ACCESS TO INFORMATION

III. JURISPRUDENCE

ICCPR

- *S. E. T. A. v. Finland* (R.14/61), ICCPR, A/37/40 (2 April 1982) 161 at paras. 2.1-2.5, 9.1-9.3, 10.1-10.4, 11 and Individual Opinion of Mr. Torkel Opsahl, 166.

...

2.1 The facts of the five cases are essentially undisputed. The parties only disagree as to their evaluation. According to the contentions of the authors of the communication, Finnish authorities, including organs of the State-controlled Finnish Broadcasting Company (FBC), have interfered with their right of freedom of expression and information, as laid down in article 19 of the Covenant, by imposing sanctions against participants in, or censuring, radio and TV programmes dealing with sanctions against participants in, or censuring, radio and TV programmes dealing with homosexuality. At the heart of the dispute is paragraph 9 of chapter 20 of the Finnish Penal Code which sets forth the following:

> "If someone publicly engages in an act violating sexual morality, thereby giving offense, he shall be sentenced for publicly violating sexual morality to imprisonment for at most six months or to a fine."
>
> "Anyone who publicly encourages indecent behaviour between persons of the same sex shall be sentenced for encouragement to indecent behaviour between members of the same sex as decreed in subsection 1."

2.2 In September 1976, Leo Rafael Hertzberg, a lawyer, was interviewed for the purposes of a radio programme entitled "*Arbetsmarknadens uteslutna*" ("The Outcasts of the Labour Market"). In the interview, he asserted on the strength of his knowledge as an expert that there exists job discrimination in Finland on the ground of sexual orientation, in particular, to the detriment of homosexuals. Because of this programme criminal charges were brought against the editor (not Mr. Hertzberg) before the Helsinki Municipal Court and, subsequently, before the Helsinki Court of Appeals. Although the editor was acquitted, Mr. Hertzberg claims that through those penal proceedings his right to seek, receive and impart information was curtailed. In his view, the Court of Appeals (decision No. 2825 of 27 February 1979) has exceeded the limits of reasonable interpretation by construing paragraph 9 (2) of chapter 20 of the Penal Code as implying that the mere "praising of homosexual relationships" constituted an offence under that provision.

2.3 Astrid Nikula prepared a radio programme conceived as part of a young listeners series in December 1978. This programme included a review of the book, "*Pojkar skall inte grata*" ("Boys must not cry") and an interview with a homosexual about the identity of a young

homosexual and about life as a homosexual in Finland. When it was ready for broadcasting, it was censored by the responsible director of FBC against the opposition of the editorial team of the series. The author claims that no remedy against the censorship decision was available to her.

2.4 Uit Mansson participated in a discussion about the situation of the young homosexual depicted in Mrs. Nikula's production. The discussion was designed to form part of the broadcast. Like Mrs. Nikula, the author states that no remedy was available to him to challenge the censorship decision.

2.5 In 1978, Marko and Tuovi Putkonen, together with a third person, prepared a TV series on different marginal groups of society such as Jews, gypsies and homosexuals. Their main intention was to provide factual information and thereby to remove prejudices against those groups. The responsible programme director, however, ordered that all references to homosexuals be cut from the production, indicating that its transmission in full would entail legal action against FBC under paragraph 9 (2) of chapter 20 of the Penal Code.

...

9.1 In considering the merits of the communication, the Human Rights Committee starts from the premise that the State party is responsible for actions of the Finnish Broadcasting Company (FBC), in which the State holds a dominant stake (90 per cent) and which is placed under specific government control.

9.2 The Committee wishes further to point out that it is not called upon to review the interpretation of paragraph 9 (2) of chapter 20 of the Finnish Penal Code. The authors of the communication have advanced no valid argument which could indicate that the construction placed upon this provision by the Finnish tribunals was not made *bona fide*. Accordingly, the Committee's task is confined to clarifying whether the restrictions applied against the alleged victims, irrespective of the scope of penal prohibitions under Finnish penal law, disclose a breach of any of the rights under the Covenant.

9.3 In addition, the Committee wishes to stress that it has only been entrusted with the mandate of examining whether an individual has suffered an actual violation of his rights. It cannot review in the abstract whether national legislation contravenes the Covenant, although such legislation may, in particular circumstances, produce adverse effects which directly affect the individual, making him thus a victim in the sense contemplated by articles 1 and 2 of the Optional Protocol. The Committee refers in this connexion to its earlier views on Communication No. R.9/35 (*S. Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*).

10.1 Concerning Leo Rafael Hertzberg, the Committee observes that he cannot validly claim to be a victim or a breach by the State party of his right under article 19 (2) of the Covenant.

The programme in which he took part was actually broadcast in 1976. No sanctions were imposed against him. Nor has the author claimed that the programme restrictions as applied by FBC would in any way personally affect him. The sole fact that the author takes a personal interest in the dissemination of information about homosexuality does not make him a victim in the sense required by the Optional Protocol.

10.2 With regard to the two censored programmes of Mrs. Nikula and of Marko and Tuovi Putkonen, the Committee accepts the contention of the authors that their rights under article 19 (2) of the Covenant have been restricted. While not every individual can be deemed to hold a right to express himself through a medium like TV, whose available time is limited, the situation may be different when a programme has been produced for transmission within the framework of a broadcasting organization with the general approval of the responsible authorities. On the other hand, article 19 (3) permits certain restrictions on the exercise of the rights protected by article 19 (2), as are provided by law and are necessary for the protection of public order or of public health or morals. In the context of the present communication, the Finnish Government has specifically invoked public morals as justifying the actions complained of. The Committee has considered whether, in order to assess the necessity of those actions, it should invite the parties to submit the full text of the censored programmes. In fact, only on the basis of these texts could it be possible to determine whether the censored programmes were mainly or exclusively made up of factual information about issues related to homosexuality.

10.3 The Committee feels, however, that the information before it is sufficient to formulate its views on the communication. It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities.

10.4 The Committee finds that it cannot question the decision of the responsible organs of the Finnish Broadcasting Corporation that radio and TV are not the appropriate forums to discuss issues related to homosexuality, as far as a programme could be judged as encouraging homosexual behaviour. According to article 19 (3), the exercise of the rights provided for in article 19 (2) carries with it special duties and responsibilities for those organs. As far as radio and TV programmes are concerned, the audience cannot be controlled, In particular, harmful effects on minors cannot be excluded.

11. Accordingly, the Human Rights Committee is of the view that there has been no violation of the rights of the authors of the communication under article 19 (2) of the Covenant.

Individual Opinion of Mr. Torkel Opsahl:
Although I agree with the conclusion of the Committee, I wish to clarify certain points.

This conclusion prejudges neither the right to be different and live accordingly, protected by article 17 of the Covenant, nor the right to have general freedom of expression in this respect, protected by article 19. Under article 19 (2) and subject to article 19 (3), everyone must in principle have the right to impart information and ideas - positive or negative - about homosexuality and discuss any problem relating to it freely, through any media of his choice and on his own responsibility.

Moreover, in my view the conception and contents of "public morals" referred to in article 19 (3) are relative and changing. State-imposed restrictions on freedom of expression must allow for this fact and should not be applied so as to perpetuate prejudice or promote intolerance. It is of special importance to protect freedom of expression as regards minority views, including those that offend, shock or disturb the majority. Therefore, even if such laws as paragraph 9 (2) of chapter 20 of the Finnish Penal Code may reflect prevailing moral conceptions, this is in itself not sufficient to justify it under article 19 (3). It must also be shown that the application of the restriction is "necessary".

However, as the Committee has noted, this law has not been directly applied to any of the alleged victims. The question remains whether they have been more indirectly affected by it in a way which can be said to interfere with their freedom of expression, and if so, whether the grounds were justifiable.

It is clear that nobody - and in particular no State - has any duty under the Covenant to promote publicity for information and ideas of all kinds. Access to media operated by others is always and necessarily more limited than the general freedom of expression. It follows that such access may be controlled on grounds which do not have to be justified under article 19 (3).

It is true that self-imposed restrictions on publishing, or the internal programme policy of the media, may threaten the spirit of freedom of expression. Nevertheless, it is a matter of common sense that such decisions either entirely escape control by the Committee or must be accepted to a larger extent than externally imposed restrictions such as enforcement of criminal law or official censorship, neither of which took place in the present case. Not even media controlled by the State can under the Covenant be under an obligation to publish all that may be published. It is not possible to apply the criteria of article 19 (3) to self-imposed restrictions. Quite apart from the “public morals” issue, one cannot require that they shall be only such as are "provided by law and are necessary" for the particular purpose. Therefore I prefer not to express any opinion on the possible reasons for the decisions complained of in the present case.

The role of mass media in public debate depends on the relationship between journalists and their superiors who decide what to publish. I agree with the authors of the communication

that the freedom of journalists is important, but the issues arising here can only partly be examined under article 19 of the Covenant.

- *Aduayom, Diasso and Dobou v. Togo* (422-424/1990), ICCPR, A/51/40 vol. II (12 July 1996) 17 (CCPR/C/51/D/422/1990) at para. 7.4.

...
7.4 In respect of the claim under article 19, the Committee observes that it has remained uncontested that the authors were first prosecuted and later not reinstated in their posts, between 1986 and 1991, *inter alia*, for having read and, respectively, disseminated information and material critical of the Togolese Government in power and of the system of governance prevailing in Togo. The Committee observes that the freedoms of information and of expression are cornerstones in any free and democratic society. It is in the essence of such societies that its citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticize or openly and publicly evaluate their Governments without fear of interference or punishment, within the limits set by article 19, paragraph 3. On the basis of the information before the Committee, it appears that the authors were not reinstated in the posts they had occupied prior to their arrest, because of such activities. The State party implicitly supports this conclusion by qualifying the authors' activities as "political offences", which came within the scope of application of the Amnesty Law of 11 April 1991; there is no indication that the authors' activities represented a threat to the rights and the reputation of others, or to national security or public order (article 19, paragraph 3). In the circumstances, the Committee concludes that there has been a violation of article 19 of the Covenant.

- *Gauthier v. Canada* (633/1995), ICCPR, A/54/40 vol. II (7 April 1999) 93 (CCPR/C/65/D/633/1995) at paras. 2.1, 13.3-13.6, 15 and Individual Opinion of Mr. Rajsoomer Lallah (partly dissenting), 110.

...
2.1 The author is publisher of the National Capital News, a newspaper founded in 1982. The author applied for membership in the Parliamentary Press Gallery, a private association that administers the accreditation for access to the precincts of Parliament. He was provided with a temporary pass that gave only limited privileges. Repeated requests for equal access on the same terms as other reporters and publishers were denied.
...
13.3 The issue before the Committee is...whether the restriction of the author's access to the press facilities in Parliament amounts to a violation of his right under article 19 of the Covenant, to seek, receive and impart information.

13.4 In this connection, the Committee also refers to the right to take part in the conduct of public affairs, as laid down in article 25 of the Covenant, and in particular to General Comment No. 25 (57) which reads in part: "In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion."36/ Read together with article 19, this implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members. The Committee recognizes, however, that such access should not interfere with or obstruct the carrying out of the functions of elected bodies, and that a State party is thus entitled to limit access. However, any restrictions imposed by the State party must be compatible with the provisions of the Covenant.

13.5 In the present case, the State party has restricted the right to enjoy the publicly funded media facilities of Parliament, including the right to take notes when observing meetings of Parliament, to those media representatives who are members of a private organization, the Canadian Press Gallery. The author has been denied active (i.e. full) membership of the Press Gallery. On occasion he has held temporary membership which has given him access to some but not all facilities of the organization. When he does not hold at least temporary membership he does not have access to the media facilities nor can he take notes of Parliamentary proceedings. The Committee notes that the State party has claimed that the author does not suffer any significant disadvantage because of technological advances which make information about Parliamentary proceedings readily available to the public. The State party argues that he can report on proceedings by relying on broadcasting services, or by observing the proceedings. In view of the importance of access to information about the democratic process, however, the Committee does not accept the State party's argument and is of the opinion that the author's exclusion constitutes a restriction of his right guaranteed under paragraph 2 of article 19 to have access to information. The question is whether or not this restriction is justified under paragraph 3 of article 19. The restriction is, arguably, imposed by law, in that the exclusion of persons from the precinct of Parliament or any part thereof, under the authority of the Speaker, follows from the law of parliamentary privilege.

13.6 The State party argues that the restrictions are justified to achieve a balance between the right to freedom of expression and the need to ensure both the effective and dignified operation of Parliament and the safety and security of its members, and that the State party is in the best position to assess the risks and needs involved. As indicated above, the Committee agrees that the protection of Parliamentary procedure can be seen as a legitimate goal of public order and an accreditation system can thus be a justified means of achieving this goal. However, since the accreditation system operates as a restriction of article 19 rights, its operation and application must be shown as necessary and proportionate to the goal

in question and not arbitrary. The Committee does not accept that this is a matter exclusively for the State to determine. The relevant criteria for the accreditation scheme should be specific, fair and reasonable, and their application should be transparent. In the instant case, the State party has allowed a private organization to control access to the Parliamentary press facilities, without intervention. The scheme does not ensure that there will be no arbitrary exclusion from access to the Parliamentary media facilities. In the circumstances, the Committee is of the opinion that the accreditation system has not been shown to be a necessary and proportionate restriction of rights within the meaning of article 19, paragraph 3, of the Covenant, in order to ensure the effective operation of Parliament and the safety of its members. The denial of access to the author to the press facilities of Parliament for not being a member of the Canadian Press Gallery Association constitutes therefore a violation of article 19 (2) of the Covenant.

...

15. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Gauthier with an effective remedy including an independent review of his application to have access to the press facilities in Parliament. The State party is under an obligation to take measures to prevent similar violations in the future.

Notes

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36/ General Comment No. 25, paragraph 25, adopted by the Committee on 12 July 1996.

Individual Opinion by Rajsoomer Lallah (partly dissenting)

...

It seems to me that articles 22 and 26 are, in the particular circumstances of this communication, particularly relevant in deciding whether there has been a violation of the author's right under article 19 (2) of the Covenant to seek, receive and impart information, in relation to Parliamentary proceedings which are matters of interest to the general public. It is to be noted that access to parliamentary press facilities in this regard is given exclusively to members of an association which has so to say a monopoly over access to those facilities.

Freedom of association under article 22 inherently includes freedom not to associate. To impose membership of an association on the author as a condition precedent to access to Parliamentary press facilities in effect means that the author is compelled to seek membership of the association, which may or may not accept the author as a member, unless he decides to forego the full enjoyment of his rights under article 19 (2) of the Covenant.

The rights of the author, in respect of equality of treatment guaranteed under article 26, have been violated in the sense that the State party has, in effect, delegated its control over the provision of equal press facilities within public premises to a private association which may,

for reasons of its own and not open to judicial control, admit or not admit a journalist like the author as a member. The delegation of this control by the State party exclusively to a private association generates inequality of treatment as between members of the association and other journalists who are not members.

I conclude, therefore, that the author has been a victim of a violation of his rights under article 19 (2) by the State party's recourse to measures, designed to provide access to journalists reporting on Parliamentary proceedings, which are themselves violative of articles 22 and 26 of the Covenant and which cannot be justified by the restrictions permissible under article 19 (3) of the Covenant.

- *Laptsevich v. Belarus* (780/1997), ICCPR, A/55/40 vol. II (20 March 2000) 178 at paras. 2, 8.1-8.5 and 10.

...
2. On 23 March 1997, in the centre of the city of Mogilev in Belarus, the author distributed leaflets devoted to the anniversary of the proclamation of independence of the People's Republic of Belarus. While distributing the leaflets, the author was approached by officers of the Mogilev Central District Internal Affairs Department who confiscated the 37 copies of the leaflet still in the author's possession and subsequently charged the author under article 172(3) of the Code of Administrative Offences for disseminating leaflets not bearing the required publication data. In accordance with the charge, the author was fined 390 000 roubles by the Administrative Commission. The author appealed the decision to the Central District Court, which on 13 June 1997 rejected his appeal. Further appeals to the Regional Court and the Supreme Court were dismissed respectively on 18 June 1997 and 22 July 1997. With this, it is submitted, all available domestic remedies have been exhausted.
...
8.1 The first issue before the Committee is whether or not the application of article 26 of the Press Act to the author's case, resulting in the confiscation of the leaflets and the subsequent fine, constituted a restriction within the meaning of article 19, paragraph 3, on the author's freedom of expression. The Committee notes that under the Act, publishers of periodicals as defined in article 1 are required to include certain publication data, including index and registration numbers which, according to the author, can only be obtained from the administrative authorities. In the view of the Committee, by imposing these requirements on a leaflet with a print run as low as 200, the State party has established such obstacles as to restrict the author's freedom to <u>impart</u> information, protected by article 19, paragraph 2.

8.2 The Committee observes that article 19 allows restrictions only as provided by law and necessary (a) for respect of the rights and reputation of others; and (b) for the protection of national security or public order (*ordre public*), or of public health or morals. The right to

freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification. 1/

8.3 The Committee notes that the author has argued that article 172(3) of the Administrative Offences Code does not apply to him and that the sanctions thus were unlawful and constituted a violation of article 19 of the Covenant. The Committee is, however, not in a position to reevaluate the findings of the Belorussian courts with regard to the applicability of the said provision, which appears to leave room for interpretation ... Nonetheless, even if the sanctions imposed on the author were permitted under domestic law, the State party must show that they were necessary for one of the legitimate aims set out in article 19, paragraph 3.

8.4 In the very brief submission of the State party...it is implied that the sanctions were necessary to protect national security, as reference is made to the contents of the author's writings. There is, however, nothing in the material before the Committee which suggests that either the reactions of the police or the findings of the courts were based on anything other than the absence of necessary publication data. Therefore, the only issue before the Committee is whether or not the sanctions imposed on the author for not including the details required by the Press Act can be deemed necessary for the protection of public order (*ordre public*) or for respect of the rights or reputations of others.

8.5 In this regard, the Committee notes that the State party has argued that the requirements set out in article 26 of the Press Act are generally in full compliance with the Covenant. It has not, however, made any attempt to address the author's specific case and explain the reasons for the requirement that, prior to publishing and disseminating a leaflet with a print run of 200, he was to register his publication with the administrative authorities to obtain index and registration numbers. Furthermore, the State party has failed to explain why this requirement was necessary for one of the legitimate purposes set out in article 19, paragraph 3, and why the breach of the requirements necessitated not only pecuniary sanctions, but also the confiscation of the leaflets still in the author's possession. In the absence of any explanation justifying the registration requirements and the measures taken, it is the view of the Committee that these cannot be deemed necessary for the protection of public order (*ordre public*) or for respect of the rights or reputations of others. The Committee therefore finds that article 19, paragraph 2, has been violated in the present case.

10. ...[T]he State party is under an obligation to provide Mr. Laptsevich with an effective remedy, including compensation amounting to a sum not less than the present value of the fine and any legal costs paid by the author. The State party is also under an obligation to take measures to prevent similar violations in the future.

Notes

1/ See, *inter alia*, Communication No. 574/1994, *Kim v. the Republic of Korea*, Views dated 3 November 1998 and Communication No. 628/1995, *Park v. the Republic of Korea*, Views dated 20 October 1998.

- *Robinson v. Jamaica* (731/1996), ICCPR, A/55/40 vol. II (29 March 2000) 116 at paras. 3.8, 10.7 and 10.8.

...
3.8 Counsel...alleges a violation of article 14, paragraph 5, on the ground that the original of the written confession was not available to the author or his counsel before the petition for special leave to the Privy Council, and therefore it could not be properly reviewed by a handwriting expert assigned by counsel. It is submitted that the State party has an obligation to preserve evidence relied upon in a trial at least until appeals have been exhausted, and that this obligation has been breached in this case with the effect that the author was deprived of an opportunity to place new material before the court.
...
10.7 While recognizing that in order for the right to review of one's conviction to be effective, the State party must be under an obligation to preserve sufficient evidential material to allow for such a review, the Committee cannot see, as implied by counsel, that any failure to preserve evidential material until the completion of the appeals procedure constitutes a violation of article 14, paragraph 5. Article 14, paragraph 5, will, in the view of the Committee, only be violated where such failure prejudices the convict's right to a review, i.e. in situations where the evidence in question is indispensable to perform such a review. It follows that this is an issue which it is primarily for the appellate courts to consider.

10.8 In the present case, the State party's failure to preserve the original confession statement was made one of the grounds of appeal before the Judicial Committee of the Privy Council which, nevertheless, found that there was no merit in the appeal and dismissed it without giving further reasons. The Human Rights Committee is not in a position to re-evaluate the Judicial Committee's finding on this point, and finds that there was no violation of article 14, paragraph 5, in this respect.

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- *Pezoldova v. The Czech Republic* (757/1997), ICCPR, A/58/40 vol. II (25 October 2002) 25 (CCPR/C/76/D/757/1997) at paras. 2.1-2.7, 7.1-7.3, 11.2-12.2 and Individual Opinion by Justice Prafullachandra Natwarlal Bhagwati (concurring), 39.

...

2.1 Mrs. Pezoldova was born on 1 October 1947 in Vienna as the daughter and lawful heiress of Dr. Jindrich Schwarzenberg. The author states that the Nazi German Government had confiscated all of her family's properties in Austria, Germany, and Czechoslovakia, including an estate in Czechoslovakia known as "the Stekl" in 1940. She states that the property was confiscated because her adoptive grandfather Dr. Adolph Schwarzenberg was an opponent of Nazi policies. He left Czechoslovakia in September 1939 and died in Italy in 1950. The author's father, Jindrich, was arrested by the Germans in 1943 and imprisoned in Buchenwald from where he was released in 1944. He went into exile in the United States and did not return to Czechoslovakia after the war.

2.2 After the Second World War, the family properties were placed under National Administration by the Czechoslovak Government in 1945. Pursuant to the Decrees issued by the Czechoslovak President Edward Benes, No. 12 of 21 June 1945 and No. 108 of 25 October 1945, houses and agricultural property of persons of German and Hungarian ethnic origin were confiscated...

2.3 On 13 August 1947, a general confiscation law No. 142/1947 was enacted, allowing the Government to nationalize, in return for compensation, agricultural land over 50 hectares and industrial enterprises employing more than 200 workers. This law was, however, not applied to the Schwarzenberg estate because on the same day a *lex specialis*, Law No. 143/1947 (the so-called "Lex Schwarzenberg"), was promulgated, providing for the transfer of ownership of the Schwarzenberg properties to the State without compensation, notwithstanding the fact that the properties had already been confiscated pursuant to Benes' Decrees 12 and 108.2/ The author contends that Law No. 143/1947 was unconstitutional, discriminatory and arbitrary, perpetuating and formalizing the earlier persecution of the Schwarzenberg family by the Nazis. According to the author, the Law did not automatically affect the previous confiscation under the Benes' Decrees. However, on 30 January 1948, the confiscation of the Schwarzenberg agricultural lands under Decrees Nos. 12 and 108 was revoked. Schwarzenberg's representative was informed by letter of 12 February 1948, and the parties were given the possibility to appeal within 15 days. The author submits therefore that the revocation only took effect after 27 February 1948 (two days after the qualifying date 25 February 1948 for restitution under law 229/1991).

2.4 According to the author, the transfer of the property was not automatic upon the coming into force of Law No. 143/1947, but subject to the intabulation (writing into the register) in the public register of the transfer of the relevant rights of ownership. In this context, the

author states that National Administration (see paragraph 2.2) remained in force until June 1948, and that intabulation of the properties by land offices and Courts shows that, at the time, Law No. 143/1947 was not considered as having immediately transferred title.

2.5 Following the collapse of communist administration in 1989, several restitution laws were enacted. Pursuant to Law No. 229/1991,3/ the author applied for restitution to the regional land authorities, but her applications for restitution were rejected by decisions of 14 February, 20 May and 19 July 1994.

2.6 The Prague City Court, by decisions of 27 June 1994 4/ and 28 February 1995, 5/ refused the author's appeal and decided that the ownership of the properties had been lawfully and automatically transferred to the State by operation of Law No. 143/1947, on 13 August 1947. Since according to restitution Law No. 229/1991 the qualifying period for claims of restitution started on 25 February 1948, the Prague City Court decided that the author was not entitled to claim restitution.6/ The Court refused the author's request to suspend the proceedings in order to request the Constitutional Court to rule on the alleged unconstitutionality and invalidity of Law No. 143/1947.

2.7 On 9 March 1995 the author's application before the Constitutional Court concerning the City Court's decision of 27 June 1994 was rejected. The Court upheld the City Court's decision that ownership had been transferred to the State automatically by operation of Law No. 143/1947 and refused to consider whether Law No. 143/1947 was unconstitutional and void. The author did not appeal the City Court's decision of 28 February 1995 to the Constitutional Court, as it would have been futile in light of the outcome of the first appeal.

...

7.1 By submission of 23 March 2002, the author refers to the Committee's Views in case No. 774/1997 (*Brok v. The Czech Republic*), and, with respect to the issue of equal access, within the limits of the admissibility granted for issues under articles 2 and 26 of the Covenant, alleges that the Ministry of Agriculture and various State archives, until the year 2001, consistently denied to the author and to all land authorities access to the complete file on the confiscation procedures against her grandfather Dr. Adolph Schwarzenberg and his appeals lodged in due course...In particular, it is stated that as late as 2001 author's counsel was denied the inspection of the Schwarzenberg file by the director for legal affairs in the Ministry, Dr. Jindrich Urfus, and only when the author had found other relevant documents in another archive, was counsel informed by the Ministry, on 11 May 2001, that the file indeed existed and he was allowed to inspect it. Moreover, it is stated that on 5 October 1993 the head of the State archive in Krumlov, Dr. Anna Kubikova, had denied the author the use of the archive in the presence of her assistant Ing. Zaloha, dismissing her with the words "All Czech citizens are entitled to use this archive but you are not entitled to do so." The author complains that such denials of access illustrate the inequality of treatment to which she has been subjected by the Czech authorities since 1992.

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7.2 The documents suppressed prove that, in fact, the Schwarzenberg estate was confiscated pursuant to Presidential Decree No. 12/45. The authorities of the State party not only prevented the author from detecting and reporting the complete facts of her case to the land authorities and courts and to meet the deadlines for lodging claims according to laws 87/91 and 243/92, but also wilfully misled all land authorities and the Human Rights Committee.

7.3 On 29 November 2001, the Regional Court of Ceske Budejovice (15 Co 633/2001-115) as court of appeal confirmed that the Schwarzenberg estate was indeed confiscated pursuant to Section 1, par. 1, lit (a) of Decree No. 12/45, thus underlining the inapplicability of Law 143/47. However, the Court granted no redress to the author, because according to the author, there was no remedy available for anybody deemed to be of German or Hungarian stock.

...

11.2 The question before the Committee is whether the author was excluded from access to an effective remedy in a discriminatory manner. According to article 26 of the Covenant, all persons are equal before the law and every person has the right to equal protection of the law.

11.3 The Committee notes the statement of the author that the essence of her complaint is that the Czech authorities have violated her right to equal treatment by arbitrarily denying her right to restitution on the basis of Laws Nos. 229/1991 and 243/1992 with the argument that the properties of her adoptive grandfather were confiscated under Law No. 143/1947 and not under Benes' Decrees Nos. 12 and 108/1945 and therefore the restitution laws of 1991 and 1992 would not apply. The Committee notes further the author's argument that the State party constantly, until the year 2001, denied her access to the relevant files and archives, so that only then could documents be presented that would prove that, in fact, the confiscation occurred on the basis of the Benes' Decrees of 1945 and not of Law No. 143/1947, with the consequence that the author would be entitled to restitution under the laws of 1991 and 1992.

11.4 The Committee recalls its jurisprudence that the interpretation and application of domestic law is essentially a matter for the courts and authorities of the State party concerned. However, in pursuing a claim under domestic law, the individual must have equal access to remedies, which includes the opportunity to ascertain and present the true facts, without which the courts would be misled. The Committee notes that the State party has not addressed the allegation of the author that she was denied access to documents which were crucial for the correct decision of her case. In the absence of any explanation by the State party, due weight must be given to the author's allegations.

11.5 In this context, the Committee also notes that by decision of 29 November 2001, the Regional Court of Ceske Budejovice recognized that the taking of Dr. Adolph Schwarzenberg's property had been effected pursuant to Benes' Decree 12/1945. The Committee further notes that on 30 January 1948 the confiscation of the Schwarzenberg agricultural lands under Benes' Decrees Nos. 12 and 108/1945 was revoked, apparently in

order to give way for the application of Law 143/1947. The point in time when the revocation became effective seems not to have been clarified, because the courts proceeded from the premise that Law No. 143 was the only applicable legal basis.

11.6 It is not the task of the Committee but of the courts of the State party to decide on questions of Czech Law. The Committee finds, however, that the author was repeatedly discriminated against in being denied access to relevant documents which could have proved her restitution claims. The Committee is, therefore, of the view that the author's rights under article 26 in conjunction with article 2 of the Covenant were violated.

12.1 The Human Rights Committee ... is of the view that the facts before it reveal a violation of article 26, in conjunction with article 2 of the Covenant.

12.2 In accordance with article 2, paragraph 3 (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including an opportunity to file a new claim for restitution or compensation. The State party should review its legislation and administrative practices to ensure that all persons enjoy both equality before the law as well as the equal protection of the law.

...

Individual Opinion by Justice Prafullachandra Natwarlal Bhagwati (concurring)

I agree with the Committee's conclusion that the facts before it reveal a violation of articles 26 and 2 of the Covenant. However, I am persuaded that there is also a violation of article 14, paragraph 1, of the Covenant, which stipulates that all persons shall be equal before the courts and tribunals and be entitled to a fair and public hearing of their rights and obligations in a suit at law. As a prerequisite to have a fair and meaningful hearing of a claim, a person should be afforded full and equal access to public sources of information, including land registries and archives, so as to obtain the elements necessary to establish a claim. The author has demonstrated that she was denied such equal access, and the State party has failed to explain or refute the author's allegations. Moreover, the protracted legal proceedings in this case, now lasting over 10 years, have not yet been completed. In the context of this particular case and in the light of previous Czech restitution cases already adjudicated by the Committee, the apparent reluctance of the Czech authorities and of the Czech courts to process restitution claims fairly and expeditiously also entails a violation of the spirit, if not the letter of article 14. It should also be remembered that, subsequent to the entry into force of the Optional Protocol for the Czech Republic, the State party has continued to apply Law No. 143/1947 (the "law Schwarzenberg") which targeted exclusively the property of the author's family. Such ad hominem legislation is incompatible with the Covenant, as a general denial of the right to equality. In the light of the above, I believe that the appropriate remedy should have been restitution and not just the opportunity of resubmitting a claim to the Czech courts.

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In 1999 the Committee had declared this communication admissible, insofar as it might raise issues under articles 26 and 2 of the Covenant. I do not think that this necessarily precluded the Committee from making a finding of a violation of article 14, since the State party was aware of all elements of the communication and could have addressed the article 14 issues raised by the author. Of course, the Committee could have revised its admissibility decision so as to include the claims under article 14 of the Covenant, and requested relevant observations from the State party. This, however, would have further delayed disposition of a case which has been before the Courts of the State party since 1992 and before the Committee since 1997.

...

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Notes

...

2/ The law reads:

"1 (1) The ownership of the property of the so-called primogeniture branch of the Schwarzenberg family in Hluboká nad Vlatavou - as far as it is situated in the Czechoslovak Republic - is transferred by law to the county of Bohemia ...

"4 The annexation of the property rights as well as all other rights according to paragraph 1 in favour of the county of Bohemia will be dealt with by the courts and offices, which keep public records of immobile property or other rights, and that following an application by the National Committee in Prague.

"5 (1) The property is transferred into the ownership of the county of Bohemia without compensation for the former owners …"

3/ Act no. 229/1991 enacted by the Federal Assembly of the Czech and Slovak Federal Republic came into force on 24 June 1991. The purpose of this law was "to alleviate the consequences of some property injuries suffered by the owners of agrarian and forest property in the period from 1948 to 1989". According to the Act persons who are citizens of the Czech and Slovak Federal Republic who reside permanently on its territory and whose land and buildings and structures belonging to their original farmstead devolved to the State or other legal entities between 25 February 1948 and 1 January 1990 are entitled to restitution of this former property *inter alia* if it devolved to the State by dispossession without compensation under Law No. 142/1947, and in general by expropriation without compensation. By judgement of 13 December 1995 the Constitutional Court - held that the requirement of permanent residence in Act No. 229/1991 was unconstitutional.

4/ Concerning the "Stekl" property.

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5/ Concerning properties in Krumlov and Klatovy.

6/ The Prague City Court decided that the author was not an "entitled person" under section 4 (1) of Act No. 229/1991 on the ground that the transfer of the Schwarzenberg property to Czechoslovakia occurred immediately upon the promulgation of Act No. 143/1947 on 13 August 1947, before the qualifying date of 25 February 1948 prescribed by section 4 (1) of Act No. 229/1991. However, before the judgement by the Prague City Court, the interpretation had been that the material date was the date of intabulation of the property, which in the instant case occurred after 25 February 1948. In this context, the author states that the Constitutional Court, by judgement of 14 June 1995, concerning Act No. 142/1947 recognized that until 1 January 1951 intabulation had been necessary for the transfer of property.

For dissenting opinion in this context, see Pezoldova v. The Czech Republic (757/1997), ICCPR, A/58/40 vol. II (25 October 2002) 25 (CCPR/C/76/D/757/1997) at Individual Opinion by Mr. Nisuke Ando.

- *Zheludkov v. Ukraine* (726/1996), ICCPR, A/58/40 vol. II (29 October 2002) 12 (CCPR/C/76/D/726/1996) at paras. 2, 3.1, 8.4, 9 and Individual Opinion by Ms. Cecilia Medina Quiroga (concurring), 22.

...

2. The author states that her son was arrested on 4 September 1992 and was charged, alongside two other men, with the rape of a minor, a 13-year-old girl, H.K. The rape was alleged to have occurred on 23 August 1992. On 28 March 1994, the author's son was convicted by the Ordzhonikidzevsky District Court (Mariupol) and sentenced to seven years' imprisonment. His appeal to the Donetsk Regional Court was dismissed on 6 May 1994. His subsequent appeal to the Supreme Court of Ukraine was dismissed on 28 June 1995.

3.1 The author claims that her son is a victim of a violation of articles 7 and 10 of the Covenant on the ground that, both on the date of his arrest and on other occasions before his trial, he was severely ill- treated and because of the inhuman conditions of detention. With regard to the first ground, she states, in particular, that on 4 September 1992, her son was brought to a police station to give evidence as a witness in a case concerning a theft. She states that at the police station he was taken to a room where he was severely beaten with metal objects by several policemen for many hours. Her son identifies one of the assailants as Mr. K., a police captain and father of the victim of the alleged rape. The author further claims that Mr. K. forced her son to write a confession to the alleged rape. She explains that he declined to make any complaints to a man in civilian dress who subsequently came into

the interrogation room to ask him some questions, fearing that he would be beaten again if he complained. The author claims that her son has suffered serious injuries as a result of the beatings and states that he is still in bad health. In particular, he suffered severe damage to his left eye. She supplies no medical evidence, since her son has no access to his medical records. However, she provides a report by a doctor of the institution where her son was detained, which shows that he did complain to the doctor about the state of his eye. Furthermore, she has put before the Committee an extensive series of medical records aimed at showing that he was in good health until 1992.

...

8.4 With regard to the alleged violation of article 10, paragraph 1, in respect of the alleged victim's treatment in detention, in particular as to his medical treatment and access to medical records, the Committee takes note of the State party's reply, according to which Mr. Zheludkov received medical care and underwent examinations and hospitalization during his stay in the centre and the prison, and that a medical certificate based on the medical records was issued, upon request, on 2 March 1994. However, these statements do not contradict the argument presented on behalf of the alleged victim that despite repeated requests, direct access to the actual medical records was denied by the State party's authorities. The Committee is not in a position to determine what the relevance of the medical records in question would be for the assessment of the conditions of Mr. Zheludkov's detention, including medical treatment afforded to him. In the absence of any explanation for such denial, the Committee is of the view that due weight must be given to the author's allegations. Therefore, in the circumstances of the present communication, the Committee concludes that the consistent and unexplained denial of access to medical records to Mr. Zheludkov must be taken as sufficient ground for finding a violation of article 10, paragraph 1, of the Covenant.

9. The Human Rights Committee...is of the view that the facts before it disclose a violation of paragraph 3 of article 9, and paragraph 1 of article 10, of the International Covenant on Civil and Political Rights.

...

Individual Opinion by Ms. Cecilia Medina Quiroga (concurring)

I concur with the Committee's decision in this case, but differ on the reasoning behind it with regard to the existence of a violation of article 10, paragraph 1, of the Covenant, as set out in paragraph 8.4 of the Committee's Views.

I consider that the Committee's reasoning excessively restricts the interpretation of article 10, paragraph 1, by linking the violation of that provision to the possible relevance which the victim's access to the medical records might have had for the medical treatment that he received in prison, in order to assess "the conditions of Mr. Zheludkov's detention, including medical treatment afforded to him".

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Article 10, paragraph 1, requires States to treat all persons deprived of their liberty "with humanity and with respect for the inherent dignity of the human person". This, in my opinion, means that States have the obligation to respect and safeguard all the human rights of individuals, as they reflect the various aspects of human dignity protected by the Covenant, even in the case of persons deprived of their liberty. Thus, the provision implies an obligation of respect that includes all the human rights recognized in the Covenant. This obligation does not extend to affecting any right or rights other than the right to personal liberty when they are the absolutely necessary consequence of the deprivation of that liberty, something which it is for the State to justify.

A person's right to have access to his or her medical records forms part of the right of all individuals to have access to personal information concerning them. The State has not given any reason to justify its refusal to permit such access, and the mere denial of the victim's request for access to his medical records thus constitutes a violation of the State's obligation to respect the right of all persons to be "treated with humanity and with respect for the inherent dignity of the human person", regardless of whether or not this refusal may have had consequences for the medical treatment of the victim.

...

For dissenting opinions in this context, see Zheludkov v. Ukraine (726/1996), ICCPR, A/58/40 vol. II (29 October 2002) 12 (CCPR/C/76/D/726/1996) at Individual Opinion by Mr. Nisuke Ando, 20, Individual Opinion by Mr. P. N. Bhagwati, 21, and Individual Opinion by Mr. Rafael Rivas Posada, 23.

- *Van Hulst v. The Netherlands* (903/2000), ICCPR, A/60/40 vol. II (1 November 2004) 29 at paras. 6.4 and 6.5.

...

6.4 With regard to the author's claim that his right under article 14, paragraph 5, to have his conviction and sentence reviewed by a higher tribunal was violated, because the judgements other than that of 16 April 1996 by the Supreme Court did not give sufficient reasons for the courts' dismissal of his defence challenging the lawfulness of the evidence obtained, the Committee recalls that, where domestic law provides for several instances of appeal, a convicted person must have effective access to all of them. To ensure the effective use of this right, the convicted person is entitled to have access to duly reasoned, written judgements in the trial court and at least in the court of first appeal.

6.5 The Committee notes that the judgements of the 's-Hertogenbosch District and Appeal Courts, as well as the judgement of the Supreme Court dated 30 November 1993 and the judgement of the Arnhem Court of Appeal, do give reasons for the dismissal of the author's

defence. It recalls that it is generally for the national tribunals, and not for the Committee, to evaluate the facts and evidence in a particular case, unless it can be ascertained that the proceedings before these tribunals were clearly arbitrary or amounted to a denial of justice. The Committee considers that the author has not substantiated, for purposes of admissibility, that the reasons given by the Dutch courts for rejecting his challenge to the admissibility of the prosecution's case were arbitrary or amounted to a denial of justice. It must therefore follow that this part of the communication is inadmissible under article 2 of the Optional Protocol.