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HUMAN RIGHTS COMMITTEE
Eighty-sixth session
13-31 March 2006

VIEWS

Communication No. 1123/2002

Submitted by:	Carlos Correia de Matos (not represented by counsel)
Victim:	The author
State party:	Portugal
Date of communication:	1 April 2002
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 14 October 2002
Date of adoption of decision/Views:	28 March 2006
Subject matter:	Right to defend oneself in person
Procedural issues:	Status of "victim"; amnesty; final decision of inadmissibility by the European Court of Human Rights; exhaustion of domestic remedies closely linked to substantive issues

* Made public by decision of the Human Rights Committee.

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Substantive issues:	Right to defend oneself in person; fair trial; proper dispensation of justice
Articles of the Covenant:	14, paragraph 3 (d)
Articles of the Optional Protocol:	5, paragraph 2 (a)

On 28 March 2006, the Human Rights Committee adopted its Views, under article 5, paragraph 4, of the Optional Protocol, in respect of communication No. 1123/2002. The text of the Views is annexed to the present document.

[ANNEX]

Annex

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Eighty-sixth session

concerning

Communication No. 1123/2002*

Submitted by: Carlos Correia de Matos (not represented by counsel)

Victim: The author

State party: Portugal

Date of communication: 1 April 2002

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

Meeting on 28 March 2006,

Having concluded its consideration of communication No. 1123/2002, submitted to the Human Rights Committee on behalf of Carlos Correia de Matos under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

An individual opinion signed jointly by Committee members Ms. Elisabeth Palm, Mr. Nisuke Ando and Mr. Michael O'Flaherty, and a separate opinion signed by Committee member Sir Nigel Rodley, are appended to these Views.

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

1. The author is Mr. Carlos Correia de Matos, a Portuguese citizen, born on 25 February 1944 and residing at Viana do Castelo, Portugal. He states that he is a victim of a violation by Portugal of article 14, paragraph 3 (d), of the International Covenant on Civil and Political Rights. The author is not represented by counsel. The Covenant and the Optional Protocol came into force for Portugal on 15 June 1978 and 3 May 1983 respectively.

Factual background

2.1 The author is an auditor and lawyer in Portugal. His name was temporarily removed from the Bar Council's roll by decision dated 24 September 1993 of the Bar Council, which considered the exercise of the profession of lawyer to be incompatible with that of auditor.

2.2 On 4 July 1996, the author was committed to trial at the Ponte de Lima District Court. He was accused of insulting a judge. The investigating magistrate officially assigned a lawyer to represent the author contrary to his wishes, as he considered he was entitled to defend himself in person.

2.3 The author appealed against the committal order (*despacho de pronúncia*) to the Oporto Court of Appeal (*Tribunal da Relação do Porto*). The investigating magistrate declared the appeal inadmissible, however, on the grounds that it had not been lodged by a lawyer, and the appellant could not defend himself in person. A complaint by the author to the President of the Court of Appeal was dismissed on the same grounds.

2.4 The author then lodged a constitutional appeal with the Constitutional Court. In an order of 16 May 1997, the President of the Court of Appeal ruled that the issue raised by the author, that he was not allowed to defend himself in person, should be decided by the Constitutional Court, and accordingly ordered the appeal to be referred to that Court.

2.5 On 23 September 1997, the judge rapporteur at the Constitutional Court, noting that the applicant's name had been temporarily removed from the Bar Council's roll, requested him to instruct a lawyer, pursuant to the Constitutional Court Act. On 6 October, the author submitted that the provision obliging him to appoint a defence lawyer was unconstitutional, and requested consideration of his appeal. In an order of 4 November 1997, the judge rapporteur ruled that the provision in question was not in conflict with the Constitution and once again invited the author to instruct a lawyer, failing which the Court would refuse to hear his appeal. On 19 November 1997, the author asked that the matter be submitted to a committee of judges.

2.6 In a ruling of 13 October 1999, a committee of judges upheld the order of 4 November 1997, stressing that neither the provision in the Constitutional Court Act nor the arrangements provided for under the Code of Civil Procedure were unconstitutional. The Constitutional Court accordingly invited the author to instruct a lawyer.

2.7 Meanwhile, the Ponte de Lima Court scheduled a hearing for 15 December 1998. When it was called to order, the author declared that he had asked to defend himself, but this had been refused by the judge. A court-appointed lawyer was then designated.

2.8 In a judgement dated 21 December 1998, the Court found the author guilty and sentenced him to 170 day-fines (*jours-amende*), i.e. 600,000 Portuguese escudos in damages to the judge concerned.

2.9 The author lodged an appeal which the judge decided not to refer to the Court of Appeal, considering that it was merely a statement by the author within the meaning of article 98 of the Code of Penal Procedure. A second application under the same heading was rejected by order dated 23 March 1999. The author brought in a final application on 18 January 2001 against an order dated 4 January 2001, and the matter was referred to the Court of Appeal on 7 February 2001. The judge-president of the Court of Appeal confirmed on 12 June 2001 that the matter was still before the Third Section of the Court (case No. 268/01).

2.10 On 12 May 1999, Amnesty Act No. 29/99 was adopted. On 3 December 1999, the judge at the Ponte de Lima Court, considering that this Act should apply, cancelled the author's sentence. On 14 August 2000, however, the author learned of enforcement proceedings instituted by the prosecutor in respect of the amount payable to the judge in damages.

2.11 On 2 February 2000, following a request by the author to that effect, the judge rapporteur at the Constitutional Court cancelled the appeal still pending before that court.

The complaint

3.1 The author complains he was not permitted to defend himself, in contravention of article 14, paragraph 3 (d), of the Covenant, and considers that he did not have a fair trial.

3.2 On 17 April 1999, the author also filed a claim with the European Court of Human Rights, which ruled it partly inadmissible on 14 September 2000[1] and inadmissible overall on 15 November 2001,[2] on the grounds that the application was ill-founded.

State party's submissions on admissibility and the merits

4.1 In a note verbale dated 3 January 2003, the State party contests the admissibility of the communication. In the first place, article 5, paragraph 2 (a), of the Optional Protocol and article 96 (e) (formerly 90 (e)) of the rules of procedure of the Committee provide that the latter shall not consider an application already examined under another international judicial procedure. As the author's claim has also come before the European Court of Human Rights, which has already ruled on its admissibility and merits, the State party considers that the Committee cannot examine it, in part because of the risk of inconsistency in international decisions.

4.2 Secondly, the author failed to respect the rule that he must submit his claim within six months from the date of the final domestic decision. Thirdly, the author does not have the status of victim, inasmuch as during the proceedings he was granted an amnesty that expunged the effects of his conviction.

4.3 Lastly, the author has not exhausted all domestic remedies, inasmuch as he lodged an appeal with the Constitutional Court but the Court has been unable to consider it because of the

author's refusal to instruct a lawyer. According to the State party, as the appeal to the Constitutional Court was not properly submitted, the author prevented consideration of the question and so has not exhausted all domestic remedies.

4.4 In its submissions of 1 April 2003, the State party reiterates its arguments on the inadmissibility of the communication and provides comments on the merits. It points out that the right to defend oneself in person, provided for in article 14, paragraph 3 (d), of the Covenant, demands that there should be no hindrance to the accused's right to self-representation. This means that the accused should be able to make a personal submission of his version of the facts, and that a defence counsel should not be imposed on him, leaving him free to choose who will defend him.

4.5 The State party points out that the right to defend oneself is a right enshrined in Portugal's penal procedure. Articles 138 and 140 of the Code of Penal Procedure allow the accused to be given a hearing and to express directly and personally his position with regard to the facts, and article 332 of the same Code requires the accused to be present in court.

4.6 In the State party's view, a distinction should be drawn between personal defence, which allows the accused to be given a hearing and to submit his position with regard to the facts directly, and technical defence, which should be conducted by a lawyer at certain stages of the proceedings such as hearings or appeals. The right to defend oneself is not absolute: in certain circumstances States may require legal representation by a lawyer.[3] Though article 14, paragraph 3 (d), of the Covenant recognizes the right of the accused to defend himself in person or with legal assistance, it does not specify under what conditions and leaves to States parties the choice of the appropriate means to enable their judicial systems to guarantee the defence.

4.7 The State party maintains that the requirement for a lawyer to act at certain stages of the proceedings is a sufficient and proportionate means for States to employ in order to provide greater guarantees and more strictly defend the accused, given the type and specific nature of the issues raised in criminal proceedings.

Author's comments on the State party's submissions

5.1 In his comments of 4 August 2003, the author contests the arguments of the State party. First of all, he considers that Portugal's Code of Penal Procedure departs from article 14 of the Covenant in stipulating that in certain cases, including attendance at hearings and the lodging of appeals, the presence of a defence lawyer is obligatory, and if the accused fails to appoint a lawyer, the court must assign him one. The author also refers to the case law of the Portuguese Supreme Court (*Supremo Tribunal de Justiça*) under which the accused cannot act in person in criminal proceedings, even if he is a lawyer or a judge. Finally, the author considers that the reference by the State party to the ruling of the European Court of Human Rights in relation to the case of *Croissant v. Germany*, 25 September 1992, is not relevant, as on that occasion the Court decided that the assignment of a third lawyer to an appellant who did not wish to assume his own defence was not in breach of the European Convention.

5.2 With regard to admissibility, the author explains that the claim which he has lodged with the Committee differs from the case heard by the European Court. First of all, the Court

only considered the events relating to the judgement of the Court of first instance of 15 December 1998. He later appealed against that judgement and is still awaiting a decision. Moreover, the point of law raised relates to article 14 of the Covenant, not article 6 of the European Convention on Human Rights; the tenor of those provisions is different. According to the author, in addition to the breach of the basic guarantee set out in article 14, paragraph 3 (d) and (e), there has also been a violation of paragraphs 1 and 5 of that article, namely, the right to a fair trial in connection with the judgement, on appeal, regarding the civil obligations resulting from an unlawful criminal conviction.

5.3 Lastly, article 5, paragraph 2 (a), of the Optional Protocol to the Covenant rules out consideration by the Committee of any communication if the same matter is "being examined" under another procedure of international investigation or settlement, not if the matter *has already been examined*.

5.4 The author points out that the rule requiring a claim to be lodged within six months of the final decision does not apply to the Committee. As to his status as victim, the amnesty granted by the Court of Ponte de Lima on 3 December 1999 did not expunge his sentence to pay damages to the judge in question and that he can therefore still claim to be a victim.

5.5 So far as the exhaustion of domestic remedies is concerned, the author concedes that he has not exhausted domestic remedies given the application he filed on 18 January 2001. He maintains, however, although without laying a complaint for a violation of article 14, paragraph 3 (c), of the Covenant, that he has been waiting for more than four years for a decision from the Appeals Court, and this does not constitute an appeals procedure functioning within a reasonable lapse of time. He also explains that he raised before the Constitutional Court the question of his right to defend himself personally, and that the Constitutional Court's decision did not take account of the fact that the temporary removal of his name from the Bar Council's roll was wrongful.

5.6 On the merits, the author points out that a breach of article 14, paragraph 3 (d), is manifest in Portuguese legislation, whereas other States' laws[4] allow an accused to defend himself in person. At the judicial level there is also a breach of article 14, paragraph 3 (d), given the decision of the Portuguese courts to assign him a lawyer against his will. The author notes the distinction between personal defence and technical defence compulsorily provided by a lawyer. He considers, however, that the way personal defence is guaranteed under Portuguese laws limits the accused to a passive role, and asserts that the limits to personal defence should not apply when the accused is a lawyer himself.

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 cannot accept the argument by the State party that the communication is inadmissible owing to the Committee's lack of competence, the present communication having already been 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, and on the other, Portugal has entered no reservation to article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With regard to the status of victim, the Committee has noted the State party's argument that the author cannot claim to be a "victim" within the meaning of article 1 of the Optional Protocol inasmuch as he has been awarded an amnesty that erased the effects of his conviction. The Committee notes that the amnesty of the Court of Ponte de Lima dated 3 December 1999 did not expunge the award of damages against the author. The Committee concludes that the author can therefore claim to be the victim of a breach of the Covenant.

6.4 As to the State party's argument on the deadline of six months for submitting communications, the Committee points out that this rule cannot be used in the present case, since it is not explicitly provided for by the Optional Protocol or established by the Committee.

6.5 So far as the exhaustion of domestic remedies is concerned, the Committee has taken note of the arguments advanced by the State party maintaining that the author's appeal to the Constitutional Court over the right to defend himself in person could not be considered because of his failure to instruct a lawyer, meaning that he had not exhausted all the domestic remedies. Having also taken note of the author's arguments, the Committee remarks that the only reason why the Constitutional Court has not examined the appeal is that the author did not instruct a lawyer but asked to defend himself in person. In these circumstances, the Committee considers that the exhaustion of domestic remedies is closely linked to the issue of whether the author could claim to defend himself in person in the proceedings against him. The Committee considers that these arguments should be taken up when the merits of the communication are examined.

Consideration of the merits

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

7.2 The Committee has taken note of the arguments submitted by the State party recalling that articles 138-140 of the Portuguese Code of Penal Procedure guarantee the right to defend oneself in person and the references to the decision of the European Court of Human Rights. The State party asserts that the right to defend oneself in person is not absolute, and in this respect draws a distinction between personal defence (allowing the accused to be given a hearing and to state his position on the facts at issue) and technical defence (to be handled by a lawyer at certain stages of the proceedings). It also considers that article 14, paragraph 3 (d), of the Covenant does not specify the way defence is to be conducted, and leaves to States parties the choice of the appropriate means to enable their judicial systems to guarantee the defence. Finally, the Committee takes note of the author's position as a lawyer himself, and his arguments that he has an absolute right to defend himself in person at every stage of the proceedings, failing which the fairness of the trial would be tainted.

7.3 The Committee notes that article 14, paragraph 3 (d), of the Covenant provides that everyone accused of a criminal charge shall be entitled "to defend himself in person or through legal assistance of his own choosing". The two types of defence are not mutually exclusive. Persons assisted by a lawyer retain the right to act on their own behalf, to be given a hearing, and to state their opinions on the facts of the case. At the same time, the Committee considers that the wording of the Covenant is clear in all official languages, in that it provides for a defence to be conducted in person "or" with legal assistance of one's own choosing, taking as its point of departure the right to conduct one's own defence. In fact, if an accused person had to accept an unwanted counsel whom he does not trust he may no longer be able to defend himself effectively as such counsel would not be his assistant. Thus, the right to conduct one's own defence, which is a cornerstone of justice, may be undermined when a lawyer is imposed against the wishes of the accused.

7.4 The right to defend oneself without a lawyer is not absolute, however. Notwithstanding the importance of the relationship of trust between accused and lawyer, the interests of justice may require the assignment of a lawyer against the wishes of the accused, particularly in cases of a person substantially and persistently obstructing the proper conduct of trial, or facing a grave charge but being unable to act in his own interests, or where it is necessary to protect vulnerable witnesses from further distress if the accused were to question them himself. However, any restriction of the accused's wish to defend himself must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice.

7.5 The Committee considers that it is the task of the competent courts to assess whether in a specific case the assignment of a lawyer is necessary in the interests of justice, inasmuch as a person facing criminal prosecution may not be in a position to make a proper assessment of the interests at stake, and thus defend himself as effectively as possible. However, in the present case, the legislation of the State party and the case law of its Supreme Court provide that the accused can never be released from the requirement to be represented by counsel in criminal proceedings, even if he is a lawyer himself, and that the law takes no account of the seriousness of the charges or the behaviour of the accused. Moreover, the State party has not provided any objective and sufficiently serious reasons to explain why, in this instance of a relatively simple case, the absence of a court-appointed lawyer would have jeopardized the interests of justice or why the author's right to self-representation had to be restricted. The Committee concludes that the right to defend oneself in person, guaranteed under article 14, paragraph 3 (d), of the Covenant has not been respected.

8. The Committee recalls that by acceding to the Optional Protocol, the State party has recognized the Committee's competence to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, it has undertaken to respect and ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, and to take the necessary steps and provide an effective and enforceable remedy in cases where a violation has been established. The Committee considers that the author is entitled to an effective remedy under article 2, paragraph 3 (a), of the Covenant. The State party should amend its laws to ensure conformity with article 14, paragraph 3 (d), of the Covenant.

Consequently, within 90 days of communicating these views, the Committee would like to receive from the State party information on the measures taken to give effect to them. The State party is also requested to make the Committee's views public.

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

Notes

[1] *Carlos Correia de Matos v. Portugal* (dec.), No. 48188/99, 14 September 2000.

[2] *Carlos Correia de Matos v. Portugal* (dec.), No. 48188/99, CEDH 2001-XII.

[3] The State party refers to Ireneu Cabral Barreto in its comments to the European Court of Human Rights (2nd ed., pp. 168-169) and to the case of *Croissant v. Germany*, 25 September 1992 (Series A, No. 237-B).

[4] For example, China, Sweden and Switzerland.

Appendix

DISSENTING OPINION BY COMMITTEE MEMBERS, Ms. ELISABETH PALM, Mr. NISUKE ANDO AND Mr. MICHAEL O'FLAHERTY

We disagree with the majority's decision for the following reasons.

As the Committee's majority has noted, the right to defend oneself without a lawyer is not absolute. Even if the relationship of trust between the accused and lawyer is important, the interests of justice may require the assignment of a lawyer against the wishes of the accused. We observe that it is not for the Committee to decide on the State party's legislation in the abstract but to examine if there in the case before it is a violation of the author's right under the Covenant. We consider that national courts are better placed than an international committee to assess whether in a specific case the assignment of a lawyer is necessary in the interests of justice. We find that there is nothing in the material before the Committee that indicates that the relevant courts' decisions were arbitrary or that the author was unable to present his own view of the facts to the courts concerned. We therefore find that the State party has not infringed the author's right to defence and that consequently there has been no violation of the Covenant. Furthermore we note that the European Court of Human Rights has, in the decision *Correia de Matos v. Portugal*, 15 November 2001, declared inadmissible an application from the same author on the same facts. We are deeply concerned 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.

(*Signed*): Ms. Elisabeth Palm
(*Signed*): Mr. Nisuke Ando
(*Signed*): Mr. Michael O'Flaherty

[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.]

DISSENTING OPINION BY COMMITTEE MEMBER Sir NIGEL RODLEY

While inclined to agree with the dissent of Mr. Ando and Ms. Palm on the merits, not least because of the cavalier way in which the Committee chooses to ignore the reasoned approach of the European Court of Human Rights, applying the same law to the same facts, I do not believe that the Committee needed even to reach a decision on the merits.

Important as it may be to ensuring justice in an individual case, a constitutional motion is not procedurally an integral part of a criminal trial. The Covenant does not guarantee a right to engage in any legal procedure without legal counsel. Accordingly, the author's failure to instruct legal counsel to pursue the motion (the Committee is not in a position to determine whether the author was improperly removed from the Bar Council's roll, nor does it) meant that a possible domestic remedy was not exhausted. Accordingly, the Committee should have declared the case inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

(*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 Committee's annual report to the General Assembly.]
