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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2118/2011*, **

Communication submitted by:	Rakesh Saxena (represented by counsel, Jeremy McBride)
Alleged victim:	The author
State party:	Canada
Date of communication:	8 October 2011 (initial submission)
Document references:	Decision taken pursuant to rules 92 and 97 of the Committee's rules of procedure, transmitted to the State party on 12 December 2011 (not issued in a document form)
Date of adoption of Views:	3 November 2016
Subject matter:	Extradition from Canada to Thailand
Procedural issue:	Incompatibility of claims with the Covenant; level of substantiation of claims
Substantive issues:	Prosecution for criminal offences in Thailand not listed in the original extradition request and surrender order
Articles of the Covenant:	9 and 13
Articles of the Optional Protocol:	2 and 3

* Adopted by the Committee at its 118th session (17 October-4 November 2016).

** The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Duncan Muhumuza Laki, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Yuval Shany and Konstantine Vardzelashvili.

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1.1 The author of the communication is Rakesh Saxena, a national of India, born on 13 July 1952. In 2009, he was extradited from Canada to Thailand to face criminal charges for conspiracy to embezzle money from the Bangkok Bank of Commerce. He alleges that after he was extradited to Thailand, Canada consented to his prosecution for two other offences against him, thereby allowing his prosecution for charges not listed in the original extradition request and surrender order, in breach of the specialty rule.[1] The author claims that Canada's consent to waive the specialty rule violated his rights under articles 9 and 13 of the Covenant. The Optional Protocol entered into force for Canada on 19 May 1976. The author is represented by counsel.

1.2 The author requested the Committee to issue interim measures requesting that Canada refrain from acceding to any further requests from Thailand to consent to waive the specialty rule in respect of offences not covered by the amended surrender order, while his communication was being examined by the Committee. Pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided not to issue a request for interim measures. The author was extradited to Thailand on 29 October 2009.

The facts as submitted by the author

2.1 The author submits that he worked in Thailand between 1985 and 1995 as a consultant for various financial institutions, including the Bangkok Bank of Commerce, where he served as an adviser to its president for one year. In 1996, his consultancy ended and he moved to Canada.

2.2 Subsequently, politically motivated loans made by the Bangkok Bank of Commerce were disclosed, in the course of a parliamentary debate, and the management of the Bank was taken over by the Bank of Thailand. On 4 June 1996, the Bank of Thailand submitted a brief to the Attorney General of Thailand, alleging that the President of the Bangkok Bank of Commerce and others, including the author, were involved in a conspiracy to embezzle money from the bank.

2.3 On 5 June 1996, the Economic Crime Investigation Division of the Thai police issued an arrest warrant for the author, accusing him of "conspiring with accomplices to embezzle properties". The Thai police requested the arrest of the author by the Canadian authorities pending the presentation of a formal diplomatic request for extradition, in accordance with the 1911 Treaty between the United Kingdom and Siam respecting the Extradition of Fugitive Criminals.

2.4 On 7 July 1996, the author was arrested pursuant to a warrant of apprehension issued by an extradition judge under section 10 of the Canadian Extradition Act "for conspiracy to embezzle money" from the Bangkok Bank of Commerce. Subsequently, the Thai Economic Crime Investigation Division issued a further warrant on 25 July 1996 in respect of the author for offences under the Securities and Exchange Act. On 30 August 1996, Thailand requested the extradition of the author based on charges under the Criminal Code and the Securities and Exchange Act. The charges concerned a loan made to the City Trading Corporation in 1995. The extradition request and the evidence submitted by Thailand were reviewed by the Supreme Court of British Columbia, which concluded on 15 September 2000 that there was evidence of "a trier of fact, properly instructed and acting reasonably,

[1] The specialty rule means that a person extradited should only be tried, in the requesting State, for the offences specified in the extradition order, unless such offences have been committed since the extradition order was issued. The rule was applicable to the extradition proceedings between Canada and Thailand in the author's case by virtue of article 6 of the 1911 Treaty between the United Kingdom and Siam respecting the Extradition of Fugitive Criminals and section 33 of the Canadian Extradition Act.

[which] could convict the author of offences alleged against him". The Court issued an order of committal to await a decision on the extradition request.

2.5 On 18 November 2003, a surrender order for the author was issued and amended on 1 December 2005. The amended surrender order did not include the offences allegedly committed in relation to the Criminal Code, since the relevant statutory period had expired. It therefore only covered the following matters: "causing the Managing Director … to commit offences under sections 307, 308, 309, 311, 313 and 315 of the [Securities and Exchange Act] by ordering, advising, threatening or otherwise". The penalties that could be imposed for such offences were 5 to 10 years' imprisonment and considerable fines.

2.6 Between 2006 and 2009, the author submitted a number of unsuccessful challenges to the surrender order. On 15 May 2009, the Court of Appeal dismissed his application for a judicial review of the amended surrender order. On 29 October 2009, the Supreme Court of Canada dismissed his application for leave to appeal and the author was immediately surrendered to the Thai authorities, who arranged for his flight to Thailand. The author, who suffered a stroke in March 2009 and has since been in a wheelchair, has been detained at the Bangkok remand prison since his return to Thailand.

2.7 The author has contested his extradition, inter alia, on the grounds that once returned to Thailand, he would be charged with offences not reflected in the extradition order in violation of the specialty rule. As evidence, he submitted a letter from Thailand to Switzerland, requesting assistance in respect of offences he had allegedly committed that were different from the ones cited in the extradition request, and a report in the Bangkok Post, which stated that the Criminal Litigation Division of the Thai police was gathering evidence and was planning to indict him for additional criminal offences. He also submitted a copy of a case similar to his, where the defendant was charged after extradition with an offence not included in the extradition request. In that case, the English and Thai versions of the extradition treaty were different: the former included a prohibition against trial for other offences, while the latter limited the prohibition to serving a sentence for such offences.[2] However, Canada repeatedly dismissed the author's submissions in that regard. On 18 November 2003 and 19 December 2008, the Minister of Justice of Canada stated that in its opinion there was no evidence that Thailand would not respect its treaty obligations to Canada and that the Court of Appeal relied on the opinion of the Ministry of Justice when confirming the surrender order. On 29 October 2009, the Senior Counsel of the Ministry of Justice assured the author that he could only be prosecuted for the offences for which the surrender order had been issued and that she had received oral assurances from the Thai authorities to that effect.

2.8 Following the author's return to Thailand, the Thai Attorney General's office sent correspondence to the Canadian Ministry of Justice regarding other offences unrelated to those for which he had been extradited. Not all of this correspondence was disclosed to the author's counsel, but it appears that the Thai authorities had requested a waiver of speciality in respect of 16 cases involving the author. On 29 July 2010, the Minister of Justice of Canada admitted the request for a waiver of speciality for the detention, prosecution and punishment of the author with respect to two of the cases in which he was charged.[3] However, several other charges against the author were not included in the waiver. The court in Thailand asked for confirmation that a waiver of specialty in respect of those cases had also been obtained. However, the prosecution has claimed that the discussions with the authorities of the State party are confidential. In Thailand, the author's applications for bail

[2] Copies of documents confirming those allegations have been provided by the author.

[3] The consent to waiver of specialty covered charges under sections 83, 352 and 354 of the Criminal Code and new charges under sections 307, 308, 309, 311, 313 and 314 of the Securities and Exchange Act.

have been repeatedly refused. The author contends that he has exhausted all available and effective domestic remedies.

The complaint

3.1 The author submits that in the circumstances of his case, the consent to the waiver of specialty by Canada has resulted in a violation of his rights under articles 9 (1) and 13 of the Covenant.

3.2 The author submits that for an extradition to be compliant with article 13 of the Covenant, it must be in accordance with the law and the person to be extradited must have the opportunity to contest such action and to have the relevant decision reviewed. He submits that in his case, the amended surrender order and the consent to the waiver of specialty must be taken together and that by granting the waiver, the Canadian courts breached the specialty rule. He therefore considers that his extradition did not comply with the law of the State party.

3.3 The author further submits that, even if it were considered that his surrender had a formal legal basis, the decision to extradite him should be viewed as arbitrary. In that connection, he submits that the repeated assurances of the State party that he would not be prosecuted were rendered useless because of the State party's agreement to waive the specialty rule. The author considers that by repeatedly assuring the author that the specialty rule would not be breached while it was willing to authorize the surrender, the State party deprived him of the procedural guarantees required under article 13 for any extradition decision.[4] The author claims that the offences for which he has become liable for prosecution as a result of the waiver were not subjected to judicial scrutiny and that he did not have the opportunity to challenge them before a Canadian court.

3.4 The author further submits that the State party's responsibility under the Covenant can be engaged when its decisions result in the infringement of a person's rights and freedoms by another State, especially in cases of extradition.[5] He maintains that his surrender and the subsequent waiver of specialty have exposed him to a much longer period of imprisonment than if the State party's rules governing extradition had been observed, and that such a consequence was foreseeable. In that regard, the author submits that the rules requiring that sentences be served concurrently do not apply where the convictions concern unrelated sets of facts, as was the case of the offences covered by the waiver. The author further submits that the institution of new charges following his extradition made it impossible for him to get bail in respect of the charges for which he was extradited. He therefore considers that the State party has exposed him to the clear risk of extended imprisonment and that any sentence of imprisonment imposed on him for the offences covered by the consent to waive the specialty rule will result from a decision taken arbitrarily, in violation of the procedural guarantees required by the Covenant.

3.5 For the reasons set out above, the author submits that the State party has violated his rights under articles 9 and 13 of Covenant, through extraditing him to Thailand for certain offences and then authorizing his prosecution for other offences in breach of the specialty rule.

[4] The author submits that the exception to the requirements of article 13 are only envisaged in cases of threats to national security and maintains that in his case, there was no such element.

[5] The author refers to communication No. 539/1993, *Cox v. Canada*, Views adopted on 31 October 1994, para. 16.1.

State party's observations on admissibility and the merits

4.1 On 11 June 2012, the State party submitted its observations on the admissibility and merits of the communication.

4.2 The State party recalls that the rule of specialty is an obligation between extradition partners that may lawfully be waived by the State from which the person has been extradited. It was not a breach of the rule of specialty for Thailand to request that Canada waive the rule, nor for Canada to consent to the waiver.

4.3 As regards the author's allegations concerning article 13 of the Covenant, the State party submits that the author has conceded that his extradition proceedings in Canada complied with the requirements of the Covenant. His complaint only refers to the additional criminal charges to which he is now subjected in Thailand, which were not previously scrutinized by the Canadian courts. The State party submits that article 13 is limited to expulsion proceedings and does not apply to the consent to the waiver of specialty which occurred only after the author's extradition to Thailand. The State party, however, considers that the author has not substantiated his allegation that the scrutiny of his additional criminal charges in Thailand by a Canadian court is a right recognized under the Covenant.

4.4 As regards the author's allegations under article 9 (1) of the Covenant, the State party considers that the author has failed to provide any substantiation: he does not allege that his trial in Thailand is in any way unfair and his detention can therefore not be considered as arbitrary.[6] The author's sole complaint under article 9 is that the State party's consent to a waiver of specialty has exposed him to a much longer period of detention if he is convicted for the additional charges against him in Thailand. The State party considers that at the time it consented to the waiver of specialty, the author was already in Thailand and no longer subject to its jurisdiction or within its effective control. In addition, a fair trial and potential imprisonment as a result of a conviction on a number of criminal charges is not the type of "irreparable harm" envisioned by the Committee when attributing responsibility to one State for potential human rights violations in another State. Moreover, the State party considers that its consent to the prosecution of the author for new charges, in circumstances where his right to a fair trial is guaranteed and he has the benefit of diplomatic assurances that he will be treated well, does not amount to a violation of article 9 (1) of the Covenant. In that regard, the State party submits that article 9 (1) does not apply to consent to a waiver of specialty, even when it may result in additional criminal charges and conviction in another State. Being exposed to additional criminal charges, a fair trial and a potentially longer period of imprisonment upon conviction, as a result of a consent to a waiver of specialty does not amount to an arbitrary detention within the meaning of article 9 (1) and does not constitute an arbitrary expulsion under article 13 of the Covenant. Should the Committee consider the communication to be admissible, the State party submits that the author's allegations are without merit.

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

5.1 In his comments dated 9 August 2012, the author submits that he was convicted of the charges for which he was originally surrendered by the State party to Thailand.[7] He

[6] The State party refers to a decision by the European Court of Human Rights in the case of *Wooley v. the United Kingdom* (application No. 28019/10, 2012), also concerning an alleged violation of the rule of specialty, in order to argue that any potential longer term of detention that the author may face upon extradition cannot be considered "arbitrary".

[7] The author was convicted by the Southern Bangkok Criminal Court on 8 June 2012 of participation and facilitation in the commission of offences against the property of a "legal person" (the Bangkok Bank of Commerce). He was sentenced to 10 years' imprisonment and a fine of B 1,000,000 and ordered to return money in the amount of B 1,132,000,000.

states that the consent to a waiver of specialty by the State party of 28 June 2012 concerned a different case from the two cases referred to in his initial communication.[8] The author, inter alia, submits that Thailand instituted criminal proceedings in the *Somprasong Intercommunication* (*Somprasong*) and *Zilar International Service Co. Ltd*. cases on 29 March 2011, before it had received the consent to a waiver of specialty from Canada, in order to avoid the cases becoming time-barred under Thai law, on 3 July 2011 and 7 May 2011 respectively.

5.2 The author submits that the rule of specialty only comes into play in the State party at the executive stage in extradition proceedings and that the offences for which extradition was granted, and in relation to which specialty was waived, all arose from the same set of circumstances.

5.3 He also submits that the three reasons given by the State party for suggesting that article 13 does not apply to his case are unfounded. He considers that the violation of article 13 arose from the inextricable link between the amended surrender order adopted by the State party and its subsequent consent to waive the specialty rule, despite its repeated assurances to the author that he would only be tried for the offences for which he was surrendered. The author also claims that the State party's consent to waive the rule of specialty in the *Somprasong* case was given without the State party seeking or receiving any statement from him concerning the new offences, in violation of article 14 of the Model Treaty on Extradition.

5.4 The author further asserts that the State party's submission that its responsibility under article 9 is not engaged by its consent to waive the specialty rule is unfounded, because such consent directly exposed him to the risk of extended imprisonment, despite the State party's assurances that the rule of specialty would not be breached.

5.5 With respect to the State party's submission that his allegations under articles 9 and 13 of the Covenant are unsubstantiated, the author submits that the waiver of specialty nullified the procedural protection required by article 13. He argues that any sentence of imprisonment for the offences concerned results from an arbitrary decision, taken in violation of procedural guarantees.

5.6 The author further notes that the State party does not explain why it considers that the communication should be held to be without merit.

5.7 In the light of the above, the author requests the Committee to declare the communication admissible and to find a violation of articles 9 (1) and 13 of the Covenant; to declare that the State party is under an obligation to provide him with an effective remedy, including compensation, in accordance with article 2 (3) (a) of the Covenant; and to ensure that he is not subjected to prosecution in Thailand on matters not covered by the amended surrender order.

5.8 On 12 February 2013, the author stated that the State party had refused to grant a waiver of specialty in the *Zilar* case, which was under consideration at the time of submission of his initial comments. Notwithstanding that refusal, on 4 December 2012 the Southern Bangkok Criminal Court merged the *Zilar* case with the *Somprasong* case, for which a waiver of specialty had been granted. Further proceedings in the merged cases were expected in April 2013.

[8] The waiver of specialty concerned the *Somprasong Intercommunication* case. The consent to a waiver of specialty was granted without the State party ever seeking or receiving from the author any statement regarding the offences in respect of which the waiver of specialty had been sought by Thailand. Such a statement — essential to protect the interests of an accused person — is required by article 14 of the Model Treaty on Extradition, which has established the standard for international practice in respect of any consent to a waiver of specialty.

State party's additional observations

6.1 In its additional observations of 6 May 2013, the State party responded to the author's new allegations. The State party notes the author's allegations that on 28 June 2012, Canada consented to a waiver of specialty in the *Somprasong* case and was still considering whether to grant a waiver of specialty in the *Zilar* case. It further noted the author's claim that Thailand instituted criminal proceedings in both cases on 29 March 2011, before it had received Canada's consent, in order to avoid the cases becoming time-barred under Thai law. The State party asserts that pursuant to the extradition treaty between Canada and Thailand, the specialty provision only prohibits detention or trial and that the laying of criminal charges prior to consent to a waiver of specialty does not constitute a violation of the specialty rule.

6.2 The State party considers that as long as the author was not being detained or tried in connection with the offences for which the waiver of specialty was sought, the specialty rule was not violated pursuant to the 1911 Treaty between the United Kingdom and Siam respecting the Extradition of Fugitive Criminals,[9] since nothing prohibits the laying of charges. The State party observes that many States have limitation periods for criminal charges to be laid and that prosecution may occur outside the limitation period if, as in the present case, consent to waive the rule of specialty is obtained.

6.3 With respect to the author's complaint related to the *Zilar* case, the State party states that upon learning that it had refused to waive the rule of specialty, the Attorney General of Thailand withdrew the prosecution, which resulted in the dismissal of the case by the Bangkok Criminal Court on 1 April 2013.

6.4 The State party further submits that the Model Treaty on Extradition has no legal status in Canada or internationally and that article 14 of the Model Treaty does not impose an obligation on the requested State to obtain a statement from the accused. That provision would rather require Thailand, as the requesting State, to provide any statement made by the author. The State party also submits that the instrument relevant to the author's extradition is the 1911 extradition treaty between the United Kingdom and Siam.

6.5 Although the author presents his allegations in a number of different ways, the main claim before the Committee is that, during his extradition proceedings in Canada, the State party repeatedly told him that specialty would not be breached in his case and that the State party has acted contrary to those statements by subsequently consenting to waive the specialty rule. The State party emphasizes that specialty may lawfully be waived and that even if it may have confirmed to the author that specialty would not be breached in his case, it had never said that it would not consent to the waiver of specialty. The State party therefore considers that the author's allegation that the Canadian courts should not have authorized his extradition since they knew that the specialty rule would be breached is irrelevant, as there was no such breach.[10]

[9] Article VI of the Treaty states: "A person surrendered can in no case be detained or tried in the State to which the surrender has been made, for any other crime or on account of any other matters than those for which the extradition shall have taken place, until he has been restored or had an opportunity of returning to the State by which he has been surrendered".

[10] In his comments of 9 August 2012, the author claims that the Court of Appeal of British Columbia, in confirming the decision to issue the surrender order, rejected the author's submissions to the amended surrender order of 15 May 2009 and stated that there was no doubt concerning the charges on which the applicant was being ordered to be surrendered, nor about the conduct which comprised the activity for which Thailand sought to prosecute him. The State party further stated that it was not probable that an extradition partner would fail to honour its obligations under the rule of specialty. That was pre-eminently a matter to be considered primarily by the Minister, as opposed to the courts. If there existed some obvious indication of a likely breach of that solemn State obligation, a court would not

6.6 As regards the author's assertion that Canada breached article 9 of the Covenant by exposing him to a foreseeable risk of extended imprisonment in Thailand by consenting to a waiver of specialty "notwithstanding its repeated and categorical assurances that there would be no breach of the specialty rule",[11] the State party reiterates that as there was no breach of specialty, there could be no breach of article 9. Consequently, the State party reiterates its position that the author's communication is inadmissible for incompatibility with the terms of the Covenant or, in the alternative, for non-substantiation.

6.7 Should the Committee determine that the author's communication is admissible, the State party submits for the same reasons that it is without merit.

Author's further comments on the State party's additional observations

7.1 On 21 July 2013, the author submitted further comments on the State party's additional observations. While reiterating his arguments, the author adds that his surrender must be considered together with the subsequent consent to waive the specialty rule, which was adopted in violation of the procedural guarantees enshrined in article 13 in cases of expulsion.

7.2 The author submits that the violation of article 9 (1) of the Covenant is a consequence of the violation of article 13, since the effect of his surrender, combined with the consent to waive the specialty rule, have exposed him to a much longer period of imprisonment than if he had only been tried for the matter with respect to which the State party had authorized his extradition.

7.3 The author adds that it was foreseeable for the State party that Thailand would not respect the rule of specialty and that he raised this issue with the executive and in the context of various judicial proceedings relating to the decision to surrender him to Thailand. It was not considered by the Canadian courts as something likely to occur. The author also argues that he could not have been surrendered on the additional charges without further evidence being adduced.

7.4 The author further submits that the *Zilar* case was indeed dismissed on 1 April 2013, but that the withdrawal of the prosecution by the Attorney General of Thailand did not occur "upon learning that Canada had refused consent to a waiver of specialty" in that case, but had occurred at least seven months after that refusal. He adds that the alleged offences in the *Somprasong* case became time-barred on 12 September 2010 and not on 7 July 2011. The author disputes the assertions of the State party in regard to: (a) the laying of a criminal

countenance it. In the instant case, the ministers have concluded that, "there is nothing to suggest such a course of action by the requesting State. A decision by the Minister on this sort of issue is entitled to a high level of deference. There is simply no basis demonstrated for this Court to interfere with the decision of the Minister on this subject and the judge would not accede to the submissions to the contrary advanced in this Court by the applicant". The author claims that this view taken by the Canadian courts is material to the responsibility of Canada under the Covenant for consenting to a waiver of specialty, despite giving the author assurances that he would not be prosecuted in Thailand for offences additional to those in the amended surrender order. The author adds that, while consent to a waiver of specialty might normally be an act entirely discrete from an extradition measure, it would be inappropriate in his case to separate the two acts because of the repeated and emphatic assurances by the State party that specialty would not be breached by Thailand. That assumption was of fundamental importance for the courts of the State party in rejecting the author's challenge to his extradition.

[11] In the same comments, the author submits that the issue in his case is not about the impermissibility of extradition because a risk of additional imprisonment was foreseeable, but about the State party itself having exposed him to a clear risk of extended imprisonment through its consent to a waiver of specialty, notwithstanding its repeated and categorical assurances that there would be no breach of the specialty rule.

charge, which is allegedly not a violation of the specialty rule; (b) the allegation that the author was not detained or tried for matters other than those for which he had been extradited; and (c) the fact that prosecution may occur outside the limitation period if consent to a waiver of specialty is obtained. He asserts that by granting consent to the waiver of specialty in the *Somprasong* case outside the limitation period for the alleged offences, the State party's consent to waive the specialty rule resulted in a breach of specialty by Thailand and in the pursuit of charges that had become time-barred. That was something that the State party had previously refused to do, having amended the surrender order to remove the offences for which the limitation period had expired.

7.5 The author considers that the State party's conclusion that the laying of charges was effectively to stop the expiry of the limitation period, because it amounted to the institution of the trial proceedings, implies that there was a breach of the specialty rule by Thailand when the author was charged in March 2010 with respect to the *Silver Star Investment Corporation* and *Special Passing Card 112J* cases. The author adds that he was detained in the context of the *Somprasong* case by a warrant of detention of the Southern Bangkok Criminal Court on 29 March 2011, while the limitation period had expired. The author was therefore tried for an offence for which he had not been extradited and he was detained for the offence he was charged with in the *Somprasong* case, in breach of the specialty rule.

7.6 As regards the State party's argument that article 14 of the Model Treaty on Extradition is not a binding international norm, but a summary of international good practices, the author claims that he referred to it only to underline the State party's failure to make any effort to protect his interests before granting its consent to a waiver of specialty. The author further submits that the State party was already aware that the operation of limitation periods was a material consideration in respect of the proceedings brought against him, as they made it impossible to pursue some of the charges in the original extradition request. The author submits that had he been consulted about the request for the grant of waiver of specialty in the *Somprasong* case, he would have alerted the State party to the fact that the charges in that case were time-barred and that it was therefore not appropriate to waive the specialty rule.

7.7 The author reiterates that the violation of article 13 and consequently, of article 9 (1) in his case stems from the fact that the State party gave consent to the waiver of specialty after Thailand had already instituted proceedings against him in the three cases concerned, in an apparent attempt to evade the operation of the applicable limitation periods. By instituting the proceedings against the author and authorizing his detention, Thailand breached the rule of specialty. Such a breach cannot be regarded as having been cured by the State party's subsequent consent to a waiver of specialty.

7.8 The author emphasizes that he is not claiming that an extradited person should enjoy immunity in respect of matters not covered by the surrender order. However, he considers that a State party violates the Covenant when it disregards the assurances it has given to that person that he or she will not be charged with matters not covered by a surrender order. Although the reasons for advancing the extradition request were the object of judicial scrutiny, thereby enabling the author to test the quality of the evidence for the claim that an extraditable offence was to be tried, such scrutiny was not possible in respect of the matters for which consent to a waiver of specialty was given.

State party's further observations

8.1 On 12 February 2014, the State party commented on the author's allegations of 21 July 2013 that he was detained in Thailand in the *Somprasong* case, for which he had not been extradited and with regard to which the limitation period had expired before the waiver of speciality was granted by Canada. The State party recalls that specialty, as an obligation between extradition partners, may lawfully be waived by the State from which a

person has been extradited. As such, it considers that it was not a breach of specialty for Thailand to request that Canada waive specialty and for Canada to consent to waive it.

8.2 The State party reiterates that article 13 of the Covenant only applies to the author's removal (expulsion) from Canada by extradition and to the legal processes governing the decision to extradite him while he was still in Canada. Article 13 has no application to consent to a waiver of specialty. It submits that its consent to the author's prosecution by Thailand for new charges and in compliance with the principles of a fair trial is not a violation of his right to be free from arbitrary detention under article 9 (1) of the Covenant.

8.3 The State party further objects to the author's assertion that the Thai court ordered his detention on the warrant dated 29 March 2011, although Canada did not waive specialty with respect to the *Somprasong* case until 28 June 2012. The State party submits that it was informed by the Thai authorities that when the author was originally surrendered to Thailand on 29 October 2009 to face charges in the *City Trading Corporation* case, he was detained without bail by order of the court. According to the Thai authorities, since the author was already in detention, no further detention orders were required in respect of the *Somprasong*, *Special Passing Card 112J* or *Silver Star Investment Corporation* cases, as there was already an existing detention order against him. The State party is of the view that the Thai authorities have respected specialty.

8.4 The State party admits that it does not have an expert knowledge of Thai criminal law and that it relies on the good faith of the Thai authorities for the accuracy of the information received in relation to the author's case. The State party further submits that the intricacies of Thai criminal law with respect to the grounds for the author's detention are beyond the scope of the Committee's competence.

Author's further comments

9.1 In its observations of 10 June 2014, the author notes that the State party does not contest (a) that the likely failure of Thailand to respect the rule of specialty was raised by the author, not just with the executive, but also in various judicial proceedings relating to the decision to surrender him to Thailand, and that this was not considered by the courts as something likely to occur; and (b) that the author could not have been surrendered on the additional charges without the need for significant additional evidence being adduced.

9.2 The author also claims that the State party has not disputed his submissions that consent to a waiver of specialty could not, contrary to what was asserted in the State party's further observations of 6 May 2013, authorize a prosecution outside the prescribed limitation period. The offences alleged in the *Somprasong* case had already become time-barred well before 29 March 2011, when the Prosecutor requested the Southern Bangkok Criminal Court to accept the charges against the author, since the limitation period applicable for those offences expired in September 2010, 15 years after the latest date when the offences were allegedly committed. Furthermore, on 23 January 2012, before the State party consented to waive the specialty rule in the *Somprasong* case, the Southern Bangkok Criminal Court granted the prosecution request for a postponement of the hearing. The criminal proceedings against the author were therefore initiated in breach of specialty and contrary to the extradition treaty. The author argues that by granting the waiver of specialty on 28 June 2012, after his trial had commenced, the State party was endorsing a breach of the specialty rule and the continuation of proceedings that were already time-barred.

9.3 The author also reiterates that the Minister of Justice never attempted to seek any comments from him regarding the applications by Thailand for the grant of a waiver of specialty in respect of the *Somprasong*, *Special Passing Card 112J* and *Silver Star Investment Corporation* cases. The author considers that omission erroneous, given the repeated assurances made by the State party before his extradition to Thailand that specialty

would be respected. The State party seems therefore to be ill-informed about the nature of all the offences for which a waiver of specialty had been sought by Thailand.

9.4 The author further notes that the Minister of Justice and his officials expressed legitimate concerns in two letters from the State party to Thailand of 29 July 2010 and 28 June 2012, that a further request for extradition would delay the existing extradition request long enough to cause the remaining charges in the *City Trading Corporation* case to become time-barred.[12] Indeed, had the author not been surrendered on 29 October 2009, the remaining charges would have been time-barred effective July 2010. The author considers that this supports his submission that the violation of article 13 of the Covenant, and consequently of article 9, stems from the fact that the State party was fully aware that Thailand had already announced that it would initiate proceedings against him with respect to offences not covered by the extradition request.

9.5 The author thus reaffirms that the State party consented to the waiver of specialty after Thailand had already instituted proceedings against him in all three cases concerned, in an attempt to evade the operation of the limitation periods applicable to them. Thailand breached the rule of specialty, which cannot be regarded as having been "cured" by the State party's subsequent consent to the waiver of specialty, insofar as that consent was inconsistent with the assurances that the State party had repeatedly given to the author.

Issues and proceedings before the Committee

Consideration of admissibility

10.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

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

10.3 The Committee notes that the State party has not objected to the admissibility of the communication with regard to the exhaustion of domestic remedies. It also observes that the author submitted a number of unsuccessful challenges to the surrender order of 18 November 2003, as amended on 1 December 2005; that the Court of Appeal dismissed his application for a judicial review of the surrender order; and that the Supreme Court of Canada dismissed his application for leave to appeal against that ruling, following which the author was surrendered to Thailand. Accordingly, the Committee considers that the author has exhausted all available domestic remedies.

10.4 The Committee notes the assertion by the State party that the author's allegations of a violation of article 13 should be found inadmissible under article 3 of the Optional Protocol, since the extradition proceedings in Canada complied with the requirements of the Covenant, and its consent to a waiver of specialty was not a violation of specialty or of its statements to the author that specialty would be respected in his case. The State party further submits that the author has not substantiated his allegations that having the additional criminal charges brought by Thailand scrutinized by a Canadian court is a right recognized under the Covenant. The Committee also notes the State party's claim that imprisonment upon conviction in another State, in the absence of evidence of any arbitrariness, does not amount to arbitrary detention within the meaning of article 9 (1) of

[12] The author refers to the two letters from the State party to Thailand of 29 July 2010 and 28 June 2012, in connection with the grant of a waiver of specialty in the *Somprasong, Special Passing Card 112J* and *Silver Star Investment Corporation* cases.

the Covenant, submitting that the author's claims in that regard are therefore inadmissible *ratione loci* and *ratione materiae*. The Committee, however, notes that the State party did not ask the author for his views on the request for consent to a waiver of specialty, despite the assurances granted in the context of extradition proceedings that he would not face further charges following his surrender to Thailand. It therefore considers that the author's claims under articles 9 and 13 are adequately substantiated for the purpose of admissibility. The Committee therefore considers those claims admissible and proceeds with its consideration of the merits.

Consideration of the merits

11.1 The 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 (1) of the Optional Protocol.

11.2 The main issue before the Committee is whether the consent by Canada, after the author was extradited to Thailand for prosecution for two offences on charges not listed in the original extradition request and surrender order, amounted to a violation of the author's rights under articles 9 and 13 of the Covenant.

11.3 The Committee notes the author's allegations that subsequent to his extradition to Thailand, Canada violated article 13 of the Covenant by giving consent to the waiver of specialty after Thailand had initiated criminal proceedings against him in the three cases that were allegedly time-barred. It also notes his allegations that as the proceedings in which the State party consented to the waiver of specialty were closely related to the extradition proceedings, he should have benefited from the guarantees stipulated in article 13 of the Covenant. The author in particular claims that during the proceedings to grant consent to the waiver of specialty, he was not afforded the procedural guarantees of article 13 of the Covenant, as Canada did not ask for his views on the request for consent to the waiver of specialty; the offences concerned had become time-barred; and there was no judicial scrutiny of the reasons for granting a waiver of specialty. The Committee further notes the author's assertion that the breach of the rule of specialty by Thailand cannot be considered as "cured" by the State party's subsequent consent to waive the specialty rule, as that consent was inconsistent with the assurances that the State party had repeatedly given to him. The Committee also notes the State party's assertion that article 13 is limited to expulsion proceedings and has no application to consent to a waiver of speciality, which can be legally granted under the respective bilateral extradition agreement.

11.4 As regards the author's claim under article 9, the Committee notes the author's argument that by his surrender and the subsequent consent to the waiver of specialty, without seeking his views or holding a hearing by a court, Canada has exposed him to a much longer period of detention and imprisonment than he would have faced if the State party had not consented to waive the speciality rule, and if its rules governing extradition had been observed. The Committee also notes the State party's submission that at the time when the consent to the waiver of specialty was given, the author was already in Thailand and no longer subject to Canadian jurisdiction. The Committee further notes that, according to the State party, the author would enjoy a fair trial and that potential imprisonment following a criminal conviction on a number of charges would not fall within the notion of "irreparable harm", as interpreted by the Committee to attribute responsibility to one State for a potential violation of rights by another State.

11.5 The Committee observes that the author availed himself of all procedural guarantees, as set out in article 13 of the Covenant, during his extradition proceedings in Canada and that he was extradited to Thailand in October 2009 and was in prison there when Canada consented to the waiver of specialty. While noting the State party's claim that the consent to the waiver of specialty was granted in compliance with the 1911 extradition treaty in

force, the Committee observes that this agreement enabled the prosecution of the author for criminal charges other than those on which he was extradited from Canada to Thailand. The Committee recalls its jurisprudence that extradition falls under the protection of the Covenant.[13]

11.6 The Committee notes that during the extradition proceedings, the author raised concerns that he could be charged, prosecuted and tried for offences other than those for which he was surrendered and that the State party's judicial and administrative authorities provided him with assurances that the specialty rule would be respected. The Committee further notes that, pursuant to article 13 of the Covenant, the competent extradition authority is a court, whereas in the particular circumstances of the present case the consent to waive the specialty rule was granted by the Ministry of Justice, without a judicial review and in the absence of other due process guarantees.

11.7 The Committee also notes the author's allegations that the Thai authorities signalled their intent to present additional criminal charges against the author prior to his actual surrender in October 2009, but waited to launch further criminal proceedings until after the author was extradited, submitting a request for the waiver of specialty rule shortly after his arrival in Thailand. The Committee also notes that the State party does not provide any explanation as to why the charges for the latter offences were not made part of the initial or amended extradition orders of 2003 and 2005, given that the author had been detained and investigated since 1996.

11.8 The Committee notes that the State party does not deny that it would not have granted the waiver of specialty had it known that the author would be charged for other offences committed prior to the extradition order being issued and which had not been covered by the surrender order. It also notes that the waiver was granted notwithstanding its repeated and emphatic assurances that there would be no breach of the specialty rule, i.e. that he would not be tried in Thailand for offences other than those for which he was being extradited. It further notes that the author was not given the opportunity to challenge the decision on granting consent to the waiver of specialty, thereby depriving him of the due process guarantees he was entitled to in compliance with article 13 of the Covenant, and that as a consequence of the procedure, the author might have been exposed to a much longer detention and imprisonment. The Committee further notes that during the proceedings related to the request by Thailand for granting consent to a waiver of specialty, the author remained within the jurisdiction of Canada.

12. The Committee thereby concludes that by depriving the author of the possibility to comment on the request to waive the specialty rule and closing off the possibility for the author to seek a review of such a request by a court, the State party violated his rights under article 13 of the Covenant. In the light of its findings on article 13, the Committee will not further examine the author's claims under article 9 of the Covenant.

13. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to revise and amend its extradition legislation, including the procedure for consent to a waiver of specialty, in full compliance with the State party's obligations under the Covenant and the Committee's present Views.

14. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a

[13] See communications No. 743/1997, *Ngoc Si Truong v. Canada*, decision of inadmissibility adopted on 28 March 2003, para. 7.6, and No. 961/2000, *Everett v. Spain*, decision of inadmissibility adopted on 9 July 2004, para. 6.4.

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 when it has been determined that a violation has occurred, 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 present Views and to have them widely disseminated in the official languages of the State party.