b>	25 June 2008
<b>State party response</b>	<p>The State party informs the Committee that Messrs. Atvan, Behrooz, Boostani, Ramezani, Saadat, and Shams have been granted permanent Protection visas, which allow them to remain in Australia indefinitely. As noted in the Committee's views, Mr Shahrooei and Mr Sefed had been granted permanent Protection visas before the Committee adopted its views. Mr Houvedar Sefed was granted Australian citizenship on 10 October 2007. As to the violation of article 9, paragraph 1, the State party acknowledges its obligation under the Covenant not to subject any person to arbitrary detention, and further acknowledges that there are some circumstances in which the lawful and permissible detention of a person may become arbitrary if there are no longer any grounds to justify it. The State party will retain the system of mandatory detention (along with tough anti-people smuggling measures) to ensure the orderly processing of migration to the country. However, it is committed to reviewing the conditions, period and forms of managing detention. In 2005 the State party's Government announced a number of changes to both the law and the handling of matters relating to people in immigration detention and the processing of Protection visa applications. These changes include:</p> <p>(1) That where detention of an unlawful non-citizen family (with children) is required under the Migration Act 1958 (Migration</p>

Act), detention should be under alternative arrangements (that is, in the community under residence determination arrangements [now known as community detention] at a specified place in accordance with conditions that address their individual circumstances), where and as soon as possible, rather than under traditional detention; (2) All primary Protection visa applications are to be decided by the Department of Immigration and Citizenship (DIAC) within 90 days of application lodgement; (3) All reviews by the Refugee Review Tribunal are to be finalized within 90 days of the date the Tribunal receives the relevant files from DIAC; (4) Regular reporting to Parliament on cases exceeding these time limits is required; (5) Where a person has been in detention for two years or more there will automatically be a requirement that every six months a report on that person be furnished by DIAC to the Commonwealth Ombudsman. The Ombudsman's assessment of each report, including recommendations on whether the person should be released from detention, will be tabled in Parliament; (6) The provision in the Migration Act of an additional non-compellable power for the Minister for Immigration and Citizenship to specify alternative arrangements for a person's detention and conditions to apply to that person and to act personally, to grant a visa to a person in detention; and the amendment of the Migration Regulations 1994 to 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. A Removal pending bridging visa may be granted using the Minister for Immigration and Citizenship's non-delegable, non-compellable public interest power to grant a visa to a person in immigration detention. These legislative changes necessary to give effect to the reforms were contained in the Migration Amendment (Detention Arrangements) Act 2005 and the Migration and Ombudsman Legislation Amendment Act 2005. The State party has also introduced Detention Review Managers (DRMs), who independently review the initial decision to detain a person and continue to review the cases of people in immigration detention on an ongoing basis to ensure their detention remains lawful and reasonable. Since its election on 24 November 2007, the State party has ended the "Pacific Strategy", under which unauthorized boat arrivals who raised protection claims were assessed at offshore processing centres in Nauru and Manus Province, Papua New Guinea. In February 2008, the last asylum-seekers to be processed in an offshore centre were granted humanitarian visas and resettled in Australia. All future unauthorized boat arrivals who raise refugee claims will be taken to Christmas Island, an Australian territory, where their claims will be processed under existing refugee status assessment arrangements. The Minister for Immigration and Citizenship has completed a review of the cases

of persons who have been in immigration detention for more than two years. The review, conducted personally by the Minister, sought to apply a range of measures to progress, if not resolve, the immigration status of these detainees. A number were granted visas as a result of the review, enabling their release from immigration detention. Others were removed from immigration detention centres and placed in community detention. The Minister's review was underpinned by the principle that indefinite detention is not acceptable. This demonstrates the State party's commitment to promptly resolve the immigration status of all persons. The State party will only detain persons in immigration detention centres as a last resort and will only do so for the shortest practicable time.

As to the violation of article 9 (4), the State party argues that there can be no doubt that the term "lawfulness" refers to the Australian domestic legal system, and was not intended to mean "lawful at international law" or "not arbitrary". It does not accept it owes the authors compensation under article 2 (3).

<b>Author's response</b>	The State party's submission was sent to the authors on 27 June 2008, with a deadline of two months for comments.
<b>Committee's Decision</b>	The Committee considers the dialogue ongoing.
<b>State party</b>	<b>BELARUS</b>
<b>Case</b>	<b>Belyatsky Aleksander, 1296/2004</b>
<b>Views adopted on</b>	24 July 2007
<b>Issues and violations found</b>	Dissolution of NGO - article 22, paragraph 2.
<b>Remedy recommended</b>	Appropriate remedy, including the re-registration of <i>Viasna</i> and compensation.
<b>Due date for State party response</b>	30 November 2007
<b>Date of reply</b>	20 November 2007
<b>State party response</b>	On 20 November 2007, the State party contested the Views and submitted that article 22 of its Constitution proclaims the principle of equality before the law and equal protection of the rights and legitimate interests of everyone without discrimination. Article 52 requires everyone within the territory of the State party to abide by its Constitution and laws and to respect national traditions. Under article 45, paragraphs 1 and 2, of the Belarus Civil Code, legal entities can have civil rights conforming to the objectives of their

statutory activities, as well as to the subject matter of the activities if it is stipulated by the statutes; and carry obligations relating to these activities. The rights of legal entities can only be restricted under the procedure established by law.

Article 57 of the Civil Code establishes general provisions on the dissolution of legal entities Article 57, paragraph 2, of the Civil Code envisages a procedure for dissolution of a legal entity by court order when it is engaged in unlicensed activities or the activities are prohibited by law or when it has committed repeated or gross breaches of the law. Therefore, in order for a court to take a decision on the dissolution of a legal entity, it is sufficient to establish that a single gross breach of the law took place.

Administration of justice in Belarus follows the same interpretation of article 57, paragraph 2, of the Civil Code. The Committee's Views in the case on the dissolution of *Viasna*, however, erroneously refers to the "repeated gross breaches of the law".

Article 110 of the Constitution guarantees the principle of independence of the judiciary. The task of evaluating whether the breach of the law in question was gross is attributed to the courts, which they do at their own discretion, based on the comprehensive, complete and objective examination of all the facts, and proof and are guided in it only by law.

The State party reiterated that the decision on *Viasna's* dissolution was taken by the Belarus Supreme Court on 28 October 2003, as it did not comply with the established procedure of sending its observers to the meetings of the electoral commission and to the polling stations. This information was described in the written warning issued to *Viasna* by the Ministry of Justice on 28 August 2001 (this warning was not appealed) and in the ruling of the Central Electoral Commission on Elections and Conduct of Republican Referendums of 8 September 2001. This ruling was based on the inspections conducted by the Ministry of Justice and the Belarus Prosecutor's Office.

**Author's response**

On 4 March 2008, the author submits that the State party did not take any measures to give effect to the Committee's Views. Namely, *Viasna* has not been re-registered, compensation has not been paid and the Views have not been published in the State-run mass-media. The author strongly objects to the State party's assertion that article 57 of the Civil Code was correctly applied by the Supreme Court in considering a civil case on the dissolution of *Viasna*. He reiterates that under article 117 of the Civil Code, the legal regime applicable to public associations is subject to a *lex specialis*. Article 57 of the Civil Code does not contain any provision to the effect that it is applicable even when *lex specialis*

exists. The Law “On Public Associations” contains a list of grounds for the dissolution of a public association; and the Belarus Constitution provides for an exhaustive list of restrictions of the right to freedom of association.

Article 5 of the Constitution prohibits the creation and activities of political parties and other public associations that aim at changing the constitutional order by force, or conduct propaganda of war, ethnic, religious, or racial hatred. Under article 23 of the Constitution, restriction of personal rights and liberties shall be permitted only in cases specified in law, in the interest of national security, public order, the protection of the morals and health of the population, as well as rights and liberties of other persons. The author, therefore, reiterates his initial claim that the State party has unlawfully restricted his right to freedom of association by taking a decision on the dissolution of *Viasna*.

The author also reiterates his initial claim that *Viasna* was dissolved by the Supreme Court for the same activities, as those described in the Ministry of Justice’s written warning of 28 August 2001, and for which *Viasna* has already been reprimanded. In turn, this written warning served as a basis for the ruling of the Central Electoral Commission on Elections and Conduct of Republican Referendums of 8 September 2001. In its follow-up submission of 19 November 2007, the State party conceded that *Viasna* was dissolved by the Supreme Court for the same activities (breach of electoral laws before and during the 2001 Presidential election), for which it has already been reprimanded in the Ministry of Justice’s written warning. The author notes that in the State party’s earlier submissions of 5 January 2001, it denied that *Viasna* was penalized twice for identical activities. The State party stated then 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.

The author submits that the State party failed to advance any plausible arguments 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. Therefore, the author is of the opinion that his rights under article 22, paragraph 1, have been violated, and that the dissolution of *Viasna* was disproportionate, especially in the light of the introduction in 2006 of criminal sanctions for activities carried out by an unregistered or dissolved association.

#### **Committee’s Decision**

The Committee reiterates its Decision made during the ninety-second session of the Committee. It noted that the State party had reiterated information provided prior to consideration of

the case by the Committee, and had argued that the court's decisions were in compliance with domestic law but had not responded on the Committee's findings that the application of the law had been found to be contrary to the rights protected under the Covenant. The Committee observed that the State party had not responded to its concerns and regretted its refusal to accept the Committee's Views. It considers the dialogue ongoing.

<b>Case</b>	<b>Bondarenko and Lyashkevich, 886/1999 and 887/1999</b>
<b>Views adopted on</b>	3 April 2003
<b>Issues and violations found</b>	Secrecy of date of execution of family member and place of burial of victims - article 7.
<b>Remedy recommended</b>	An effective remedy, including information on the location where the sons of the authors are buried, and compensation for the anguish suffered by the family.
<b>Due date for State party response</b>	23 July 2003
<b>Date of reply</b>	26 June 2007 (the State party had replied on 1 November 2006)
<b>State party response</b>	<p>On 1 November 2006, the State party argued inter alia that neither the Convention nor in any other international legal act defines the meanings of other cruel, inhumane, or degrading treatment or punishment and that torture or other cruel acts are criminalized in its Criminal Code (articles 128 (2) and (3), and article 394). It stated 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 who have not attained the age of 18, or against women and men that are over 65 at the moment of commission of the crime. A death sentence may be substituted by life imprisonment.</p> <p>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 an exceptional basis, a prosecutor may authorize the presence of additional persons.</p>

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 concluded 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 sentence to death or the date of execution and burial place is also provided by law (the CEC).

In light of the above, the State party affirmed that in the present cases, the moral anguish and stress caused to the authors 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 occurs as a result of the application of the State party's official organs of a lawful sanction and are not separable from this sanction, as provided in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

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 added that these measures are provided by law not with the aim of punishing the relatives of those executed, leaving them in a state of uncertainty and moral anguish, but because, as has been 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. The State party added that neither the author nor her counsel had ever mentioned that the lack of information about the date of execution or the burial site location had caused any psychological harm to the author; they did not appeal to the State party's competent authorities in this relation.

Finally, the State party informed 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.

On 26 June 2007, the State party provided another submission to the Committee, in which it outlined its legislative framework and practice with respect to the death penalty (as provided in November 2006 above). It submits that a new law, which came into force on 17 July 2006, amended the Criminal Procedure and Administrative Infractions' Codes. In accordance with this law the death penalty should only be applied "until its abolition".



Indicating that the death penalty may be abolished at some point in the future. In light of the information provided, in particular with respect to the new law, the State party requests the Committee to remove these cases from consideration under the follow-up procedure.

**Further action taken or required**

In its last annual report (A/62/40), the Committee considered the State party's response of 1 November 2006, regretted its refusal to accept the Committee's Views and considered the dialogue ongoing. In an effort to assist the State party and given the information provided in the last paragraph of this submission above, the Committee instructed the Secretariat to inform it that the Committee and/the Office of the United Nations High Commissioner for Human Rights would be ready to assist it in the examination of its obligations under international law with respect to the imposition of the death penalty. It also requested of the State party further information on the issues to be examined by the Constitutional Court and the likely time frame for consideration. The Committee understands that the law of 17 July 2007, as referred to above, was based on a decision of the Constitutional Court of 2004, which upheld the constitutionality of the application of the death penalty "until its abolition." It understands that there has been no decision relating to the death penalty by the Constitutional Court since 2004.

**Committee's Decision**

While welcoming the information that the abolition of the death penalty is envisaged for some future date, the Committee notes that the cases under consideration related to a finding of a violation of article 7 with respect to the authorities' initial failure to notify the authors of the scheduled date for the execution of their sons, and their subsequent persistent failure to notify them of the location of their sons' graves. The Committee notes that it has received two responses from the State party with respect to this issue and that the Special Rapporteur has met with the State party's representative on several occasions with regard to these cases as well as other cases involving the State party.

Given the State party's persistent failure to explain how its law relating to the notification of the date of execution and burial ground (CEC) and its implementation are consistent with the rights protected under the Covenant, and its failure to provide any remedy for the authors in these cases, the Committee considers that it serves no useful purpose to pursue the dialogue in these two cases and does not intend to consider these cases any further under the follow-up procedure.

<b>State party</b>	<b>BURKINA FASO</b>
<b>Case</b>	<b>Sankara et al., 1159/2003</b>
<b>Views adopted on</b>	28 March 2006
<b>Issues and violations found</b>	Inhuman treatment and equality before the Courts - articles 7 and 14, paragraph 1.
<b>Remedy recommended</b>	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.
<b>Due date for State party response</b>	4 July 2006
<b>Date of State party's response</b>	30 June 2006
<b>State party response</b>	<p>The State party provided its follow-up response on 30 June 2006. It stated that it was ready to officially acknowledge Mr. Sankara's grave at Dagnoin, 29 Ouagadougou, to his family and reiterated its submission prior to the decision that he has been declared a national hero and that a monument is being erected in his honour.</p> <p>It submitted that on 7 March 2006, the Tribunal of Baskuy in the commune of Ouagadougou ordered a death certificate for 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.</p> <p>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 Committee's Views to provide compensation, the Government had assessed and liquidated the amount of compensation due to Ms. Sankara and her children as 434,450,000 CFA (around 843,326.95 USD). The family should contact the fund to ascertain the method of payment if they wish to receive it.</p> <p>The State party submitted that the Views are accessible on various governmental websites, as well as distributed to the media.</p>

Finally, it submitted that the events which are the subject matter of these Views occurred 20 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 Committee members will recall that the authors commented on the State party's submission disputing the adequacy of all the remedies set out in the State party's submission. They highlighted the failure by the State party to initiate inquiry proceedings to establish the circumstance of Mr. Sankara's death. On 21 June 2006, the Procurator refused to refer the matter to the Minister of Defence to commence a judicial inquiry, arguing that it was "time-barred". They argue that the only effective remedy would be an impartial judicial inquiry into the cause of his death. The Committee itself in paragraph 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. As to the recognition of his burial place, the authors stated that no records, direct witness evidence, burial record, DNA analysis, autopsy or forensic report were provided which would constitute an "official record" in relation to the burial remains of Mr. Sankara. As to the entitlement to a military pension, the authors stated 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 for Victims of Political Violence, the authors submitted 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 does not qualify as an effective and enforceable remedy under the Covenant given the context of the grave breaches of article 7 rights. 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 waive all rights to seek remedies before the courts.

In an e-mail from the authors on 14 November 2007, they insist that, despite the Committee's failure to specifically mention it in the Views, the only appropriate remedy in this case is the initiation of an inquiry to establish the circumstances of Mr. Sankara's

death. The prosecutor has continually refused to do so. The authors refer to the Committee's jurisprudence (including in *Kimouche v. Algeria*, communication No. 1159/2003) to demonstrate that this has been the type of remedy requested of the Committee in previous cases and refer also to the admissibility decision of the case of Sankara itself which affirms the necessity for such an inquiry. They submit that it is unclear whether this was merely an oversight by the Committee or an administrative error.

**Committee's Decision** The Committee welcomes the State party's response to its Views. It notes the authors' claim that the only effective remedy in this case is an inquiry into the circumstances of Mr. Sankara's death but recalls that the remedy recommended by it did not include a specific reference to such an inquiry. It also recalls that its decisions are not open to review and that this applies equally to its recommendation. The Committee considers the State party's remedy satisfactory for the purposes of follow-up to its Views and does not intend to consider this matter any further under the follow-up procedure.

**State party**

**CAMEROON**

**Case**

**Gorji-Ginka Fongum, 1134/2002**

**Views adopted on**

17 March 2005

**Issues and violations found**

Conditions of detention, unlawful and arbitrary arrest, right to liberty of movement, right to vote and to be elected - articles 9, paragraph 1, 10, paragraphs 1 and 2 (a), 12, paragraph 1, and 25 (b).

**Remedy recommended**

An effective remedy, including compensation and assurance of the enjoyment of his civil and political rights.

**Due date for State party response**

18 July 2005

**State party response**

None

**Author's response**

On 29 February 2008, the author informed the Committee that the State party had made no effort to implement its decision and requested to know what steps the Committee would take to encourage the State party to meet its commitments.

**Committee's Decision**

The Committee considers the dialogue ongoing.

<b>State party</b>	<b>CANADA</b>
<b>Case</b>	<b>N.T., 1052/2002</b>
<b>Views adopted on</b>	20 March 2007
<b>Issues and violations found</b>	Interference with the author and her daughter's family life, failure to protect the family unit, violation of the author's and her daughter's rights to an expeditious trial and to fair hearing, articles 17, 23, 24, 14, paragraph 1.
<b>Remedy recommended</b>	Effective remedy, including regular access of the author to her daughter and appropriate compensation for the author.
<b>Due date for State party response</b>	3 July 2007
<b>Date of reply</b>	6 June 2008 (the State party had previously replied on 31 July 2007)
<b>State party response</b>	<p>On 31 July 2007, the State party explained the reasons why it did not provide submissions following the author's second set of submissions in September 2003. The author's claims were formulated in such a broad, imprecise and sweeping manner that in order to have appropriately responded to them, the State party would have been forced to disclose an enormous amount of highly sensitive personal information relating to the author, her daughter and the adoptive parents. Moreover, officials were operating under the assumption that the Committee would be rendering its views exclusively on admissibility. The State party regretted the fact that the Committee issued its views without the benefit of its submission on the merits. The State party claimed that the communication was without merit. The statement of facts submitted by the author and relied upon by the Committee was incomplete and contained errors. The State party provided a detailed chronology of events and comments regarding each of the Committee's findings. It did not contest admissibility. However, regarding the merits it requested the Committee to reconsider both its findings of violations of the Covenant and its recommendation for remedial action. All actions taken with respect to the placement and care of the author's daughter were undertaken according to the terms set out under the law and were subsequently confirmed by the courts, with a view to ensuring the best interests of the child.</p> <p>Regarding the remedy proposed by the Committee, based on the historical hostility of the author towards the child's adoptive family, the State party stated that there was no prospect for an openness agreement between the birth parent and adoptive parents pursuant to 153.6 of the Child and Family Services Act (CFSA).</p>

Therefore, contact between the author and her birth daughter was not a remedy that can be pursued at law by Canada. Furthermore, the evidence before the Committee does not support an inference that reintroduction of access between this child and her birth parent would be in the child's best interests.

On 6 June 2008, the State party responded to the Committee's decision not to review the case. The State party submits that there has been no violation of article 17. It reminds the Committee that when J.T. was initially taken to the police station on 2 August 1997, the authorities came to realize that she had been beaten by N.T. and that this may not have been an isolated incident. In order to ensure the child's safety, a decision was made by the Catholic Children's Aid Society of Toronto (CCAST) to seek a three month temporary placement for J.T. The initial terms of access were direct and regular and in the State party's view not "extremely harsh". Visits were scheduled every Monday from 1.00 to 2.30 and every Thursday from 1.00 to 2.00. They were held in the CCAST office and supervised by the CCAST worker who was either present in the room with N.T. and the child, or who observed from behind a one way mirror. Access by telephone between N.T. and J.T. was also permitted. Access was only terminated only after N.T. abducted J.T. during a scheduled access visit for which she was criminally convicted, after it was observed that J.T. exhibited signs of distress prior to access visits and after N.T. repeatedly refused to attend counselling (*Buckle v. New Zealand*, 858/1999). On 12 August 1998, the motion regarding the termination of access was heard by a court. Although N.T. was represented by counsel at the time, she chose to proceed with a hearing of the motion without the benefit of counsel. Following the hearing, the court terminated access pending the disposition of the protection application because termination of access was found to be in the best interests of the child.

The State party submits that there was no violation of articles 23 or 24 and that the Ontario Child and Family Services Act ("the CFSA") establishes clear criteria to enable the courts to apply the provisions of article 23. During the child protection trial, the judge had to determine the issue of whether J.T. should be declared a "Crown ward" for the purposes of adoption, rather than a "society wardship", where the presumption under the CFSA favoured access. In the determination of Crown wardship, there is a bias against access unless certain conditions exist. The reason for this is the concern that long term foster care plans with access to family members have been found to place a child in a loyalty bind which can seriously hamper a child's development and ability to form positive attachments. Such concerns were beginning to surface in

J.T., who according to the specialist seemed to be in limbo and did not know where she belonged. Due to the unique concerns with respect to placing a child in permanent limbo, and recognizing that the context is Crown wardship for the purposes of adoption and not custody and access as between two divorced parents, as was the case in *Hendricks v. Finland* (201/1985), the State party submits that the Committee incorrectly applied the test in *Hendricks* and that the standard set out in the CFSA is in the best interest of the child.

The State party denies that article 14 applies to child protection proceedings. In any event, it submits that the proceedings were not unreasonably prolonged, as a significant cause of the length of the proceedings was the multiple motions etc. initiated by the author and refers to the Committee's decision in *E.B. v. New Zealand* (1368/2005). It shares the concerns of the Committee with respect to the time it took to proceed to trial given the age of J.T. However, it submits that at no point was there a period of inactivity and points to the jurisprudence of the European Court of Human Rights in this respect. The State party submits that the criteria set out in the legislation in question was followed, and a determination was reached after having heard all the parties, including counsel for the child. The protection trial lasted 7 days and during that time 11 witnesses were called by the CCAST and a number of expert reports were put before the court. Thus, the national proceedings disclosed no manifest error, unreasonableness or abuse which would allow the Committee to evaluate the facts and evidence. The State party notes that J.T. was not independently represented before the Committee and therefore it was not in a position to take her best interests into account.

The State party also submits a copy of its response to the Committee on the Rights of the Child, in which it submits that re-instating access now, on the basis of the Committee's Views alone, which were adopted without any knowledge of the views of the child or her adoptive parents may be in contravention of article 3 (1) and 12 (2) of the Convention on the Rights of the Child.

**Author's comments**

The State party's response was sent to the author on 12 June 2008 within a deadline for comments of two months. On 18 June 2008, the author acknowledged receipt of the State party's submission and indicated that she expects the Committee to comment on the State party's arguments.

**Committee's Decision** During the ninety-first session, the Committee regretted the State party's refusal to accept the Views. It reviewed the new submission sent by the State party and concluded that there were no grounds to reconsider the Views in the case. The Committee considered the dialogue ongoing.

During the ninety-third session, the Committee considered the State party's most recent response of 6 June 2008. It notes that the communication was submitted on behalf of both the mother and the child. It regrets that the State party had not responded on the merits of the case prior to its consideration by the Committee and recalls that it was requested to provide such information on 10 December 2003. It also regrets that the State party is not willing to accept the Committee's Views, however, as it can see no useful purpose in pursuing a dialogue with the State party it does not intend to consider the communication any further under the follow-up procedure.

**State party**

**COLOMBIA**

**Case**

**Nydia Erika Bautista, 563/1993**

**Views adopted on**

27 October 1995

**Issues and violations found**

Abduction, detention incommunicado and subsequent disappearance of the victim - articles 2, paragraph 3, 6, paragraph 1, 7, 9, 10 and 14, paragraph 3 (c).

**Remedy recommended**

In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the victim's family with an appropriate remedy, which should include damages and an appropriate protection of family members from harassment. The Committee urged the State party to expedite the criminal proceedings leading to the prompt prosecution and conviction of the persons responsible for the abduction, torture and death of the victim.

**Date of reply**

The State party responded on 21 April 1997 and 2 November 1999.

**State party response**

The State party claimed that the case was pending before the Higher Military Tribunal. Some unspecified payment had been made to the family on an unspecified date.

**Author's comments**

Counsel has informed the Committee on several occasions of the lack of implementation of the Committee's recommendations. In a letter dated 19 July 2007 he indicates that the case was transferred from the military to civilian jurisdiction in 2000. The Public Prosecutor's Office carried out investigations against a number of



military officers allegedly involved in the crime, however, in January 2004, it decided to drop the charges for lack of evidence. That decision was appealed by the family on 5 February 2004, but the appeal was rejected by the Superior Court of Bogota in February 2006. As a result, no further investigation will be possible.

The decision to drop penal charges is however inconsistent with a judgement of the Administrative Tribunal of Cundinamarca dated 22 June 1995 which acknowledged the State's liability for the disappearance and extrajudicial execution of the victim carried out by members of the Army's XX Brigade. It is also inconsistent with Resolution No. 13 dated 5 July 1995 of the Human Rights Procurator which ordered the removal of Commander Velandia and Sergeant Ortega from the Army. That Resolution was implemented. However, on appeal, the State Council declared it null on 23 May 2002 and ordered the Commander's return to the Army.

Counsel claims that the Public Prosecutor's Office and the Superior Court of Bogota did not investigate the case properly and did not take into consideration the existing evidence against the military officers involved in the crime, some of whom had already been convicted for similar acts committed against another victim. Clearly, the investigation did not respect the minimum rules for the investigation of enforced disappearances and extrajudicial executions.

**Further action taken or required**

On 18 July 2008, a meeting was attended by Mr. Shearer, Special Rapporteur on follow-up, members of the secretariat, and Ms. Alma Viviana Perez Gomez, and Mr. Alvaro Ayala Melendez from the Colombian Permanent Mission.

The Rapporteur had forwarded an aide memoire to the State party prior to the meeting in an effort to assist it in its preparations and to structure the meeting. The State party's representatives attended the meeting with a response from the State party on the questions raised in the aide memoire. As to the question on the provision of compensation in three cases (45/1979, Saurez de Guerrero; 161/1983, Herrera Rubio; and 195/1985, Delgado Paez), the State party stated that it could not follow-up on these cases as it had no information on the location of the authors. The secretariat indicated to the State party that it could assist it in this regard. As to questions on the payment of compensation in four other cases (46/1079, Fals Borda; 64/1979, Salgar de Montejo; 181/1984, Freres Sanjuan Arevalo; and 514/1992, Fei), the State party states that, as the Committee did not specifically recommend compensation in these cases, under Law 288/1966, the Committee of Ministers cannot make such a recommendation. The Rapporteur

stated that he would discuss this matter with the bureau to see what could be done in this regard. As to case No. 687/1996, Rojas Garcia, the State party stated that this matter is before the Council of State for the purposes of (it would appear) the consideration of the amount of compensation. As to case No. 778/1997, Coronel et al., the State party indicated that there are two procedures ongoing - one criminal in nature against the accused and one relating to compensation. As to 859/1999, Jimenez Vaca; 848/1999, Rodriguez Orejuela; and 1298/2004, Becerra Barney, the State party's representatives indicated that the State party would wish to receive a note that there is no procedure for reconsideration of these cases. As to No. 1361/2005, "C", the State party indicated that it had already responded in detail, but that it had not received the author's response which was sent on 20 February 2008. It will be resent by the secretariat with a request for comments. In any event, the State party confirmed (as stated by the author) that the new draft legislation had not passed through the Senate, but that new legislation was being considered, that in any event same sex couples were now protected through a change in the jurisprudence of the Constitutional Court and that because these precedents are not retroactive, efforts are being made to provide the author with a remedy through other means. As to case No. 563/1993, Bautista, the State party informed the Committee that (...) (around 31,700 dollars) were paid to the author.

The Rapporteur indicated his appreciation to the representatives for meeting with him and to the State party for the information provided, which he will present to the Committee during the discussion on follow-up.

<b>Committee's Decision</b>	The Committee considers the dialogue in relation to all of these cases ongoing.
<b>Case</b>	<b>C., 1361/2005</b>
<b>Views adopted on</b>	30 March 2007
<b>Issues and violations found</b>	Denial of life partner's pension on basis of his sexual orientation - article 26
<b>Remedy recommended</b>	An effective remedy, including reconsideration of his request for a pension without discrimination on grounds of sex or sexual orientation.
<b>Due date for State party response</b>	30 March 2007

**Date of reply**

9 November 2007

**State party response**

The State party submits that the Committee, when adopting its Views on this case, did not take into consideration all its correspondence, contrary to article 5 of the Optional Protocol. It submits that the last two letters sent to the Committee through the Permanent Mission (notes MOC 71 dated 30 Jan 2007 and MPC dated 12 April) were not taken into account when making its decision. The Permanent Mission re-sent the notes, and the secretariat acknowledged receipt.

The content of those letters can be summarized as follows: administrative and judicial decisions are based on the current legal framework that protects the family; according to the legal meaning of article 23 of the Covenant and article 42 of the Colombian Constitution a family is formed by a man and a woman; the current legal framework regarding pensions has no provisions for same sex couples; sexual orientation is not one of the criteria used by the authorities to deny social security benefits; the fact that same sex couples have no access to social security benefits does not mean they are left unprotected; the concept of “family” is a longstanding one and only recently have other forms of relationships been receiving protection; in the absence of an applicable legal framework, the Constitutional Court has recently changed its jurisprudence regarding same sex couples; and Congress has also been active in this area.

In addition, the State party states that the following measures were taken:

1. Judicial measures (a) Constitutional Court Decision c-075 of 2007: protects economic rights of same sex couples and (b) Constitutional Court decision C-811 of 2007: recognized the right of homosexual couples to health-related social security benefits.

2. Legislative measures: Draft law on social protection of homosexuals (draft 130 of 2005 (Senate), draft 152 in House of Representatives): Same sex couples can have access to social security. This draft was rejected due to the failure to fulfil certain formalities. There are currently two new drafts before the Senate.

As to the provision of a remedy to the author, the State party submits that unfortunately, due to the lack of an appropriate legal framework, it is not legally in a position to reopen the case or re-examine his application. However, the Government has expressed its support for the current draft laws.

**Author's comments**

On 28 January 2008, the author responded as follows:

Law 288 of 1996 established a procedure to implement the Committee's Views. The Ministries of Foreign Affairs, Interior, Justice and National Defence studied the author's case and decided to comply with the Views. They drafted opinion 003 of 2007 to that effect. They later "changed their minds". According to the author, an article in the front page of a Colombian newspaper sets out why the Government decided not to comply with the Views. According to this article, when opinion 003 was ready to be signed, the Ministers received a memo signed by the Director of Social Security of the Ministry of Social Welfare who advised against the implementation of the Views. An argument between the Ministers ensued. In the end, after the intervention of the Vice-President, it was decided not to comply with the Views. The reason given was to avoid setting a precedent which would have a major economic impact.

The author responds to the arguments presented by the State party as follows: the absence of national legislation or applicable case law in Colombia does not exempt it from complying with its international obligations; even if it is true that national decisions are in conformity with national legislation, they are not in conformity with the Covenant; the issue of "family" was indeed discussed by the Committee and was the object of two separate opinions; "efforts" made by the Supreme Court are not applicable to the author's case and do not resolve his situation or pension issues; all law drafts had been archived, including one that has already been approved; the State party did not sponsor these drafts; despite the claim that same sex partners are not left without a pension, however, the author does not have access to any pension whatsoever; the State party could issue decrees to avoid Congress; as laws are generally not retroactive, even if the laws are changed now, it will not have an impact on the author's situation; to date, no remedies have been provided to the author; the Views have not been made public; due to the small numbers of same sex couples in the State party, the granting of pensions to homosexuals would not have a major economic impact.

**Further action taken or required**

See above for minutes of the meeting held between the Special Rapporteur and representatives of the State party relating to all of the cases against Colombia on 18 July 2008.

**Committee's Decision**

The Committee considers the dialogue ongoing.

<b>State party</b>	<b>GUYANA</b>
<b>Cases</b>	<b>(1) Yasseem and Thomas, 676/1996; (2) Sahadeo, 728/1996; (3) Mulai, 811/1998; (4) Persaud, 812/1998; (5) Hussain et Hussain, 862/1999, (6) Hendriks, 838/1998; (7) Smartt, 867/1999; (8) Ganga, 912/2000; (9) Chan 913/2000</b>
<b>Views adopted on</b>	(1) 30 March 1998; (2) 1 November 2002; (3) 20 July 2004; (4) 21 March 2006; (5) 25 October 2005; (6) 28 October 2002; (7) 6 July 2004; (8) 1 November 2004; (9) 25 October 2005.
<b>Issues and violations found</b>	<ol style="list-style-type: none"> <li>1. Death penalty case. Unfair trial, inhuman or degrading treatment resulting in forced confessions, conditions of detention - articles 10 paragraph 1, 14, paragraph 3 (b), (c), (e), in respect of both authors; 14, paragraph 3 (b), (d) in respect of Mr. Yasseen.</li> <li>2. Prolonged pretrial detention - articles 9, paragraph 3, 14, paragraph 3 (c).</li> <li>3. Death penalty after unfair trial - articles 6 and 14, paragraph 1.</li> <li>4. Death penalty, death row phenomenon - article 6, paragraph 1.</li> <li>5. Death penalty - mandatory nature - article 6, paragraph 1.</li> <li>6. Death penalty following unfair trial and mistreatment - articles 9, paragraph 3 and 14, paragraph 3 (c), (d) and (e) and consequently of 6.</li> <li>7. Death penalty after unfair trial - articles 6, and 14, paragraph 3 (d).</li> <li>8. Fair trial (compelled to testify against self) - articles 6, and 14, paragraphs 1, 3 (g).</li> <li>9. Death penalty - article 6, paragraph 1.</li> </ol>
<b>Remedy recommended</b>	<ol style="list-style-type: none"> <li>1. Under article 2, paragraph 3 (a), of the Covenant, Messrs. Abdool S. Yasseen and Noel Thomas are entitled to an effective remedy. The Committee considers that in the circumstances of their case, this should entail their release.</li> <li>2. The Committee is of the view that Mr. Sahadeo is entitled, under article 2, paragraph 3 (a), to an effective remedy, in view of the prolonged pretrial detention in violation of article 9, paragraph 3, and the delay in the subsequent trial,</li> </ol>

in violation of article 14, paragraph 3 (c), entailing a commutation of the sentence of death and compensation under article 9, paragraph 5, of the Covenant.

3. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Bharatraj and Lallman Mulai with an effective remedy, including commutation of their death sentences.
4. Effective remedy, including commutation of his death sentence.
5. Effective remedy including commutation of sentence.
6. In accordance with article 2, paragraph 3, of the Covenant, the author's son is entitled to an effective remedy, including the commutation of his death sentence.
7. An effective remedy, including release or commutation.
8. An effective remedy, including commutation of their death sentence.

**Due date for State party response**

(1) 3 September 1998; (2) 21 March 2002; (3) 1 November 2004; (4) 6 November 2006; (5) 9 March 2006; (6) 10 March 2003; (7) 10 October 2004; (8) 10 March 2004; (9) 9 March 2006.

**State party response**

No reply to any of these Views.

**Further action taken/required**

Action taken: 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.

On 31 March 2008, the Rapporteur on follow-up, Mr. I. Shearer, met with Ms. Donette Critchlow, member of the Permanent Mission of Guyana to the United Nations in New York. Mr. Shearer observed that, despite repeated requests, the Committee had never received information from the State party

regarding follow-up to the nine cases on which Views had been adopted. Furthermore, the Committee was also concerned at alleged recent statements by the President of Guyana according to which he intends to resume signing death warrants and expediting execution dates.

Ms. Critchlow said she was not in a position to react to Mr. Shearer's concerns, but she would convey his message to the capital. She did not deny that the above-mentioned statements had been made. Rather, she said that there had never been an official moratorium on the death penalty and that executions might resume in view of the recent increase of murder cases. Despite several reminders sent on behalf of the Secretariat for information on follow-up to these cases, none has been forthcoming.

<b>Author's response</b>	With regard to communication No. 811/1998 (Mulai), the lawyer informed the Committee by letter dated 6 June 2005 that no measures had been taken by the State party to implement the Committee's recommendation.
<b>Committee's Decision</b>	The Committee considers the dialogue in all of these cases ongoing.
<b>State party</b>	<b>ICELAND</b>
<b>Case</b>	<b>Haraldsson, 1306/2004</b>
<b>Views adopted on</b>	24 October 2007
<b>Issues and violations found</b>	Discrimination in business of commercial fishing quotas - article 28.
<b>Remedy recommended</b>	An effective remedy, including adequate compensation and review of its fisheries management system.
<b>Due date for State party response</b>	2 June 2008
<b>Date of reply</b>	11 June 2008
<b>State party response</b>	The State party provides a detailed response to the Committee's Views, which is only summarized below. The State party provides detailed information on the development of fishing rights in the State party with a view to shedding some light on the framework in which the State party may take action on its Views (copies may be provided from the secretariat upon request). It submits that it cannot infer from the Views how far it should go for its measures to be considered "effective". It asks of the Committee whether minor adaptations and changes in the Icelandic fisheries management system will suffice or whether more radical changes

are needed. In any event, it is of the view that caution is required and that overturning the Icelandic fisheries management system would have a profound impact on the Icelandic economy, and in some respects it would appear to be impossible to wind down the system e.g. by recovering the quota for the State, unless the State treasury were prepared to pay some sort of compensation to the persons affected by the confiscation. It could not however be rule out that the State could act on the basis of the third sentence in Article 1 of the Fisheries Management Act which stipulates that the issue of catch entitlements does not form a right of ownership or irrevocable jurisdiction over harvest rights. In short there are numerous considerations that need to be taken into account before any decisions can be made on alterations of the system. The State party submits that the manifesto of the current Government includes a decision to “conduct a study of the experience of the quota system for fisheries management and the impact of the system on regional development” but that this is a long-term plan and the system cannot be dismantled in six months. The State party submits that there are no grounds for paying compensation to the authors as this could result in a run of claims for compensation against the State; such claims are untenable under Icelandic law. To ensure equality, the State would have to compensate all those who found themselves in a similar situation and it would constitute an admission that anyone who possesses or buys a vessel holding a fishing permit would be entitled to allocation of catch quotas. This would have unforeseeable consequences for the management of the State party’s fisheries resources, protection of the fish stocks around Iceland and economic stability in the country.

**Author’s response**

The State party’s submission was sent to the authors on 12 June 2008 with a deadline of two months for comments.

**Committee’s Decision**

The Committee welcomes the fact that the State party is currently conducting a review of its fisheries management system and looks forward to being informed of the results as well as the implementation of the Committee’s Views. It also looks forward to receiving the authors’ comments in this regard and considers the dialogue ongoing.

**State party**

**JAMAICA**

**Case**

**Simpson, 695/1996**

**Views adopted on**

23 October 2001

**Issues and violations found**

Inhuman conditions of detention and absence of legal representation - articles 10, paragraph 1, 14, paragraph 3 (d).



<b>Remedy recommended</b>	An appropriate remedy, including adequate compensation, an improvement in the present conditions of detention and due consideration of early release.
<b>Due date for State party response</b>	5 February 2002
<b>Date of reply</b>	18 June 2003
<b>State party response</b>	On 18 June 2003, State party advised that the author had complained to prison authorities about testicular, eye and shoulder problems. He has been receiving medical attention, keeping to date 25 medical appointments, consistent with international standards. His detention conditions have improved significantly since being moved from St Catherines to Sth Camp Rd Adult Correctional Centre in September 2002, the best facility on the island. The Courts will need to decide on his parole eligibility - the Registrar of the Court of Appeal is making arrangements for the matter to be placed before a judge of the court. The assignment of legal representation is being awaited.
<b>Author's comments</b>	<p>On 18 February 2002, counsel asked whether the State party had responded with follow-up information. He noted that the author's non-parole period had still not been reviewed as required by law since the commutation of his death sentence in 1998, rendering him ineligible for parole. The State party has also not taken steps to address the author's medical problems.</p> <p>On 26 March 2008, the author informed the Committee that his conditions of detention had worsened and that he had not been considered for release.</p>
<b>Committee's Decision</b>	The Committee considers the dialogue ongoing.
<b>State party</b>	<b>NEW ZEALAND</b>
<b>Case</b>	<b>E.B., 1368/2005</b>
<b>Views adopted on</b>	16 March 2007
<b>Issues and violations found</b>	Undue delay in the resolution of the author's application to the Family Court for access to his children (art. 14, para. 1).
<b>Remedy recommended</b>	Effective remedy, including the expeditious resolution of the access proceedings in relation to one of the children.
<b>Due date for State party response</b>	July 2007

**Date of reply**

26 July 2007

**State party response**

The New Zealand Police has conducted a thorough review of the four separate investigations relating to the author, in light of the Committee's Views. The State party gives details about such investigations in order to explain the reasons for the delays. It states that while at face value the total period of time involved may seem lengthy and was indeed regrettable, the delay was neither undue nor unreasonable when considering in detail the circumstances of the case. Nor were the delays wholly attributable to the State, as noted in the opinion of one Committee member. As such the State party does not accept the Views of the Committee that a breach of Article 14, paragraph 1 has occurred, and accepts instead the individual View of one Committee member that "the suggestion that this case could be handled quickly does not give weight to the difficulty of assessing delicate facts in the close confines of a family and to the trauma to children that can be caused by the very process of investigation".

In order to comply with natural justice and fairness, the Court was required at various points in the process to extend time frames beyond those originally imposed. Thus, although regrettable, the delays were neither undue nor unreasonable, nor wholly attributable to the State.

In relation to the continuing application by the author for access to one of the children, while it would be inappropriate for the Executive to intervene in matters of the Judiciary, the Family Court advised that the matter would be set down for a five-day hearing on 20-24 August 2007. The principal judge of the Family Court has assured the Government of New Zealand that undertaking its cases speedily and in accordance with the principles of fairness and natural justice is the single greatest concern of the Family Court judges.

To address the concern that cases are sometimes taking longer to hear than is desirable, the principal Family Court judge launched a new initiative in November 2006, aimed at those 5 per cent of cases that require a defended hearing. It is intended to reduce delay and costs by shortening families' involvement in litigation through a less adversarial approach.

**Author's response**

On 23 October 2007 the author informed the Committee that he had not been supplied with copies of the investigations referred to in the State party's response and, therefore, he suffered from an inequality of arms. As a result of the Committee's views, some priority was given to the case by the judicial authorities and a four-day hearing commenced on 20 August 2007. The judgement has not been issued yet.

<b>Committee's Decision</b>	The Committee considers the dialogue ongoing and would appreciate information on the results of the hearings which took place in August.
<b>State party</b>	<b>PERU</b>
<b>Case</b>	<b>Avellanal, 202/1986</b>
<b>Views adopted on</b>	28 October 1988
<b>Issues and violations found</b>	No standing of wife in court procedure over property - articles 3, 14, paragraph 1, 26.
<b>Remedy recommended</b>	Take effective measures to remedy the violations.
<b>Due date for State party response</b>	12 June 1991
<b>Date of reply</b>	None
<b>State party response</b>	None
<b>Author's comments</b>	Letters dated 30 March 2007, 4 June 2007 and 3 August 2007 were received by the Committee in which the author complains about the Committee's inability to secure implementation of its Views.
<b>Committee's Decision</b>	The Committee regrets the State party's lack of response and considers the dialogue ongoing.
<b>Case</b>	<b>K.N.L.H., 1153/2003</b>
<b>Views adopted on</b>	24 October 2005
<b>Issues and violations found</b>	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.
<b>Remedy recommended</b>	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.
<b>Due date for State party response</b>	9 February 2006
<b>Date of State party response</b>	7 March 2006

**State party response**

The Committee will recall that as set out in its 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 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 anencephalic fetuses.

**Author's response**

By letter of 16 June 2006, the Centre for Reproductive Rights (which represents the author) 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 National Human Rights Council 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 considered that the Government's proposed action, which would consist in the payment of \$10,000 dollars in compensation as well as the introduction of a proposal to amend legislation in order to decriminalize abortions in cases of anencephalic fetuses, to be insufficient. 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. She contended 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 recalled 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.<sup>1</sup> She provides a detailed proposal for reparations totalling \$96,000 dollars (the proposal includes \$850 dollars for payment of expenses such as the birth and baby's burial, \$10,400 dollars for psychological rehabilitation, \$10,000 dollars for diagnostic and treatment of physical consequences, \$50,000 dollars for moral damages and \$25,000 for "life project" (lost opportunities). The State party should retract its proposal in which women seeking a therapeutic abortion must seek judicial authorization.

On 7 January 2008, the author submits that there are currently no technical guidelines or procedures regarding the voluntary termination of pregnancy that could provide guidance to women and doctors, at the national level, on how to terminate a pregnancy for medical reasons. The Ministry of Health has prepared a proposal, which was submitted to the Cabinet in May 2007, for their review and advice. Those guidelines are currently with the Minister of Health, but according to the author, there is a lack of political will to approve them. The State party has not taken any measures to allow women to have safe therapeutic abortions. It has made changes to the Penal Code, allowing for therapeutic abortion in case of anencephaly, but not for other reasons that also may cause harm to women's mental health. The author has not accepted the offer of \$10,000 made to her, as: (1) Peru has not accepted responsibility in relation to violations of articles 2, 7 and 17 of the Covenant and (2) The compensation offered is not commensurate with the damage caused. The State party has not yet published the Views.

<b>Committee's Decision</b>	The Committee welcomes the information provided by the author that the State party has proposed providing her with compensation and looks forward to receiving detailed information from the State party on this proposal as well as any other means the State party intends to implement its Views.
<b>Case</b>	<b>Carranza Alegre, Marlem, 1126/2002</b>
<b>Views adopted on</b>	28 October 2005
<b>Issues and violations found</b>	Arbitrary detention, torture and inhuman and degrading treatment, faceless judges - articles 2, paragraph 1, 7, 9, 10 and 14.

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<sup>1</sup> Tribunal Constitucional Peruano, *En la acción de amparo por Rubén Toribio Muñoz Hermoza*, EXP. No. 012-95-AA/TC. The authors also refers to a decision by the same court in 105-2001-AC/TC.

<b>Remedy recommended</b>	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.
<b>Date of State party's response</b>	25 May 2006 (see 2007 annual report) and 8 August 2007.
<b>State party's response</b>	The State party recalls that the author was released from prison following a judgment of the Supreme Court dated 17 November 2005 in which all charges of terrorism against her were dropped. The Ministry of Justice, through its National Human Rights Council, requested the Casimiro Ulloa Hospital, in which the author worked as a doctor before her detention, to reinstate her in her post. Such request was accepted and the author was able to rejoin the hospital staff as of 27 April 2007.
<b>Author's response</b>	None
<b>Committee's Decision</b>	The Committee welcomes the information regarding the author's reinstatement in her post at the hospital. It regrets, however, that no compensation has been provided to her and considers the dialogue ongoing.
<b>Case</b>	<b>Quispe Roque, 1125/2002</b>
<b>Views adopted on</b>	21 October 2005
<b>Issues and violations found</b>	Illegal arrest, unfair trial, faceless judges, articles 9 and 14.
<b>Remedy recommended</b>	An effective remedy and appropriate compensation. In the light of the long period that he has already spent in prison and the nature of the acts of which he is accused, the State party should consider the possibility of terminating his deprivation of liberty, pending the outcome of the current proceedings against him. Such proceedings must comply with all the guarantees required by the Covenant.
<b>Due date for State party response</b>	1 February 2006
<b>Date of reply</b>	25 May 2006, 13 August 2007
<b>State party response</b>	On 13 August 2007, the State party sent to the Committee report No. 105-2007-JUS/CNDH-SE-CESAPI of the Executive Secretary of the National Council of Human Rights issued on 24 July 2007,

concluding that although the State party is still waiting for the Supreme Court's judgment on the remedy sought by the applicant, it considers that the recommendations of the Committee have been complied with as (a) the applicant was found guilty of the crime against public order-terrorism (affiliation to terrorist organizations) and sentenced to 15 years imprisonment; and (b) the time spent in jail by the applicant before conviction has been counted as served for the 15 years' imprisonment imposed on him. His imprisonment therefore came to an end on 20 June 2007.

<b>Author's response</b>	None
<b>Committee's Decision</b>	The Committee welcomes the information regarding the author's release from prison. It regrets, however, that no compensation has been provided to him and considers the dialogue ongoing.
<b>Case</b>	<b>Vargas Mas, 1058/2002</b>
<b>Views adopted on</b>	26 October 2005
<b>Issues and violations found</b>	Torture, illegal arrest, inhuman treatment in prison, unfair trial, faceless judges, articles 7, 9, paragraph 1, 10, paragraph 1, 14.
<b>Remedy recommended</b>	The State party is under an obligation to provide the author with an effective remedy and appropriate compensation. In the light of the long period that he has already spent in detention, the State party should give serious consideration to terminating his deprivation of liberty, pending the outcome of the current proceedings against him. Such proceedings must comply with all the guarantees required by the Covenant.
<b>Due date for state party response</b>	6 February 2006
<b>Date of State party response</b>	25 May 2006 and 13 August 2007
<b>State party response</b>	On 13 August 2007, the State party sent to the Committee report No. 105-2007-JUS/CNDH-SE-CESAPI of the Executive Secretary of the National Council of Human Rights issued on 24 July 2007, concluding that although the State party is still waiting for the Supreme Court's judgment on the remedy sought by the applicant, it considers that the recommendations of the Committee have been complied with as (a) the applicant was found guilty for the crime against public order-terrorism (affiliation to terrorist organizations) and sentenced to 20 years of imprisonment; and (b) the time spent in jail by the applicant before conviction has been counted as served for the 20 years' imprisonment imposed on him.

<b>Author's response</b>	None
<b>Further action required</b>	The Committee considers the dialogue ongoing.
<b>State party</b>	<b>PHILIPPINES</b>
<b>Case</b>	<b>Pimentel et al., 1320/2004</b>
<b>Views adopted on</b>	19 March 2007
<b>Issues and violations found</b>	Unreasonable length of time in civil proceedings, equality before the Courts - article 14, paragraph 1 in conjunction with article 2, paragraph 3.
<b>Remedy recommended</b>	Adequate remedy including compensation and a prompt resolution of their case on the enforcement of the United States judgement in the State party.
<b>Due date for State party response</b>	3 July 2007
<b>State party response</b>	None
<b>Author's comments</b>	On 1 October 2007, the authors informed the Committee that the State party had failed to date to provide them with compensation and that the action to enforce the class judgement has remained in the Regional Trial Court of Makati following remand of the case in March 2005. It was not until September 2007, that the court determined, per motion for consideration, that service of the complaint on the defendant estate in 1997 was proper. Thus, the authors wish the Committee to request of the State party prompt resolution of the enforcement action and compensation. Following the jurisprudence of the European Court of Human Rights (inter alia <i>Triggiani v. Italy</i> , (1991) 197 Eur.Ct.H.R. (ser. A)) and other reasoning, including the fact that the class action is made up of 7,504 individuals, they suggest a figure of 413,512,296 dollars in compensation.
<b>Committee's Decision</b>	The Committee considers the dialogue ongoing.
<b>State party</b>	<b>REPUBLIC OF KOREA</b>
<b>Case</b>	<b>Yeo-Bum Yoon and Myung-Jin Choi, 1321/2004 and 1322/2004</b>
<b>Views adopted on</b>	3 November 2006
<b>Issues and violations found</b>	Conscientious objection to enlistment in compulsory military service - article 18, paragraph 1.



<b>Remedy recommended</b>	An effective remedy, including compensation.
<b>Due date for State party response</b>	16 April 2007
<b>Date of reply</b>	March 2007 (no date)
<b>State party response</b>	<p>In March 2007, the State party informed 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 Defence. It was made up of members selected from legal, religious, sporting, and artistic circles and from amongst concerned public authorities. Its mandate was 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 was suppose to release its results on the basis of which the State party would proceed with the follow-up of this case.</p> <p>As to the consideration of remedial measures for the authors in question, the State party informed the Committee that a task force relating to the implementation of individual communications was set up. 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.</p>
<b>Authors response</b>	<p>On 12 November 2007, the authors submitted that they have been provided with no effective remedy to date and their criminal record still stands. They report that there are around 700 conscience objectors serving prison sentences in the State party, and that even since the Views the State party has continued to charge, prosecute and imprison such objectors. On 18 September 2007, the Ministry of Defence issued a press release stating that "it will propose allowing conscience objectors to engage in social service instead of mandatory military terms." However, before doing so "the Ministry plans to hold public hearings and opinion polls before revising laws governing the military service by the end of next year. The revision is subject to the legislature's approval." Thus, according to the authors this is only a political proposition that may or may not happen. Furthermore, the Ministry of Defence has indicated that if such a</p>

law is ever adopted alternative service would be nearly twice as long as military service. In their view, this would appear to be a punitive alternative at best.

<b>Committee's Decision</b>	The Committee considers the dialogue ongoing.
<b>State party</b>	<b>SERBIA</b>
<b>Case</b>	<b>Bodrožić, 1180/2003</b>
<b>Views adopted on</b>	31 October 2005
<b>Issues and violations found</b>	Freedom of expression - article 19, paragraph 2.
<b>Remedy recommended</b>	An effective remedy, including quashing of the conviction, restitution of the fine imposed on and paid by the author as well as restitution of court expenses paid by him, and compensation for the breach of his Covenant right.
<b>Due date for State party response</b>	
<b>Date of reply</b>	N/A
<b>State party response</b>	None
<b>Author's comments</b>	<p>On 22 July 2008, the State party informed the Committee that the author had been paid 800,000 RSD (approximately €10,000) pursuant to a compensation agreement between the State party and the author.</p> <p>On 19 June 2008, the Secretariat received information through the United Nations Development Programme that the author had signed an agreement with the Ministry of Justice according to which he will receive 800,000 dinars (approximately 10,000 euros) for reparations and restitution.</p> <p>On 25 July 2008, the author informed the Committee that he had accepted compensation of 800,000 dinars for the violation of his rights under the Covenant.</p>
<b>Committee's Decision</b>	The Committee welcomes the award of compensation, which the author accepts as a remedy for the violation of his rights under the Covenant, and regards the State party's response as satisfactory.

<b>State party</b>	<b>SRI LANKA</b>
<b>Case</b>	<b>Sarma, Jegatheeswara, 950/2000</b>
<b>Views adopted on</b>	16 July 2003
<b>Issues and violations found</b>	Military detention, mistreatment and disappearance - articles 7 and 9.
<b>Remedy recommended</b>	The State party is under an obligation to provide the author and his family with 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 violations suffered by the author's son, the author and his family. The State party is also under an obligation to expedite the current criminal proceedings and ensure the prompt trial of all persons responsible for the abduction of the author's son under section 356 of the Sri Lankan Penal Code and to bring to justice any other person who has been implicated in the disappearance.
<b>Due date for State party response</b>	4 November 2003
<b>Date of reply</b>	2 February 2005
<b>State party response</b>	The State party submitted that the criminal proceedings against the accused charged with the abduction of the author's son were pending before the High Court of Trincomalee. The Attorney-General had, on behalf of the Government of Sri Lanka, informed the court to expedite the trial. The Government intended to refer the case to the Human Rights Commission of Sri Lanka to make recommendations on the question of payment of compensation including the determination of the quantum of such compensation.
<b>Author's comments</b>	On 11 April 2005, counsel provided comments on the State party's submission. He stated that the State party has failed to give effect to the decision as it has: failed to investigate all those responsible even though their particulars were made available by the author to the State party; failed to trace the interviews of the potential witnesses whose names and addresses were disclosed to the State party and whose evidence could cast light as to the whereabouts of the author's son, and failed to cite them as witnesses for the prosecution in the case of Corporal Sarath; failed to pay compensation, deferring consideration of the payment of compensation to the conclusion of the said trial, which, in light of experience, is likely to lead to further inordinate delays if it does

not lead to the question of compensation being deferred indefinitely. The case against Corporal Sarath has been pending in the High Court of Trincomalee for the last three years. There is nothing on the case brief to indicate that any request to expedite the trial has been received by the Court, still less acted upon.

On 10 April 2008, the author states that he was informed on 8 October 2007 by the Human Rights Commission of Sri Lanka that it had sent its recommendations for compensation to the Attorney General of Sri Lanka. However, since then he has not heard from the Government.

<b>Further action taken or required</b>	The author's submission was sent to the State party on 21 April 2008 with a request for comments by 23 June 2008.
<b>Committee's Decision</b>	The Committee considers the dialogue ongoing.
<b>State party</b>	<b>SWEDEN</b>
<b>Case</b>	<b>Alzery, 1416/2005</b>
<b>Views adopted on</b>	25 October 2006
<b>Issues and violations found</b>	Failure to ensure that the diplomatic assurances procured were sufficient to eliminate the risk of ill-treatment; excessive use of force against the author at Bromma airport; failure to ensure that the State party's investigative apparatus is able to preserve 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; absence of any opportunity for effective, independent review of the decision to expel the author; failure to permit the exercise in good faith of the right of complaint to the Committee. Articles 7, 7 in conjunction with 2, article 1 of the Optional Protocol.
<b>Remedy recommended</b>	Effective remedy, including compensation.
<b>Due date for State party response</b>	6 February 2007
<b>Date of reply</b>	9 July 2008 (the State party had previously responded on 18 September 2007 and 14 March 2007)
<b>State party response</b>	In its response of 14 March 2007, the State party indicated that the author's request for a residence permit in Sweden, as well as his request for compensation were pending (See 2007 annual report, A/62/40).

On 18 September 2007, the State party informed the Committee that on 10 May 2007 the Migration Board rejected Mr. Alzery's application for a residence permit. The Migration Court of Appeal upheld the Board's decision on 31 August 2007. The Government will now examine Mr. Alzery's application in accordance with the relevant provisions of the Aliens Act. A decision might be expected before the end of the year.

Furthermore, Mr. Alzery's request for compensation from the Swedish Government is presently under examination by the Chancellor of Justice.

On 9 July 2008, the State party informed the Committee that a settlement of 3,160,000 SEK was awarded to the author. The decision is currently being translated. It also informed the Committee that it is still awaiting a decision on the author's request for a residence permit, and that this decision will probably be made in August.

<b>Author's comments</b>	<p>According to newspaper reports, the author has been awarded 3 million SEK (approximately 500,000 CHF) by the Swedish Government as compensation for his case.</p> <p>The State party has been requested to confirm the information provided.</p>
<b>Committee's Decision</b>	The Committee considers the dialogue ongoing.
<b>State party</b>	<b>TAJIKISTAN</b>
<b>Case</b>	<b>Boymurodov, 1042/2001</b>
<b>Views adopted on</b>	20 October 2005
<b>Issues and violations found</b>	Torture, forced confession, incommunicado detention, right to counsel - article 7, 9, paragraph 3, 14, paragraph 3 (b), and (g).
<b>Remedy recommended</b>	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.
<b>Due date for State party response</b>	1 February 2006
<b>Date of reply</b>	5 December 2007 (the State party had responded on 14 April 2006)

**State party response**

On 14 April 2006, the State party submitted two letters, one from the Supreme Court and one from the Office of the Prosecutor General, and informed the Committee that both institutions had examined the Committee's Views, at the request of the Governmental Commission on the State party's compliance with its international human rights obligations.

The Supreme Court, which had studied the materials from the criminal case, established that there had been no gross violations of the State party's criminal or procedural legislation during the preliminary investigation and court consideration, on the basis of which the Committee found violations of article 9 and 14, paragraph 3 (b) of the Covenant. Despite the author's statement on 10 October 2000, that he did not need a defence lawyer, from 9 November 2000 a defence lawyer participated in his preliminary investigation and trial.

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, having found that the author had not been subjected to any form of coercion and neither he nor his lawyer made any complaint in this regard either during the preliminary investigation or court hearings. 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.

On 5 December 2007, the State party provided further decisions from the Supreme Court and the Prosecutor General, dated 5 October 2007 and 28 May 2007, respectively, which reviewed the matter for a second time. After consideration of the cases, they arrive at similar conclusions to their earlier decisions provided to the Committee on 29 September 2004.

**Author's response**

The author responded to the State party's submission and notes that the State party maintains that Mr. Boyumorodv's guilt was established but does not indicate what measures have been taken to remedy the violation of his rights in the context of the Committee's Views. According to the author, during the examination of the Committee's case, he had asked different

national authorities on the steps he should take to have those responsible for his son's ill-treatment punished. He and his lawyer received only limited answers. Even though a criminal case was opened against the officials in question, they are still working in the law enforcement agencies and received new posts. In the meantime, the author and his lawyer have requested to have Mr. Boymurodov's criminal case re-examined. According to him, his son's guilt was established on three counts and he was sentenced to 25 years' imprisonment. After the recent re-examination of the case (exact dates or Court name not provided), Boyumurodov was found guilty on only one count, but his punishment was confirmed and remained 25 years' of imprisonment.

**Further action taken or required**

The Special Rapporteur met with the State party during the ninety-second session and received confirmation from the State party that it would accept a follow-up mission to the State party.

A meeting between the Committee's Special Rapporteur on follow-up to Views and representatives of Tajikistan (H.E. the Ambassador and a Secretary) took place during the Committee's ninety-second session in New York, on 3 April 2008.

The Special Rapporteur had submitted an aide memoire to the State party's representatives. He noted, inter alia, the amelioration in the communication between the State party and the Committee. He raised a number of questions in relation to the moratorium on death penalty and the State party's intention to permanently abolish recourse to capital punishment; the structure and functions of the State party's Commission on the execution of Tajikistan's international obligations; on the existence of an institution which deals specifically with the individual communications submitted under the Optional Protocol to the Covenant; on the introduction of the institution of Ombudsman.

The Special Rapporteur further asked the State party on the measures taken in order to give effect to the Committee's Views in respect to relatives (that were found to be victims of a violation of article 7 of the Covenant) of individuals who were sentenced to death and were executed and whose burial site was never revealed to the family.

The State party's representatives provided a number of clarifications in particular to the effect that the death penalty would be excluded from the legislation after the necessary legislative changes; to the work of an Inter-Ministerial (Inter-Agency) Commission on human rights, and the Department on Constitutional (human) rights of Tajik citizens. The State party's representatives noted that recently Tajikistan was visited

by the United Nations High Commissioner for Human Rights; the Special Rapporteur on freedom of religion and belief, and the Special Rapporteur on violence against women, its causes and consequences.

The State party's representatives expressed their agreement to receiving a visit, in Tajikistan, of the Committee's Special Rapporteur. The purpose of the visit would be to facilitate better cooperation with officials concerned and to contribute to yet better understanding of the work/procedure. They have asked for a note verbale to that effect, in order to check for available dates for the visit with their capital.

A note verbale was sent to the State party in May 2008 requesting available dates for the mission. To date no response has been received from the State party.

<b>Committee's Decision</b>	The Committee considers the State party's response unsatisfactory and considers the dialogue ongoing. It reminds the State party of its invitation to the Rapporteur for a follow-up mission to the State party and notes that despite a note verbale in May 2008 from the secretariat on behalf of the Special Rapporteur to the State party requesting available dates for the mission, no response has been forthcoming from the State party.
<b>Case</b>	<b>Kurbanov, 1096/2002</b>
<b>Views adopted on</b>	6 November 2003
<b>Issues and violations found</b>	Arbitrary arrest and detention, torture, unfair trial, no/inadequate legal representation, no right to appeal, no interpretation, inhuman conditions, death sentence following unfair trial - articles 6, 7, 9, paragraph 2, and 3, 10, 14, paragraphs 1, and 3 (a) and (g).
<b>Remedy recommended</b>	Compensation and a new trial before an ordinary court and with all the guarantees of article 14, or, should this not be possible, release.
<b>Due date for State party response</b>	10 February 2003
<b>Date of reply</b>	5 December 2007 (the State party had responded on 29 September 2004)
<b>State party response</b>	On 29 September 2004, the State party confirmed that following the Committee's Views, and pursuant to the Death Penalty (Suspension) Act of 2 June 2004, the execution of the author's death sentence was commuted to 25 years. By order No. 1300 of the President of the Republic of Tajikistan dated 9 March 2004, he was granted clemency. The State party provided a copy of the joint



reply of the Office of the Prosecutor General and the Supreme Court addressed to the Deputy Prime Minister. The Prosecutor General and the Supreme Court re-examined the author's case and established the following facts. He was arrested on 12 May 2001 suspected of fraud, with which he was charged on 14 May 2001, and was kept in detention from 15 May 2001. At the time, the law did not allow for court control of detention and it was controlled by the prosecutor. According to the authorities, the case file did not contain any information that the author had been subjected to torture or ill-treatment, and he presented no complaint on this issue during the investigation or in court. After having confessed to the murders for which he had also been charged he was assigned a lawyer in whose presence he was charged with murder on 30 June 2001. The authorities concluded that his conviction for different crimes (including murders) was proven, that the judgment was grounded, and they found no reason to challenge it.

On 5 December 2007, the State party provided further decisions from the Supreme Court and the Prosecutor General, dated 5 October 2007 and 28 May 2007 respectively. After a second review of these cases, both bodies arrive at similar conclusions to their earlier decisions provided to the Committee on 29 September 2004.

<b>Further action taken or required</b>	In an earlier report the Committee, while expressing its satisfaction that the author's sentence had been commuted, requested the State party to fully implement its Views.
<b>Committee's Decision</b>	The Committee considers the dialogue ongoing.
<b>Case</b>	<b>Dovud and Sherali Nazriev, 1044/2002</b>
<b>Views adopted on</b>	17 March 2006
<b>Issues and violations found</b>	Torture, forced confession, unlawful detention, no legal representation at initial stages of the investigation, no notification of execution or burial ground - articles 6, 7, 9, paragraph 1, 14, paragraphs 1, 3 (b), (d), and (g) and breach of the Optional Protocol.
<b>Remedy recommended</b>	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.

<b>Due date for State party response</b>	2 July 2006
<b>Date of reply</b>	5 December 2008 (the State party had responded on 13 July 2006)
<b>State party response</b>	<p>On 13 July 2006, the State party submitted two letters, one from the Supreme Court and one from the Office of the Prosecutor General. It informed the Committee that, at the request of the Governmental Commission, both institutions had examined the Committee's Views and had given their opinion on the State party's compliance with its international human rights obligations.</p> <p>The Supreme Court recalled in extenso the facts/procedure of the case. It submitted 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 judiciary remedies were exhausted.</p> <p>The examination of the criminal case file showed that the Nazrievs' guilt was established by much corroborating evidence (an extensive list of this evidence was provided, for example witnesses' testimonies, material evidence, and several experts' conclusions) that were examined and evaluated by the court). According to the Supreme Court, the author's allegations about the use of torture by the investigators to force the brothers to confess guilt were groundless and contradicted the content of the criminal case file and the rest of the evidence. There was 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 the Nazrievs' lawyers about the impossibility of meeting with their clients.</p> <p>The Supreme Court rejected 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. It noted 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 the 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</p>

had requested from the Detention Centre of the Ministry of Security (where the brothers were kept) medical records, and according to a response of 18 April 2001, it transpired that both brothers had requested medical care during their stay for hypertonia, “acute respiratory virus infection”, grippe, caries, and depression. The brothers were examined on several occasions by medical doctors and were given appropriate medical care. No marks of torture or ill-treatment were revealed during these examinations, nor had 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 or of the burial place of her husband and his brother, the Supreme Court referred the Committee to its law on the Execution of Criminal Penalties. It stated that when the Supreme Court learnt that the brothers had been executed, it informed the relatives.

The Deputy Prosecutor General had provided a similar decision to that of the Supreme Court with identical conclusions, in a decision of 14 June 2006.

On 5 December 2008, the State party provided further decisions from the Supreme Court and the Prosecutor General, dated 5 October 2007 and 28 May 2007. After review of these cases for a second time, they arrived at similar conclusions to their earlier decisions provided to the Committee on 13 July 2006.

**Author’s response**

The State party’s response was sent to the author on 26 September 2006 with a deadline of 26 November 2006 for comments.

The State party’s response of 5 December 2008 was sent to the author on 21 February 2008 with a deadline of 21 April 2008 for comments.

**Committee’s Decision**

The Committee considers the dialogue ongoing.

**Case**

**Davlatov brothers and Askarov, 1121/2001**

**Views adopted on**

26 March 2007

**Issues and violations found**

Torture; unfair trial; right to life; conditions of detention: as to Messrs. Davlatovs - articles 6, paragraph 2, 7 and 14, paragraph 3 (g) read together, 10, and 14, paragraph 2. As to Messrs. Karimov and Askarov - articles 6, paragraph 2, 7 read together with 14, paragraph 3 (g), 10, and 14, paragraphs 2 and 3 (b) and (d), of the Covenant

<b>Remedy recommended</b>	An effective remedy, including compensation.
<b>Due date for State party response</b>	3 September 2007
<b>Date of reply</b>	5 December 2008
<b>State party response</b>	<p>The State party submits that in light of the Views, the Supreme Court reviewed the authors' case. It reiterated the facts in detail and refers to the large quantity of evidence on which the courts based their judgment in establishing the authors' guilt. With reference to the authors' allegations set out in the Committee's Views, the Supreme Court notes the following: the allegations of the alleged victims' innocence is not corroborated and is groundless; during the preliminary investigation, in the presence of their lawyers, all authors confirmed that they were not forced to confess and that they made their depositions freely; three witnesses testified, both during the preliminary investigation and in court, having seen Karimov on 11 April 2001 near the place where the Deputy Minister was killed; and during a search on 11 April 2001 at the crime scene, a sports bag was discovered. All four authors confirmed that the bag in question was used by them to carry the guns used in the murder.</p> <p>The Supreme Court contends that the Committee's conclusions are groundless, and are refuted by the material in the criminal case file.</p> <p>The General Prosecutor's Office also examined the Committee's Views and contests the findings. The file demonstrates <i>inter alia</i> that all actions taken during the investigation were conducted in the presence of their respective lawyers and all records are countersigned by the lawyers. Thus, the Committee's conclusion in relation to the breach of the alleged victims' right to defence has not been confirmed. As to the alleged violation of the presumption of innocence, due to the fact that they were kept with handcuffs in a metallic cage, the State party submits that officials have explained that this was needed because they were dangerous criminals. The fact that officials refused to remove their handcuffs does not in any way affect the outcome of the trial. The Committee's conclusion that the pronouncement of death sentences does not fulfil the requirements of justice is, according to the Prosecutor's decision, also incorrect as it is only based on the author's distorted allegations.</p>

<b>Author's comments</b>	State party's response sent to the authors on 21 February 2008 with a deadline of 21 April 2008.
<b>Committee's Decision</b>	The Committee considers the dialogue ongoing.
<b>State party</b>	<b>ZAMBIA</b>
<b>Case</b>	<b>Chisanga, 1132/2002</b>
<b>Views adopted on</b>	18 October 2005
<b>Issues and violations found</b>	Right to life, ineffective remedy on appeal and ineffective remedy with respect to commutation - articles 14, paragraph 5 together with articles 2, 7, 6, paragraph 2, and 6, paragraph 4, together with article 2.
<b>Remedy recommended</b>	To provide the author with a remedy, including as a necessary prerequisite in the particular circumstances, the commutation of the author's death sentence.
<b>Due date for State party response</b>	9 February 2006
<b>Date of State party's response</b>	27 May 2008 (previously responded on 17 January 2006)
<b>State party response</b>	<p>On 17 January 2006, the State party provided its follow-up response. As to the author's sentence, the State party stated that it had provided the Committee with the Supreme Court judgement dated 5 June 1996, which upheld the sentence of death for aggravated robbery and also convicted the accused to an additional 18 years on the count of attempted murder. Therefore, Zambia's view is that, if the sentence clearly indicates two different counts and two different sentences given for each count respectively, there can be no confusion. The State party quoted from section 294 of its Penal Code and affirmed that the Supreme Court cannot reduce the sentence of death if it finds that the offence contained in Section 294 (2) - namely the felony of aggravated robbery where the offensive weapon or instrument is a firearm, or where the offensive weapon or instrument is not a firearm and grievous harm is done to any person in the course of the offence - was committed.</p> <p>The State party acknowledged the "possibility" that the complainant may have been transferred from death row to the long-term section of the prison. It explained that this constitutes</p>

“deterrent sentencing”, which means that the convict is required to perform the shorter sentence before being subjected to the more severe one when sentenced on more than one count. It affirms that “deterrent sentencing” is a recognized form of punishment under the common law system and that, therefore, Zambian courts are within their mandates when imposing such sentences.

The State party affirmed that the right to appeal in its judicial system is not only guaranteed under the Constitution but is also effectively implemented, because in the offences of treason, murder and aggravated robbery (carrying the death penalty) an accused person is, without discrimination, automatically granted the right to appeal to the Supreme Court by the High Court. Regarding the communication of the Master of the Supreme Court that purportedly reduced the complainant’s sentence, it states that the communication may have been conveying the sentence by the Supreme Court for the count of attempted murder.

The State party stated that the accused was taken to the long-term section of the prison to serve the 18-year sentence for attempted murder. It added that there is no record that the author was taken back to death row after two years and requests him to prove this allegation. It considered that what constitutes one of the most serious crimes is a subjective test and depends upon a given society. In the State party crimes of murder or aggravated robbery are widespread and, therefore, not to consider them as serious crimes defeats fundamental rights such as the right to life, security and liberty of the person. Zambia further states that the Committee’s suggestion that since the victim did not die the complainant should not be sentenced to death is an affront to the very essence of human rights.

The State party submits that there is a Presidential decree giving amnesty to all prisoners on death row. What the President is said to have declared publicly is that he will not sign any death warrants during his term. It further affirms that prisoners can still apply for clemency according to the terms of the Constitution. Such applications are dealt with by the “Committee on the Prerogative of Mercy” chaired by the Vice-President. No death sentence has been carried out since 1995, and there is a moratorium on the death penalty in Zambia.

On 27 May 2008, the State party provided another copy of the Supreme Court judgement of 5 June 1996, as well as the notification of result of final appeal, both of which indicate that the author’s appeal against the death penalty was dismissed and

his death sentence confirmed and that the author was also sentenced to 18 years imprisonment. The State party provides no explanation of the reason behind the re-submission of these documents.

**Author's response**

None

**Committee's Decision**

The Committee reiterates its decision set out in its annual report A/61/40, that the State party's argument on admissibility should have been included in its comments on the communication prior to consideration by the Committee, and that it regards the State party's response as unsatisfactory and considers the follow-up dialogue ongoing.

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