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HUMAN RIGHTS COMMITTEE
Ninety-third session
7 to 25 July 2008

DECISION

Communication No. 1591/2007

Submitted by:	Mr. Gordon Brown (not represented by counsel)
Alleged victims:	The author
State party:	Namibia
Date of communication:	12 September 2007 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 1 October 2007 (not issued in document form)
Date of adoption of Decision:	23 July 2008

* Made public by decision of the Human Rights Committee.

Subject matter: Unfair trial relating to criminal charge and sentence of five years

Procedural issues: Inadmissible - exhaustion of domestic remedies, *ratione temporis*

Substantive issues: Unfair trial, arbitrary or unlawful interference with correspondence

Articles of the Covenant: 2, paragraphs 1 and 3, 14, paragraphs 1, 2, and 3 (a), (b), (d), and (e) and article 17, paragraph 1.

Articles of the Optional Protocol: 1 and 5, paragraph 2(b)

[ANNEX]

ANNEX

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

Ninety-third session

concerning

Communication 1591/2007*

Submitted by:	Mr. Gordon Brown (not represented by counsel)
Alleged victims:	The author
State party:	Namibia
Date of communication:	12 September 2007 (initial submission)

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.

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 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.

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 5 years' of 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, 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 than 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 monopolise 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 disposed of 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 perverting 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[1] 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 Committee's annual report to the General Assembly.]

[1] Communication No. 1434/2005, *Claude Fillacier v. France*, Decision of 27 March 2006.

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 notes 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 sets out 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.[2] 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 Committee's annual report to the General Assembly.]

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[2] Communication no. 900/1999, C. v Australia, Views adopted on 28 October 2002.