HUMAN RIGHTS COMMITTEE

Koi v. Portugal

Communication No. 925/2000

22 October 2001

CCPR/C/73/D/925/2000

ADMISSIBILITY

Submitted by: Mr. Wan Kuok Koi (represented by counsel, Mr. Pedro Redinha)

State party concerned: Portugal

Date of registered communication: 15 December 1999 (initial submission)

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

Meeting on: 22 October 2001

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 15 December 1999, is Mr. Wan Kuok Koi, a citizen of Portugal and resident of Macao, at present serving a sentence of imprisonment at Coloane Prison in Macao. At the time of submission of the communication, Macao was a territory under Chinese sovereignty and Portuguese administration (Art. 292 of the Portuguese Constitution). The author claims to be a victim of a violation of article 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

1.2 Portugal is a party to the International Covenant on Civil and Political Rights since 15 September 1978 and a party to the Optional Protocol since 3 August 1983. On 27 April 1993, Portugal made a notification concerning the application of the Covenant to Macao. There is no record of a notification of territorial application of the Optional Protocol to Macao. However, there is no reservation or declaration by Portugal excluding the application of the Optional Protocol to Macao.

1.3 At the time of submission of the communication, Macao was still under Portuguese administration. It reverted to Chinese administration on 20 December 1999, four days after submission of the communication against Portugal.

1.4 Until 19 December 1999, the status of Macao was governed by the Basic Statute of Macao of 15 February 1976 (Lei No. 1/76). Article 2 of the Statute stipulated that the territory of Macao constituted a legal personality under internal public law, with administrative, economic, financial and legislative autonomy within the framework of the Portuguese Constitution. The judiciary remained part of the Portuguese administration of justice. Macao's status under public international law was also defined in the Sino-Portuguese Joint Declaration of Beijing of 13 April 1987 (in force 15 January 1988), pursuant to which Macao's status was determined to be Chinese territory under Portuguese administration, as already provided for by secret arrangements of 1976. Indeed, in the Portuguese Constitution of 2 April 1976, Macao is not included among the territories under Portuguese sovereignty, but is referred to as a territory under Portuguese administration.

The facts as submitted

2.1 The author was arrested on 1 May 1998 at the Coloane Prison in Macao, under suspicion of being the moral author of an alleged attempt against the Director of the Macao Judiciary Police. He was brought before the Judge of Criminal Prosecutions forty-eight hours later, who considered that there was no evidence linking the author to the alleged attempt, but that he was suspected of the crime of secret association. He was accordingly placed in preventive detention.

2.2 In May 1998 the author unsuccessfully challenged his detention before the High Court of Macao (Tribunal Superior de Justiçça de Macao, the Supreme Court of the Territory), judgment being rendered on 21 July 1998 on the grounds that “the defendant is a member of 14-K (carats) secret association."

2.3 The trial at the Court of Generic Competence of Macao (Tribunal de Competêência Genéérica) against the author and nine other defendants on the charge of involvement in the crime of secret association was opened on 27 April 1999 but immediately adjourned to 17 June 1999. The Chief Judge, however, tendered his resignation and left the Territory of Macao. It is alleged that pursuant to the applicable procedure, the lawsuit should immediately have been referred to the legal substitute of the Chief Judge. Instead of following this procedure, a new judge was recruited from Portugal, who came to Macao expressly to preside over this trial, and who returned to Portugal immediately after its conclusion. It is alleged that such procedure was illegal and in breach of Art. 31.2 of Decree-Law No. 55/92/M of 18 August 1992.

2.4 The trial was successively postponed to 29 September and 11 October 1999. It is alleged that the rights of defence were violated, in particular the right to be presumed innocent, which the Chief Judge is said to have breached by expressing on different occasions, as early as the initial hearing, a pre-judgment about the author's guilt. Moreover, it is stated that the defence attorneys were initially prohibited from having any contact with their clients until the end of the production of testimonial evidence in court (a measure lifted after protests in the press). The Macao Bar Association is said to have addressed an urgent communication to the Judiciary Council of the

territory complaining about the judge's orders dictated into the minutes referring to the defendants as “naturally dangerous” and suggesting that the attorneys would intimidate the witnesses.
2.5 Eight of the ten defendants, amongst them the author, filed a petition requesting the rejection of the new Chief Judge in view of doubts as to his impartiality on the basis of certain remarks of the judge allegedly by showing bias, but the High Court (Tribunal Superior de Justicia de Macao), by judgement of 15 October 1999 dismissed the petition and refused to decree a suspension of the judge in question, allowing the trial to proceed. A second challenge against the judge's impartiality was filed on 25 October 1999 and rejected on 29 October 1999. On this date author's counsel withdrew, arguing in a statement presented to the Secretariat of the Court that he could not continue to assure in a valid and efficient manner his clients's defence. Following the withdrawal of author's counsel, the Chief Judge appointed as official defender a young lawyer who was among the public to attend the hearing, but rejected the new lawyer's request for a suspension of the hearing to allow for consultation of the files. Said newly appointed lawyer also withdrew, whereupon the Chief Judge appointed first one clerk of the court and then another, neither one of whom had the minimum conditions to assure the defence. The author was thus tried without the assistance of an attorney of record and without being offered the opportunity of appointing a new attorney.

2.6 On 29 October 1999 a third petition for the rejection of the Chief Judge was lodged, which was dismissed on 8 November 1999.

2.7 Judgment was rendered on 23 November 1999, and the author was convicted and sentenced to fifteen years of imprisonment. An appeal was filed with the Court of Second Instance (Tribunal de Segunda Instâância, Case No. 46/2000), which was heard in March 2000, judgement being rendered on 28 July 2000. The Tribunal of Last Instance (Tribunal de Ultima Instâância), by judgment of 16 March 2001, affirmed the second instance court's findings).

2.8 Counsel states that the same matter has not been submitted to any other international procedure of investigation and settlement.

The complaint

3. Counsel claims multiple violations of article 14 concerning the alleged denial of a fair hearing before a competent and impartial tribunal, the alleged violation of the presumption of innocence, and the alleged violation of fundamental guarantees of the defence, including access of counsel to the accused and proper representation of the accused during the trial. [1]

The State party's observations and author's comments thereon

4.1 In its submission of 29 June 2000, the State party refers to article 2 of Macao's Statute, pursuant to which Macao enjoyed autonomy and did not fall under the sovereignty of Portugal. It argues that whereas the application of the Covenant was extended to Macao by the Portuguese Parliament by virtue of Resolution 41/92 of 17 December 1992, no such resolution was adopted with respect to the Optional Protocol.

4.2 The State party also indicates that the Optional Protocol is not among the treaties listed in the note addressed by the Portuguese Government in November 1999 to the United Nations Secretary General concerning those treaties for which the People's Republic of China had agreed to assume the responsibilities of succession.
4.3 The State party quotes the text of article 1 of the Optional Protocol, indicating that Macao was not a State party to the Protocol. Accordingly, it requests the Committee to declare the communication inadmissible.

4.4 In the alternative, the State party requests that the case be declared inadmissible because, since Portugal is no longer responsible for Macao, there is no legitimate international procedure.

4.5 Moreover, the State party contends that domestic remedies have not been exhausted, since the decision on the author's appeal is still pending. It is not relevant that the decisions concerning the petitions against the Chief Judge are final, since the exhaustion of domestic remedies should be understood as applying to the entire procedure. Moreover, the decision on appeal will no longer be the responsibility of Portugal, since it will be taken by a Court of the Macao Special Administrative Region, which is under the jurisdiction of the People's Republic of China.

5.1 In his comments, dated 29 September 2000, the author argues that the Optional Protocol is complementary to the Covenant and therefore its application in Macao should be deemed to have been effected by Resolution 41/92 of 17 December 1992.

5.2 Notwithstanding the transfer of administration to the People's Republic of China on 19/20 December 1999, it is clear that the events complained of occurred in the period when Portugal was responsible for Macao and bound by the Optional Protocol.

5.3 With regard to the alleged non-exhaustion of domestic remedies, the author contends that it is legitimate to sever the decisions concerning the impartiality of the judge from the decision on the author's guilt or innocence. It is stressed that the violations alleged were perpetrated by a court under Portuguese jurisdiction and not by the courts under the jurisdiction of the People's Republic of China. Moreover, the pending appeal before the Second Instance Court was finally decided on 28 July 2000.

5.4 The Second Instance Court examined the author's allegations, inter alia, that the tribunal was neither competent nor impartial, that the Chief Judge was biased against the defendants, that the adversary principle and the principle of equality of arms were systematically violated (judgement, section. 1.5.A.) The judgement reaffirmed the competence of the tribunal of first instance and found no merit in the author's other allegations of procedural irregularities. The author's conviction on charges of membership in a secret association and usury was affirmed. The sentence, however, was reduced to thirteen years and ten months. The Tribunal of the Last Instance, by judgment of 16 March 2001, fully affirmed the judgment of the Tribunal of Second Instance.

Issues and proceedings before the Committee

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

6.2 With regard to the application of the Optional Protocol to Macao during the period under Portuguese administration, until 19 December 1999, the Committee notes that the State party adhered to the Optional Protocol with effect from 3 August 1983. It further notes that the application of the Protocol cannot be based on article 10 of the Optional Protocol, since Macao was not a constituent part of Portugal after adoption of the new Constitution in 1976. It is also not possible to draw a positive conclusion from the Portuguese Parliament's resolution 41/92 which formally extended the application of the Covenant to Macao, since the Covenant and the Optional Protocol are distinct treaties.

6.3 The Committee, on the other hand, does not share the view that the fact that an analogous declaration has not been made with regard to the Optional Protocol precludes the application of the Protocol to this case. The Committee recalls the language of article 1 of the Optional Protocol which stipulates in its first clause:

> "A State party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State party of any of the rights set forth in the Covenant".

All these elements are present in the case at hand. Portugal is a party to the Covenant, as well as to the Optional Protocol, and as such it has recognized the Committee's competence to receive and consider communications from individuals "subject to its jurisdiction". Individuals in Macao were subject to Portugal's jurisdiction until 19 December 1999. In the present case, the State party exercised its jurisdiction by the courts over the author.

As the intention of the Optional Protocol is further implementation of Covenant rights, its non-applicability in any area within the jurisdiction of a State party cannot be assumed without any express indication (reservation/declaration) to that effect. No act of this nature exists. Therefore, the Committee comes to the conclusion that it has the competence to receive and consider the author's communication insofar it concerns alleged violations by Portugal of any of the rights set forth in the Covenant. [2]

6.4 With regard to exhaustion of domestic remedies, Article 2 of the Optional Protocol states:

> "Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and *who have exhausted all available domestic remedies* may submit a written communication to the Committee for consideration." (emphasis added)

The implications of this provision are clear: until such time as remedies available under the

domestic legal system have been exhausted an individual who claims that his or her rights under the Covenant have been violated is not entitled to submit a communication to the Committee. It is therefore incumbent on the Committee to reject as inadmissible a communication submitted before this condition has been met. And indeed it has been the practice of the Committee not to receive communications when it is abundantly clear that available domestic remedies have not been exhausted. Thus, for example, in communications involving allegations of violations of fair trial in criminal cases, the Committee does not receive and register communications when it is clear that an appeal is still pending. The problem is that in many cases it is not self-evident from the communication itself whether domestic remedies were available and if so, whether they were exhausted by the author. In such cases the Committee has no choice but to register the communication and to decide on admissibility after considering the submissions of both the author and the State party on the issue of domestic remedies. When deciding whether to reject such communications as inadmissible under article 5, para. 2 (b) of the Optional Protocol, the Committee generally follows the practice of other international decision-making bodies and examines whether domestic remedies have been exhausted at the time of considering the matter (rather than at the time the communication was submitted). The rationale of this practice is that rejecting a communication as inadmissible when domestic remedies have been exhausted at the time of consideration would be pointless, as the author could merely submit a new communication relating to the same alleged violation. It should be noted, however, that the assumption underlying this practice is that the legal standing of the State party has not changed between the date of submission and the date of consideration of the communication, and that there would therefore be no legal impediments to submission of a new communication by the author relating to the alleged violation. When this assumption is invalid, the practice becomes incompatible with the requirements of the Optional Protocol.

6.5 In the present case both the author's claims concerning the lack of competence of the special Portuguese judge, as well as the other claims regarding alleged violations of article 14 of the Covenant in the course of the author's trial, were raised in the appeal to the Tribunal de Segunda Instancia in Macao. This appeal had not yet been heard at the time of the submission of the communication. The judgments in this appeal and in a further appeal lodged with the Tribunal of Last Instance, were rendered on 28 July 2000 and 16 March 2001 respectively, when Macao was no longer administered by Portugal. It follows that domestic remedies had not been exhausted when the communication was submitted and that the author was therefore not entitled, under article 2 of the Optional Protocol, to submit a communication. By the time the remedies had been exhausted the author was no longer subject to the jurisdiction of Portugal and his communication was inadmissible under article 1 of the Optional Protocol.

6.6 It should further be noted that the fact that the author's appeals were heard after Portugal no longer had jurisdiction over Macao in no way implies that these remedies ceased to be domestic remedies which had to be exhausted before a communication could be submitted against Portugal. While Macao became a special administrative region in the People's Republic of China after submission of the communication, its legal system remained intact, and the system of criminal appeals remained unchanged. Thus there remained remedies that had to be pursued under the domestic legal system, irrespective of the State which exercised control over the territory.

6.7 In conclusion, while the Committee is of the opinion that in the period during which Portugal exercised jurisdiction over Macao after it had acceded to the Optional Protocol, individuals subject to its jurisdiction who claimed their rights under the Covenant had been violated were entitled to submit communications against Portugal, it finds that the present communication is inadmissible, under articles 2 and 5, para.2 (b) of the Optional Protocol.

7. The Human Rights Committee decides:
(a) that the communication is inadmissible,

(b) that this decision shall be communicated to the State party and to the author of the communication.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèèlèè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipóólito Solari Yrigoyen and Mr. Maxwell Yalden.

** The text of five individual opinions signed by members: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rafael Rivas Posada, Mr. Martin Scheinin and Mr. Maxwell Yalden, are appended to the present document.

Individual Opinion by Committee Members, Messrs. Abdelfattah Amor and Prafullachandra Natwarlal Bhagwati (partly dissenting)

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

With regard to the application of the Optional Protocol to Macao during the period under Portuguese administration, until 19 December 1999, the Committee notes that the State party ratified the Optional Protocol and it came into force with effect from 3 August 1983. The State party ratified the Covenant and became a party to it from 3 August 1983. The State party ratified the Covenant and became a party to it from 15 September 1978, but so far as the Optional Protocol is concerned, it was not ratified until about 5 years later. Obviously, the Covenant and the Optional Protocol are two distinct treaties and the ratification of the former does not carry with it the ratification of the latter and that is why the Optional Protocol had to be separately ratified as a distinct treaty by the State Party.

The first question that requires to be considered for determining the applicability of the Optional Protocol to Macao up to 19 December 1999 is whether there is anything in the language of the Optional Protocol to suggest that when the State party ratified the Optional Protocol, it became applicable to Macao as a territory under the administration of the State Party. Article 10 of the Optional Protocol obviously cannot be invoked since Macao was not a constituent part of Portugal. Some reliance may be placed on article 29 of the Vienna Convention on the Law of Treaties which stipulates that "Unless different intention appears from the Treaty, or is otherwise established, a treaty is binding upon each party in respect of its entire territory".

Now there are divergent views on whether the application of a treaty automatically extends to dependent territories or whether the extension needs a specific legal act. We do not think it would be a fruitful exercise to enter upon a discussion of these divergent views, since jurists are divided sharply on this issue. In any event, it is, in our view, clear that since Macao was at no material time a constituent part of Portugal, it could not be said to be a part of the territory of Portugal and hence the Optional Protocol could not be said to be binding on Macao by virtue of Article 29 of the Vienna Convention on the Law of Treaties. The ratification of the Optional Protocol by Portugal did not therefore have the effect of making it automatically applicable to Macao.

It may also be pointed out that if, contrary to what I have held, article 29 of the Vienna Convention on the Law of Treaties were applicable, it would equally be applicable in relation to the Covenant and in that event the Covenant would have to be regarded as applicable right form the time it was ratified by Portugal. But it is indisputable that the Covenant did not become applicable to Macao from the moment of its ratification by Portugal. The Covenant was in fact extended to Macao for the first time by a Resolution passed by the Portuguese Parliament on 17 December 1992. Till that time the Covenant was not applicable to Macao. It was by virtue of the Parliamentary Resolution dated 17 December 1992 that it became applicable to Macao. The Parliamentary extension of the Covenant to Macao on 17 December 1992 also demonstrates that in any event, it was not the intention of Portugal, when it ratified the Covenant, to make it applicable to Macao. The conclusion is therefore inevitable that the Covenant became applicable to Macao for the first time on 17 December 1992.

Turning once again to the question of applicability of the Optional Protocol to Macao, I have already pointed out that the Optional Protocol did not become applicable to Macao by virtue of its ratification by Portugal. There is also an additional reason why the Optional Protocol could not be said to have become applicable on its ratification by Portugal. If the Covenant did not become applicable to Macao until 17 December 1992, how could the Optional Protocol which merely provides the machinery for redressing violations of the Covenant rights, become applicable to Macao at any earlier point of time? Since the Optional Protocol did not become applicable to Macao as a consequence of its ratification by Portugal, it becomes necessary to consider whether at any subsequent point of time, it was extended to Macao.

Now it is obvious that there was no explicit legal act by which the applicability of the Optional Protocol was extended to Macao. The only argument which the State party could advance in support of the applicability of the Optional Protocol to Macao was that the extension of the Covenant to Macao on 17 December 1992 carried with it also the extension of the Optional

Protocol to Macao. But this argument is clearly unsustainable. In the first place, the Covenant and the Optional Protocol are two distinct treaties. The former can be ratified without ratification of the latter. The ratification of the Covenant does not therefore involve ratification of the Optional Protocol. If the contrary argument of Portugal were valid, there would be no necessity for a State party to the Covenant, separately to ratify the Optional Protocol, because the ratification of the Covenant would carry with it ratification of the Optional Protocol. But it is incontrovertible that the Optional Protocol does not become binding until it is ratified by the State Party. Here, in the present case, it is significant to note that though the Covenant was extended to Macao on 17 December 1992 by a specific resolution passed by the Portuguese Parliament, the extension did not include the Optional Protocol. Portugal specifically made one treaty applicable to Macao but not the other. This clearly shows the intention of Portugal that, while the Covenant should be applicable to Macao, the Optional Protocol should not be. This also becomes abundantly clear from the fact that it was only the Covenant and not the Optional Protocol which was mentioned in the note sent by Portugal to the Secretary-General setting out the treaties for which China was going to be responsible. I have therefore no doubt that the Optional Protocol was not applicable to Macao at any time and hence the communication must be held to be inadmissible under article 2 of the Optional Protocol.

There was some argument debated in the Committee that in any event, the case would fall within article 1 of the Optional Protocol and since the author was within the jurisdiction of Portugal at the time of submission of the communication, the Committee would have jurisdiction to deal with the communication. But this argument suffers from a two-fold fallacy. In the first place, it postulates the applicability of the Optional Protocol to Macao so as to enable the author to invoke its article 1 for supporting the sustainability of the communication. But, as I have pointed out above, the Optional Protocol was not applicable to Macao at any time and hence this argument based on article 1 must fail. Secondly, in order to attract the applicability of article 1, what is necessary is that the author who complains of violation of his Covenant rights must be subject to the jurisdiction of the State party not only when the Committee receives the communication but also when the Committee considers the Communication. The language of article 1 speaks of "the competence of the Committee to receive and consider the communication". Here, in the present case, when the Committee is considering a communication the author is no longer subject to the jurisdiction of Portugal, because China took over the administration of Macao on 20 December 1999. Article 1 has therefore, in any event, no application in the present case.

So far as the question of exhaustion of domestic remedies is concerned, article 5(2) (b) requires that the author of a communication must have exhausted all domestic remedies by the time the Committee considers the communication. The Committee is precluded from considering any communication unless the author has exhausted all domestic remedies. Therefore, the point of time at which the question of exhaustion of domestic remedies is required to be considered is when the Committee is considering the communication. It is common ground that at the present time when the Committee is considering the author's communication, the author has exhausted all domestic remedies. The communication cannot therefore be held to be inadmissible on the ground of non-exhaustion of domestic remedies under article 5(2) (b) of the Optional Protocol.

In the result, we hold that the communication is inadmissible.

Signed Abdelfattah Amor
Signed Prafullachandra Natwarlal Bhagwati

Individual Opinion by Committee Member, Mr. Nisuke Ando (partly dissenting)

In the present case I agree with the Committee's conclusion that the communication is inadmissible because the author was no longer subject to the jurisdiction of Portugal both when his appeals were heard by the Court of Second Instance in May 2000 and when the Tribunal of Last Instance rendered its judgement in March 2001. (See paras. 6.4, 6.5 and 2.7). However, I am unable to share the Committee's view that non-applicability of the Optional Protocol in any area within its jurisdiction of a State party cannot be assumed without an express indication to that effect (para. 6.3). In my view this assumption of the Committee is not fully convincing for the following reasons:

First of all, the State party clearly indicated that, whereas the application of the Covenant was extended to Macao by a resolution of the Portuguese Parliament, no such resolution was adopted with respect to the Optional Protocol (para. 4.2). Secondly, the Committee accepts the State party's statement that the Optional Protocol is not, whereas the Covenant is, among the treaties listed in its note to the United Nations Secretary General with respect to which the Chinese Government has agreed to assume responsibilities of succession (para 4.1). Thus, thirdly, while the Committee accepts that the continued application of the Covenant requires "express" indication of a State concerned (China in the present case), it seems to assume that no such indication is required with respect to the extension of application of the Optional Protocol. (Portugal in the present case).

In regard to the third point, it must be admitted that, while the continued application of the Covenant is an issue between two different States (China and Portugal), the extension of application of the Optional Protocol to Macao is an issue within one and the same State (Portugal alone). Nevertheless, the fact remains that, while the Covenant has become applicable to the Macao Special Administrative Region by the "express" indication of China, the Optional Protocol has not become applicable to the same region in the absence of "express" indication of the same State. In this connection, it must be remembered that, according to the Committee's General Comment No. 26 entitled "Continuity of Obligations", "The Human Rights Committee has consistently taken the view ... that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant". [3]

Personally, I agree with the Committee's view as a matter of policy statement, but I cannot agree with it as a statement of a rule of customary international law. As far as State practice with respect to the Covenant is concerned, only in the cases of the dismemberment of the former Yugoslavia and that of Czechoslovakia, each of the newly born States in Central and Eastern Europe except Kazakhstan (Kazakhstan has made no indication) indicated that it "succeeds to" the Covenant. All

the other seceding or separating States indicated that they "accede to" the Covenant, which implies that they are not succeeding to the former States' Covenant obligations but are newly acceding to the Covenant obligations on their own. The corresponding State practice with respect to the Optional Protocol makes it clear that only the Czech Republic and Slovakia "expressly" succeeded to the Optional Protocol obligations. Certainly the State practice shows that there is no "automatic" devolution of the Covenant obligations, to say nothing of the Optional Protocol obligations, to any State. A State needs to make an "express" indication as to whether or not it accepts obligations under the Covenant and/or the Optional Protocol. Absent such an indication, it should not be assumed that the State has accepted the obligations.

It may be recalled that during the consideration of the 4th periodic report of Portugal on Macao, the Committee specifically posed the question; "What arrangements exist for the application of the Optional Protocol in the Macao Special Administration Region?" The delegation replied that the question of the Optional Protocol had not been addressed in its negotiation with China (CCPR/C/SR. 1794, para. 9). From this reply it is difficult to determine whether or not the Optional Protocol, as distinguished from the Covenant, was considered as applicable in Macao. However, in response to the author's claims in the present case, Portugal expressly indicates that no resolution was adopted by its Parliament to extend the application of the Optional Protocol to Macao during its administration of the territory, suggesting that it has never intended to apply the Optional Protocol there.

Signed Nisuke Ando

Individual Opinion by Committee Members, Messrs. Eckart Klein, Rafael Rivas Posada and Maxwell Yalden (partly dissenting)

In our view the Committee should have decided that the communication was admissible.

We agree with the Committee's finding that in the present case the Optional Protocol establishing the competence of the Committee to receive and consider communications is applicable to Macao.

However, we disagree with the finding that the author had not exhausted domestic remedies. We base our dissent on two interrelated grounds.

First, we do not think that further domestic remedies were, in fact, available to the author after the jurisdiction of Portugal over Macao had come to an end. It is true that by agreement between the State party and the People's Republic of China the system of criminal appeals was to remain unchanged. But it is likewise true that after 19 December 1999, the courts to which the author could have applied (and has done in fact) no longer came within the jurisdiction of the State party against which this communication had been directed. The author submitted his communication on 15 December 1999, only four days before Macao reverted to Chinese administration. To take the view that the author should have exhausted further domestic (i.e. Portuguese) remedies within this short period of time would be clearly unreasonable. Therefore, even if the essential moment for

deciding the question when domestic remedies are exhausted were to be the time of submission of the communication and not that of its consideration by the Committee (an issue on which we need not comment here), this requirement would have been met due to the special circumstances of the present case.

Second, we believe that the Committee's view suffers from a further defect. Requesting the author at the time of submission of his communication to exhaust domestic remedies, since otherwise the communication would be inadmissible, on the one hand, and taking the line when he has done so that his communication is inadmissible because he is no longer subject to the jurisdiction of Portugal, on the other, creates an unacceptable situation in which the author is deprived of any effective protection which the Covenant and the Optional Protocol purport to ensure.

For these reasons we are of the view that the Committee should have declared the communication admissible.

Signed Eckart Klein
Signed Rafael Rivas Posada
Signed Maxwell Yalden

Individual Opinion by Committee Member, Mr. David Kretzmer (partly concurring and possibly reserving his position)

Domestic remedies in this case had not been exhausted when the communication was submitted. For the reasons set out in the Committee's Views the communication is therefore inadmissible even on the assumption that the Optional Protocol to alleged violations of the Covenant carried out by the authorities in Macao before the transfer of jurisdiction to the People's Republic of China. I believe that in these circumstances it was unnecessary for the Committee to decide whether the Optional Protocol did indeed apply to such alleged violations. I reserve my opinion on this question.

Signed David Kretzmer

Individual Opinion by Committee Member, Mr. Martin Scheinin (dissenting)

It needs to be pointed out at the outset that although the majority of the Committee came to the conclusion that the communication is inadmissible, there was no majority for any specific reason for inadmissibility. The reasons given in the decision itself were formulated by a minority of Committee members, representing the majority position among those who came to inadmissibility as conclusion.

In my opinion the decision is to be seen as an anomaly in the Committee's jurisprudence. It is the established position of the Committee that article 5, paragraph 2 (b) is the clause in the Optional

Protocol that prescribes the requirement of exhaustion of domestic remedies as a condition for admissibility. The reference to exhaustion of domestic remedies in article 2 as a condition for the submission of an individual communication is to be understood as a general reflection of this rule, not as a separate admissibility requirement. The requirement of exhaustion of domestic remedies is subject to the discretion of the Committee (article 5, paragraph 2 in fine). Also, it is a recoverable ground for inadmissibility (Rule 92.2 of the Committee's Rules of Procedure). Consequently, it would be absurd to read into article 2 an additional requirement that domestic remedies must be exhausted prior to the submission of a communication and to declare a communication inadmissible in a case where domestic remedies were not yet exhausted at the time of submission but have been exhausted by the time when the Committee has the opportunity to make its decision on admissibility.

The specific circumstances of transfer of sovereignty over Macao do not change the situation. If that change has any effect on the requirement of exhausting domestic remedies, it is because the available remedies after the transfer might not be regarded as effective ones in respect of Portugal. Consequently, domestic remedies would be exhausted in respect of Portugal on the date of transfer of sovereignty, irrespective of the stage where the proceedings were on that date.

Signed Martin Scheinin

Notes

[1] These issues, including the question of the alleged breach of article 31.2 of the Decree-Law No. 55/92/M (see above para 2.3), were addressed in the Judgment of the Tribunal de Segunda Instâância of 28 July 2000 as well as in the judgment of the Tribunal of Last Instance of 16 March 2001.

[2] Cf. also the general rule embodied in article 29 of the Vienna Convention on the Law of Treaties.

[3] UN document No. A/53/40, Annex VII, para. 40.