EQUALITY AND DISCRIMINATION - EQUALITY BEFORE THE LAW

III. JURISPRUDENCE

CERD

- *Diop v. France* (2/1989), CERD, A/46/18 (18 March 1991) 124 (CERD/C/39/D/2/1989/Rev.2) at paras. 3.1 and 6.2-6.4.

...

3.1 The author considers that he was denied the right to work on the ground of national origin, and alleges that the French judicial authorities violated the principle of equality, enshrined in article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination. Allegedly, his right to equal treatment before the tribunals was violated in two respects: First, whereas he was denied to practice law in Nice, six lawyers of Senegalese nationality are members of the Paris Bar. According to the author, his application would have been granted had he submitted it in Paris; he considers it unacceptable that the State party should allow such differences within the national territory. Secondly, it is submitted that the principle of equality and reciprocity at the international level is also affected by virtue of the fact that on the basis of the above-mentioned bilateral instruments, all French lawyers have the right to exercise their profession in Senegal and vice versa.

...

6.2 The Committee has noted the author's claims (a) that he was discriminated against on one of the grounds defined in article 1, paragraph 1, of the Convention on the Elimination of All Forms of Racial Discrimination, (b) that the rejection of his application for admission to the Bar of Nice constituted a violation of his right to work (article 5 (e) of the Convention) and his right to a family life, and (c) that the rejection of his application violated the Franco-Senegalese Convention on Movement of Persons. After careful examination of the material placed before it, the Committee bases its decision on the following considerations.

6.3 In respect of the alleged violations of the Franco-Senegalese Convention on Freedom of Movement of 29 March 1974, the Committee observes that it is not within its mandate to interpret or monitor the application of bilateral conventions concluded between States parties to the Convention, unless it can be ascertained that the application of these conventions result in manifestly discriminatory or arbitrary treatment of individuals under the jurisdiction of States parties to the International Convention on the Elimination of All Forms of Racial Discrimination, which have made the declaration under article 14. The Committee has no evidence that the application or non-application of the Franco-Senegalese Conventions of March 1974 has resulted in manifest discrimination.

6.4 As to the alleged violation of article 5 (e) of the Convention and of the right to a

family life, the Committee notes that the rights protected by article 5 (e) are of programmatic character, subject to progressive implementation. It is not within the Committee's mandate to see to it that these rights are established; rather, it is the Committee's task to monitor the implementation of these rights, once they have been granted on equal terms. Insofar as the author's complaint is based on article 5 (e) of the Convention, the Committee considers it to be ill-founded.

- *L. R. et al. v. Slovakia* (31/2003), CERD, A/60/18 (7 March 2005) 119 at paras. 2.1-2.4, 10.2-10.10, 11 and 12.

...

2.1 On 20 March 2002, the councillors of the Dobšiná municipality adopted resolution No. 251-20/III-2002-MsZ, whereby they approved what the petitioners describe as a plan to construct low-cost housing for the Roma inhabitants of the town.a/ About 1,800 Roma live in the town in what are described as "appalling" conditions, with most dwellings comprising thatched huts or houses made of cardboard and without drinking water, toilets, or drainage or sewage systems. The councillors instructed the local mayor to prepare a project aimed at securing finance from a government fund set up expressly to alleviate Roma housing problems in the State party.

2.2 Thereupon, certain inhabitants of Dobšiná and surrounding villages established a five-member "petition committee", led by the Dobšiná chairman of the Real Slovak National Party. The committee drafted a petition with the following text:

> "I do not agree with the building of low-cost houses for people of Gypsy origin on the territory of Dobšiná, as it will lead to an influx of inadaptable citizens of Gypsy origin from the surrounding villages, even from other districts and regions."b/

The petition was signed by some 2,700 inhabitants of Dobšiná and deposited with the municipal council on 30 July 2002. On 5 August 2002, the council considered the petition and unanimously voted, "having considered the factual circumstances", to cancel the earlier resolution by means of a second resolution which included an explicit reference to the petition.c/

2.3 On 16 September 2002, in the light of the relevant law,d/ the petitioners' counsel requested the Rožňava District Prosecutor to investigate and prosecute the authors of the discriminatory petition, and to reverse the council's second resolution as it was based on a discriminatory petition. On 7 November 2002, the District Prosecutor rejected the request on the basis of purported absence of jurisdiction over the matter. The Prosecutor found that "...the resolution in question was passed by the Dobšiná Town

Council exercising its self-governing powers; it does not constitute an administrative act performed by public administration and, as a result, the prosecution office does not have the competence to review the legality of this act or to take prosecutorial supervision measures in non-penal area".

2.4 On 18 September 2002, the petitioners' counsel applied to the Constitutional Court for an order determining that articles 12 and 33 of the Constitution, the Act on the Right of Petition and the Framework Convention for the Protection of National Minorities (Council of Europe) had been violated, cancelling the second resolution of the council and examining the legality of the petition. Further information was provided on two occasions at the request of the Court. On 5 February 2003, the Court, in closed session, held that the petitioners had provided no evidence that any fundamental rights had been violated by the petition or by the council's second decision. It stated that as neither the petition nor the second resolution constituted legal acts, they were permissible under domestic law. It further stated that citizens have a right to petition regardless of its content.

...

10.2 The Committee observes, at the outset, that it must determine whether an act of racial discrimination, as defined in article 1 of the Convention, has occurred before it can decide which, if any, substantive obligations in the Convention to prevent, protect against and remedy such acts have been breached by the State party.

10.3 The Committee recalls that, subject to certain limitations not applicable in the present case, article 1 of the Convention defines racial discrimination as follows: "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field".

10.4 The State party argues firstly that the challenged resolutions of the municipal council make no reference to Roma, and must thus be distinguished from the resolutions at issue in, for example, the *Koptova* y/ case that were racially discriminatory on their face. The Committee recalls that the definition of racial discrimination in article 1 expressly extends beyond measures which are explicitly discriminatory to encompass measures that are not discriminatory at face value but are discriminatory in fact and effect, that is, if they amount to indirect discrimination. In assessing such indirect discrimination, the Committee must take full account of the particular context and circumstances of the petition, as by definition indirect discrimination can only be demonstrated circumstantially.

10.5 In the present case, the circumstances surrounding the adoption of the two resolutions by the municipal council of Dobšiná and the intervening petition presented to

the council following its first resolution make abundantly clear that the petition was advanced by its proponents on the basis of ethnicity and was understood as such by the council as the primary, if not the exclusive basis for revoking its first resolution. As a result, the Committee considers that the petitioners have established a distinction, exclusion or restriction based on ethnicity, and dismisses this element of the State party's objection.

10.6 The State party argues, in the second instance, that the municipal council's resolution did not confer a direct and/or enforceable right to housing, but rather amounted to but one step in a complex process of policy development in the field of housing. The implication is that the second resolution of the council, even if motivated by ethnic grounds, thus did not amount to a measure "nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field", within the meaning of article 1, paragraph 1 *in fine*. The Committee observes that in complex contemporary societies the practical realization of, in particular, many economic, social and cultural rights, including those related to housing, will initially depend on and indeed require a series of administrative and policymaking steps by the State party's competent relevant authorities. In the present case, the council resolution clearly adopted a positive development policy for housing and tasked the mayor with pursuing subsequent measures by way of implementation.

10.7 In the Committee's view, it would be inconsistent with the purpose of the Convention, and elevate formalism over substance, to consider that the final step in the actual implementation of a particular human right or fundamental freedom must occur in a non-discriminatory manner, while the necessary preliminary decision-making elements directly connected to that implementation were to be severed and be free from scrutiny. As a result, the Committee considers that the council resolutions in question, taking initially an important policy and practical step towards realization of the right to housing, followed by its revocation and replacement with a weaker measure, taken together, do indeed amount to the impairment of the recognition or exercise on an equal basis of the human right to housing, protected by article 5, paragraph (e) (iii), of the Convention and further in article 11 of the International Covenant on Economic, Social and Cultural Rights. The Committee thus dismisses the State party's objection on this point.

10.8 In light of this finding that an act of racial discrimination has occurred, the Committee recalls its jurisprudence [n/]...to the effect that acts of municipal councils, including the adoption of public resolutions of legal character such as in the present case, amount to acts of public authorities within the meaning of Convention provisions. It follows that the racial discrimination in question is attributable to the State party.

10.9 Accordingly, the Committee finds that the State party is in breach of its obligation

under article 2, paragraph 1 (a), of the Convention to engage in no act of racial discrimination and to ensure that all public authorities act in conformity with this obligation. The Committee also finds that the State party is in breach of its obligation to guarantee the right of everyone to equality before the law in the enjoyment of the right to housing, contrary to article 5, paragraph (e) (iii), of the Convention.

10.10 With respect to the claim under article 6, the Committee observes that, at a minimum, this obligation requires the State party's legal system to afford a remedy in cases where an act of racial discrimination within the meaning of the Convention has been made out, whether before the national courts or, in this case, the Committee. The Committee having established the existence of an act of racial discrimination, it must follow that the failure of the State party's courts to provide an effective remedy discloses a consequential violation of article 6 of the Convention.

...

11. The Committee on the Elimination of Racial Discrimination...is of the view that the facts before it disclose violations of article 2, paragraph 1 (a), article 5, paragraph (e) (iii), and article 6 of the Convention.

12. In accordance with article 6 of the Convention, the State party is under an obligation to provide the petitioners with an effective remedy. In particular, the State party should take measures to ensure that the petitioners are placed in the same position that they were in upon adoption of the first resolution by the municipal council. The State party is also under an obligation to ensure that similar violations do not occur in the future.

Notes

a/ The State party provides, with its submissions on the merits of the petition, the following full text of the resolution:

> "On its 25th extraordinary session held on 20 March 2002 the Town Council of the town of Dobšiná adopted the following resolution from discussed reports and points:
>
> RESOLUTION 251-20/III-2002-MsZ
>
> After discussing the proposal by Lord Mayor Ing. Ján Vozár concerning the building of low-cost housing the Town Council of Dobšiná
>
> Approves
>
> the low-cost housing - family houses or apartment houses - development policy

and

Recommends

the Lord Mayor to deal with the preparation of project documentation and acquisition of funds for this development from State subsidies."

b/ Petitioners' translation, which reflects exactly the text of the petition set out in the translated judgement of the Constitutional Court provided by the State party annexed to its submissions on the merits. The State party suggests in its submissions on the merits that a more appropriate translation would be: "I do not agree with the construction of flats for the citizens of Gypsy nationality (ethnicity) within the territory of the town of Dobšiná, as there is a danger of influx of citizens of Gypsy nationality from surrounding area [sic] and even from other districts and regions."

c/ The State party provides, with its submissions on the merits of the petition, the following full text of the resolution:

"RESOLUTION 288/5/VIII-2002-MsZ

I. After discussing the petition of 30 July 2002 and after determining the facts, the Town Council of Dobšiná, through the Resolution of the Town Council is in compliance with the law, on the basis of the citizens' petition

Cancels

Resolution 251-20/III-2002-MsZ approving the low-cost housing - family houses or apartment houses - development policy.

II. Tasks

The Town Council commissions with elaborating a proposal for solving the existence of inadaptable citizens in the town of Dobšiná and then to discuss it in the bodies of the town and at a public meeting of the citizens.

Deadline: November 2002
Responsible: Chairpersons of commissions."

d/ The petitioners refer to:

(i) Article 1 of the Act on the Right of Petition, which provides:
"A petition cannot call for a violation of the Constitution of the Slovak Republic and its laws, nor deny or restrict individual rights";

(ii) Article 12 of the Constitution, which provides:

(1) All human beings are free and equal in dignity and in rights. Their fundamental rights and freedoms are sanctioned; inalienable, imprescriptible and irreversible.

(2) Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favoured on any of these grounds.

(3) Everyone has the right to decide freely which national group he or she is a member of. Any influence and all manners of pressure that may affect or lead to a denial of a person's original nationality shall be prohibited.

(4) No injury may be inflicted on anyone, because of exercising his or her fundamental rights and freedoms;

(iii) Article 33 of the Constitution, which provides:

"Membership in any national minority or ethnic group may not be used to the detriment of any individual"; and

(iv) The Act on the Public Prosecution Office, which provides that the Prosecutor has a duty to oversee compliance by public administration bodies with laws and regulations, and to review the legality of binding regulations issued by public administration bodies.

...

n/ [See *Koptova v. Slovak Republic*, case No. 13/1998, Opinion of 8 August 2000], at para. 6.6.

...

y/ [*Koptova v. Slovak Republic*, case No. 13/1998, Opinion of 8 August 2000].

_____

ICCPR

- *Broeks v. The Netherlands* (172/1984), ICCPR, A/42/40 (9 April 1987) 139 at para. 13.

...

13. The right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.

See also:

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- *Danning v. The Netherlands* (180/1984), ICCPR, A/42/40 (9 April 1987) 151 at para. 13.

- *Avellanal v. Peru* (202/1986), ICCPR, A/44/40 (28 October 1988) 196 at paras. 2.1, 10.1, 10.2 and 11.

  ...
  2.1 The author is the owner of two apartment buildings in Lima, which she acquired in 1974. It appears that a number of tenants took advantage of the change in ownership to cease paying rent for their apartments. After unsuccessful attempts to collect the overdue rent, the author sued the tenants on 13 September 1978. The court of first instance found in her favour and ordered the tenants to pay her the rent due since 1974. The Superior Court reversed the judgement on 21 November 1980 on the procedural ground that the author was not entitled to sue, because, according to article 168 of the Peruvian Civil Code, when a woman is married only the husband is entitled to represent matrimonial property before the Courts ("*El marido es el representante de la sociedad conyugal*"). On 10 December 1980 the author appealed to the Peruvian Supreme Court, submitting, *inter alia*, that the Peruvian Constitution now in force abolished discrimination against women and that article 2 (2) of the Peruvian Magna Carta provides that "the law grants rights to women which are not less than those granted to men". However, on 15 February 1984 the Supreme Court upheld the decision of the Superior Court. Thereupon, the author interposed the recourse of *amparo* on 6 May 1984, claiming that in her case article 2 (2) of the Constitution had been violated by denying her the right to litigate before the courts only because she is a woman. The Supreme Court rejected he recourse of *amparo* on 10 April 1985.
  ...
  10.1 With respect to the requirement set forth in article 14, paragraph 1, of the Covenant that "all persons shall be equal before the courts and tribunals", the Committee notes that the court of first instance decided in favour of the author, but the Superior Court reversed that decision on the sole ground that according to article 168 of the Peruvian Civil Code only the husband is entitled to represent matrimonial property, i.e. that the wife was not equal to her husband for purposes of suing in Court.

  10.2 With regard to discrimination on the ground of sex the Committee notes further that under article 3 of the Covenant State parties undertake "to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant" and that article 26 provides that all persons are equal before the law and are entitled to the equal protection of the law. The Committee finds that the facts before it reveal that the application of article 168 of the Peruvian Civil Code to the author resulted in denying her equality before the courts and constituted discrimination on the ground of

sex.

11. The Human Rights Committee...is of the view that the events of this case...disclose violations of articles 3, 14, paragraph 1 and 26 of the Covenant.

- *B. d. B. et al. v. The Netherlands* (273/1989), ICCPR, A/44/40 (30 March 1989) 286 at para. 6.4.

...
6.4 ...[W]hile the authors have complained about the outcome of the judicial proceedings, they acknowledge that procedural guarantees were observed in their conduct. The Committee observes that article 14 of the Covenant guarantees procedural equality but cannot be interpreted as guaranteeing equality of results or absence of error on the part of the competent tribunal. Thus, this aspect of the authors' communication falls outside the scope of the application of article 14 and is, therefore, inadmissible under article 3 of the Optional Protocol.

- *Morael v. France* (207/1986), ICCPR, A/44/40 (28 July 1989) 210 at paras. 9.2 and 9.6.

...
9.2 The author of the communication is a businessman and former member of the board, and later Managing Director, of the joint-stock company "Société anonyme des cartonneries mécaniques du Nord". In 1973, the company began to experience serious financial difficulties and a judicial administrator was appointed. After a sale of some company assets to satisfy creditors in 1978, the company resumed operations under a different management. Since it continued to lose money, the general meeting of shareholders appointed the author as Managing Director on 1 July 1979. He served in that capacity until 7 December 1979, when another judicial administrator was appointed. During those five months he ordered several economy measures designed to save the company, such as closing the Paris office and reducing the salary of the Managing Director by 33 per cent; he also attempted to reduce personnel, but this was unsuccessful owing to the partial refusal of the Inspectorate of Employment and to strikes. During civil proceedings held on the petition of the court-appointed administrator for an order for coverage of liabilities, the Tribunal of Commerce of Dunkirk heard the Public Prosecutor (who made reference to criminal proceedings then pending against the author, subsequently acquitted of all charges by decision of the *Tribunal correctionnel* of Dunkirk on 4 May 1982) and, on 7 July 1981, finding that the author had not proven that he had been diligent in the sense of article 99 of the Bankruptcy Act, ordered him to bear part of the company's indebtedness, as established by operations of the procedure, in the proportion of 5 per cent, together with other members of management, who were jointly

ordered to pay 35 per cent of the indebtedness. The author appealed, petitioning the Court of Appeal to find that he had exercised all due diligence during his five months as Managing Director. In its order of 13 July 1983, the Court of Appeal of Douai, while acknowledging that the author had taken a number of measures, held that those measures, designed to save a loss-making enterprise at any cost, had turned out to be inadequate and that the author had helped, as Managing Director, to prolong the life of the company while worsening its finances. Consequently, the Court, considering that he had not demonstrated that he had exercised due diligence, confirmed the lower court's judgement that the company's indebtedness would partly be borne by its managers, while amending it as concerns its fixing of the amount in percentages. Deciding to take as the appropriate point for evaluating the shortfall in the company's assets the date of 15 February 1983, when it had been definitively verified, without challenge, at about FF 30 million, the Court set the sum to be charged the author at FF 3 million, independently of the other managers. The author then appealed to the Court of Cassation, arguing that the Court of Appeal had erred in finding that he had not proven due diligence and that it had based the determination of the shortfall on elements which had not been part of the proceedings. On 2 May 1985, the Court of Cassation rejected the author's appeal, finding that the Court of Appeal had established the facts correctly and had based its decision on the verification of the statement of liabilities, about which there had been no challenge, by the parties, and that consequently it had not disregarded the principle of adversary proceedings. Subsequently, article 180 of the new Bankruptcy Act, dated 25 January 1985 (and effective as from 1 January 1986), abolished the presumption of fault, restoring the principle of proof of fault to determine the responsibilities of company managers in case of losses.

...

9.6 With respect to the complaints of violation of articles 26 and 17 (1) of the Covenant, the Committee considers that the author has not demonstrated that he was a victim of a violation of article 26, regarding equality before the law or that the procedure followed by the French courts improperly attacked his honour and reputation, protected by article 17.

- *González del Río v. Peru* (263/1987), ICCPR, A/48/40 vol. II (28 October 1992) 17 (CCPR/C/46/D/263/1987) at para. 5.2.

...

5.2 The Committee has noted the author's claim that he was not treated equally before the Peruvian courts, and that the State party has not refuted his specific allegation that some of the judges involved in the case had referred to its political implications...and justified the courts' inaction or the delays in the judicial proceedings on this ground. The Committee recalls that the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception. It considers that the Supreme Court's

position in the author's case was, and remains, incompatible with this requirement...

- *Davidson and McIntyre v. Canada* (359/1989 and 385/1989), ICCPR, A/48/40 vol. II (31 March 1993) 91 (CCPR/C/47/D/359/1989/385/1989) at para. 11.5.

...
11.5 The authors have claimed a violation of their right, under article 26, to equality before the law; the Government of Quebec has contended that Sections 1 and 6 of Bill 178 are general measures applicable to all those engaged in trade, regardless of their language. The Committee notes that Sections 1 and 6 of Bill 178 operate to prohibit the use of commercial advertising outdoors in other than the French language. This prohibition applies to French speakers as well as English speakers, so that a French speaking person wishing to advertise in English, in order to reach those of his of her clientele who are English speaking, may not do so. Accordingly, the Committee finds that the authors have not been discriminated against on the ground of their language, and concludes that there has been no violation of article 26 of the Covenant.

- *Bahamonde v. Equatorial Guinea* (468/1991), ICCPR, A/49/40 vol. II (20 October 1993) 183 (CCPR/C/49/D/468/1991) at para. 9.4.

...
9.4 The author has contended that despite several attempts to obtain judicial redress before the courts of Equatorial Guinea, all of his *démarches* have been unsuccessful. This claim has been refuted summarily by the State party, which argued that the author could have invoked specific legislation before the courts, without however linking its argument to the circumstances of the case. The Committee observes that the notion of equality before the courts and tribunals encompasses the very access to the courts and that a situation in which an individual's attempts to seize the competent jurisdictions of his/her grievances are systematically frustrated runs counter to the guarantees of article 14, paragraph 1. In this context, the Committee has also noted the author's contention that the State party's president controls the judiciary in Equatorial Guinea. The Committee considers that a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal within the meaning of article 14, paragraph 1, of the Covenant.

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- *Fei v. Colombia* (514/1992), ICCPR, A/50/40 vol. II (4 April 1995) 77 (CCPR/C/53/D/514/1992) at paras. 8.4-8.6.

...

8.4 The concept of a "fair trial" within the meaning of article 14, paragraph 1...includes other elements. Among these, as the Committee has had the opportunity to point out, 24/ are the respect for the principles of equality of arms, of adversary proceedings and of expeditious proceedings. In the present case, the Committee is not satisfied that the requirement of equality of arms and of expeditious procedure have been met. It is noteworthy that every court action instituted by the author took several years to adjudicate - and difficulties in communication with the author, who does not reside in the State party's territory, cannot account for such delays, as she had secured legal representation in Colombia. The State party has failed to explain these delays. On the other hand, actions instituted by the author's ex-husband and by or on behalf of her children were heard and determined considerably more expeditiously. As the Committee has noted in its admissibility decision, the very nature of custody proceedings or proceedings concerning access of a divorced parent to his children requires that the issues complained of be adjudicated expeditiously. In the Committee's opinion, given the delays in the determination of the author's actions, this has not been the case.

8.5 The Committee has further noted that the State party's authorities have failed to secure the author's ex-husband's compliance with court orders granting the author access to her children, such as the court order of May 1982 or the judgement of the First Circuit Court of Bogotá of 13 March 1989. Complaints from the author about the non-enforcement of such orders apparently continue to be investigated, more than 30 months after they were filed, or remain in abeyance; this is another element indicating that the requirement of equality of arms and of expeditious procedure has not been met.

8.6 Finally, it is noteworthy that in the proceedings under article 86 of the Colombian Constitution instituted on behalf of the author's daughters in December 1993, the hearing took place, and judgement was given, on 16 December 1993, that is, before the expiration of the deadline for the submission of the author's defence statement. The State party has failed to address this point, and the author's version is thus uncontested. In the Committee's opinion, the impossibility for Mrs. Fei to present her arguments before judgement was given was incompatible with the principle of adversary proceedings, and thus contrary to article 14, paragraph 1, of the Covenant.

Notes

...

24/ Views on Communication No. 203/1986 (*Muñoz v. Peru*), para. 11.3; and Communication No. 207/1986 (*Morael v. France*), para. 9.3.

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- *de Groot v. The Netherlands* (578/1994), ICCPR, A/50/40 vol. II (14 July 1995) 179 (CCPR/C/54/D/578/1994) at paras. 3.3 and 4.6.

...
3.3. ...[T]he author states that he is a victim of a violation of article 26 of the Covenant, because another participant in the so-called "criminal organization" was not prosecuted, according to the author, because he was a spy of the secret service.
...
4.6 With regard to the author's claim under article 26, the Committee recalls that the Covenant does not provide a right to see another person prosecuted, 57/ nor does the absence of prosecution against one person render the prosecution of another person involved in the same offence necessarily discriminatory, in the absence of specific circumstances revealing a deliberate policy of unequal treatment before the law. Since no such circumstances have been shown in the instant case, this part of the communication is therefore inadmissible...

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Notes
...
57/ See, *inter alia*, the Committee's inadmissibility decisions with respect to Communication No. 213/1986 (*H.C.M.A. v. The Netherlands*) and Communication No. 396/1990 (*M.S. v. The Netherlands*).

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- *Malik v. Czech Republic* (669/1995), ICCPR, A/54/40 vol. II (21 October 1998) 291 at paras. 3.3, 3.4 and 6.5.

...
3.3 Mr. Malik specifically complains of the denial of equality before the courts, in violation of article 14, and of discrimination, in violation of article 26. He points out that the enforced expatriation in 1945, the expropriations and the expulsions were carried out in a collective way, and were not based on conduct but rather on status. All members of the German minority, including Social Democrats and other antifascists were expelled and their property was confiscated, just because they were German. In this context he refers to the policy of ethnic cleansing in the former Yugoslavia, which has been recognized to be in violation of international law. He also refers to the Nazi expatriation and expropriation of German Jews, which were arbitrary and discriminatory.

He points out that while Nazi laws have been abrogated and restitution or compensation has been effected for Nazi confiscations, neither Czechoslovakia nor the Czech Republic has offered restitution or compensation to the expatriated, expropriated and expelled German minority.

3.4 Mr. Malik notes that by virtue of Law No. 87/1991 Czech citizens with Czech residence may obtain restitution or compensation for properties that were confiscated by the Government of Czechoslovakia in the period from 1948 to 1989. Mr. Malik and his family do not qualify for compensation under this law, because their properties were confiscated in 1945, and because they lost their Czech citizenship as a result of Benes Decree No. 33 and their residence because of their expulsion. Moreover, he points out that whereas there is a restitution and compensation law for Czechs, none has been enacted to allow any form of restitution or compensation for the German minority. This is said to constitute a violation of article 26 of the Covenant.

...

6.5 The Committee has consistently held that not every distinction or differentiation in treatment amounts to discrimination within the meaning of articles 2 and 26. The Committee considers that in the present case, legislation adopted after the fall of the Communist regime in Czechoslovakia to compensate victims of that regime does not appear to be *prima facie* discriminatory within the meaning of article 26 merely because, as the author contends, it does not compensate the victims of injustices committed in the period before the communist regime. 1/ The Committee considers that the author has failed to substantiate, for purposes of admissibility, his claim that he is a victim of violations of articles 14 and 26 in this regard. This part of the communication is thus inadmissible under article 2 of the Optional Protocol.

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Notes

1/ See the Committee's decision declaring inadmissible communication No. 643/1995 (*Drobek v. Slovakia*), adopted on 14 July 1997.

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See also:

- *Schlosser v. Czech Republic* (670/1995), ICCPR, A/54/40 vol. II (21 October 1998) 298 at paras. 3.4, 3.5 and 6.5.

- *Foin v. France* (666/1995), ICCPR, A/55/40 vol. II (3 November 1999) 30 at para. 10.3.

...

10.3 The issue before the Committee is whether the specific conditions under which alternative service had to be performed by the author constitute a violation of the

Covenant. The Committee observes that under article 8 of the Covenant, States parties may require service of a military character and, in case of conscientious objection, alternative national service, provided that such service is not discriminatory. The author has claimed that the requirement, under French law, of a length of 24 months for national alternative service, rather than 12 months for military service, is discriminatory and violates the principle of equality before the law and equal protection of the law set forth in article 26 of the Covenant. The Committee reiterates its position that article 26 does not prohibit all differences of treatment. Any differentiation, as the Committee has had the opportunity to state repeatedly, must however be based on reasonable and objective criteria. In this context, the Committee recognizes that the law and practice may establish differences between military and national alternative service and that such differences may, in a particular case, justify a longer period of service, provided that the differentiation is based on reasonable and objective criteria, such as the nature of the specific service concerned or the need for a special training in order to accomplish that service. In the present case, however, the reasons forwarded by the State party do not refer to such criteria or refer to criteria in general terms without specific reference to the author's case, and are rather based on the argument that doubling the length of service was the only way to test the sincerity of an individual's convictions. In the Committee's view, such argument does not satisfy the requirement that the difference in treatment involved in the present case was based on reasonable and objective criteria. In the circumstances, the Committee finds that a violation of article 26 occurred, since the author was discriminated against on the basis of his conviction of conscience.

For dissenting opinion in this context, see Foin v. France (666/1995), ICCPR, A/55/40 vol. II (3 November 1999) 30 at Individual Opinion by Nisuke Ando, Eckart Klein and David Kretzmer, 39.

See also:

- *Maille v. France* (689/1996), ICCPR, A/55/40 vol. II (10 July 2000) 62 at para. 10.4.
- *Venier and Nicolas v. France* (690/1996 and 691/1996), ICCPR, A/55/40 vol. II (10 July 2000) 75 at para. 10.4.

- *Hoelen v. The Netherlands* (873/1999), ICCPR, A/55/40 vol. II (3 November 1999) 240 at paras. 2, 3.1, 4.2 and 5.

...

2. On 8 May 1993, the author participated in a demonstration which ended in violent disturbances. On 8 June 1993, the author was found guilty by a single judge of the District Court at The Hague for having committed acts of violence against police personnel by throwing stones. He was sentenced to a fine of NGL 750 and a suspended sentence of two weeks' imprisonment. His appeal was heard on 13 October 1994, 9 and

10 February 1995, and rejected by the Court of Appeal on 24 February 1995. His further (cassation) appeal was rejected on 20 February 1996.

3.1 The author claims that his right to equality under article 26 of the Covenant has been violated, because no police officers were prosecuted after the disturbances, although independent reports had established that the police had used unreasonable violence.

...

4.2 The Committee recalls that the prosecution of one person and the failure to prosecute another as such does not raise an issue of equality before the law, since each case has to be judged on its own merits. 1/ The author's allegations and the material before the Committee do not substantiate the author's claim that he is a victim of a violation of article 26 in this respect.

...

5. Accordingly, the Human Rights Committee decides:

(a) that the communication is inadmissible under articles 2 and 3 of the Optional Protocol...

_____

Notes

1/ See the Committee's decision declaring inadmissible communication No. 579/1994 (*Werenbeck v. Australia*), 27 March 1997, CPR/C/59/D/579/1994, para. 9.9.

_____

- *Gomez v. Spain* (701/1996), ICCPR, A/55/40 vol. II (20 July 2000) 102 at paras. 3.1 and 11.2.

...

3.1 The author's complaint concerns primarily the right to an effective appeal against conviction and sentence. He argues that the Spanish Criminal Procedure Act (*Ley de Enjuiciamiento Criminal*) violates articles 14, paragraph 5, and 26 of the Covenant because those charged with the most serious crimes have their cases heard by a single judge (*Juzgado de Instrucción*), who conducts all the pertinent investigations and, once he considers the case ready for the hearing, refers it to the Provincial Court (*Audiencia Provincial*), where a panel of three judges is in charge of proceedings and hands down the sentence. Their decision is subject to judicial review proceedings only on very limited legal grounds. There is no possibility of a re-evaluation of the evidence by the Court of Cassation, as all factual determinations by the lower court are final. By contrast, those convicted of less serious crimes for which sentences of less than six years' imprisonment have been imposed have their cases investigated by a single judge (*Juzgado de Instrucción*) who, when the case is ready for the hearing, refers it to a single

judge ad quo (*Juzgado de lo Penal*), whose decision may be appealed before the Provincial Court (*Audiencia Provincial*), thus ensuring an effective review not only of the application of the law, but also of the facts.

...

11.2 With regard to the allegation that article 26 of the Covenant was violated because the Spanish system provides for various types of remedy depending on the seriousness of the offence, the Committee considers that different treatment for different offences does not necessarily constitute discrimination. The Committee is of the opinion that the author has not substantiated the allegation of a violation of article 26 of the Covenant.

See also:

- *Sineiro Fernandez v. Spain* (1007/2001), ICCPR, A/58/40 vol. II (7 August 2003) 325 (CCPR/C/78/D/1007/2001) at para. 6.4.

- *Thompson v. Saint Vincent and the Grenadines* (806/1998), ICCPR, A/56/40 vol. II (18 October 2000) 93 at paras. 2.1, 3.1, 3.2, 8.2, 8.3 and 10.

...

2.1 The author was arrested on 19 December 1993 and charged with the murder of D'Andre Olliviere, a four-year old girl who had disappeared the day before. The High Court (Criminal Division) convicted him as charged and sentenced him to death on 21 June 1995. His appeal was dismissed on 15 January 1996 ...

...

3.1 Counsel claims that the imposition of the sentence of death in the author's case constitutes cruel and unusual punishment, because under the law of St. Vincent the death sentence is the mandatory sentence for murder. He also points out that no criteria exist for the exercise of the power of pardon, nor has the convicted person the opportunity to make any comments on any information which the Governor-General may have received in this respect.1/ In this context, counsel argues that the death sentence should be reserved for the most serious of crimes and that a sentence which is indifferently imposed in every category of capital murder fails to retain a proportionate relationship between the circumstances of the actual crime and the offender and the punishment. It therefore becomes cruel and unusual punishment. He argues therefore that it constitutes a violation of article 7 of the Covenant.

3.2 The above is also said to constitute a violation of article 26 of the Covenant, since the mandatory nature of the death sentence does not allow the judge to impose a lesser sentence taking into account any mitigating circumstances. Furthermore, considering that the sentence is mandatory, the discretion at the stage of the exercise of the prerogative of mercy violates the principle of equality before the law.

...

EQUALITY AND DISCRIMINATION - EQUALITY BEFORE THE LAW

8.2 Counsel has claimed that the mandatory nature of the death sentence and its application in the author's case, constitutes a violation of articles 6 (1), 7 and 26 of the Covenant. The State party has replied that the death sentence is only mandatory for murder, which is the most serious crime under the law, and that this in itself means that it is a proportionate sentence. The Committee notes that the mandatory imposition of the death penalty under the laws of the State party is based solely upon the category of crime for which the offender is found guilty, without regard to the defendant's personal circumstances or the circumstances of the particular offence. The death penalty is mandatory in all cases of "murder" (intentional acts of violence resulting in the death of a person). The Committee considers that such a system of mandatory capital punishment would deprive the author of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case. The existence of a right to seek pardon or commutation, as required by article 6, paragraph 4, of the Covenant, does not secure adequate protection to the right to life, as these discretionary measures by the executive are subject to a wide range of other considerations compared to appropriate judicial review of all aspects of a criminal case. The Committee finds that the carrying out of the death penalty in the author's case would constitute an arbitrary deprivation of his life in violation or article 6, paragraph 1, of the Covenant.

8.3 The Committee is of the opinion that counsel's arguments related to the mandatory nature of the death penalty, based on articles 6 (2), 7, 14 (5) and 26 of the Covenant do not raise issues that would be separate from the above finding of a violation of article 6 (1).

...

10. Under article 2, paragraph 3 (a), of the Covenant, the State party is under the obligation to provide Mr. Thompson with an effective and appropriate remedy, including commutation. The State party is under an obligation to take measures to prevent similar violations in the future.

Notes

1/ Under section 65 of the Constitution, the Governor General may exercise the prerogative of mercy, in accordance with the advice of the Minister who acts as Chairman of the Advisory Committee on the prerogative of mercy. The Advisory Committee consists of the Chairman (one of the Cabinet Ministers), the Attorney-General and three to four other members appointed by the Governor General on the advice of the Prime Minister. Of the three or four Committee members at least one shall be a Minister and one other shall be a medical practitioner. Before deciding on the exercise of the prerogative of mercy in any death penalty case, the Committee shall obtain a written report of the case from the trial judge (or the Chief Justice, if a report from the trial judge cannot be obtained) together with such other information derived from the

record of the case or elsewhere as he may require.

- *Jansen-Gielen v. The Netherlands* (846/1999), ICCPR, A/56/40 vol. II (3 April 2001) 158 at paras. 2.1-2.6, 8.2 and Individual Opinion by David Kretzmer and Martin Scheinin (concurring in part), 164.

...

2.1 The author used to work as a teacher at the Roman Catholic primary school Budschop in Nederweert. She was employed by a private association.

2.2 On 20 December 1989, the Director of the General Civil Pension Scheme (Algemeen Burgerlijk Pensioenfonds), which is a private scheme, declared the author 80 per cent disabled. This decision was based on a psychiatrist's report established in November 1989.

2.3 The author appealed this decision, but her appeal was dismissed by the District Court of the Hague on 24 September 1992. From the Court's decision, it appears that the author was frequently absent from work for reasons of health, from October 1987 to October 1988, and as of October 1988, did not report to work at all. The psychiatric report showed that her absence was caused by a serious work conflict, with which she could not cope.

2.4 The author then appealed to the Central Appeals Tribunal (Centrale Raad van Beroep), the highest instance in pension cases. In September 1994, she changed counsel. By letter of 26 September 1994, received by the Tribunal on 27 September 1994, the new counsel addressed to the Tribunal a psychological report, refuting the conclusions of the first expert report. The hearing at the Central Appeals Tribunal took place as scheduled on 29 September 1994. In its judgement of 20 October 1994, the Central Appeals Tribunal dismissed the author's appeal. It considered that it could not take into account the expert report submitted by the author because of its late presentation. It appears from the judgement that the Tribunal considered that the defending party would be unreasonably hindered in its defence if the document were to be allowed. In reaching its decision the Tribunal also referred to the provisions of article 8:58 of the (new) General Administrative Law.

2.5 According to the author, the General Administrative Law came into force on 1 January 1994, but, pursuant to article 1(3) of the law, does not apply to the author's case, since she appealed before 1 January 1998 1/. According to the old administrative procedure, no deadline for the submission of a report existed, and the report should thus have been considered as having been presented in time.

2.6 The author moreover points out that, in the summons for the hearing of 29 September 1994, the Tribunal did not advise her that she could submit new documents only up to ten days before the date of the hearing. Further, it is argued that in practice even under the new law, late submission of documents is accepted as long as it does not seriously affect the other party's rights.

...

8.2 The author has claimed that the failure of the Central Appeals Tribunal to append the psychological report, submitted by her counsel, to the case file two days before the hearing, constitutes a violation of her right to a fair hearing. The Committee has noted the State party's argument that the Court found that admission of the report two days before the hearing would have unreasonably obstructed the other party in the conduct of the case. However, the Committee notes that the procedural law applicable to the hearing of the case did not provide for a time limit for the submission of documents. Consequently, it was the duty of the Court of Appeal, which was not constrained by any prescribed time limit to ensure that each party could challenge the documentary evidence which the other filed or wished to file and, if need be, to adjourn proceedings. In the absence of the guarantee of equality of arms between the parties in the production of evidence for the purposes of the hearing, the Committee finds a violation of article 14, paragraph 1 of the Covenant.

_____

Notes

1/ The Central Appeals Tribunal, at the beginning of its judgement of 20 October 1994, indicates that the appeal has been considered on the basis of the legal provisions in force before the entry into force of the General Administrative Law.

_____

Individual Opinion by David Kretzmer and Martin Scheinin

While we agree with the Committee's conclusion, as set out in paragraph 8.2 of its Views, that there was a violation of article 14, paragraph 1, in the present case, we differ in the reasons for this decision.

It is generally for the domestic courts to decide on admissibility of documents in court proceedings and the procedure for their submission. While at the time of the author's case before the domestic courts there was no provision in the law setting time-limits for the submission of documents, the State party has argued that under the domestic law of administrative procedure no documents could be submitted in proceedings unless the other party would be afforded an opportunity to take note of them within reasonable time. This has not been contested by the author. However, the State party has offered no explanation why, given the centrality of the report to the author's case, the court did not

take measures to allow consideration of the report by the other party rather than simply ignoring it. In these particular circumstances, we agree that the author's right to a fair determination of her rights in a suit of law, protected under article14, paragraph 1, of the Covenant, was violated.

- *Kavanagh v. Ireland* (819/1998), ICCPR, A/56/40 vol. II (4 April 2001) 122 at paras. 2.1-2.3, 3.2-3.4, 3.6, 10.1-10.3,11, 12 and Individual Opinion by Louis Henkin, Rajsoomer Lallah, Cecilia Medina Quiroga, Ahmed Tawfik Khalil and Patrick Vella (concurring), 136 at para. 1-2.

...

2.1 Article 38(3) of the Irish Constitution provides for the establishment by law of Special Courts for the trial of offences in cases where it may be determined, according to law, that the ordinary courts are "inadequate to secure the effective administration of justice and the preservation of public peace and order". On 26 May 1972, the Government exercised its power to make a proclamation pursuant to Section 35(2) of the Offences Against the State Act 1939 (the Act) which led to the establishment of the Special Criminal Court for the trial of certain offences. Section 35(4) and (5) of the Act provide that if at any time the Government or the Parliament is satisfied that the ordinary courts are again adequate to secure the effective administration of justice and the preservation of public peace and order, a rescinding proclamation or resolution, respectively, shall be made terminating the Special Criminal Court regime. To date, no such rescinding proclamation or resolution has been promulgated.

2.2 By virtue of s. 47(1) of the Act, a Special Criminal Court has jurisdiction over a "scheduled offence" (i.e. an offence specified in a list) where the Attorney-General "thinks proper" that a person so charged should be tried before the Special Criminal Court rather than the ordinary courts ... The Special Criminal Court also has jurisdiction over non-scheduled offences where the Attorney-General certifies, under s.47(2) of the Act, that in his or her opinion the ordinary courts are "inadequate to secure the effective administration of justice in relation to the trial of such person on such charge". The Director of Public Prosecutions (DPP) exercises these powers of the Attorney-General by delegated authority.

2.3 In contrast to the ordinary courts of criminal jurisdiction, which employ juries, Special Criminal Courts consist of three judges who reach a decision by majority vote. The Special Criminal Court also utilises a procedure different from that of the ordinary criminal courts, including that an accused cannot avail himself or herself of preliminary examination procedures concerning the evidence of certain witnesses.

...

3.2 On 19 July 1994, the author was arrested on seven charges related to the incident;

namely false imprisonment, robbery, demanding money with menaces, conspiracy to demand money with menaces, and possession of a firearm with intent to commit the offence of false imprisonment. Six of those charges were non-scheduled offences, and the seventh charge (possession of a firearm with intent to commit the offence of false imprisonment) was a 'scheduled offence'.

3.3 On 20 July 1994 the author was charged directly before the Special Criminal Court with all seven offences by order of the Director of Public Prosecution (DPP), dated 15 July 1994, pursuant to s.47(1) and (2) of the Act, for the scheduled offences and the non-scheduled offences respectively.

3.4 On 14 November 1994, the author sought leave from the High Court to apply for judicial review of the DPP's order. The High Court granted leave that same day and the author had his application heard in June 1995. The author contended that the offences with which he was charged had no subversive or paramilitary connection and that the ordinary courts were adequate to try him. The author challenged the 1972 proclamation on the basis that there was no longer a reasonably plausible factual basis for the opinion on which it was grounded, and sought a declaration to that effect. He also sought to quash the DPP's certification in respect of the non-scheduled offences, on the grounds that the DPP was not entitled to certify non-scheduled offences for trial in the Special Criminal Court if they did not have a subversive connection. In this connection, he contended that the Attorney-General's representation to the Human Rights Committee at its 48th session that the Special Criminal Court was necessitated by the ongoing campaign in relation to Northern Ireland gave rise to a legitimate expectation that only offences connected with Northern Ireland would be put before the Court. He further contended that the decision to try him before the Special Criminal Court constituted unfair discrimination against him.

...

3.6 Concerning the contention that the author was subject to a mode of trial different from those charged with similar offences but who were not certified for trial before the Special Criminal Court, the High Court found that the author had not established that such a difference in treatment was invidious ...

...

10.1 The author claims a violation of article 14, paragraph 1, of the Covenant, in that, by subjecting him to a Special Criminal Court which did not afford him a jury trial and the right to examine witnesses at a preliminary stage, he was not afforded a fair trial. The author accepts that neither jury trial nor preliminary examination is in itself required by the Covenant, and that the absence of either or both of these elements does not necessarily render a trial unfair, but he claims that all of the circumstances of his trial before a Special Criminal Court rendered his trial unfair. In the Committee's view, trial before courts other than the ordinary courts is not necessarily, *per se*, a violation of the entitlement to a fair hearing and the facts of the present case do not show that there has been such a violation.

10.2 The author's claim that there has been a violation of the requirement of equality before the courts and tribunals, contained in article 14, paragraph 1, parallels his claim of violation of his right under article 26 to equality before the law and to the equal protection of the law. The DPP's decision to charge the author before the Special Criminal Court resulted in the author facing an extra-ordinary trial procedure before an extra-ordinarily constituted court. This distinction deprived the author of certain procedures under domestic law, distinguishing the author from others charged with similar offences in the ordinary courts. Within the jurisdiction of the State party, trial by jury in particular is considered an important protection, generally available to accused persons. Under article 26, the State party is therefore required to demonstrate that such a decision to try a person by another procedure was based upon reasonable and objective grounds. In this regard, the Committee notes that the State party's law, in the Offences Against the State Act, sets out a number of specific offences which can be tried before a Special Criminal Court at the DPP's option. It provides also that any other offence may be tried before a Special Criminal Court if the DPP is of the view that the ordinary courts are "inadequate to secure the effective administration of justice". The Committee regards it as problematic that, even assuming that a truncated criminal system for certain serious offences is acceptable so long as it is fair, Parliament through legislation set out specific serious offences that were to come within the Special Criminal Court's jurisdiction in the DPP's unfettered discretion ("thinks proper"), and goes on to allow, as in the author's case, any other offences also to be so tried if the DPP considers the ordinary courts inadequate. No reasons are required to be given for the decisions that the Special Criminal Court would be "proper", or that the ordinary courts are "inadequate", and no reasons for the decision in the particular case have been provided to the Committee. Moreover, judicial review of the DPP's decisions is effectively restricted to the most exceptional and virtually undemonstrable circumstances.

10.3 The Committee considers that the State party has failed to demonstrate that the decision to try the author before the Special Criminal Court was based upon reasonable and objective grounds. Accordingly, the Committee concludes that the author's right under article 26 to equality before the law and to the equal protection of the law has been violated. In view of this finding with regard to article 26, it is unnecessary in this case to examine the issue of violation of equality "before the courts and tribunals" contained in article 14, paragraph 1, of the Covenant.

...

11. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 26 of the Covenant.

12. 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. The State party is also under an obligation to ensure that similar violations do not occur in the future: it

should ensure that persons are not tried before the Special Criminal Court unless reasonable and objective criteria for the decision are provided.

Individual Opinion by Louis Henkin, Rajsoomer Lallah, Cecilia Medina Quiroga, Ahmed Tawfik Khalil and Patrick Vella

1. While the complaint of the author can be viewed in the perspective of Article 26 under which States are bound, in their legislative, judicial and executive behaviour, to ensure that everyone is treated equally and in a non-discriminatory manner, unless otherwise justified on reasonable and objective criteria, we are of the view that there has also been a violation of the principle of equality enshrined in Article 14, paragraph 1, of the Covenant.

2. Article 14, paragraph 1, of the Covenant, in its very first sentence, entrenches the principle of equality in the judicial system itself. That principle goes beyond and is additional to the principles consecrated in the other paragraphs of Article 14 governing the fairness of trials, proof of guilt, procedural and evidential safeguards, rights of appeal and review and, finally, the prohibition against double jeopardy. That principle of equality is violated where all persons accused of committing the very same offence are not tried by the normal courts having jurisdiction in the matter, but are tried by a special court at the discretion of the Executive. This remains so whether the exercise of discretion by the Executive is or is not reviewable by the courts.

- *Cheban v. The Russian Federation* (790/1997) , ICCPR, A/56/40 vol. II (24 July 2001) 88 at paras. 2.1, 3.3, and 7.2-7.4.

...
2.1 The authors were convicted on 17 February 1995, by the Moscow City Court, of criminal acts committed on 24 January 1994, consisting of rape of a minor (who was aged 13 at the time of the incident), accompanied by violence and threats, and of acting in concert by prior agreement to commit the crimes. At the time of the offences of which they were convicted, the authors were all aged between 15 and 16 years and were attending a boarding school in Moscow ...
...
3.3 The facts as stated by the authors may also imply claims that the State party committed breaches of article 14, paragraph 4, and article 26 of the Covenant. As regards article 14, paragraph 4, the facts as stated by the authors suggest that the court did not take into account the age of the accused. The authors sought on several occasions to invoke article 20 of the Russian Constitution, 1993, which provides that cases in which an accused subject to the death penalty may, at his request, be tried before a jury. Denial of a jury trial to the authors might also raise an issue under article 26 because of a

difference in treatment between them and other accused persons who received a jury trial.
...
7.2 The claim of discrimination made by the authors is that they were denied a jury trial, while a jury trial was granted to some other accused persons in courts of the State party. The Committee notes that while the Covenant contains no provision asserting a right to a jury trial in criminal cases, if such a right is provided under the domestic law of the State party, and is granted to some persons charged with crimes, it must be granted to others similarly situated on an equal basis. If distinctions are made, they must be based on objective and reasonable grounds.

7.3 The authors claim that they should have been afforded a trial by jury, afforded to all accused persons liable to the death penalty. The Committee notes, however, that in the present case the authors were juveniles at the time the crimes were committed and thus they were not subject to the death penalty according to domestic legislation.

7.4 Another possible claim of violation of article 26 is that trial by jury was made available in trials in some parts of the country but not in Moscow where the authors were tried and convicted. The Committee notes that under the Constitution of the State party the availability of jury trial is governed by federal law, but there was no federal law on the subject. The fact that a State party that is a federal union permits differences among the federal units in respect of jury trial does not in itself constitute a violation of article 26.2/ As the authors have provided no information on cases in which jury trials have been held in non-capital cases in the city of Moscow, the Committee cannot conclude that the State party violated article 26.

Notes

1/ The communication contains no direct presentation of the facts by either the authors or counsel.

2/ The Russian Constitution provides in its Article 5 that Regions, and cities with federal status, are equal units ("subjects") of the Russian Federation, have their own legislative authority, and can enact their own legislation. (Article 65 enumerates the units of the Federation. Moscow city and Moscow Region, are equal and separate "subjects" of the Russian Federation.) See also Core document, HRI/CORE/1/Add.52,25 October 1995, paragraphs 24 and 30.

- *Äärelä and Näkkäläjärui v. Finland* (779/1997) ICCPR, A/57/40 vol. II (24 October 2001) 117 (CCPR/C/73/D/779/1997) at paras. 2.1-2.5, 4.11, 7.2, 7.4, 8.1, 8.2, Individual Opinion by Prafullachandra N. Bhagwati (concurring) and Individual Opinion by

Abdelfattah Amor, Nisuke Ando, Christine Chanet, Eckart Klein, Ivan Shearer and Max Yalden (partly dissenting).

...

2.1 The authors are reindeer breeders of Sami ethnic origin and members of the Sallivaara Reindeer Herding Co-operative. The Co-operative has 286,000 hectares of State-owned land available for reindeer husbandry. On 23 March 1994, the Committee declared a previous communication, brought by the authors among others and which alleged that logging and road-construction activities in certain reindeer husbandry areas violated article 27 of the Covenant, inadmissible for non-exhaustion of domestic remedies. 1/ In particular, the Committee considered that the State party had shown that article 27 could be invoked in the relevant domestic proceedings, which the authors should have engaged before coming to the Committee. Thereafter, following unsuccessful negotiations, the authors brought a suit in the Lappi District Court of first instance against the National Forestry and Park Service (Forestry Service). The suit sought the enjoinder, on the basis *inter alia* of article 27 of the Covenant, of any logging or road-construction in the Mirhaminmaa-Kariselkä area. This area is said to be amongst the best winter herding lands of the Sallivara Co-operative.

2.2 On 30 August 1996, the District Court decided, following an on-site forest inspection at the authors' request, to prohibit logging or road construction in the 92 hectare Kariselkä area, but to allow it in the Mirhaminmaa area. 2/ The Court applied a test of "whether the harmful effects of felling are so great that they can be deemed to deny to the Sami a possibility of reindeer herding that is part of their culture, is adapted to modern developments, and is profitable and rational". The Court considered that logging in the Mirhaminmaa area would be of long-term benefit to reindeer herding in the area and would be convergent with those interests. In the Kariselkä area, differing environmental conditions meant that there would be a considerable long-term decrease in lichen reserves. Relying inter alia on the decisions of the Committee, 3/ the Court found that these effects of logging, combined with the fact that the area was an emergency feeding ground, would prevent reindeer herding in that area. A factor in the decision was the disclosure that an expert testifying for the Forestry Service disclosed he had not visited the forest in question. After the decision, logging duly proceeded in the Mirhaminmaa area.

2.3 On appeal by the Forestry Service to the Rovaniemi Court of Appeal, the Forestry Board sought the then exceptional measure of oral hearings. The Court granted this motion, while rejecting the author's motion that the appellate court itself conduct an on-site inspection. The expert witness, having in the meanwhile examined the forest, repeated his first instance testimony for the Forestry Service. Another expert witness for the Forestry Service testified that the authors' herding co-operative would not suffer greatly in the reduction of herding land through the logging in question, however the

Court was not informed that the witness already had proposed to the authorities that the authors' herd should be reduced by 500 owing to serious overgrazing.

2.4 On 11 July 1997, the Appeal Court, reversing the first instance decision, allowed logging also in the Kariselkä area, and awarded costs of 75,000 Finnish marks against the authors.4/ The Court took a different view of the expert evidence. It found that the small area of logging proposed (which would not involve further roadworks) would have minimal effects on the quantities of arboreal lichen and, over time, increase the amounts of ground lichen. In light of the finding that the area was not the main winter pasture and in recent years had not been used as a back-up area, the Court concluded it had not been shown that there would be adverse effects on reindeer in the long run and even the immediate effects would be small. The authors were not made aware by the Appeal Court or the Forestry Service that the latter had presented allegedly distorted arguments to the Court based on the Committee's finding of no violation of article 27 of the Covenant in the separate case of *Jouni Länsman et al. v. Finland*. 5/ The authors learned of this brief only upon receiving the Appeal Court's judgement, in which it stated that the material had been taken into account, but that an opportunity for the authors to comment was "manifestly unnecessary". On 29 October 1997, the Supreme Court decided, in its discretion and without giving reasons, not to grant leave to appeal. Thereafter, logging took place in the Kariselkä area, but no roads were constructed.

2.5 On 15 December 1997, the Ombudsman decided that the municipality of Inari and its mayor had exerted inappropriate pressure on the authors by formally asking them to withdraw from their legal proceedings, but did not find that the Forestry Service had acted unlawfully or otherwise wrongly. 6/ The Ombudsman limited his remedy to bringing this conclusion to the attention of the parties. On 1 June 1998, a decision of the Ministry of Agriculture and Forestry (of 13 November 1997) entered into effect reducing the permissible size of the Sallivaara herd by 500 head from 9,000 to 8,500 animals. On 3 and 11 November 1998, the Forestry Service required a total sum of over 20,000 Finnish marks from the authors towards meeting the costs judgement. 7/ This sum distrained by the Forestry Service corresponds to a major share of the authors' taxable income.

...

4.11 As to the imposition of costs, the State party points out that under its law there is an obligation for the losing party to pay, when sought, the reasonable legal costs of the successful party. 15/ The law does not alter this situation when the parties are a private individual and public authority, or when the case involves human rights issues. These principles are the same in many other States, including Austria, Germany, Norway and Sweden, and are justified as a means of avoiding unnecessary legal proceedings and delays. The State party argues this mechanism, along with free legal aid for lawyers' expenses, ensures equality in the courts between plaintiffs and defendants. The State party notes however that, from 1 June 1999, an amendment to the law will permit a court *ex officio* to reduce a costs order that would otherwise be manifestly unreasonable or

inequitable with regard to the facts resulting in the proceedings, the position of the parties and the significance of the matter.

...

7.2 As to the authors' argument that the imposition of a substantial award of costs against them at the appellate level violated their rights under article 14, paragraph 1, to equal access to the courts, the Committee considers that a rigid duty under law to award costs to a winning party may have a deterrent effect on the ability of persons who allege their rights under the Covenant have been violated to pursue a remedy before the courts. In the particular case, the Committee notes that the authors were private individuals bringing a case alleging breaches of their rights under article 27 of the Covenant. In the circumstances, the Committee considers that the imposition by the Court of Appeal of substantial costs award, without the discretion to consider its implications for the particular authors, or its effect on access to court of other similarly situated claimants, constitutes a violation of the authors' rights under article 14, paragraph 1, in conjunction with article 2 of the Covenant. The Committee notes that, in the light of the relevant amendments to the law governing judicial procedure in 1999, the State party's courts now possess the discretion to consider these elements on a case by case basis.

...

7.4 As to the author's contention that the Court of Appeal violated the authors' right to a fair trial contained in article 14, paragraph 1, by failing to afford the authors an opportunity to comment on the brief containing legal argument submitted by the Forestry Authority after expiry of filing limits, the Committee notes that it is a fundamental duty of the courts to ensure equality between the parties, including the ability to contest all the argument and evidence adduced by the other party. 17/ The Court of Appeal states that it had "special reason" to take account of these particular submissions made by the one party, while finding it "manifestly unnecessary" to invite a response from the other party. In so doing, the authors were precluded from responding to a brief submitted by the other party that the Court took account of in reaching a decision favourable to the party submitting those observations. The Committee considers that these circumstances disclose a failure of the Court of Appeal to provide full opportunity to each party to challenge the submissions of the other, thereby violating the principles of equality before the courts and of fair trial contained in article 14, paragraph 1, of the Covenant.

...

8.1 The Human Rights Committee...is of the view that the facts before it reveal of a violation by Finland of article 14, paragraph 1, taken in conjunction with article 2 of the Covenant, and additionally a violation of article 14, paragraph 1, of the Covenant taken alone.

8.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the authors are entitled to an effective remedy. In terms of the award of costs against the authors, the Committee considers that as the costs award violated article 14, paragraph 1, of the Covenant and, moreover, followed proceedings themselves in

violation of article 14, paragraph 1, the State party is under an obligation to restitute to the authors that proportion of the costs award already recovered, and to refrain from seeking execution of any further portion of the award. As to the violation of article 14, paragraph 1, arising from the process applied by the Court of Appeal in handling the brief submitted late by the Forestry Service (para. 7.4), the Committee considers that, as the decision of the Court of Appeal was tainted by a substantive violation of fair trial provisions, the State party is under an obligation to reconsider the authors' claims. The State party is also under an obligation to ensure that similar violations do not occur in the future.

Notes

1/ *Sara et al. v. Finland*, Communication 431/1990.

2/ The State party points out that the 92 hectare area amounts to some 3 per cent of the 6,900 hectares of the Co-operative's lands used for forestry.

3/ *Sara v. Finland* (Communication 431/1990), *Kitok v. Sweden* (Communication 197/1985), *Ominayak v. Canada* (Communication 167/1984), *Ilmari Länsman v. Finland* (Communication 511/1992); and moreover the Committee's General Comments 23 (50).

4/ Costs, for which the authors were jointly liable, totalled 73,965.28 Finnish marks, with 11 per cent annual interest.

5/ Communication 671/1995.

6/ The complaint had been submitted almost three years earlier.

7/ No information is provided on whether the Forestry Service is pursuing the outstanding portion of costs awarded to it (some 55,000 Finnish marks).

...

15/ Chapter 21, section 1, *Code of Judicial Procedure* 1993.

...

17/ In *Jansen-Gielen v. The Netherlands* (Communication 846/1999), the Committee stated: "Consequently, it was the duty of the Court of Appeal, which was not constrained by any prescribed time limit to ensure that each party could challenge the documentary evidence which the other filed or wished to file and, if need be, to adjourn proceedings. In the absence of the guarantee of equality of arms between the parties in the production of evidence for the purposes of the hearing, the Committee finds a violation of article 14, paragraph 1 of the Covenant."

...

EQUALITY AND DISCRIMINATION - EQUALITY BEFORE THE LAW

Individual Opinion by Prafullachandra N. Bhagwati (concurring)

I have gone through the text of the views expressed by the majority members of the Committee. I agree with those views save in respect of paragraph 7.2 and, partly, in respect of paragraph 8.2. Since I am in substantial agreement with the majority on most of the issues, I do not think it necessary to set out the facts again in my opinion and I will therefore straightaway proceed to discuss my dissenting opinion in regard to paragraphs 7.2 and 8.2.

So far as the alleged violation of article 14, paragraph 1, in conjunction with article 2, by the imposition of substantial costs is concerned, the majority members have taken the view that such imposition, on the facts and circumstances of the case, constitutes a violation of those articles. While some of the members have expressed a dissenting view, I agree with the majority view but I would reason in a slightly different way.
It is clear that under the law as it then stood, the Court had no discretion in the matter of award of costs. The Court was under a statutory obligation to award costs to the winning party. The Court could not tailor the award of costs - even refuse to award costs - against the losing party taking into account the nature of the litigation, the public interest involved, and the financial condition of the party. Such a legal provision had a chilling effect on the exercise of the right of access to justice by none too wealthy litigants, and particularly those pursuing an *actio popularis*. The imposition of substantial costs under such a rigid and blind-folded legal provision in the circumstances of the present case, where two members of the Sami tribe were pursuing public interest litigation to safeguard their cultural rights against what they felt to be a serious violation, would, in my opinion, be a clear violation of article 14, paragraph 1, in conjunction with article 2. It is a matter of satisfaction that such a situation would not arise in the future, because we are told that the law in regard to the imposition of costs has since been amended. Now the Court has a discretion whether to award costs at all to the winning party, and, if so, what the amount of such costs should be depending upon various circumstances such as those I have mentioned above.

So far as paragraph 8.2 is concerned, I would hold that the authors are entitled to the relief set out in paragraph 8.2 in regard to the costs, not only because the award of costs followed upon the proceedings in the appellate Court which were themselves in violation of article 14, paragraph 1, for the reasons set out in paragraph 7.4, but also because the award of costs was itself in violation of article 14, paragraph 1, read in conjunction with article 2, for the reasons set out in paragraph 7.2. I entirely agree with the rest of paragraph 8.2

Individual Opinion by Abdelfattah Amor, Nisuke Ando, Christine Chanet, Eckart Klein, Ivan Shearer and Max Yalden (partly dissenting)

While we share the Committee's general approach with regard to the award of costs (see also *Lindon v Australia* (Communication 646/1995), we cannot agree that in the present case it has convincingly been argued and proven that the authors were in fact so seriously affected by the relevant decision taken at the appellate level that access to the court was or would in future be closed to them. In our view, they have failed to substantiate a claim of financial hardship.

Concerning possible deterrent effects in future on the authors or other potential authors, due note must be given to the amendment of the code of judicial procedure according to which a court has the power to reduce a costs order that would be manifestly unreasonable or inequitable, having regard to the concrete circumstances of a given case (see paragraph 4.11 above).

However, given that we share the view that the Court of Appeal's judgment is vitiated by a violation of article 14, paragraph 1, of the Covenant (see paragraph 7.4 above), its decision relating to the costs is necessarily affected as well. We therefore join the Committee's finding that the State party is under an obligation to refund to the authors that proportion of the costs award already recovered, and to refrain from executing any further portion of the award (see paragraph 8.2 of the Committee's views).

- *Fábryová v. Czech Republic* (765/1997), ICCPR, A/57/40 vol. II (30 October 2001) 103 (CCPR/C/73/D/765/1997) at paras. 2.1-2.5, 4.1, 4.2, 4.4, 9.2, 9.3, 10 and 11.

...

2.1 The author's father Richard Fischmann owned an estate in Puklice in the district of Jihlava, Czechoslovakia. In 1930, at a national census, he and his family registered as Jews. In 1939, after the occupation by the Nazis, the estate was "aryanised" 2/ and a German sequestrator was appointed. Richard Fischmann died in 1942 in Auschwitz. The author is not represented by counsel.

2.2 The rest of the family was interned in concentration camps and only the author and her brother Viteslav returned. In 1945, the estate of Richard Fischmann was confiscated under Benes decree 12/1945 because the district committee decided that he was German as well as a traitor to the Czech Republic 3/, the assumption that he was German being based on the assertion that he had lived "in a German way".

2.3 The author's appeal against the confiscation was dismissed. The decision of the district committee was upheld by a judgment of the highest administrative court in Bratislava on 3 December 1951.

2.4 After the end of communist rule in Czechoslovakia, the author lodged a complaint

to the General procurator, on 18 December 1990, for denial of justice with regard to her claim for restitution. Her complaint was dismissed on 21 August 1991 for being out of time, having been lodged more than five years after the confiscation. The author states that under Communist rule it was not possible to lodge a complaint within the time limit of five years as prescribed by law.

2.5 The author states that on 17 June 1992 she applied for restitution according to the law No. 243/1992 4/. Her application was dismissed on 14 October 1994 by the Land Office of Jihlava.

...

4.1 By submission of 20 October 1997, the State party stated that the author's application for restitution of her father's property was dismissed by the Jihlava Land Office on 14 October 1994, on grounds of non-compliance with the legal requirements. It explained that the confiscated property of persons who were deprived of Czechoslovak citizenship under the Benes decrees in 1945, may be restituated in cases where the claimant has his citizenship renewed through the procedures set by law. However, the law did not expressly address the situation of persons who never lost their citizenship and whose property was confiscated in violation of the laws operative at that time. Since the author's father never lost his Czechoslovak citizenship, he could not be considered to be an entitled person and the property could not be restored.

4.2 The State party further explained that the author's appeal was dismissed for being filed out of time. The author's lawyer then raised the objection that the Land Office's decision had not been served properly, since it had not been served to the lawyer directly, but to a member of his staff, who was not authorized to receive it. The Land Office accepted the objection, and served the decision again. The author subsequently appealed against the decision. The City Court dismissed the appeal by a ruling dated 6 August 1996, on the ground that the decision had been properly served the first time and should not have been served a second time. On 11 October 1996, the author filed a constitutional complaint, which was dismissed by the Constitutional Court as inadmissible *ratione temporis*.

...

4.4 The State party...submitted that, since the present communication had been submitted to the Committee, the Constitutional Court had decided, in cases similar to that of the author's father, that applicants who never lost their citizenship were also entitled to restitution under law no. 243/1992. As a consequence, the Central Land Office, which examined the author's file, decided that the Land Office's decision in the author's case should be reviewed, since it was inconsistent with the Constitutional Court's ruling. On 27 August 1997, the Central Land Office initiated administrative proceedings and on 9 October 1997, it quashed the Land Office's decision of 14 October 1994, and decided that the author should restart her application for restitution *ab initio*. Normal appeal possibilities would be open to the author if she was not satisfied with the outcome of the

proceedings. Also for this reason, the State party argued that the communication was inadmissible under article 5, paragraph 2(b), of the Optional Protocol.

...

9.2 The Committee notes that the State Party concedes that under Law No. 243/1992 individuals in a similar situation as that of the author qualify for restitution as a result of the subsequent interpretation given by the Constitutional Court (para. 4.4). The State Party further concedes that the decision of the Jihlava Land Office of 14 October 1994 was wrong and that the author should have had the opportunity to enter a fresh application before the Jihlava Land Office. The author's renewed attempt to obtain redress has, however, been frustrated by the State party itself which, through a letter of the Ministry of Agriculture of 25 May 1998, informed the author that the decision of the Jihlava Land Office of 14 October 1994 had become final on the ground that the decision of the Central Land Office reversing the decision of the Jihlava Land Office had been served out of time.

9.3 Given the above facts, the Committee concludes that, if the service of the decision of the Central Land Office reversing the decision of the Jihlava Land Office was made out of time, this was attributable to the administrative fault of the authorities. The result is that the author was deprived of treatment equal to that of persons having similar entitlement to the restitution of their previously confiscated property, in violation of her rights under article 26 of the Covenant.

10. The Human Rights Committee...is therefore of the view that the facts before it disclose a violation of article 26 of the Covenant.

11. 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.

Notes

...

2/ i. e. that the property was taken away from Jews as "non-Aryans" and transferred to the German State or German natural or juridical persons.

3/ The author states that according to the edict Nr. A 4600 9/11 45 VI/2 of the Ministry of the Interior of 13 November 1945 the district committees had the competence to examine the reliability of those persons who in 1930 had registered as Jews.

4/ Law no. 243/1992 provides for the restitution of property which was confiscated as a result of Benes decrees Nos. 12/1945 and 108/1945. One of the conditions to be eligible

for restitution is that the claimant must have been granted Czech citizenship by decree 33/1945, Act no. 245/1948, 194/1949 or 34/1953.

- *Brok v. Czech Republic* (774/1997), ICCPR, A/57/40 vol. II (31 October 2001) 110 (CCPR/C/73/D/774/1997) at paras. 2.1-2.6, 7.2-7.4, 8 and 9.

...

2.1 Robert Brok's parents owned a house in the centre of Prague since 1927 (hereinafter called the property). During 1940 and 1941, the German authorities confiscated their property with retroactive effect to 16 March 1939, because the owners were Jewish. The property was then sold to the company Matador on 7 January 1942. The author himself, was deported by the Nazis, and returned to Prague on 16 May 1945, after having been released from a concentration camp. He was subsequently hospitalized until October 1945.

2.2 After the end of the war, on 19 May 1945, President Benes' Decree No. 5/1945, followed up later by Act 128/1946, declared null and void all property transactions effected under pressure of the occupation regime on the basis of racial or political persecution. National administration was imposed on all enemy assets. This included the author's parents' property pursuant to a decision taken by the Ministry of Industry on 2 August 1945. However, in February 1946, the Ministry of Industry annulled that decision. It also annulled the prior property confiscation and transfers, and the author's parents were reinstated as the rightful owners, in accordance with Benes Decree No. 5/1945.

2.3 However, the company Matador, which had been nationalized on 27 October 1945, appealed against this decision. On 7 August 1946, the Land Court in Prague annulled the return of the property to the author's parents and declared Matador to be the rightful owner. On 31 January 1947, the Supreme Court confirmed this decision.... The property thereby stayed in possession of Matador, and was later, in 1954, transferred to the state company Technomat.

2.4 Following the change to a democratic government at the adoption of restitution legislation, the author applied for restitution under Act No. 87/1991 as amended by Act No. 116/1994. The said law provides restitution or compensation to victims of illegal confiscation carried out for political reasons during the Communist regime (25 February 1948 -1 January 1990). The law also matter provisions for restitution or compensation to victims of racial persecution during the Second World War, who have an entitlement by virtue of Decree No. 5/1945. The courts (District Court decision 26 C 49/95 of 20 November 1995 and Prague City Court decision 13 Co 34/94-29 of 28 February 1996), however, rejected the author's claim. The District Court states in its decision that the

amended Act extends the right to restitution to persons who lost their property during the German occupation and who could not have their property restituted because of political persecution, or who went through legal procedures that violated their human rights subsequent to 25 February 1948, on condition that they comply with the terms set forth in Act No. 87/1991. However, the court was of the opinion that the author was not eligible for restitution, because the property was nationalized before 25 February 1948, the retroactive cut-off date for claims under Act No. 87/1991 Section 1, paragraph 1, and Section 6. This decision was confirmed by the Prague City Court.

2.5 Pursuant to section 72 of Act No. 182/1993, the author filed a complaint before the Constitutional court that his right to property had been violated. This provision allows an individual to file a complaint to the Constitutional Court if the public authority has violated the claimant's fundamental rights guaranteed by a constitutional law or by an international treaty in particular the right to property.

2.6 The Constitutional Court concluded that since the first and second instances had decided that the author was not the owner of the property, there were no property rights that could have been violated. In its decision, the Constitutional Court invoked the question of fair trial on its own motion and concluded that "the legal proceedings were conducted correctly and all the legal regulations have been safeguarded". Accordingly, the Constitutional Court rejected the author's constitutional complaint on 12 September 1996.

...

7.2 The question before the Committee is whether the application of Act No. 87/1991, as amended by Act No. 116/1994, to the author's case entails a violation of his right to equality before the law and to the equal protection of the law.

7.3 These laws provide restitution or compensation to victims of illegal confiscation carried out for political reasons during the Communist regime. The law also provides for restitution or compensation to victims of racial persecution during the Second World War who had an entitlement under Benes Decree No. 5/1945. The Committee observes that legislation must not discriminate among the victims of the prior confiscation to which it applies, since all victims are entitled to redress without arbitrary distinctions.

7.4 The Committee notes that Act No. 87/1991 as amended by Act No. 116/1994 gave rise to a restitution claim of the author which was denied on the ground that the nationalization that took place in 1946/47 on the basis of Benes Decree No. 100/1945 falls outside the scope of laws of 1991 and 1994. Thus, the author was excluded from the benefit of the restitution law although the Czech nationalization in 1946/47 could only be carried out because the author's property was confiscated by the Nazi authorities during the time of German occupation. In the Committee's view this discloses a discriminatory treatment of the author, compared to those individuals whose property was confiscated by Nazi authorities without being subjected, immediately after the war, to Czech

nationalization and who, therefore, could benefit from the laws of 1991 and 1994. Irrespective of whether the arbitrariness in question was inherent in the law itself or whether it resulted from the application of the law by the courts of the State party, the Committee finds that the author was denied his right to equal protection of the law in violation of article 26 of the Covenant.

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

9. 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. Such remedy should include restitution of the property or compensation, and appropriate compensation for the period during which the author and his widow were deprived of the property, starting on the date of the court decision of 20 November 1995 and ending on the date when the restitution has been completed. The State party should review its relevant legislation and administrative practices to ensure that neither the law nor its application entails discrimination in contravention of article 26 of the Covenant.

For dissenting opinions in this context, see Brok v. Czech Republic (774/1997), ICCPR, A/57/40 vol. II (31 October 2001) 110 (CCPR/C/73/D/774/1997) at Individual Opinion by Mr. Nisuke Ando and Individual Opinion by Ms. Christine Chanet.

- *Müller and Engelhard v. Namibia* (919/2000), ICCPR, A/57/40 vol. II (26 March 2002) 243 (CCPR/C/74/D/919/2000) at paras. 2.1-2.6, 6.7-6.9 and 8.

...

2.1 Mr. Müller, a jewellery maker, came to Namibia in July 1995 as a visitor, but was so taken up with the country that he decided to settle in the city of Swakopmund. He started to work for Engelhard Design, a jewellery manufacturer since 1993, owned by Ms. Engelhard. The authors married on 25 October 1996. Before getting married, they sought legal advice concerning the possibility of adopting Ms. Engelhard's surname. A legal practitioner informed them that this was possible. After the marriage, they returned to the same legal practitioner to complete the formalities to change the surname. They were then informed that whereas a wife could assume her husband's surname without any formalities, a husband would have to apply to change his surname.

2.2 The Aliens Act No. 1 of 1937 (hereinafter named the Aliens Act) Section 9, paragraph 1 as amended by Proclamation A.G. No. 15 of 1989, states that it is an offence to assume another surname than a person has assumed, described himself, or passed before 1937, without the authorisation by the Administrator General or an officer in the Government Service, and such authority has been published in the Official Gazette, or

unless one of the listed exceptions apply. The listed exception in the Aliens Act Section 9, paragraph 1 (a), is when a woman on her marriage assumes the surname of her husband. Mr. Müller submits that the said section infringes his rights under the Namibian Constitution to equality before the law and freedom from discrimination on the grounds of sex (article 10), his and his family's right to privacy (article 13, paragraph 1), his right to equality as to marriage and during the marriage (article 14 paragraph 1), and his right to have adequate protection of his family life by the State party (article 14 paragraph 3).

2.3 Mr. Müller further submits that there are numerous reasons for his wife's and his own desire that he assumes the surname of Ms. Engelhard. He contends that his surname, Müller, is extremely common in Germany, and exemplifies this by explaining that the phonebook in Munich were he comes from, contained several pages of the surname Müller, and that there were 11 Michael Müller alone in the phonebook for Munich. He contends that Engelhard is a far more unusual surname, and that the name is important to his wife and him because their business has established a reputation under the name Engelhard Design. It would be unwise to change the name to Müller Design because the surname is not distinctive. It is likewise important that jewellery manufacturers trade under a surname because the use of one's surname implies that one takes pride in one's work, and customers believe that it ensures a higher quality of workmanship. Mr. Müller submits that if he were to continue to use his surname, and his wife were to continue to use hers, customers and suppliers would assume that he was an employee. Mr. Müller and his wife also have a daughter who has been registered under the surname of Engelhard, and Mr. Müller would like to have the same surname as his daughter to avoid exposing her to unkind remarks about him not being the father.

2.4 Mr. Müller filed a complaint to the High Court of Namibia on 10 July 1997, alleging that Section 9, paragraph 1 of the Aliens Act was invalid because it conflicted with the Constitution with regard to the right to equality before the law and freedom from discrimination, the right to privacy, the right to equality as to marriage and during the marriage, and with regard to the right to family life.

2.5 Ms. Engelhard filed an affidavit with her husband's complaint, in which she stated that she supported the complaint and that she also wanted the joint family surname to be Engelhard rather than Müller, for the reasons given by her husband. The case was dismissed with costs on 15 May 1998.

...

6.7 With regard to the authors' claim under article 26 of the Covenant, the Committee notes the fact, undisputed by the parties to the case; that section 9, paragraph 1, of the Aliens Act differentiates on the basis of sex, in relation to the right of male or female persons to assume the surname of the other spouse on marriage. The Committee reiterates its constant jurisprudence that the right to equality before the law and to the equal protection of the law without any discrimination does not make all differences of

treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.8/ A different treatment based on one of the specific grounds enumerated in article 26, clause 2 of the Covenant, however, places a heavy burden on the State party to explain the reason for the differentiation. The Committee, therefore, has to consider whether the reasons underlying the differentiation on the basis of gender, as embodied in section 9, paragraph 1, remove this provision from the verdict of being discriminatory.

6.8 The Committee notes the State party's argument that the purpose of Aliens Act section 9, paragraph 1, is to fulfil legitimate social and legal aims, in particular to create legal security. The Committee further notes the States party's submission that the distinction made in section 9 of the Aliens Act is based on a long-standing tradition for women in Namibia to assume their husbands' surname, while in practice men so far never have wished to assume their wives' surname; thus the law, dealing with the normal state of affairs, is merely reflecting a generally accepted situation in Namibian society. The unusual wish of a couple to assume as family name the surname of the wife could easily be taken into account by applying for a change of surname in accordance with the procedures set out in the Aliens Act. The Committee, however, fails to see why the sex-based approach taken by section 9, paragraph 1, of the Aliens Act may serve the purpose of creating legal security, since the choice of the wife's surname can be registered as well as the choice of the husband's surname. In view of the importance of the principle of equality between men and women, the argument of a long-standing tradition cannot be maintained as a general justification for different treatment of men and women, which is contrary to the Covenant. To subject the possibility of choosing the wife's surname as family name to stricter and much more cumbersome conditions than the alternative (choice of husband's surname) cannot be judged to be reasonable; at any rate the reason for the distinction has no sufficient importance in order to outweigh the generally excluded gender-based approach. Accordingly, the Committee finds that the authors have been the victims of discrimination and violation of article 26 of the Covenant.

6.9 In the light of the Committee's finding that there has been a violation of article 26 of the Covenant, the Committee considers that it is not necessary to pronounce itself on a possible violation of articles 17 and 23 of the Covenant.

...

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, avoiding any discrimination in the choice of their common surname. The State party should further abstain from enforcing the cost order of the Supreme Court or, in case it is already enforced, to refund the respective amount of money.

Notes

...

8/ See Views *Danning v. The Netherlands*, Case No. 180/1984.

- *Rodríguez Orejuela v. Colombia* (848/1999) ICCPR, A/57/40 vol. II (23 July 2002) 172 (CCPR/C/75/D/848/1999) at paras. 2.1-2.3, 3.1, 3.2 and 7.2.

...

2.1 Mr. Miguel Ángel Rodríguez Orejuela was charged with, among other activities, the offence of engaging in drug trafficking on 13 May 1990...

2.2 In a judgement handed down by the Bogota Regional Court on 21 February 1997, the author was sentenced to 23 years' imprisonment and a fine. He appealed against the sentence before the National Court, which, in a judgement of 4 July 1997, upheld the conviction at first instance but reduced the sentence to 21 years' imprisonment and a lower fine. An appeal was lodged on 20 October 1997 before the Colombian Supreme Court of Justice, which upheld the conviction on 18 January 2001.

2.3 Both the Bogotá Regional Court and the National Court were established by Emergency Government Decree No. 2790 of 20 November 1990 (Defence of Justice Statute), and were incorporated in the new Code of Criminal Procedure enacted by Decree No. 2700 of 30 November 1991, which entered into force on 1 July 1992, and which was repealed by Law No. 600 of 2000 which is currently in force. Article 457 on the confidentiality of proceedings held in closed court was repealed by Law No. 504 of 1999. Article 9 of Decree No. 2790 established the public order judges and granted them competence to hear offences provided for in the "Drugs Statute".2/ This article was given permanent legal character by means of Decree No. 2271 of 1991. The above-mentioned Decree No. 2790 withdrew competence to try offences provided for in the "Drugs Statute" from "district criminal courts and district courts exercising mixed jurisdiction" as specialized jurisdictions and established the "public order, faceless or emergency jurisdiction", which was converted into secret "regional justice" after its entry into force on 1 July 1992.

...

3.1 The author claims to be a victim of a violation of the Covenant because Decrees No. 2790 of 20 November 1990 and No. 2700 of 30 November 1991 were applied ex post facto against him. In particular, he claims a violation of article 14, paragraph 1, of the Covenant because neither the Bogotá Prosecution Commission, which conducted the investigation and brought the charges against the author, nor the Bogotá Regional Court, which handed down the judgement against the author, nor the National Court existed at the time the offences were committed, i.e. on 13 May 1990. The author maintains that the Prosecution Commission began the investigation in 1993 and brought charges against

him before the Bogotá Regional Court for an offence allegedly committed on 13 May 1990. He states that the court is therefore an unlawful ad hoc body or special commission.

3.2 The author maintains that the court competent to try this case would have been the Cali Circuit Court of Criminal and Mixed Jurisdiction as a specialized court, since it was courts in that category that were competent in drug-trafficking matters at the time the offence was committed. However, since this court was abolished on 15 July 1991, the competent court would have been the Cali Circuit Criminal Court, which is a court of ordinary jurisdiction. The competent court at second instance, at the appeal stage, would have been the Cali Higher Judicial District Court. The author states that the guarantee of a competent, independent and impartial judge or court has been ignored as he was tried by members of an institution established subsequent to the commission of the offence. He likewise claims that the right to be tried in conformity with laws that predated the act of which he was accused and the guarantee enshrined in article 14 of the Covenant that all persons shall be equal before the courts has been breached, as he has been tried under the restrictive emergency provisions introduced subsequent to the offence.

...

7.2 The author claims a violation of article 14, paragraph 1, of the Covenant because he was deprived of his right to be tried by the court that would have been competent at the time that the alleged offence was committed, and was charged in, and tried at first and second instance by, courts whose jurisdiction was established subsequent to the events in question. In this respect, the Committee notes the State party's explanations to the effect that the law in question was established in order to ensure the proper administration of justice, which was under threat at the time. The Committee considers that the author has not demonstrated how the entry into force of new procedural rules and the fact that these are applicable from the time of their entry into force constitute in themselves a violation of the principle of a competent court and the principle of the equality of all persons before the courts, as established in article 14, paragraph 1.

Notes

...

2/ This article stipulates that the competence of the public order courts responsible for hearing cases shall include ongoing actions and proceedings for punishable acts assigned to them under the article, regardless of the time when they were perpetrated, and related offences. It further stipulates that in every case favourable substantive law or procedural law having substantive effects of the same character shall have primacy over unfavourable law.

- *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, 11.2-11.6, 12.1,12.2 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.

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.

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.

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.

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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, 38.

- *Ruiz Agudo v. Spain* (864/1999), ICCPR, A/58/40 vol. II (31 October 2002) 134 (CCPR/C/76/D/864/1999) at paras. 2.1-2.3, 3.3 and 9.4.

...

2.1 From 1971 to 1983, Alfonso Ruiz Agudo held the post of Director of the Caja Rural Provincial in the small town of Cehegín (Murcia), where he was responsible for customer relations. In the period from 1981 to 1983, 75 fictitious loan policies, which duplicated an equal number of real loans, were transacted in the office of the Cehegín bank. In other words, there were bank customers who signed blank loan forms that were later completed in duplicate.

2.2 The Caja Rural Provincial was taken over by the Caja de Ahorros de Murcia, and both banks appeared in the criminal proceedings opened against Alfonso Ruiz Agudo and others as private complainant or injured party. Alfonso Ruiz Agudo's counsel immediately asked for the original files of the accounts, which the author kept at the Cehegín bank and where, according to the complainant, the money from the fictitious loans was deposited, to be produced at the proceedings. According to the author of the communication, these files would have shown that the money went not to Alfonso Ruiz Agudo but to other persons. The bank submitted a computerized version of the files.

2.3 Counsel maintains that, although proceedings were initiated against his client in

1983, no judgement was handed down until 1994. The judgement was eventually passed by the judge of the No. 1 Criminal Court of Murcia, sentencing the author to a custodial penalty of two years, four months and one day of ordinary imprisonment with a fine for an offence of fraud, and to a further identical penalty for the offence of falsifying a commercial document.

...

3.3 He also points out that there was no verbatim record of the statements of witnesses, experts, parties and counsel but only a summary drawn up by the clerk of the court, so that the proceedings, according to the author, lacked essential guarantees. Moreover, the accusing parties were at a clear advantage in the proceedings. He mentions article 790, paragraph 1, of the Criminal Procedure Act, maintaining that the rules of summary proceedings infringe the basic principle of equality of arms in judicial proceedings.

...

9.4 ...[T]he Committee takes note of the author's contention that the summary proceeding, in particular article 790 of the Criminal Procedure Act, infringes the principle of equality of arms. The Committee finds that the author, on the basis of the information and documentation submitted, has not substantiated his complaint for the purposes of determining that there was a violation of article 14, paragraph 1, in this respect.

- *Weiss v. Austria* (1086/2002), ICCPR, A/58/40 vol. II (3 April 2003) 375 (CCPR/C/77/D/1086/2002) at paras. 2.1, 2.3, 2.8, 2.11-2.14, 2.16, 9.6 and 10.1.

...

2.1 In a trial beginning on 1 November 1998 in the District Court of Florida, the author was tried on numerous charges of fraud, racketeering and money laundering. He was represented throughout the trial by counsel of his choice. On 29 October 1999, as jury deliberations were about to begin, the author fled the courtroom and escaped...

...

2.3 On 24 October 2000, the author was arrested in Vienna, Austria, pursuant to an international arrest warrant, and on 27 October 2000 transferred to extradition detention...

...

2.8 On 8 May 2002, the Upper Regional Court...found that the author's extradition was admissible on all counts except that of "perjury while a defendant" (for which the author had been sentenced to 10 years imprisonment). In conformity with the Supreme Court's decision, the Court concluded that the author had enjoyed a fair trial and that his sentence would not be cruel, inhuman or degrading. It did not address the issue of the author's right to an appeal. On 10 May 2002, the Minister of Justice allowed the author's extradition to the United States, without reference to any issues as to the author's human rights.3/

...

EQUALITY AND DISCRIMINATION - EQUALITY BEFORE THE LAW

2.11 On 24 May, the author...petitioned the Administrative Court, challenging the Minister's decision to extradite him and seeking an injunction to stay the author's extradition, pending decision on the substantive challenge. The stay was granted and referred to the Ministry of Justice and the Vienna Regional Criminal Court.

2.12 On 26 May, an attempt was made to surrender the author. After a telephone call by the ranking officer of the airport police to the president of the Administrative Court, the author was returned to a detention facility in light of the stay issued by the Administrative Court and the author's poor health. On 6 June 2002, the investigating judge of the Vienna Regional Criminal Court considered the Administrative Court to be "incompetent" to entertain any proceedings or to bar implementation of the extradition, and directed that the author be surrendered. On 9 June 2002, the author was transferred by officials of the author's prison and of the Ministries of Justice and the Interior, to the jurisdiction of United States military authorities at Vienna airport, and returned to the United States.

2.13 At the time the author was extradited, two sets of proceedings remained pending before the Constitutional Court, neither of which had suspensive effect under the State party's law. Firstly, on 25 April 2002, the author had lodged a constitutional motion attacking the constitutionality of various provisions of the State party's extradition law, as well as of the extradition treaty with the United States...Secondly, on 17 May 2002, he had lodged a "negative competence challenge"...to resolve the question whether the issue of a right to an appeal must be resolved by administrative decision or by the courts, as both the Upper Regional Court as well as the Minister of Justice had declined to deal with the issue.

2.14 On 13 June 2002, the Administrative Court decided, given that the author had been removed in violation of the Court's stay on execution, that the proceedings had been deprived of any object and suspended them. The Court observed that the purpose of its order to stay extradition was to preserve the rights of the author pending the main proceedings, and that as a result no action could be taken to the author's detriment on the basis of the Minister's challenged decision. As a consequence, the author's surrender had no sufficient legal basis.

...

2.16 On 12 December 2002, the Constitutional Court decided in the author's favour, holding that the Upper Regional Court should examine all admissibility issues concerning the author's human rights, including issues of a right to an appeal. Thereafter, the Minister's formal decision to extradite should consider any other issues of human dignity that might arise. The Court also found that the author's inability, under the State party's extradition law, further to challenge a decision of the Upper Regional Court finding his extradition admissible was contrary to rule of law principles and unconstitutional.

EQUALITY AND DISCRIMINATION - EQUALITY BEFORE THE LAW

...

9.6 Concerning the author's claim that, in the proceedings before the State party's courts, he was denied the right to equality before the law, the Committee observes that the author obtained, after submission of the case to the Committee, a stay from the Administrative Court to prevent his extradition until the Court had resolved the author's challenge to the Minister's decision directing his extradition. The Committee observes that although the order to stay was duly communicated to the relevant officials, the author was transferred to United States jurisdiction after several attempts, in violation of the Court's stay. The Court itself, after the event, observed that the author had been removed from the country in violation of the Court's stay on execution and that there was no legal foundation for the extradition; accordingly, the proceedings had become moot and deprived of object in the light of the author's extradition, and would not be further pursued. The Committee further notes that the Constitutional Court found that the author's inability to appeal an adverse judgment of the Upper Regional Court, in circumstances where the Prosecutor could, and did, appeal an earlier judgment of the Upper Regional Court finding the author's extradition inadmissible, was unconstitutional. The Committee considers that the author's extradition in breach of a stay issued by the Administrative Court and his inability to appeal an adverse decision of the Upper Regional Court, while the Prosecutor was so able, amount to a violation of the author's right under article 14, paragraph 1, to equality before the courts, taken together with the right to an effective and enforceable remedy under article 2, paragraph 3, of the Covenant.

10.1 The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by Austria of article 14, paragraph 1 (first sentence), taken together with article 2, paragraph 3, of the Covenant. The Committee reiterates its conclusion that the State party breached its obligations under the Optional Protocol by extraditing the author before allowing the Committee to address whether he would thereby suffer irreparable harm, as alleged.

Notes

...

3/ The author provides the terms of the Treaty which provide: "Convictions in absentia.

> "If the person sought has been found guilty in absentia, the executive authority of the Requested State may refuse extradition unless the Requesting State provides it with such information or assurances as the Requested State considers sufficient to demonstrate that the person was afforded an adequate opportunity to present a defence or that there are adequate remedies or additional proceedings available to the person after surrender."

EQUALITY AND DISCRIMINATION - EQUALITY BEFORE THE LAW

- *Gómez Casafranca v. Peru* (981/2001), ICCPR, A/58/40 vol. II (22 July 2003) 278 (CCPR/C/78/D/981/2001) at paras. 2.1, 2.5-2.7, 7.4, 8 and 9.

...

2.1 The victim was a student at the Faculty of Dentistry of the Inca Garcilaso de la Vega University, and also worked in the family restaurant. On 3 October 1986 he was arrested in a building near to his home, where he had gone to clean up after being stopped at gunpoint by the police. The arrest was made without any arrest warrant, and without the detainee having been arrested in *flagrante delicto*; he was taken to the offices of DIRCOTE,1/ where he was locked in the cells while the police made inquiries.

...

2.5 In the oral proceedings, the judges confined themselves to questioning the alleged victim on the basis of the contentions in the police report, without taking into account events at the pre-trial stage. On 22 December 1988 Lima Seventh Correctional Court acquitted him, declaring him innocent of the charges brought against him.

2.6 The Office of the Attorney-General applied for annulment of the judgement, which was declared void on 11 April 1997 by the faceless Supreme Court. The Court held that the facts had not been properly determined or the evidence properly verified.

2.7 On 11 September 1997 the police arrested Mr. Ricardo Ernesto Gómez Casafranca at his home for an appearance at further oral proceedings based on the same charges; this time, on 30 January 1998, he was sentenced to 25 years' imprisonment by the Special Criminal Counter-Terrorism Division. The sentence was confirmed by the Supreme Court on 18 September 1998.

...

7.4 With regard to the author's claims that there was a violation of the principles of non-retroactivity and equality before the law as a result of the application of Act No. 24651 of 6 March 1987, subsequent to the events in the case, the Committee notes that the State party acknowledges that this occurred. While it is true, as asserted by the State party, that acts of terrorism at the time of the events were already offences under Legislative Decree No. 46 of March 1981, it is equally true that Act No. 24651 of 1987 amended the penalties, by imposing higher minimum sentences and thereby making the situation of guilty parties worse.6/ Although Mr. Gómez Casafranca was sentenced to the minimum term of 25 years under the new law, this was more than double compared to the minimum term under the previous law, and the Court gave no explanation as to what would have been the sentence under the old law if still applicable. Accordingly, the Committee finds that there was a violation of article 15 of the Covenant.

...

8 The Human Rights Committee...is of the view that the facts as found by the

Committee constitute violations of articles 7; 9, paragraphs 1 and 3; 14 and 15 of the Covenant.

9 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to release Mr. Gómez Casafranca and pay him appropriate compensation. The State party is also under an obligation to ensure that similar violations do not occur in future.

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Notes

1/ Department of Counter-Terrorism.

...

6/ Legislative Decree No. 46 of March 1981 sets the minimum penalty at 12 years' imprisonment and sets no maximum penalty. Act No. 24651 of 1987 sets the minimum penalty at 25 years' imprisonment and the maximum at life imprisonment, but only for leaders of terrorist organizations.

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- *Baumgarten v. Germany* (960/2000), ICCPR, A/58/40 vol. II (31 July 2003) 261 (CCPR/C/78/D/960/2000) at paras. 2.1, 2.2, 3.1, 3.2, 4.1, 4.2 and 10.

...

2.1 From 1979 until his retirement in February 1990, the author was Deputy Minister of Defence and Head of Border Troops (*Chef der Grenztruppen*) of the former German Democratic Republic (GDR).

2.2 On 10 September 1996, the Regional Court of Berlin (*Landgericht Berlin*) convicted the author of homicide 2/ and attempted homicide in several cases occurring between 1980 and 1989, sentencing him to a prison term of six years and six months. The Court found that the author was responsible for the killing or attempted killing of the persons concerned, who, upon attempting to cross the border between the former GDR and the Federal Republic of Germany (FRG) including West Berlin, were shot by border guards or set off mines. On 30 April 1997, the Federal Court (*Bundesgerichtshof*) dismissed the author's appeal. The Federal Constitutional Court (*Bundesverfassungsgericht*) rejected his constitutional motion on 21 July 1997, holding that the previous court decisions did not violate constitutional law.

...

3.1 Between 1949 and 1961, approximately two and a half million Germans fled from the German Democratic Republic to the Federal Republic of Germany, including West Berlin. To stop this flow of refugees, the GDR started construction of the Berlin Wall on 13 August 1961 and reinforced security installations along the inner-German border,

in particular by installing landmines, later replaced by SM-70 fragmentation mines. Hundreds of persons lost their lives attempting to cross the border, either because they set off mines, or because they were shot by East German border guards.

3.2 Following German reunification, public prosecutors started to investigate the killings of persons at the former inner-German border on the basis of the Treaty on the Establishment of a Unified Germany of 31 August 1990 (*Einigungsvertrag)*. The Unification Treaty, taken together with the Unification Treaty Act of 23 September 1990 declares, in the transitional provisions relating to the Criminal Code (articles 315 to 315c of the Introductory Act to the Criminal Code), that, as a rule, the law of the place where an offence was committed remains applicable for acts that occurred prior to the time when unification became effective. For offences committed in the former GDR, the Criminal Code of the former GDR remains applicable. Pursuant to section 2, paragraph 3, of the Criminal Code (FRG), the law of the FRG is applicable only if it is more lenient than that of the GDR.

...

4.1 The Berlin Regional Court, in its judgment of 10 September 1996, found that, based on the provisions on homicide of the GDR Criminal Code, the author was responsible for the deaths or injuries inflicted on persons trying to cross the border at the inner-German border or, respectively, the Berlin Wall, by virtue of his annual orders, triggering a chain of subsequent orders and, thereby, inciting the acts committed by border guards in the cases at issue. While the Court recognized that it was not the author's direct intention to cause the death of border violators, it argued that he was fully aware, and accepted, that, as a direct consequence of the application of these orders, persons attempting to cross the border could lose their lives. It rejected the author's claim that he had erred about the prohibited nature of his orders, since such error was avoidable, given his high military rank, his competencies and the fact that his orders manifestly violated the right to life, thereby infringing the criminal laws of the GDR. It held that the author's acts were neither justified by the pertinent service regulations issued by the Minister of National Defence, nor under article 27, paragraph 2, of the State Border Act, arguing that these legal justifications were invalid because they manifestly violated basic principles of justice and internationally protected human rights, as enshrined in the International Covenant on Civil and Political Rights.

4.2 The Court argued that, by giving priority to the inviolability of the GDR's state borders over the right to life of unarmed fugitives who attempted to cross the inner-German border, these grounds of justification violated legal principles based on the intrinsic worth and dignity of the human person and recognized by the community of nations. The Court concluded that in such a case, the positive law had to be superseded by considerations of justice. Such a finding did not constitute a breach of the principle of non-retroactivity in article 103, paragraph 2, of the German Basic Law (*Grundgesetz*), since the expectation that the law, as applied in GDR state practice, would continue to be

applied so as to broadly construe a legal justification contrary to human rights, did not merit protection of the law. The Court dismissed order no. 101 as a lawful excuse, holding that under article 258, paragraph 1, of the Criminal Code (GDR), criminal responsibility was not excluded where the execution of an order manifestly violated recognized rules of public international law or a criminal statute. In assessing the punishment, the Court balanced the following aspects: (1) the totalitarian structure of the GDR which left the author only with a limited scope of action, (2) the author's high age and his expressions of regret for the victims, (3) the considerable lapse of time since the commission of the acts, (4) his (albeit avoidable) error as to the unlawfulness of his acts (in his favor), and (5) his participation, at a high level of hierarchy, in the maintenance and increased sophistication of the system of border control (to his detriment). Based on the relevant provisions of the Criminal Code (FRG), which were more lenient than the corresponding norms of the Criminal Code (GDR), the Court decided to impose a reduced sentence.

...

10. With regard to the author's allegation of a violation of article 26 of the Covenant, the Committee notes that the Treaty on the Establishment of a Unified Germany provides for the applicability of the criminal law of the former GDR to all acts committed on the territory of the former GDR, prior to the unification becoming effective. The Committee takes note of the author's allegation that certain provisions of the State party's law that would have been applied on the use of firearms by officials of the FRG had not been applied in his case. However, the Committee observes that the author has failed to demonstrate that persons in a similar situation in the former GDR or FRG have, in fact, been treated differently. Therefore, the Committee concludes that he has not substantiated his claim and considers that there has been no violation of article 26 in this respect.

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Notes

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2/ The English translations of these excerpts are based on the translations provided by the State party.

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- *Martinez Muñoz v. Spain* (1006/2001), ICCPR, A/59/40 vol. II (30 October 2003) 198 (CCPR/C/79/D/1006/2001) at paras. 2.1, 2.2, 2.4, 6.3 and 6.4.

...

2.1 On 21 September 1990, the author, together with six other persons, took part in writing *pintadas* ("graffiti") in favour of the right to refuse to perform military service, on the outer facade of the bullring in the town of Yecla. For this reason, they were intercepted by two local policemen. The author alleges that, when one of the policemen

attempted to arrest him, a struggle ensued and he accidentally struck the policeman in one eye, causing a contusion.

2.2 The author was held in custody on 21 September 1990 and released on 22 September 1990. The hearing took place on 14 June 1995. The author was accused by the prosecutor of two misdemeanours and an offence and, on 16 June 1995, Criminal Court No. 3 of Murcia sentenced him for the offence of attacking a law enforcement officer to a penalty of six months' and one day's imprisonment and compensation in the amount of 70,000 pesetas in favour of the injured policeman.

...

2.4 The author filed an application for *amparo* and requested the Constitutional Court to allow him to dispense with the *procurador* and to represent himself. That request was denied on 15 January 1996. The author then requested the court to appoint a *procurador*. When that person had been appointed in accordance with article 27 of the Free Legal Assistance Act, the Constitutional Court required the freely chosen lawyer to waive his fees. In the light of this requirement, the author filed an application for reconsideration, which was rejected on 22 March 1996.

...

6.3 The author claims a violation of article 14 (1) of the Covenant, arguing that, during the proceedings, privileges were granted to the prosecution, which was allowed to propose measures after the summary procedure had begun. In this regard, the Committee notes that the author does not substantiate his complaint by indicating what these measures were and how they damaged his case. He also does not substantiate his complaint that Murcia Criminal Court No. 3 granted complete freedom of interrogation to the prosecutor, without disallowing questions formulated in a manner similar to that which the author's counsel was not permitted to use. Consequently, this part of the complaint is admissible under article 2 of the Optional Protocol.

6.4 The author also claims a violation of article 14, paragraph 1, of the Covenant, arguing that, since he was not allowed to dispense with a *procurador* and to represent himself before the Constitutional Court, he was placed in a situation of inequality with respect to persons with a law degree; such inequality was not justified. In this regard, the Committee recalls its constant jurisprudence 1/ that the requirement for representation by a *procurador* reflects the need for a person with knowledge of the law to be responsible for handling an application to that court. The Committee therefore considers that the author's allegations have not been properly substantiated for the purposes of admissibility. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

Note

1/ Communication No. 865/1999, *Alejandro Marín Gómez v. Spain,* Views adopted on 22 October 2001, para. 8.4; communication No. 866/1999, *Marina Torregrosa Lafuente*

et al. v. Spain, Views adopted on 16 July 2001, para. 6.3; and communication No. 1005/2001, *Concepción Sánchez González v. Spain,* Views adopted on 22 March 2002, para. 4.3.

- *Derksen v. The Netherlands* (976/2001), ICCPR, A/59/40 vol. II (1 April 2004) 173 at paras. 1, 2.1-2.4, 9.2, 9.3, 10 and 11.

1. The author of the communication is Cecilia Derksen, a Dutch national. She submits the communication on her own behalf and on behalf of her child Kaya Marcelle Bakker, born on 21 April 1995, and thus 5 years old at the time of the initial submission. She claims that she and her child are the victims of a violation by the Netherlands of article 26 of the International Covenant on Civil and Political Rights. The author is represented by counsel.

2.1 The author shared a household with her partner Marcel Bakker from August 1991 to 22 February 1995. It is stated that Mr. Bakker was the breadwinner, whereas Ms. Derksen took care of the household and had a part-time job. They had signed a cohabitation contract and when Ms. Derksen became pregnant, Mr. Bakker recognized the child as his. The author states that they intended to marry. On 22 February 1995, Mr. Bakker died in an accident.

2.2 On 6 July 1995, the author requested benefits under the General Widows and Orphans Law (AWW, Algemene Weduwen en Wezen Wet). On 1 August 1995, her request was rejected because she had not been married to Mr. Bakker and therefore could not be recognized as widow under the AWW. Under the AWW, benefits for half-orphans were included in the widows' benefits.

2.3 On 1 July 1996, the Surviving Dependants Act (ANW, Algemene Nabestaanden Wet) replaced the AWW. Under the ANW, unmarried partners are also entitled to a benefit. On 26 November 1996 Ms. Derksen applied for a benefit under the ANW. On 9 December 1996, her application was rejected by the Social Insurance Bank (Sociale Verzekeringsbank) on the grounds that "(...) only those who were entitled to a benefit under the AWW on 30 June 1996 and those who became widow on or after 1 July 1996 are entitled to a benefit under the ANW".

2.4 Ms. Derksen's request for revision of the decision was rejected by the Board of the Social Insurance Bank on 6 February 1997. Her further appeal was rejected by the District Court Zutphen (Arrondissementsrechtbank Zutphen) on 28 November 1997. On 10 March 1999, the Central Council of Appeal (Centrale Raad van Beroep) declared her appeal unfounded. With this, all domestic remedies are said to be exhausted.

...

9.2 The first question before the Committee is whether the author of the communication is a victim of a violation of article 26 of the Covenant, because the new legislation which provides for equal benefits to married and unmarried dependants whose partner has died is not applied to cases where the unmarried partner has died before the effective date of the new law. The Committee recalls its jurisprudence concerning earlier claims of discrimination against the Netherlands in relation to social security legislation. The Committee reiterates that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The Committee recalls that it has earlier found that a differentiation between married and unmarried couples does not amount to a violation of article 26 of the Covenant, since married and unmarried couples are subject to different legal regimes and the decision whether or not to enter into a legal status by marriage lies entirely with the cohabitating persons. By enacting the new legislation the State party has provided equal treatment to both married and unmarried cohabitants for purposes of surviving dependants' benefits. Taking into account that the past practice of distinguishing between married and unmarried couples did not constitute prohibited discrimination, the Committee is of the opinion that the State party was under no obligation to make the amendment retroactive. The Committee considers that the application of the legislation to new cases only does not constitute a violation of article 26 of the Covenant.

9.3 The second question before the Committee is whether the refusal of benefits for the author's daughter constitutes prohibited discrimination under article 26 of the Covenant. The State party has explained that it is not the status of the child that determines the allowance of benefits, but the status of the surviving parent of the child, and that the benefits are not granted to the child but to the parent. The author, however, has argued that, even if the distinction between married and unmarried couples does not constitute discrimination because different legal regimes apply and the choice lies entirely with the partners whether to marry or not, the decision not to marry cannot affect the parents' obligations towards the child and the child has no influence on the parents' decision. The Committee recalls that article 26 prohibits both direct and indirect discrimination, the latter notion being related to a rule or measure that may be neutral on its face without any intent to discriminate but which nevertheless results in discrimination because of its exclusive or disproportionate adverse effect on a certain category of persons. Yet, a distinction only constitutes prohibited discrimination in the meaning of article 26 of the Covenant if it is not based on objective and reasonable criteria. In the circumstances of the present case, the Committee observes that under the earlier AWW the children's benefits depended on the status of the parents, so that if the parents were unmarried, the children were not eligible for the benefits. However, under the new ANW, benefits are being denied to children born to unmarried parents before 1 July 1996 while granted in respect of similarly situated children born after that date. The Committee considers that the distinction between children born, on the one hand, either in wedlock or after 1 July

1996 out of wedlock, and, on the other hand, out of wedlock prior to 1 July 1996, is not based on reasonable grounds. In making this conclusion the Committee emphasizes that the authorities were well aware of the discriminatory effect of the AWW when they decided to enact the new law aimed at remedying the situation, and that they could have easily terminated the discrimination in respect of children born out of wedlock prior to 1 July 1996 by extending the application of the new law to them. The termination of ongoing discrimination in respect of children who had had no say in whether their parents chose to marry or not, could have taken place with or without retroactive effect. However, as the communication has been declared admissible only in respect of the period after 1 July 1996, the Committee merely addresses the failure of the State party to terminate the discrimination from that day onwards which, in the Committee's view, constitutes a violation of article 26 with regard to Kaya Marcelle Bakker in respect of whom half-orphans' benefits through her mother was denied under the ANW.

10. The Human Rights Committee... is of the view that the facts before it relating to Kaya Marcelle Bakker disclose a violation of article 26 of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide half-orphans' benefits in respect of Kaya Marcelle Bakker or an equivalent remedy. The State party is also under an obligation to prevent similar violations.

- *Perterer v. Austria* (1015/2001), ICCPR, A/59/40 vol. II (8 July 2004) 231 at paras. 9.2, 10.6, 10.7, 11 and 12.

...

9.2 With regard to the State party's objection *ratione materiae*, the Committee recalls that the concept of a "suit at law" under article 14, paragraph 1, is based on the nature of the right in question rather than on the status of one of the parties 15/. The imposition of disciplinary measures taken against civil servants does not of itself necessarily constitute a determination of one's rights and obligations in a suit at law, nor does it, except in cases of sanctions that, regardless of their qualification in domestic law, are penal in nature, amount to a determination of a criminal charge within the meaning of the second sentence of article 14, paragraph 1. In the present case, the State party has conceded that the trial senate of the Disciplinary Commission was a tribunal within the meaning of article 14, paragraph 1, of the Covenant. While the decision on a disciplinary dismissal does not need to be determined by a court or tribunal, the Committee considers that whenever, as in the present case, a judicial body is entrusted with the task of deciding on the imposition of disciplinary measures, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article

14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee. Consequently, the Committee declares the communication admissible *ratione materiae* insofar as the author claims to be a victim of violations of his rights under article 14, paragraph 1, of the Covenant.

...

10.6 As to the trial senate's failure to transmit the 1999 trial transcript to the author before the end of the deadline for appealing the decision of the Disciplinary Commission of 23 September 1999, the Committee observes that the principle of equality of arms implies that the parties to the proceedings must have adequate time and facilities for the preparation of their arguments, which, in turn, requires access to the documents necessary to prepare such arguments 22/. However, the Committee observes that adequate preparation of one's defence cannot be equated with the adequate preparation of an appeal. Furthermore, it considers that the author has failed to demonstrate that the late transmittal of the 1999 trial transcript prevented him from raising the alleged irregularities before the Administrative Court, especially since he admits himself that the alleged manipulation of the testimonies was only discovered by counsel for the present communication. The Committee therefore concludes that the author's right to equality of arms under article 14, paragraph 1, has not been violated.

10.7 Regarding the length of the disciplinary proceedings, the Committee considers that the right to equality before the courts, as guaranteed by article 14, paragraph 1, entails a number of requirements, including the condition that the procedure before the national tribunals must be conducted expeditiously enough so as not to compromise the principles of fairness and equality of arms. The Committee observes that responsibility for the delay of 57 months to adjudicate a matter of minor complexity lies with the authorities of Austria. It also observes that non-fulfilment of this responsibility is neither excused by the absence of a request for the transfer of competence (*Devolutionsantrag*), nor by the author's failure to lodge a complaint about undue delay of proceedings (*Säumnisbeschwerde*), as it was primarily caused by the State party's failure to conduct the first two sets of proceedings in accordance with domestic procedural law. The Committee concludes that the author's right to equality before the courts and tribunals has been violated.

11. The Human Rights Committee...is of the view that the facts before it reveal a violation of article 14, paragraph 1, of the Covenant.

12. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including payment of adequate compensation. The State party is also under an obligation to prevent similar violations in the future.

Notes

...

15/ See communication No. 112/1981, *Y.L. v. Canada*, at para. 9.2; communication No. 441/1990, *Robert Casanovas v. France*, Views adopted on 19 July 1994, at para. 5.2.

...

22/ See general comment 13, at para. 9.

- *Mulai v. Guyana* (811/1998), ICCPR, A/59/40 vol. II (20 July 2004) 29 at paras. 6.1-6.3, 7 and 8.

...

6.1 The Committee notes that the independence and impartiality of a tribunal are important aspects of the right to a fair trial within the meaning of article 14, paragraph 1, of the Covenant. In a trial by jury, the necessity to evaluate facts and evidence independently and impartially also applies to the jury; it is important that all the jurors be placed in a position in which they may assess the facts and the evidence in an objective manner, so as to be able to return a just verdict. On the other hand, the Committee recalls that where attempts at jury tampering come to the knowledge of either of the parties, these alleged improprieties should have been challenged before the court 4/.

6.2 In the present case, the author submits that the foreman of the jury at the retrial informed the police and the Chief Justice, on 26 February 1996, that someone had sought to influence him. The author claims that it was the duty of the judge to conduct an inquiry into this matter to ascertain whether any injustice could have been caused to Bharatraj and Lallman Mulai, thus depriving them of a fair trial. In addition, the author complains that the incident was not disclosed to the defence although both the judge and the prosecution were made aware of it by the foreman of the jury, and that unlike in some other trials the trial against the two brothers was not aborted as a consequence of the incident. The Committee notes that although it is not in the position to establish that the performance and the conclusions reached by the jury and the foreman in fact reflected partiality and bias against Bharatraj and Lallman Mulai, and although it appears from the material before it that the Court of Appeal dealt with the issue of possible bias, it did not address that part of the grounds of appeal that related to the right of Bharatraj and Lallman Mulai to equality before the courts, as enshrined in article 14, paragraph 1, of the Covenant and on the strength of which the defence might have moved for the trial to be aborted. Consequently, the Committee finds that there was a violation of article 14, paragraph 1, of the Covenant.

6.3 In accordance with its consistent practice the Committee takes the view that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected, constitutes a violation of article 6 of the Covenant.

In the circumstances of the current case the State party has violated the rights of Bharatraj and Lallman Mulai under article 6 of the Covenant.

7. The Human Rights Committee...is of the view that the facts before reveal violations of article 14, paragraph 1, and article 6 of the International Covenant on Civil and Political Rights.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Bharatraj and Lallman Mulai with an effective remedy, including commutation of their death sentences. The State party is also under an obligation to avoid similar violations in the future.

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4/ See *Willard Collins v. Jamaica*, case No. 240/1987, Views adopted on 1 November 1991, para. 8.4.

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- *Borzov v. Estonia* (1136/2002), ICCPR, A/59/40 vol. II (26 July 2004) 369 at paras. 2.1, 2.2, 7.2-7.4 and 8.

...

2.1 From 1962 to 1967, the author attended the Sevastopol Higher Navy College in the specialty of military electrochemical engineer. After graduation, he served in Kamchatka until 1976 and thereafter in Tallinn as head of a military factory until 1986. On 10 November 1986, the author was released from service with rank of captain due to illness. The author has worked, since 1988, as a head of department in a private company, and he is married to a naturalized Estonian woman. In 1991, Estonia achieved independence.

2.2 On 28 February 1994, the author applied for Estonian citizenship. In 1994, an agreement between Estonia and the Russian Federation entered into force which concerned the withdrawal of troops stationed on the former's territory (the 1994 treaty). In 1995, the author obtained an Estonian residence permit, pursuant to the Aliens Act's provisions concerning persons who had settled in Estonia prior to 1990. In 1996, an agreement between Estonia and the Russian Federation entered into force, concerning "regulation of issues of social guarantees of retired officers of the armed forces of the Russian Federation in the territory of the Republic of Estonia" (the 1996 treaty). Pursuant to the 1996 treaty, the author's pension has been paid by the Russian Federation. Following delays occasioned by deficiencies of archive materials, on 29 September 1998, the Estonian Government, by order No. 931-k, refused the application. The

refusal was based on section 8 of the Citizenship Act of 1938, as well as section 32 of the Citizenship Act of 1995 which precluded citizenship for a career military officer in the armed forces of a foreign country who had been discharged or retired therefrom.

...

7.2 Turning to the substance of the admissible claim under article 26, the Committee refers to its jurisprudence that an individual may be deprived of his right to equality before the law if a provision of law is applied to him or her in arbitrary fashion, such that an application of law to an individual's detriment is not based on reasonable and objective grounds 3/. In the present case, the State party has invoked national security, a ground provided for by law, for its refusal to grant citizenship to the author in the light of particular personal circumstances.

7.3 While the Committee recognizes that the Covenant explicitly permits, in certain circumstances, considerations of national security to be invoked as a justification for certain actions on the part of a State party, the Committee emphasizes that invocation of national security on the part of a State party does not, *ipso facto*, remove an issue wholly from the Committee's scrutiny. Accordingly, the Committee's decision in the particular circumstances of *V.M.R.B* 4/ should not be understood as the Committee divesting itself of the jurisdiction to inquire, as appropriate, into the weight to be accorded to an argument of national security. While the Committee cannot leave it to the unfettered discretion of a State party whether reasons related to national security existed in an individual case, it recognizes that its own role in reviewing the existence and relevance of such considerations will depend on the circumstances of the case and the relevant provision of the Covenant. Whereas articles 19, 21 and 22 of the Covenant establish a criterion of necessity in respect of restrictions based on national security, the criteria applicable under article 26 are more general in nature, requiring reasonable and objective justification and a legitimate aim for distinctions that relate to an individual's characteristics enumerated in article 26, including "other status". The Committee accepts that considerations related to national security may serve a legitimate aim in the exercise of a State party's sovereignty in the granting of its citizenship, at least where a newly independent State invokes national security concerns related to its earlier status.

7.4 In the present case, the State party concluded that a grant of citizenship to the author would raise national security issues generally on account of the duration and level of the author's military training, his rank and background in the armed forces of the then USSR. The Committee notes that the author has a residence permit issued by the State party and that he continues to receive his pension while living in Estonia. Although the Committee is aware that the lack of Estonian citizenship will affect the author's enjoyment of certain Covenant rights, notably those under article 25, it notes that neither the Covenant nor international law in general spells out specific criteria for the granting of citizenship through naturalization, and that the author did enjoy a right to have the denial of his citizenship application reviewed by the courts of the State party. Noting, furthermore, that the role of the State party's courts in reviewing administrative decisions,

including those decided with reference to national security, appears to entail genuine substantive review, the Committee concludes that the author has not made out his case that the decision taken by the State party with respect to the author was not based on reasonable and objective grounds. Consequently, the Committee is unable, in the particular circumstances of this case, to find a violation of article 26 of the Covenant.

8. The Human Rights Committee...is of the view that the facts before it do not disclose a violation of article 26 of the Covenant.

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3/ See *Kavanagh v. Ireland* (No. 1), case No. 819/1998, Views adopted on 4 April 2001.

4/ [Case No. 236/1987, decision adopted on 18 July 1988.]

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- *Mariano Gallego v. Spain* (988/2001) ICCPR, A/60/40 vol. II (3 November 2004) 329 at paras. 2.1, 2.2, 7.3 and 8.

...

2.1 The author, a trained engineer, worked in Spain from 1 March 1958 until 10 September 1982, when he emigrated to Switzerland. Throughout that period, the author paid contributions to the Spanish social security scheme on the maximum contribution basis for his occupational group. During his residence in Switzerland, the author paid contributions to the Swiss social security scheme until he retired in 1995. On retirement the author, pursuant to the Agreement between Spain and Switzerland on social security of 1969 and the Additional Agreement thereto of 1982, was entitled to retirement pensions under the Spanish and Swiss social security schemes respectively. By application of the *pro rata temporis* rule, 70 per cent of the pension is payable by the Spanish system and the rest by the Swiss system1/.

2.2 In order to determine the amount of the Spanish pension, the Spanish authorities, pursuant to article 14 of the bilateral Additional Agreement cited, 2/ used the minimum contribution basis applicable in Spain to workers in the same profession. The author, who disputed the calculation, decided to initiate legal proceedings, since he considered that the basis applied to him should not correspond to the minimum contributions for his group. Other factors should also be taken into account, in particular the fact that until the year in which he emigrated he had paid contributions in Spain on the maximum contribution basis for his group.

...

7.3 With regard to the author's claim that the different treatment of Spanish workers who emigrated to Switzerland on the one hand and Spanish migrants who went to other countries constitutes a violation of article 26 of the Covenant, the Committee notes that the author has not shown how this distinction is based on the race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status of these migrant workers. The less advantageous position of the author has its roots in the fact that, regarding the calculation of the Spanish part of the pension of persons who have worked in Spain and abroad, the bilateral treaties negotiated by Spain are not identical. However, the mere fact that different treaties on the same topic with different countries concluded at different times differ in content does not amount, as such, to a violation of article 26 of the Covenant. The author has not shown any additional elements that would make article 14 of the treaty with Switzerland arbitrary. The Committee, therefore, concludes that the facts submitted by the author do not raise any issue under article 26.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;
...

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Notes

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1/ The amount of the Spanish pension in 1995 was 62,174 pesetas (373.67 euros) and the amount of the Swiss pension was 578 Swiss francs, both per month.

2/ Article 14: "When...all or part of the contribution period elected by the worker for determination of the regulatory basis for calculation of the benefit in question is completed under Swiss legislation, the competent Spanish institution shall determine that basis by taking into account the minimum contribution basis that was applicable in Spain for all or part of the period to workers in the same occupation as that exercised in Spain by the contributor." According to the author this provision was drafted at a time when the regulatory basis for a retirement pension, under Spanish legislation, was two contributory years over a period elected by the worker. With the promulgation of Act No. 26-1985 the regulatory basis became eight contributory years over a fixed period.

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- *Rouse v. The Philippines* (1089/2002), ICCPR, A/60/40 vol. II (25 July 2005) 123 at para. 6.3.

...

6.3 With regard to the alleged violation of equality before the courts (art. 14, para. 1),

the Committee notes that the author has complained about the outcome of the judicial proceedings, compared to the outcome of another similar case. The Committee notes that the State party contends that the circumstances of the case referred to by the author were completely different from those of the author's. The Committee further observes that article 14, paragraph 1, of the Covenant guarantees procedural equality but cannot be interpreted as guaranteeing equality of results in proceedings before the competent tribunal. This aspect of the author's communication falls outside the scope of application of article 14, paragraph 1, and is, therefore, inadmissible *ratione materiae* under article 3 of the Optional Protocol. However, the Committee notes that the communication raises issues with regard to the claim relating to the alleged violation of the right to a fair hearing by an impartial tribunal established by law and will examine that part of the claim under the same article.

- *Marik v. Czech Republic* (945/2000), ICCPR, A/60/40 vol. II (26 July 2005) 54 at paras. 2.1-2.4, 6.2-6.5, 7 and 8.

...

2.1 In 1969, the author emigrated from Czechoslovakia to the United States with his family. He later became a United States citizen. In 1972, he was convicted of fleeing the country by the Plzen District Court; his property was confiscated, *inter alia* his two houses in Letkov and in Plzen.

2.2 On 23 April 1990, the Czech and Slovak Republic passed Act No. 119/1990 Coll. on Judicial Rehabilitation, which rendered null and void all sentences handed down by Communist courts for political reasons. Persons whose property had been confiscated were, under section 23.2 of the Act, eligible to recover their property, subject to conditions to be spelled out in a separate restitution law.

2.3 On 1 February 1991, Act 87/1991 on Extra-Judicial Rehabilitation was adopted. Under it, a person claiming restitution of property had to (a) be a Czech-Slovak citizen and (b) be a permanent resident in the Czech Republic to claim entitlement to regain his or her property. In addition, according to the Act, (c) the claimant has a burden for proving the unlawfulness of the acquisition by the current owner of the property in question. The first two requirements had to be fulfilled during the time period in which restitution claims could be filed, between 1 April and 1 October 1991. A judgement of the Czech Constitutional Court of 12 July 1994 (No. 164/1994), however, annulled the condition of permanent residence and established a new time frame for the submission of restitution claims by persons who had thereby become entitled persons, running from 1 November 1994 to 1 May 1995. According to the author, this judgement established a right to restitution which could be exercised by those who did not have permanent residence in the country and met the citizenship condition in the new time period.

However, the Supreme Court and the Constitutional Court supported an interpretation to the effect that the newly entitled persons were persons who, during the original period of time (1 April to 1 October 1991), had met all the other conditions, including the citizenship condition, with the exception of permanent residence. Although the author claims that he never lost Czech citizenship, he formally became Czech citizen again in May 1993.

2.4 In 1994, the author filed two separate restitution claims with regard to his houses in Letkov and Plzen. In the first case (the Letkov property), the Plzen-mesto District Court refused the restitution claim on 13 November 1995, because the author did not fulfil the citizenship requirement during the initial period open for restitution claims, i.e. 1 October 1991 at the latest. It also found that the third requirement for restitution, concerning the unlawfulness of the current owners acquisition, was not met in the case. This decision was confirmed by the Plzen Regional Court on 25 March 1996. The author's appeal to the Supreme Court was dismissed on 20 August 1997 on the ground that he did not fulfil the precondition of citizenship in 1991. The judgement confirmed that the new established time frame did not change this original requirement but gave non-residents additional time to lodge their restitution claims. It did not consider the other requirements. A further appeal to the Constitutional Court was rejected on 12 May 1998.

...

6.2 The issue before the Committee is whether the application to the author of Act 87/1991 amounted to a violation of his right to equality before the law and to equal protection of the law, contrary to article 26 of the Covenant.

6.3 The Committee reiterates its jurisprudence that not all differentiations in treatment can be deemed to be discriminatory under article 26. A differentiation which is compatible with the provisions of the Covenant and is based on objective and reasonable grounds does not amount to prohibited discrimination within the meaning of article 26 6/. Whereas the citizenship criterion is objective, the Committee must determine whether its application to the author was reasonable in the circumstances of the case.

6.4 The Committee recalls its Views in the cases of *Simunek*, *Adam*, *Blazek* and *Des Fours Walderode*,7/ where it held that article 26 of the Covenant had been violated: "the authors in that case and many others in analogous situations had left Czechoslovakia because of their political opinions and had sought refuge from political persecution in other countries, where they eventually established permanent residence and obtained a new citizenship. Taking into account that the State party itself is responsible for the author's...departure, it would be incompatible with the Covenant to require the author...to obtain Czech citizenship as a prerequisite for the restitution of [his] property or, alternatively, for the payment of appropriate compensation" 8/. The Committee further recalls its jurisprudence 9/ that the citizenship requirement in these circumstances is

unreasonable. In addition, the State party's argument that the citizenship condition was included in the law to incite owners to take good care of the property after the privatization process has not been substantiated.

6.5 The Committee considers that the precedent established in the above cases also applies to the author of the present communication. The Committee notes that in the case of the Letkov property, the State party argues that the author did not fulfil the third requirement, i.e. proving that the property was acquired unlawfully by the present owners. However, the Committee further notes that although the lower courts took this element into consideration, the Supreme Court based its decision only on the non-fulfilment of the citizenship precondition. In the light of these considerations, the Committee concludes that the application to the author of Act 87/1991, which lays down a citizenship requirement for the restitution of confiscated property, violated his rights under article 26 of the Covenant.

7. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 26 of the International Covenant.

8. 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, which may be compensation, and in the case of the Plzen property, restitution, or, in the alternative compensation. The Committee reiterates that the State party should review its legislation to ensure that all persons enjoy both equality before the law and equal protection of the law.

Notes

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6/ See communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, para. 13.

7/ See footnote 8.

8/ See communication No. 586/1994, *Adam v. The Czech Republic*, Views adopted on 23 July 1996, para. 12.6 and communication No. 857/1999, *Blazek v. The Czech Republic*, Views adopted on 12 July 2001, para. 5.8.

9/ See communication No. 516/1992, *Simunek v. The Czech Republic*, Views adopted on 19 July 1995, para. 11.6.

- *Toonen v. Australia* (488/1992), ICCPR, A/49/40 vol. II (31 March 1994) 226 (CCPR/C/50/D/488/1992) at Individual Opinion by Mr. Bertil Wennergren, 236. For

text of communication, see **EQUALITY AND DISCRIMINATION** - SEXUAL ORIENTATION.

- *Snijders v. The Netherlands* (651/1996), ICCPR, A/53/40 vol. II (27 July 1998) 135 (CCPR/C/63/D/651/1996) at paras. 8.2-8.5. For text of communication, see **EQUALITY AND DISCRIMINATION** - GENERAL.

For dissenting opinions in this context generally see:

- *Järvinen v. Finland* (295/1988), ICCPR, A/45/40 vol. II (25 July 1990) 101 at Individual Opinion by Mr. Bertil Wennergren (dissenting), 107.
- *Kindler v. Canada* (470/1991), ICCPR, A/48/40 vol. II (30 July 1993) 138 (CCPR/C/48/D/470/1991) at Individual Opinion by Mr. Rajsoomer Lallah (dissenting), 160 at para. 5.
- *Teesdale v. Trinidad and Tobago* (677/1996) ICCPR, A/57/40 vol. II (1 April 2002) 36 (CCPR/C/74/D/677/1996) at Individual Opinion by Mr. David Kretzmer and Ivan Shearer (partly dissenting) and Individual Opinion by Mr. Hipólito Solari Yrigoyen (partly dissenting).