EQUALITY AND DISCRIMINATION - GENERAL

III. JURISPRUDENCE

ICCPR

- *Weinberger v. Uruguay* (28/1978)(R.7/28), ICCPR, A/36/40 (29 October 1980) 114 at paras. 12, 15 and 16.

...

12. The Committee therefore decides to base its views on the following facts which have either been essentially confirmed by the State party or are uncontested except for denials of a general character offering no particular information or explanation: Ismael Weinberger Weisz was arrested at his home in Montevideo, Uruguay, on 25 February 1976 without any warrant of arrest...

Ismael Weinberger was first brought before a judge and charged on 16 December 1976, almost 10 months after his arrest. On 14 August 1979, three and a half years after his arrest, he was sentenced to eight years of imprisonment by the Military judge of the Court of First Instance for "subversive association" (art. 60 (V) of the Military Penal Code) with aggravating circumstances of conspiracy against the Constitution. The concrete factual basis of this offence has not been explained by the Government of Uruguay, although the author of the communication claims that the true reasons were that his brother had contributed information on trade-union activities to a newspaper opposed to the Government and his membership in a political party which had lawfully existed while the membership lasted. The Committee further notes in this connection that the State party did not comply with the Committee's request to enclose copies of any court orders or decisions of relevance to the matter under consideration...

Pursuant to *Acta Institutional No. 4* of 1 September 1976, lsmael Weinberger is deprived of the right to engage in political activities for 15 years.

...

15. The Human Rights Committee is aware that under the legislation of many countries criminal offenders may be deprived of certain political rights. Accordingly, article 25 of the Covenant only prohibits "unreasonable" restrictions. In no case, however, may a person be subjected to such sanctions solely because of his or her political opinion (arts. 2 (1) and 26). Furthermore, in the circumstances of the present case there is no justification for such a deprivation of all political rights for a period of 15 years.

16. The Human Rights Committee...is of the view that these facts...disclose violations of the Covenant, in particular:

...

of article 25, because he is barred from taking part in the conduct of public

> affairs and from being elected for 15 years in accordance with *Acta Institutional No. 4* of 1 September 1976.

- *Pietraroia v. Uruguay* (44/1979) (R.10/44), ICCPR, A/36/40 (27 March 1981) 153 at paras. 16 and 17.

...

16. The Human Rights Committee is aware that the sanction of deprivation of certain political rights is provided for in the legislation of some countries. Accordingly, article 25 of the Covenant prohibits "unreasonable" restrictions. In no case, however, may a person be subjected to such sanctions solely because of his or her political opinion(arts. 2(1) and 26). Furthermore, the principle of proportionality would require that a measure as harsh as the deprivation of all political rights for a period of 15 years be specifically justified. No such attempt has been made in the present case.

17. The Human Rights Committee...is of the view that these facts...disclose violations of the Covenant, in particular:

> ...
> of article 25, because he is barred from taking part in the conduct of public affairs and from being elected for 15 years, in accordance with *Acta Institutional No. 4* of 1 September 1976.

- *Mpandanjila v. Zaire* (138/1983), ICCPR, A/41/40 (26 March 1986) 121 at paras. 8.2 and 10.

...

8.2 The authors are eight former Zairian parliamentarians and one Zairian businessman. In December 1980, they were subjected to measures of arrest, banishment or house arrest on account of the publication of an "open letter" to Zairian President Mobutu. The eight parliamentarians were also stripped of their membership of parliament and forbidden to hold public office for a period of five years. Although they were covered by an amnesty decree of 17 January 1981, they were not released from detention or internal exile until 4 December 1981. They were subsequently brought to trial before the State Security Court on 28 June 1982 on charges of plotting to overthrow the *régime* and planning the creation of a political party, and of secreting documents concerning the establishment of said party...The accused were sentenced to 15 years' imprisonment with the exception of the businessman, who was sentenced to 5 years' imprisonment. The authors were released pursuant to an amnesty decree promulgated on 21 May 1983, but they were then subjected to an "administrative banning measure" and deported along with their families to different parts of the country...

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...
10. The Human Rights Committee...is of the view that these facts disclose violations of the Covenant, with respect to:

> ...
> Article 25 as to the eight former members of the Zairian parliament, because they were deprived of the right equally to take part in the conduct of public affairs.

- *Broeks v. The Netherlands* (172/1984), ICCPR, A/42/40 (9 April 1987) 139 at paras. 12.1-12.4 and 13-16.

...
12.1 ...The Committee is of the view that the International Covenant on Civil and Political Rights would still apply even if a particular subject matter is referred to or covered in other international instruments, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, or, as in the present case, the International Covenant on Economic, Social and Cultural Rights. Notwithstanding the interrelated drafting history of the two Covenants, it remains necessary for the Committee to apply fully the terms of the International Covenant on Civil and Political Rights. The Committee observes in this connection that the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights do not detract from the full application of article 26 of the International Covenant on Civil and Political Rights.

12.2 ...The Committee has perused the relevant *travaux préparatoires* of the International Covenant on Civil and Political Rights...which provide a "supplementary means of interpretation" (art. 32 of the Vienna Convention on the Law of Treaties). The discussions, at the time of drafting, concerning the question whether the scope of article 26 extended to rights not otherwise guaranteed by the Covenant, were inconclusive and cannot alter the conclusion arrived at by the ordinary means of interpretation referred to in paragraph 12.3 below.

12.3 For the purpose of determining the scope of article 26, the Committee has taken into account the "ordinary meaning" of each element of the article in its context and in the light of its object and purpose (art. 31 of the Vienna Convention on the Law of Treaties). The Committee begins by noting that article 26 does not merely duplicate the guarantees already provided for in article 2. It derives from the principle of equal protection of the law without discrimination, as contained in article 7 of the Universal Declaration of Human Rights, which prohibits discrimination in law or in practice in any field regulated and protected by public authorities. Article 26 is thus concerned with the obligations imposed on States in

regard to their legislation and the application thereof.

12.4 Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.

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.

14. It therefore remains for the Committee to determine whether the differentiation in Netherlands law at the time in question and as applied to Mrs. Broeks constituted discrimination within the meaning of article 26. The Committee notes that in Netherlands law the provisions of articles 84 and 85 of the Netherlands Civil Code impose equal rights and obligations on both spouses with regard to their joint income. Under section 13, subsection 1 (1), of the Unemployment Benefits Act (WWV), a married woman, in order to receive WWV benefits, had to prove that she was a 'breadwinner' - a condition that did not apply to married men. Thus a differentiation which appears on one level to be one of status is in fact one of sex, placing married women at a disadvantage compared with married men. Such a differentiation is not reasonable...

15. The circumstances in which Mrs. Broeks found herself at the material time and the application of the then valid Netherlands law made her a victim of a violation, based on sex, of article 26 of the International Covenant on Civil and Political Rights because she was denied a social security benefit on an equal footing with men.

16. The Committee...notes with appreciation that the discriminatory provisions in the law applied to Mrs. Broeks have, subsequently, been eliminated. Although the State party has thus taken the necessary measures to put an end to the kind of discrimination suffered by Mrs. Broeks at the time complained of, the Committee is of the view that the State party should offer Mrs. Broeks an appropriate remedy.

See also:

- *Danning v. The Netherlands* (180/1984), ICCPR, A/42/40 (9 April 1987) 151 at paras. 12.1, 12.4 and 13.
- *Zwaan de Vries v. The Netherlands* (182/1984), ICCPR, A/42/40 (9 April 1987) 160.

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- *Danning v. The Netherlands* (180/1984), ICCPR, A/42/40 (9 April 1987) 151 at para. 14.

  ...
  14. ...In the light of the explanations given by the state party with respect to the differences made by Netherlands legislations between married and unmarried couples...the Committee is persuaded that the differentiation complained of by Mr. Danning is based on objective and reasonable criteria. The Committee observes, in this connection, that the decision to enter into a legal status by marriage, which provides, in Netherlands law, both for certain benefits and for certain duties and responsibilities, lies entirely with the cohabiting persons. By choosing not to enter into marriage, Mr. Danning and his cohabitant have not, in law, assumed the full extent of the duties and responsibilities incumbent on married couples. Consequently, Mr. Danning does not receive the full benefits provided for in Netherlands law for married couples. The Committee concludes that the differentiation...does not constitute discrimination in the sense of article 26 of the Covenant.

See also:

- *Hoofdman v. The Netherlands* (602/1994), ICCPR, A/54/40 vol. II (3 November 1998) 36 (CCPR/C/64/D/602/1994).

- *Stalla Costa v. Uruguay* (198/1985), ICCPR, A/42/40 (9 July 1987) 170 at paras. 10 and 11.

  ...
  10. The main question before the Committee is whether the author of the communication is a victim of a violation of article 25(c) of the Covenant because, as he alleges, he has not been permitted to have access to public service on general terms of equality. Taking into account the social and political situation in Uruguay during the years of military rule, in particular the dismissal of many public servants pursuant to Institutional Act No.7, the Committee understands the enactment of Act no. 15.737 of 22 March 1985 by the new democratic Government of Uruguay as a measure of redress. Indeed, the Committee observes that Uruguayan public officials dismissed on ideological, political or trade-union grounds were victims of violations of article 25 of the Covenant and as such are entitled to have an effective remedy under article 2, paragraph 3(a), of the Covenant. The Act should be looked upon as such a remedy. The implementation of the Act, therefore, cannot be regarded as incompatible with the reference to "general terms of equality" in article 25(c) of the Covenant. Neither can the implementation of the Act be regarded as an invidious distinction under article 2, paragraph 1, or as prohibited discrimination within the terms of article 26 of the Covenant.

  11. The Human Rights Committee...is of the view that the facts as submitted do not sustain the author's claim that he has been denied access to public service in violation of article

25(c) or that he is a victim of an invidious distinction, that is, of discrimination within the meaning of articles 2 and 26 of the Covenant.

See also:

- *Muñoz v. Peru* (203/1986), ICCPR, A/44/40 (4 November 1988) 200 at Individual Opinion by Mr. Bertil Wennergren, 208 at paras. 1 and 4.

- *P. P. C. v. The Netherlands* (212/1985), ICCPR, A/43/40 (24 March 1988) 244 at para. 6.2.

  ...
  6.2 ...The Committee has already had an opportunity to observe that the scope of article 26 can...cover cases of discrimination with regard to social security benefits (Communications Nos. 172/1984, 180/1984 and 182/1984)...It considers, however, that the scope of article 26 does not extend to differences of results in the application of common rules in the allocation of benefits. In the case at issue, the author merely states that the determination of compensation benefits on the basis of a person's income in the month of September led to an unfavourable result in his case. Such determination is, however, uniform for all persons with a minimum income in the Netherlands. Thus, the Committee finds that the law in question is not *prima facie* discriminatory, and that the author does not, therefore, have a claim...

- *M. J. G. v. The Netherlands* (267/1987), ICCPR, A/43/40 (24 March 1988) 271 at para. 3.2.

  ...
  3.2 The Committee notes that the author claims he is a victim of discrimination on the grounds of "other status" (Covenant, art. 26 in fine) because, being a soldier during the period of his military service, he could not appeal against a summons like a civilian. The Committee considers, however, that the scope of application of article 26 cannot be extended to cover situations such as the one encountered by the author. The Committee observes, as it did with respect to Communication No.245/1987 (*R.T.Z. v. The Netherlands*), that the Covenant does not preclude the institution of compulsory military service by States parties, even though this means that some rights of individuals may be restricted during military service, within the exigencies of such service. The Committee notes, in this connection, that the author has not claimed that the Netherlands military penal procedures are not being applied equally to all Netherlands citizens serving in the Netherlands armed forces. It therefore concludes that the author has no claim under article 2 of the Optional Protocol.

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- *V. M. R. B. v. Canada* (236/1987), ICCPR, A/43/40 (18 July 1988) 258 at paras. 6.3 and 7.

...
6.3 ...With respect to articles 18 and 19 of the Covenant, the Committee notes that the author has not submitted any evidence to substantiate how his exercise of freedom of conscience or expression has been restricted in Canada. His apparent contention that the deportation proceedings resulted from the State party's disapproval of his political opinions is refuted by the State party's uncontested statement that, as early as November 1980, he had been excluded from re-entering Canada on clear national security grounds...Deportation of an alien on security grounds does not constitute an interference with the rights guaranteed by articles 18 and 19 of the Covenant. With respect to articles 2 and 26 of the Covenant, the author has failed to establish how the deportation of an alien on national security grounds constitutes discrimination.

7. The Human Rights Committee therefore decides:

> (a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol because the author's claims are either unsubstantiated or incompatible with the provisions of the Covenant...

- *B. d. B. et al. v. The Netherlands* (273/1989), ICCPR, A/44/40 (30 March 1989) 286 at paras. 6.5-6.7.

...
6.5 With regard to an alleged violation of article 26, the Committee recalls that its first sentence stipulates that "all persons are entitled without discrimination to the equal protection of the law." In this connection, it observes that this provision should be interpreted to cover not only entitlements which individuals entertain *vis-à-vis* the State but also obligations assumed by them pursuant to law. Concerning the State party's argument that the BVG is not a State organ and that the Government cannot influence concrete decisions of industrial insurance boards, the Committee observes that a State party is not relieved of its obligations under the Covenant when some of its functions are delegated to other autonomous organs.

6.6 The authors complain about the application to them of legal rules of a compulsory nature, which for unexplained reasons were allegedly not applied uniformly to some other physiotherapy practices; regardless of whether the apparent non-application of the compulsory rules on insurance contributions in other cases may have been right or wrong, it has not been alleged that these rules were incorrectly applied to the authors...furthermore, the Committee is not competent to examine errors allegedly committed in the application of

laws concerning persons other than the authors of a communication.

6.7 The Committee also recalls that article 26, second sentence, provides that the law of States parties should "guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The Committee notes that the authors have not claimed that their different treatment was attributable to their belonging to any identifiably distinct category which could have exposed them to discrimination on account of any of the grounds enumerated or "other status" referred to in article 26 of the Covenant. The Committee, therefore, finds this aspect of the authors' communication to be inadmissible under article 3 of the Optional Protocol.

- *Gueye v. France* (196/1983), ICCPR, A/44/40 (3 April 1989) 189 at paras. 5.3, 9.4, 9.5 and 10.

...
5.3 The Committee took note of the State party's argument that, as the alleged violations derived from a law enacted in 1979, the communication should be declared inadmissible on the grounds that the interpretative declaration made by France upon ratification of the Optional Protocol precluded the Committee from considering alleged violations that derived from acts or events occurring prior to 17 May 1984, the date on which the Optional Protocol entered into force with respect to France. The Committee observed in this connection that in a number of earlier cases (Nos. 6/1977 and 24/1977), it had declared that it could not consider an alleged violation of human rights said to have taken place prior to the entry into force of the Covenant for a State party, unless it is a violation that continues after that date or has effects which themselves constitute a violation of the Covenant after that date. The interpretative declaration of France further purported to limit the Committee's competence *ratione temporis* to violations of a right set forth in the Covenant, which result from "acts, omissions, developments or events occurring after the date on which the Protocol entered into force" with respect to France. The Committee took the view that it had no competence to examine the question whether the authors were victims of discrimination at any time prior to 17 May 1984; however, it remained to be determined whether there had been violations of the Covenant subsequent to the said date, as a consequence of acts or omissions related to the continued application of laws and decisions concerning the rights of the applicants.
...
9.4 The Committee has noted the authors' claim that they have been discriminated against on racial grounds, that is, one of the grounds specifically enumerated in article 26. It finds that there is no evidence to support the allegation that the state party has engaged in racially discriminating practices *vis-à-vis* the authors. It remains, however, to be determined whether the situation encountered by the authors falls within the purview of article 26. The

Committee recalls that the authors are not generally within French jurisdiction, except that they rely on French legislation in relation to the amount of their pension rights. It notes that nationality does not figure among the prohibited grounds of discrimination listed in article 26, and that the Covenant does not protect the right to a pension, as such. Under article 26, discrimination in the equal protection of the law is prohibited on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. There has been a differentiation by reference to nationality acquired upon independence. In the Committee's opinion, this falls within the reference to "other status" in the second sentence of article 26. The Committee takes into account, as it did in Communication No. 182/1984, that "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.

9.5 In determining whether the treatment of the authors is based on reasonable and objective criteria, the Committee notes that it was not the question of nationality which determined the granting of pensions to the authors but the services rendered by them in the past...A subsequent change in nationality cannot by itself be considered as a sufficient justification for different treatment, since the basis for the grant of the pension was the same service which both they and the soldiers who remained French had provided. Nor can difference in the economic, financial and social conditions as between France and Senegal be invoked as a legitimate justification. If one compared the case of retired soldiers of Senegalese nationality in Senegal with that of retired soldiers of French nationality in Senegal, it would appear that they enjoy the same economic and social conditions. Yet, their treatment for the purpose of pension entitlements would differ. Finally, the fact that the State party claims that it can no longer carry out checks of identity and family situation, so as to prevent abuses in the administration of pension schemes cannot justify a difference in treatment. In the Committee's opinion, mere administrative convenience or the possibility of some abuse of pension rights cannot be invoked to justify unequal treatment. The Committee concludes that the difference in treatment of the authors is not based on reasonable and objective criteria and constitutes discrimination prohibited by the Covenant.

10. The Human Rights Committee...is of the view that the events of this case, in so far as they produced effects after 17 May 1984 (the date of entry into force of the Optional Protocol for France), disclose a violation of article 26 of the Covenant.

- *Vuolanne v. Finland* (265/1987), ICCPR, A/44/40 (7 April 1989) 249 at paras. 9.3 and 9.7.

...
9.3 The Committee...observes that as a general proposition, the Covenant does not contain

any provision exempting from its application certain categories of persons. According to article 2, paragraph 1, "each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The all-encompassing character of the terms of this article leaves no room for distinguishing between different categories of persons, such as civilians and members of the military, to the extent of holding the Covenant to be applicable in one case but not in the other. Furthermore, the *travaux préparatoires* as well as the Committee's general comments indicate that the purpose of the Covenant was to proclaim and define certain human rights for all and to guarantee their enjoyment. It is, therefore, clear that the Covenant is not, and should not be conceived of in terms of whose rights shall be protected but in terms of what rights shall be guaranteed and to what extent. As a consequence the application of article 9 (4), cannot be excluded in the present case.

...

9.7 The Committee observes that article 2, paragraph 1, represents a general undertaking by States parties in relation to which a specific finding concerning the author of this communication has been made in respect to the obligation in article 9, paragraph 4. Accordingly, no separate determination is required under article 2, paragraph 1.

- *Morael v. France* (207/1986), ICCPR, A/44/40 (28 July 1989) 210 at paras. 2.4, 9.2 and 9.6.

...

2.4 The author states that to the extent that he was a victim of violations of article 14 by not having been given a fair hearing, he was also denied the equal protection of the law, as provided by article 26 of the Covenant. This, he claims, also constitutes a violation of article 17 (1), in that there was an attack on his honour and reputation, in particular that the proceedings against him tarnished his reputation as a company officer and that he is now prohibited by the bankruptcy law from exercising many managerial functions.

...

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 "Societe anonyme d cartonneries mecaniques 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.

- *Bhinder v. Canada* (208/1986), ICCPR, A/45/40 vol. II (9 November 1989) 50 at para. 6.2.

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...
6.2 ...If the requirement that a hard hat be worn is seen as a discrimination *de facto* against persons of the Sikh religion under article 26, then, applying criteria now well established in the jurisprudence of the Committee, the legislation requiring that workers in federal employment be protected from injury and electric shock by the wearing of hard hats is to be regarded as reasonable and directed towards objective purposes that are compatible with the Covenant.

- *Delgado Páez v. Colombia* (195/1985), ICCPR, A/45/40 vol. II (12 July 1990) 43 at paras. 2.1-2.7 and 5.10.

...
2.1 In March 1983, the author was appointed by the Ministry of Education as a teacher of religion and ethics at a secondary school in Leticia, Colombia. He was elected vice-president of the teachers' union. As an advocate of "liberation theology", his social views differed from those of the then Apostolic Prefect of Leticia.

2.2 In October 1983, the Apostolic Prefect sent a letter to the Education Commission withdrawing the support that the Church had given to Mr. Delgado. On 10 December 1983, the Apostolic Prefect wrote to the Police Inspector accusing Mr. Delgado of having stolen money from a student.

2.3 On 25 August 1984, the Circuit Court dismissed all charges against the author, having established that the accusation of theft was unfounded.

2.4 On 5 February 1984, Mr. Delgado was informed that he would no longer teach religion. Instead, a course in manual labour and handicrafts (*manualidades y artesanías*), for which he had no training or experience, was assigned to him. In order not to lose employment altogether, he endeavoured to teach these subjects.

2.5 On 29 May 1984, the author requested from the Ministry of Education two weeks' leave for the period from 26 June to 10 July 1984 to attend an advanced course at Bogotá to further his teaching qualifications. He and other teachers were admitted to the course on 5 July 1984, but Mr. Delgado was subsequently denied leave. He considered this to be unjustified discrimination and decided to attend the course, also taking into account that, as a result of a national strike (paro nacional), the teachers were, by decree of the Ministry of Education, on enforced vacation (*vacaciones forzosas*).

2.6 By administrative decisions of the Ministry of Education, dated 12 July, and 11 and 25 September 1984, he was suspended from his post for 60 days, and a six-months' salary freeze

was imposed on him on grounds of having abandoned his post without permission from the Principal. On 27 November 1984, the author requested the annulment of these administrative decisions (*recurso de reposición*), arguing that he had not abandoned his post, but that the law allowed teachers to take such special courses and that he had been duly admitted to the course with the approval of the Ministry of Education. The action was dismissed. He then submitted an appeal, and on 3 December 1985, by decision of the Ministry of Education, the prior decisions of suspension and salary freeze were annulled.

2.7 Convinced that he was a victim of discrimination by the ecclesiastical and educational authorities of Leticia, the author took the following steps:

> (a) On.17 May 1985, he submitted a complaint to the Office of the Regional Attorney on grounds of alleged irregularities committed by the Fondo Educativo Regional (Regional Education Fund) in his case;
>
> (b) On 18 May 1985, he submitted a complaint to the penal court of Leticia, accusing the Apostolic Prefect of slander and abuse (*injuria y calumnia*);
>
> (c) On 28 May, 4 June and 3 October 1985, he wrote to the Office of the Attorney General of the Republic, expressing concern about the denial of justice at the regional level, attributable to the alleged influence of the Apostolic Prefect;
>
> (d) On 13 May 1986, he again wrote to the Attorney General describing the pressures he had been and was being subjected to in order to force him to resign. He indicated, *inter alia*, that on 23 November 1983 the Apostolic Prefect had written to the Secretary of Education asking the latter in specific and clear terms:
>
> "to bring pressure on me to resign from my post, and this in fact happened,. for, on 2 December 1983, I was summoned to the office of the Secretary of Education and orally informed that the Monsignor was putting pressure on him and that I therefore had to resign from my post as a teacher, failing which criminal proceedings would be instituted against me. I promptly informed the president of the teachers' union and the teachers' representative on the Promotion Board of such an outrage and they immediately went to the office of the Secretary of Education, who repeated that it had nothing to do with him, but that he had been acting at the Monsignor's insistence. I of course refused to resign, but the threat was carried out and criminal proceedings were instituted against me."

...

5.10 Article 26 requires that all persons are entitled without discrimination, to be equal before the law and to receive equal protection by the law. The Committee finds that neither the terms of Colombian law nor the application of the law by the courts or other authorities

discriminated against Mr. Delgado, and finds that there was no violation of article 26.

- *Järvinen v. Finland* (295/1988), ICCPR, A/45/40 vol. II (25 July 1990) 101 at paras. 6.2-6.6 and 7.

...
6.2 ...[T]he prohibition of discrimination under article 26 is not limited to those rights which are provided for in the Covenant.

6.3 Article 26 of the Covenant, while prohibiting discrimination and guaranteeing equal protection of the law to everyone, 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. b/

6.4 In determining whether the prolongation of the term for alternative service from twelve to sixteen months by Act No. 647/85, which was applied to Mr. Järvinen, was based on reasonable and objective criteria, the Committee has considered in particular the *ratio legis* of the Act and has found that the new arrangements were designed to facilitate the administration of alternative service. The legislation was based on practical considerations and had no discriminatory purpose.

6.5 The Committee is, however, aware that the impact of the legislative differentiation, works to the detriment of genuine conscientious objectors, whose philosophy will necessarily require them to accept civilian service. At the same time, the new arrangements were not merely for the convenience of the State alone. They removed from conscientious objectors the often difficult task of convincing the examination board of the genuineness of their beliefs, and they allowed a broader range of individuals potentially to opt for the possibility of alternative service.

6.6 In all the circumstances, the extended length of alternative service is neither unreasonable nor punitive.
...
7. The Human Rights Committee...is of the view that the terms of alternative service imposed on Mr. Järvinen...do not disclose a violation of article 26 of the Covenant.

Notes

...

b/ See Communication No. 196/1985 (*Gueye et al. v. France*), final views adopted on 3 April 1989, para. 9.4; Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40 (A/44/40, annex X, sect. B).

For dissenting opinions in this context, see Järvinen v. Finland (295/1988), ICCPR, A/45/40 vol. II (25 July 1990) 101 at Individual Opinion by Messrs. Francisco Aquilar Urbina and Fausto Pocar, 106 and Individual Opinion by Mr. Bertil Wennergren, 107.

- *Sprenger v. The Netherlands* (395/1990), ICCPR, A/47/40 (31 March 1992) 311 (CCPR/C/44/D/395/1990) at paras. 7.2-7.4 and Individual Opinion by Mr. Nisuko Ando, Mr. Kurt Herndl and Mr. Birama Ndiaya, 315.

  ...
  7.2 The Committee observes that, although a State is not required under the Covenant to adopt social security legislation, if it does, such legislation must comply with article 26 of the Covenant. Equality before the law implies that any distinctions in the enjoyment of benefits must be based on reasonable and objective criteria. b/

  7.3 ...the State party submits that there are objective differences between married and unmarried couples, which justify different treatment. In this context the State party refers to the Committee's views in *Danning v. The Netherlands*, in which a difference of treatment between married and unmarried couples was found not to constitute discrimination within the meaning of article 26 of the Covenant.

  7.4 The Committee recalls that its jurisprudence permits differential treatment only if the grounds therefore are reasonable and objective. Social developments occur within States parties and the Committee has in this context taken note of recent legislation reflecting these developments, including the amendments to the Health Insurance Act. The Committee has also noted the explanation of the State party that there has been no general abolition of the distinction between married persons and cohabitants, and the reasons given for the continuation of this distinction. The Committee finds this differential treatment to be based on reasonable and objective grounds. The Committee recalls its findings in communication No. 180/1984 and applies them to the present case.

  Notes

  ...
  b/ See [Official Records of the General Assembly, Forty-second Session Supplement No. 40 (A/42/40)], sect. B, *Broeks v. The Netherlands*, Communication No. 172/1984, and *ibid*., sect. D, *Zwaan-de Vries v. The Netherlands,* Communication No. 182/1984, Views adopted on 9 April 1987.

EQUALITY AND DISCRIMINATION - GENERAL

Individual Opinion by Mr. Nisuko Ando, Mr. Kurt Herndl and Mr. Birama Ndiaya

We concur in the Committee's finding that the facts before it do not reveal a violation of article 26 of the Covenant. We further believe that this is an appropriate case to expand on the Committee's rationale, as it appears in these views and in the Committee's views in Communications Nos. 180/194, *Danning v. The Netherlands* and 182/1984, *Zwaan-de-Vries v. The Netherlands*. a/

While it is clear that article 26 of the Covenant postulates an autonomous right to non-discrimination, we believe that the implementation of this right may take different forms, depending on the nature of the right to which the principle of non-discrimination is applied.

We note, firstly, that the determination whether prohibited discrimination within the meaning of article 26 has occurred depends on complex considerations, particularly in the field of economic, social and cultural rights. Social security legislation, which is intended to achieve aims of social justice, necessarily must make distinctions. While the aims of social justice vary from country to country, they must be compatible with the Covenant. Moreover, whatever distinctions are made must be based on reasonable and objective criteria. For instance, a system of progressive taxation, under which persons with higher incomes fall into a higher tax bracket and pay a greater percentage of their income for taxes, does not entail a violation of article 26 of the Covenant, since the distinction between higher and lower incomes is objective and the purpose of more equitable distribution of wealth is reasonable and compatible with the aims of the Covenant.

Surely, it is also necessary to take into account the reality that the socio-economic and cultural needs of society are constantly evolving, so that legislation - in particular in the field of social security - may well, and often does, lag behind developments. Accordingly, article 26 of the Covenant should not be interpreted as requiring absolute equality or non-discrimination in that field at all times; instead, it should be seen as a general undertaking on the part of States parties to the Covenant regularly to review their legislation in order to ensure that it corresponds to the changing needs of society. In the field of civil and political rights, a State party is required to respect Covenant rights such as the right to a fair trial, freedom of expression and freedom of religion immediately from the date of entry into force of the Covenant, and to do so without discrimination. On the other hand, with regard to rights enshrined in the International Covenant on Economic, Social and Cultural Rights, it is generally understood that States parties may need time for the progressive implementation of these rights and to adapt relevant legislation in stages; moreover, constant efforts are needed to ensure that distinctions that were reasonable and objective at the time of enactment of a social security provision are not unreasonable and discriminatory by the socio-economic evolution of society. Finally, we recognize that legislative review is a complex process entailing consideration of many factors, including limited financial resources, and the

potential effects of amendments on other existing legislation...

Notes

a/ See Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40), annex VIII, sects. C and D, Views adopted on 9 April 1987.

- *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.

- *Orihuela v. Peru* (309/1988), ICCPR, A/48/40 vol. II (14 July 1993) 48 (CCPR/C/48/D/309/1988) at para. 6.4.

...
6.4 The Committee has noted the author's claim that he has not been treated equally before the Peruvian courts in connection with his pension claims. The State party has not refuted his allegation that the courts' inaction, the delays in the proceedings and the continued failure to implement the resolution of October 1989 concerning his severance pay are politically motivated. The Committee concludes on the basis of the material before it, that the denial of severance pay to a long standing civil servant who is dismissed by the Government constitutes, in the circumstances of this case, a violation of article 26 and that Mr Orihuela Valenzuela did not benefit "without any discrimination (from) equal protection of the law". Therefore the Committee finds that there has been a violation of article 26 of the Covenant.

- *Brinkhof v. The Netherlands* (402/1990), ICCPR, A/48/40 vol. II (27 July 1993) 124

(CCPR/C/48/D/402/1990) at paras. 9.2 and 9.3.

...

9.2 The issue before the Committee is whether the differentiation in treatment as regards exemption from military service between Jehovah's Witnesses and other conscientious objectors amounts to prohibited discrimination under article 26 of the Covenant. The Committee has noted the State party's argument that the differentiation is based on reasonable and objective criteria, since Jehovah's Witnesses form a closely-knit social group with strict rules of behavior, membership of which is said to constitute strong evidence that the objections to military and substitute service are based on genuine religious convictions. The Committee notes that there is no legal possibility for other conscientious objectors to be exempted from the service altogether; they are required to substitute service; when they refuse to do this for reasons of conscience, they are prosecuted and, if convicted, sentenced to imprisonment.

9.3 The Committee considers that the exemption of only one group of conscientious objectors and the inapplicability of exemption for all others cannot be considered reasonable. In this context, the Committee refers to its General Comment on article 18 and emphasizes that, when a right of conscientious objection to military service is recognized by a State party, no differentiation shall be made among conscientious objectors on the basis of the nature of their particular beliefs. However, in the instant case, the Committee considers that the author has not shown that his convictions as a pacifist are incompatible with the system of substitute service in the Netherlands or that the privileged treatment accorded to Jehovah's Witnesses adversely affected his rights as a conscientious objector against military service. The Committee therefore finds that (the author) is not a victim of a 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 paras. 3.1 and 9.5.

...

3.1 The author complains that he and other individuals who do not share the views or adhere to the ruling party of President Obiang or who do not at least belong to his clan (the Mongomo clan) are subjected to varying degrees of discrimination, intimidation and persecution. More particularly, the author claims to have been a victim of systematic persecution by the Prime Minister, the Deputy Prime Minister, the Governor of Bioko (North) and the Minister of External Relations, all of whom, through their respective services, have pronounced threats against him, primarily on account of his outspoken views on the regime in place. He further contends that the ambassadors of Equatorial Guinea in Spain, France and Gabon have been instructed to "make his life difficult" whenever he

travels abroad.

...

9.5 ...[O]n the basis of the information before it, the Committee concludes that Mr. Oló Bahamonde has been discriminated against because of his political opinions and his open criticism of, and opposition to, the government and the ruling political party, in violation of article 26 of the Covenant.

- *Cavalcanti v. The Netherlands* (418/1990), ICCPR, A/49/40 vol. II (22 October 1993) 114 (CCPR/C/49/D/418/1990) at paras. 7.3 and 7.4.

...

7.3 The Committee recalls its earlier jurisprudence and observes that, although a State is not required under the Covenant to adopt social security legislation, if it does, such legislation must comply with article 26 of the Covenant.

7.4 ...The Committee finds that the requirement of being unemployed at the time of application for benefits is…reasonable and objective, in view of the purposes of the legislation in question, namely to provide assistance to persons who are unemployed. The Committee therefore concludes that the facts before it do not reveal a violation of article 26 of the Covenant.

- *J. A. M. B.-R v. The Netherlands* (477/1991), ICCPR, A/49/40 vol. II (7 April 1994) 294 (CCPR/C/50/D/477/1991) at paras. 2.1-2.4 and 5.3-5.5.

...

2.1 The author, who is married, was employed as a schoolteacher from August 1982 to August 1983. As of 1 August 1983, she was unemployed. She claimed, and received, unemployment benefits by virtue of the Unemployment Act. Pursuant to the provisions of that Act, the benefits were granted for a maximum period of six months, that is, until 1 February 1984. The author subsequently found new employment as of 18 August 1985.

2.2 Having received benefits under the Unemployment Act for the maximum period ending on 1 February 1984, the author contends that she was entitled, thereafter, to a benefit under the then Unemployment Provision Act, for a period of up to two years...

2.3 On 1 April 1985, the author applied for benefits under the Unemployment Benefits Act; her application was, however, rejected by the Municipality of De Lier on 23 May 1985, on the grounds that as a married woman who did not qualify as a breadwinner, she did not meet the requirements of the Act. The rejection was based on article 13, paragraph 1, subsection

1, of the Unemployment Benefits Act, which did not apply to married men.

2.4 On 26 February 1987, the municipality confirmed its earlier decision. On 26 April 1989, however, it partly revoked its decision and granted the author benefits under the Unemployment Benefits Act for the period from 23 December 1984 to 18 August 1985. It still refused benefits for the period from 1 February to 23 December 1984 (see para. 2.5 below). The author appealed the decision to the Board of Appeal at The Hague, which, on 15 November 1989, declared her appeal unfounded. The author subsequently appealed to the Central Board of Appeal, which, by judgement of 5 July 1991, confirmed the Board of Appeal's decision.

...

5.3 The Committee notes that the author contends that she is entitled without discrimination to benefits for the period of 1 February to 23 December 1984 and that the amendments in the law do not provide her with a remedy. The Committee notes that the author applied for benefits under the Unemployment Benefits Act on 1 April 1985, and that benefits were granted retroactively as from 23 December 1984. With reference to its constant jurisprudence, b/ the Committee recalls that, while article 26 requires that discrimination be prohibited by law and that all persons be guaranteed equal protection against discrimination, it does not concern itself with which matters may be regulated by law. Thus, article 26 does not of itself require States parties either to provide social security benefits or to provide them retroactively, in respect of the date of application. However, when such benefits are regulated by law, then such a law must comply with article 26 of the Covenant.

5.4 The Committee notes that the law in question grants to men and women alike benefits as from the day of application, unless there are sufficient reasons to grant benefits as from an earlier date. The Committee also notes the view expressed by the Central Board of Appeal that benefits for those women who did not qualify for benefits under the old law should be granted retroactively as from 23 December 1984 but not earlier. The author has failed to substantiate, for purposes of admissibility, that these provisions were not equally applied to her, in particular that men who belatedly apply are granted wider retroactive benefits, as from the date in which they have become eligible for benefits, whereas she, as a woman, was denied such benefits. Accordingly, the Committee finds that the author has failed to substantiate her claim under article 2 of the Optional Protocol in this regard.

5.5 As regards the author's claim that the discriminatory nature of the law from 1 February to 23 December 1984, and the application of the law at that time, made her a victim of a violation of the right to equality before the law, the Committee notes that the author, in the period between 1 February and 23 December 1984, did not apply for benefits under the Unemployment Benefits Act. Therefore, she cannot claim to be a victim of a violation of article 26 by the application of the law in force during that period, even if the law in question were found to be discriminatory in respect of some of those applying under it. This aspect

of the communication is thus inadmissible under article 1 of the Optional Protocol.

- *Neefs v. The Netherlands* (425/1990), ICCPR, A/49/40 vol. II (15 July 1994) 120 (CCPR/C/51/D/425/1990) at paras. 7.2-7.4.

...
7.2 The Committee refers to its prior jurisprudence and reiterates that, although a State is not required under article 26 of the Covenant to adopt social security legislation, if it does, such legislation must comply with article 26 of the Covenant. 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. [1]

7.3 In the instant case, the Committee notes that the author's claim that he is a victim of a violation of article 26, is based on the fact that he is sharing a household with his mother and on that basis receives a lower level of benefit under the Social Security Act than he would have if he had shared it with a non-relative or with a relative in respect of whom the regulations under the Act allow evidence of a commercially shared household.

7.4 The Committee observes that benefits under the Social Security Act are granted to persons with low or no income in order to provide for their costs of living. The author himself has conceded that his costs of living are reduced since he is sharing a household with his mother, be this on a commercial basis or on a basis of mutual support. In the light of the explanations given by the State party, the Committee finds that the different treatment of parents and children and of other relatives respectively, contained in the regulations under the Social Security Act, is not unreasonable nor arbitrary, and its application in the author's case does not amount to a violation of article 26 of the Covenant.

- *Pepels v. The Netherlands* (484/1991), ICCPR, A/49/40 vol. II (15 July 1994) 221 (CCPR/C/51/D/484/1991) at paras. 7.2 and 7.5.

...
7.2 The Committee refers to its earlier jurisprudence and recalls that, while article 26 requires that discrimination be prohibited by law and that all persons be guaranteed equal protection against discrimination, it does not concern itself with which matters may be regulated by law. Thus, article 26 does not of itself require States parties either to provide social security benefits or to provide them retroactively in respect of the date of application. However, when such benefits are regulated by law, then such law must comply with article 26 of the Covenant.

...

7.5 The Committee observes that since December 1988 AWW benefits are granted to widows and widowers alike. The Act provides for the grant of retroactive benefits for up to one year preceding the date of application; only in exceptional circumstances can benefits be granted as from an earlier date. This provision is being applied to men and women alike, and the information before the Committee does not show that Mr. Pepels was treated differently than others. The Committee, therefore, concludes that the way in which the law is applied since 1988 does not reveal a violation of article 26 of the Covenant.

- *Cox v. Canada* (539/1993), ICCPR, A/50/40 vol. II (31 October 1994) 105 (CCPR/C/52/D/539/1993) at para. 10.4.

...

10.4 With regard to the allegations that, if extradited, Mr. Cox would be exposed to a real and present danger of a violation of articles 14 and 26 of the Covenant in the United States, the Committee observed that the evidence submitted did not substantiate, for purposes of admissibility, that such violations would be a foreseeable and necessary consequence of extradition. It does not suffice to assert before the Committee that the criminal justice system in the United States is incompatible with the Covenant. In this connection, the Committee recalled its jurisprudence that, under the Optional Protocol procedure, it cannot examine *in abstracto* the compatibility with the Covenant of the laws and practice of a State. 31/ For purposes of admissibility, the author has to substantiate that in the specific circumstances of his case, the courts in Pennsylvania would be likely to violate his rights under articles 14 and 26, and that he would not have a genuine opportunity to challenge such violations in United States courts. The author has failed to do so. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

Notes

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31/ Views in Communication No. 61/1979, *Leo Hertzberg et al. v. Finland*, para. 9.3.

For dissenting opinions in this context, see Cox v. Canada (539/1993), ICCPR, A/50/40 vol. II (31 October 1994) 105 (CCPR/C/52/D/539/1993) at Individual Opinion by Ms. Christine Chanet, 126 and Individual Opinion by Mr. Rajsoomer Lallah, 128.

EQUALITY AND DISCRIMINATION - GENERAL

- *Mónaco v. Argentina* (400/1990), ICCPR, A/50/40 vol. II (3 April 1995) 10 (CCPR/C/53/D/400/1990) at paras. 2.1-2.4, 3.1 and 10.6.

...

2.1 On 5 February 1977, Ximena Vicario's mother was taken with the then nine month-old child to the Headquarters of the Federal Police (Departamento Central de la Policía Federal) in Buenos Aires. Her father was apprehended in the city of Rosario on the following day. The parents subsequently disappeared, and although the National Commission on Disappeared Persons investigated their case after December 1983, their whereabouts were never established. Investigations initiated by the author herself finally led, in 1984, to locating Ximena Vicario, who was then residing in the home of a nurse, S.S., who claimed to have been taking care of the child after her birth. Genetic blood tests (*histocompatibilidad*) revealed that the child was, with a probability of 99.82 per cent, the author's granddaughter.

2.2 In the light of the above, the prosecutor ordered the preventive detention of S.S., on the ground that she was suspected of having committed the offences of concealing the whereabouts of a minor (*ocultamiento de menor*) and forgery of documents, in violation of articles 5, 12, 293 and 146 of the Argentine Criminal Code.

2.3 On 2 January 1989, the author was granted "provisional" guardianship of the child; S.S., however, immediately applied for visiting rights, which were granted by order of the Supreme Court on 5 September 1989. In this decision, the Supreme Court also held that the author had no standing in the proceedings about the child's guardianship since, under article 19 of Law 10.903, only the parents and the legal guardian have standing and may directly participate in the proceedings.

2.4 On 23 September 1989 the author, basing herself on psychiatric reports concerning the effects of the visits of S.S. on Ximena Vicario, requested the court to rule that such visits should be discontinued. Her action was dismissed on account of lack of standing. On appeal, this decision was upheld on 29 December 1989 by the Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal of Buenos Aires. With this, the author submits, available and effective domestic remedies have been exhausted. She adds that it would be possible to file further appeals in civil proceedings, but submits that these would be unjustifiably prolonged, to the extent that Ximena Vicario might well reach the age of legal competence by the time of a final decision. Furthermore, until such time as legal proceedings in the case are completed, her granddaughter must continue to bear the name given to her by S.S.

...

3.1 The author claims that the judicial decisions in the case violate article 14 (bis) of the Argentine Constitution, which guarantees the protection of the family, as well as articles 23 and 24 of the Covenant. It is further submitted that S.S.'s regular visits to the child entail some form of "psychoaffective" involuntary servitude in violation of article 15 of the

Argentine Constitution and article 8 of the Covenant. The fact that the author is denied standing in the guardianship proceedings is deemed to constitute a violation of the principle of equality before the law, as guaranteed by article 16 of the Argentine Constitution and articles 14 and 26 of the Covenant.

...

10.6 As to an alleged violation of article 26 of the Covenant, the Committee concludes that the facts before it do not provide sufficient basis for a finding that either Ms. Vicario or her grandmother were victims of prohibited discrimination.

- *Debreczeny v. The Netherlands* (500/1992), ICCPR, A/50/40 vol. II (3 April 1995) 59 (CCPR/C/53/D/500/1992) at para. 9.4.

...

9.4 The author has also claimed that the application of...restrictions to him is in violation of article 26 of the Covenant, because (a) the restrictions do not apply to volunteer firemen and to teaching staff and (b) in two cases, police officers were allowed to become members of the council of the municipality in which they served. The Committee notes that the exception for volunteer firemen and teaching staff is provided for by law and based on objective criteria, namely, for volunteer firemen, the absence of income dependency, and, for teaching staff, the lack of direct supervision by the municipal authority. With regard to the two specific cases mentioned by the author, the Committee considers that, even if the police officers concerned were in the same position as the author and were unlawfully allowed to take up their seats in the council, the failure to enforce an applicable legal provision in isolated cases does not lead to the conclusion that its application in other cases is discriminatory. a/ In this connection, the Committee notes that the author has not claimed any specific ground for discrimination and that the State party has explained the reasons for the different treatment stating that, in one case, the facts were materially different and that, in the other, the membership was unlawful but the court never had an opportunity to review it because the case was not brought before it by any of the interested parties. The Committee concludes therefore that the facts of Mr. Debreczeny's case do not reveal a violation of article 26 of the Covenant.

Notes

a/ See also the Committee's decision declaring inadmissible Communication No. 273/1988 (*B. d. B. et al. v. The Netherlands*) adopted on 30 March 1989, in which the Committee stated that it is "not competent to examine errors allegedly committed in the application of laws concerning persons other than authors of a communication" (para. 6.6).

EQUALITY AND DISCRIMINATION - GENERAL

- *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...

_____
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*).

_____

- *Simunek v. The Czech Republic* (516/1992), ICCPR, A/50/40 vol. II (19 July 1995) 89 (CCPR/C/54/D/516/1992) at paras. 11.3, 11.5-11.8 and 12.1.

...
11.3 As the Committee has already explained in its decision on admissibility...the right to property, as such, is not protected under the Covenant. However, a confiscation of private property or the failure by a State party to pay compensation for such confiscation could still entail a breach of the Covenant if the relevant act or omission was based on discriminatory grounds in violation of article 26 of the Covenant.
...
11.5 In the instant cases, the authors have been affected by the exclusionary effect of the requirement in Act 87/1991 that claimants be Czech citizens and residents of the Czech Republic. The question before the Committee, therefore, is whether these preconditions to restitution or compensation are compatible with the non-discrimination requirement of article 26 of the Covenant. In this context the Committee reiterates its jurisprudence that not all differentiation in treatment can be deemed to be discriminatory under article 26 of the Covenant. 27/ A differentiation which is compatible with the provisions of the Covenant and is based on reasonable grounds does not amount to prohibited discrimination within the

meaning of article 26.

11.6 In examining whether the conditions for restitution or compensation are compatible with the Covenant, the Committee must consider all relevant factors, including the authors' original entitlement to the property in question and the nature of the confiscations. The State party itself acknowledges that the confiscations were discriminatory, and this is the reason why specific legislation was enacted to provide for a form of restitution. The Committee observes that such legislation must not discriminate among the victims of the prior confiscations, since all victims are entitled to redress without arbitrary distinctions. Bearing in mind that the authors' original entitlement to their respective properties was not predicated either on citizenship or residence, the Committee finds that the conditions of citizenship and residence in Act 87/1991 are unreasonable. In this connection the Committee notes that the State party has not advanced any grounds which would justify these restrictions. Moreover, it has been submitted that the authors and many others in their situation left Czechoslovakia because of their political opinions and that their property was confiscated either because of their political opinions or because of their emigration from the country. These victims of political persecution sought residence and citizenship in other countries. Taking into account that the State party itself is responsible for the departure of the authors, it would be incompatible with the Covenant to require them permanently to return to the country as a prerequisite for the restitution of their property or for the payment of appropriate compensation.

11.7 The State party contends that there is no violation of the Covenant because the Czech and Slovak legislators had no discriminatory intent at the time of the adoption of Act 87/1991. The Committee is of the view, however, that the intent of the legislature is not alone dispositive in determining a breach of article 26 of the Covenant. A politically motivated differentiation is unlikely to be compatible with article 26. But an act which is not politically motivated may still contravene article 26 if its effects are discriminatory.

11.8 In the light of the above considerations, the Committee concludes that Act 87/1991 has had effects upon the authors that violate their rights under article 26 of the Covenant.

12.1 The Human Rights Committee...is of the view that the denial of restitution or compensation to the authors constitutes a violation of article 26 of the International Covenant on Civil and Political Rights.

Notes

...

27/ *Zwaan de Vries v. The Netherlands*, Communication No. 182/1984, Views adopted on 9 April 1987, para. 13.

EQUALITY AND DISCRIMINATION - GENERAL

See also:

- *Adam v. Czech Republic* (586/1994), ICCPR, A/51/40 vol. II (23 July 1996) 165 (CCPR/C/57/D/586/1994) at paras. 12.3-12.8 and 13.1.
- *Blazek et al. v. The Czech Republic* (857/1999), ICCPR, A/56/40 vol. II (12 July 2001) 168 at paras. 2.1, 5.4, 5.6-5.8, 6 and Individual Opinion by Nisuke Ando (concurring), 174.
- *Des Fours v. Czech Republic* (747/1997), ICCPR, A/57/40 vol. II (30 October 2001) 88 (CCPR/C/73/D/747/1997) at paras. 2.1-2.4, 2.6-2.7, 8.3-9.2.

- *Pons v. Spain* (454/1991), ICCPR, A/51/40 vol. II (30 October 1995) 30 (CCPR/C/55/D/454/1991) at paras. 9.3-9.5.

...

9.3 Before addressing the merits in this case, the Committee observes that although the right to social security is not protected, as such, in the International Covenant on Social and Political Rights, issues under the Covenant may nonetheless arise if the principle of equality contained in articles 14 and 26 of the Covenant is violated.

9.4 In this context the Committee reiterates its jurisprudence that not every differentiation in treatment can be deemed to be discriminatory under the relevant provisions of the Covenant. a/ A differentiation which is compatible with the provisions of the Covenant and is based on reasonable grounds does not amount to prohibited discrimination.

9.5 The Committee notes that the author claims to be the only unemployed substitute judge who does not receive unemployment benefits. The information before the Committee reveals, however, that the relevant category of recipients of unemployment benefits encompasses only those unemployed substitute judges who cannot immediately return to another post upon the completion of their temporary assignments. The author does not belong to this category, since he enjoys the status of a civil servant. In the Committee's opinion, a distinction between unemployed substitute judges who are not civil servants on leave and those who are cannot be deemed arbitrary or unreasonable. The Committee therefore concludes that the alleged differentiation in treatment does not entail a violation of the principle of equality and non-discrimination enunciated in article 26 of the Covenant.

Notes

a/ See Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40), annex VIII.D, Communication No. 182/1984 (*Zwaan de Vries v. The Netherlands*), Views adopted on 9 April 1987, para. 13; and *ibid*., No. 516/1992 (*Simunek et al. v. the Czech Republic*), Views adopted on 19 July 1995, para. 11.5.

EQUALITY AND DISCRIMINATION - GENERAL

- *Aduayom, Diasso and Dobou v. Togo* (422-424/1990), ICCPR, A/51/40 vol. II (12 July 1996) 17 (CCPR/C/51/D/422/1990/423/1990/424/1990) at paras. 7.5, 7.6 and 9.

...

7.5 The Committee recalls that the authors were all suspended from their posts for a period of well over five years for activities considered contrary to the interests of the Government; in this context, it notes that Mr. Dobou was a civil servant, whereas Messrs Aduayom and Diasso, were employees of the University of Benin, which is in practice State-controlled. As far as the case of Mr. Dobou is concerned, the Committee observes that access to public service on general terms of equality encompasses a duty, for the State, to ensure that there is no discrimination on the ground of political opinion or expression. This applies *a fortiori* to those who hold positions in the public service. The rights enshrined in article 25 should also be read to encompass the freedom to engage in political activity individually or through political parties, freedom to debate public affairs, to criticize the Government and to publish material with political content.

7.6 The Committee notes that the authors were suspended from their posts for alleged "desertion" of the same, after having been arrested for activities deemed to be contrary to the interests of the State party's Government. Mr. Dobou was a civil servant, whereas Messrs. Aduayom and Diasso were employees of the University of Benin, which is in practice State controlled. In the circumstances of the authors' respective cases, an issue under article 25 (c) arises in so far as the authors' inability to recover their posts between 30 June 1988 and 27 May and 1 July 1991, respectively, is concerned. In this context, the Committee notes that the non-payment of salary arrears to the authors is a consequence of their non-reinstatement in the posts they had previously occupied. The Committee concludes that there has been a violation of article 25(c) in the authors' case for the period from 30 June 1988 to 27 May and to 1 July 1991, respectively.

...

9 ...[T]he authors are entitled to an appropriate remedy, which should include compensation determined on the basis of a sum equivalent to the salary which they would have received during the period of non-reinstatement starting from 30 June 1988...

- *Nahlik v. Austria* (608/1995), ICCPR, A/51/40 vol. II (22 July 1996) 259 (CCPR/C/57/D/608/1995) at paras. 8.2 and 8.4.

...

8.2 The Committee has noted the State party's argument that the communication is inadmissible under article 1 of the Optional Protocol since it relates to alleged discrimination within a private agreement, over which the State party has no influence. The Committee

observes that under article 2 and 26 of the Covenant the State party is under an obligation to ensure that all individuals within its territory and subject to its jurisdiction are free from discrimination, and consequently the courts of States parties are under an obligation to protect individuals against discrimination, whether it occurs within the public sphere or among private parties in the quasi-public sector of, for example, employment. The Committee further notes that the collective agreement at issue in the instant case is regulated by law and does not enter into force except on confirmation by the Federal Minister for Labour and Social Affairs. Moreover, the Committee notes that this collective agreement concerns the staff of the Social Insurance Board, an institution of public law implementing public policy. For these reasons, the Committee cannot agree with the State party's argument that the communication should be declared inadmissible under article 1 of the Optional Protocol.

...

8.4 The Committee recalls that the right to equality before the law and to equal protection of the law without discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to discrimination within the meaning of article 26. In the instant case, the contested differentiation is based only superficially on a distinction between employees who retired before 1 January 1992 and those who retired after that date. Actually, this distinction is based on a different treatment of active and retired employees at that time. With regard to this distinction, the Committee considers that the author has failed to substantiate, for the purposes of admissibility, that the distinction was not objective or how it was arbitrary or unreasonable. Therefore, the Committee concludes that the communication is inadmissible under article 2 of the Optional Protocol.

For dissenting opinion in this context, see Nahlik v. Austria (608/1995), ICCPR, A/51/40 vol. II (22 July 1996) 259 (CCPR/C/57/D/608/1995) at Individual Opinion by Francisco José Aguilar Urbina, Prafullachandra Natwarlal Bhagwati, Elizabeth Evatt, Andreas Mavrommatis and Cecilia Medina Quiroga, 263.

- *Somers v. Hungary* (566/1993), ICCPR, A/51/40 vol. II (23 July 1996) 144 (CCPR/C/53/D/566/1993) at paras. 9.2-9.4, 9.6, 9.8 and 10.

...

9.2 The present communication was declared admissible only in so far as it may raise issues under article 26 of the Covenant. As the Committee explained, in its admissibility decision, the right to property as such is not protected under the Covenant. However, confiscation of private property or failure by a State party to pay compensation for such confiscation could still entail a breach of the Covenant if the relevant act or omission was based on discriminatory grounds in violation of article 26 of the Covenant.

9.3 ...The Committee notes that the confiscation itself is not at issue here, but rather the alleged discriminatory effect of the compensation law on the author and his mother.

9.4 ...[T]he only issue is whether the award of less than full compensation for the loss of the author's property, under Act XXV of 1991, is contrary to article 26 of the Covenant. The Committee observes that Act XXV contains objective compensation criteria, which are applied equally and without discrimination to individuals in the author's situation.

...

9.6 The corollary of the fact that the Covenant does not protect the right to property is that there is no right, as such, to have (expropriated or nationalized) property restituted. If a State party to the Covenant provided compensation for nationalization or expropriation on equal terms, it does not discriminate against those whose property was appropriated or nationalized. The Committee is of the opinion that section 7 of Act XXV of 1991 provides for compensation on equal terms...

...

9.8 ...As in the case of Act XXV, the criteria for the privatization of former State-owned property in Act LXXVIII of 1993 are objective. The State party has justified the (exclusionary) requirement that current tenants of former State-owned residential property have a "buy first option" even *vis-à-vis* the former owner of the property with the argument that tenants contribute to the maintenance of the property through improvements of their own. The Committee does not consider that the fact of giving the current tenants of former State-owned property priority in the privatization sale of such property is in itself unreasonable; the interests of the "current tenants", who may have been occupying the property for years, are deserving of protection. If the former owners are, moreover, compensated on equal and non-discriminatory terms (paragraph 9.6), the interplay between Act XXV of 1991 and of Act LXVIII of 1993 can be deemed compatible with article 26 of the Covenant; with respect to the application of the privatization legislation to the author's case, the Committee does not dispose of sufficient elements to conclude that its criteria were applied in a discriminatory manner.

10. The Human Rights Committee...is of the view that the facts as founds by the Committee do not reveal a breach of article 26 or of any other provision of the Covenant.

- *Drake v. New Zealand* (601/1994), ICCPR, A/52/40 vol. II (3 April 1997) 273 (CCPR/C/59/D/601/1994) at paras. 8.4-8.6.

...

8.4 The authors claim that the failure of New Zealand to provide a remedy for the injustices suffered by them during their incarceration by Japan, and for their residual disabilities and incapacities, violates article 26 of the Covenant. This claim relates to the distinction said to

have been made between civilian and war veterans, and between military personnel who were prisoners of the Japanese and those who were prisoners of the Germans. The authors and the groups of whom they are representatives include both civilians and war veterans.

8.5 As regards the claim that the exclusion of civilian detainees from entitlements under the War Pensions Act is discriminatory, the Committee notes from the information before it that the purpose of the Act is specifically to provide pension entitlements for disability and death of those who were in the service of New Zealand in wartime overseas, not to provide compensation for incarceration or for human rights violations. In other words if disability arises from war service it is irrelevant to the entitlement to a pension whether the person suffered imprisonment or cruel treatment by captors. Keeping in mind the Committee's prior jurisprudence 12/ according to which a distinction based on objective and reasonable criteria does not constitute discrimination within the meaning of article 26 of the Covenant, the Committee considers that the authors' claim is incompatible with the provisions of the Covenant and thus inadmissible under article 3 of the Optional Protocol.

8.6 The authors have further claimed that those who were in war service are victims of a violation of article 26 of the Covenant because of the narrow class of disability for which pensions are made available under the War Pensions Act. The Committee notes that the authors have failed to provide information as to how this affects their personal situation. The authors have thus failed to substantiate their claim, for purposes of admissibility, and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

Notes

...

12/ See, *inter alia*, the Committee's Views concerning Communications Nos. 172/1984 (*Broeks v. The Netherlands*), para. 13; 180/1984 (*Danning v. The Netherlands*), para. 13; 182/1984 (*Zwaan-de Vries v. The Netherlands*), para. 13; 415/1990 (*Pauger v. Austria*), para. 7.3; and 425/1990 (*Neefs v. The Netherlands*), para. 7.2. See also the Committee's General Comment No. 18 (Non-discrimination), para. 13.

- *Kall v. Poland* (552/1993), ICCPR, A/52/40 vol. II (14 July 1997) 105 (CCPR/C/60/D/552/1993) at paras. 13.1, 13.2, 13.4 and 13.6.

...

13.1 The question before the Committee is whether the author's dismissal, the verification proceedings and the subsequent failure to employ him in the Police Force violated his rights under article 25(c) of the Covenant.

13.2 The Committee notes that article 25(c) provides every citizen with the right and the opportunity, without any distinctions based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and without unreasonable restrictions to have access, on general terms of equality, to public service in his country. The Committee further observes, however, that this right does not entitle every citizen to obtain guaranteed employment in the public service.

...

13.4 The Committee notes that the termination of the author's post was the result of the dissolution of the Security Police by the Protection of State Office Act and by reason of the dissolution of the Security Police, the posts of all members of the Security Police were abolished without distinction or differentiation.

...

13.6 ...As reflected above, article 25 (c) does not entitle every citizen to employment within the public service, but to access on general terms of equality. The information before the Committee does not sustain a finding that this right was violated in the author's case.

For dissenting opinion in this context, see Kall v. Poland (552/1993), ICCPR, A/52/40 vol. II (14 July 1997) 105 (CCPR/C/60/D/552/1993) at Individual Opinion by Elizabeth Evatt, Cecilia Medina Quiroga and by Christine Chanet, 113 at para. 2.

- *Drobek v. Slovakia* (643/1995), ICCPR, A/52/40 vol. II (14 July 1997) 300 (CCPR/C/60/D/643/1995) at paras. 6.3-6.5 and 7.

...

6.3 Although the author's claim relates to property rights, which are not as such protected by the Covenant, he contends that the 1991 law violates his rights under articles 2 and 26 of the Covenant in that it applies only to individuals whose property was confiscated after 1948 and thus excludes from compensation in respect of property taken from ethnic Germans by a 1945 decree of the pre-Communist regime. The Committee has already had occasion to hold that laws relating to property rights may violate articles 2 and 26 of the Covenant if they are discriminatory in character. The question the Committee must therefore resolve in the instant case is whether the 1991 law applied to the claimant falls into this category.

6.4 In its views on communication 516/1992 (*Simunek v. Czech Republic*), the Committee held that the 1991 law violated the Covenant because it excluded from its application individuals whose property was confiscated after 1948 simply because they were not nationals or residents of the country after the fall of the Communist regime in 1989. The instant case differs from the views in the above case, in that the author in the present case does not allege discriminatory treatment in respect of confiscation of property after 1948. Instead, he contends that the 1991 law is discriminatory because it does not also compensate

victims of the 1945 seizures decreed by the pre-Communist regime.

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 the 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 allegedly committed by earlier regimes. The author has failed to substantiate such a claim with regard to articles 2 and 26.

...

7. The Human Rights Committee therefore decides that that:

> (a) The communication is inadmissible under article 2 of the Optional Protocol...

- *van Oord v. The Netherlands* (658/1995), ICCPR, A/52/40 vol. II (23 July 1997) 311 (CCPR/C/60/D/658/1995) at paras. 8.4-8.6.

...

8.4 The Committee has noted the authors' claim that they have been discriminated against on the basis of their nationality, because (a) their benefits are reduced for the period between their 15th birthday and 1 January 1957 that they were not living in the Netherlands, whereas they are not reduced for Dutch citizens living in the Netherlands, and (b) their benefits are reduced and they are required to pay taxes on them whereas other former citizens of the Netherlands, now citizens of Canada, Australia or New Zealand do not suffer similar reductions.

8.5 With regard to this claim, the Committee observes that it is undisputed that the criteria used in determining the authors' pension entitlements are equally applied to all former Dutch citizens now living in the USA, and that the authors also benefit from a treaty concluded between the Netherlands and the USA, which has the effect of raising their pension to a higher level than originally agreed. According to the authors, the fact that former Dutch citizens now living in Australia, Canada and New Zealand benefit from other privileges, entails discrimination. The Committee observes, however, that the categories of persons being compared are distinguishable and that the privileges at issue respond to separately negotiated bilateral treaties which necessarily reflect agreements based on reciprocity. The Committee recalls its jurisprudence that a differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26. 32/

8.6 The Committee finds therefore that the facts presented by the authors do not raise an

issue under article 26 of the Covenant...This part of the communication is therefore inadmissible.

_____

Notes

...

32/ *Inter alia*, the Committee's Views with regard to Communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, adopted by the Committee on 9 April 1987.

_____

- *Snijders v. The Netherlands* (651/1996), ICCPR, A/53/40 vol. II (27 July 1998) 135 (CCPR/C/63/D/651/1996) at paras. 2.1 and 8.2-8.5.

...

2.1 In the Netherlands, the *Algemene Wet Bijzondere Ziektekosten* (AWBZ) provides a compulsory, nation-wide insurance for the costs of long-term medical care. The AWBZ is being funded out of contributions which are being levied by the State's tax department. Further, a contribution can be imposed on persons benefitting from the AWBZ, on the basis of article 6(2) of the law.

...

8.2 The question before the Committee is whether the principle of equality as laid down in article 26 has been violated (a) because the authors are required to make personal contributions under the AWBZ because they are in residential care, whereas insured persons who are not in residential care are not required to make personal contributions; and because the calculation of the personal contributions puts the authors at a disadvantage, since (b) they are required to pay income-related contributions whereas married or cohabiting persons whose partner is not in care, only pay a fixed non-income related contribution, regardless of their income, and (c) couples where both partners are in care, pay the same maximum amount as a single person.

8.3 The Committee is of the opinion that the requirement that individuals, when benefitting from the AWBZ insurance scheme, pay a personal contribution towards the costs of residential care, is as such not in violation of the principle of equality before the law. With regard to the issue under (a), the State party has explained that those using the system have to contribute to the scheme lest this become not affordable. The Committee considers that the explanation given by the State party justifies the distinction between those who are required to pay personal contributions and those who are not required to do so, and the distinction thus does not constitute a violation of article 26 of the Covenant.

8.4 Personal contributions under the AWBZ should however be calculated objectively and without arbitrariness. In relation to the issue under (b), the Committee has taken note of the

State party's explanation that the distinction in the contribution is based upon the factual difference that married or cohabitating persons leave behind a partner who continues to live in what was their common household and therefore does not save the same amount of money as does a single person in residential care. For this reason they are requested to pay a fixed contribution. The Committee considers that this distinction, based on a presumption that has its basis in the factual circumstances of life of persons benefitting from the scheme, is objective and reasonable. Therefore it does not constitute a violation of article 26 of the Covenant. This conclusion is not affected by the argument of the authors that the State party might have at its disposal alternative methods of levying sufficient funding for the AWBZ scheme.

8.5 With regard to the issue under (c), the Committee notes that the State party has explained that in calculating the amount of money each person must pay as an income-related contribution, it takes into account each individual's ability to pay as well as domestic circumstances. In case of a couple where both spouses are in care, their total income forms the basis of the calculation of their contribution. This, however, does not affect the ceiling of the own contribution which is the same (NLG 1,350) for single persons and couples alike. None of the authors was levied for an own contribution that would amount to this ceiling. Consequently, the authors have failed to show that they are victims of a violation of article 26 of the Covenant.

- *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.

Notes

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

For dissenting opinion in this context, see Malik v. Czech Republic (669/1995), ICCPR, A/54/40 vol. II (21 October 1998) 291 at Individual Opinion by Cecilia Medina Quiroga and Eckart Klein, 297.

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.

- *Byrne v. Canada* (742/1997), ICCPR, A/54/40 vol. II (25 March 1999) 354 (CCPR/C/65/D/742/1997) at paras. 3, 6.3, 6.4 and 7.

...

3. The authors claim that they are discriminated against because of their status as custodial mothers, in violation of articles 23, paragraph 4, and 26 of the Covenant...

...

6.3 The Committee notes that the authors' main grievance is that as a result of taxation they have paid more towards the maintenance of the child than their former spouses. The

Committee observes that the proportional contributions of parents in paying child maintenance are set by the Family Court, not by the tax authorities. In the opinion of the Committee the alleged unequal payments in the authors' cases were the result of the interaction between the child support order providing for the payments and the application of the Income Tax Act. This is to be taken into account by the Court in determining the level of payments. It is not for the Committee to reevaluate the determination of payments by the domestic Courts. In this context, the Committee notes that if the Court did not take the tax consequences into account, as has been suggested by the authors, the authors could have applied for a variance of the order on this basis.

6.4 The Committee concludes that the facts submitted by the authors do not substantiate their claim that they have been a victim of a violation of article 26, nor of articles 23 and 24 of the Covenant.

7. Accordingly, the Committee decides:

a) that the communication is inadmissible;
...

- *Tadman et al. v. Canada* (816/1998), ICCPR, A/55/40 vol. II (29 October 1999) 218 at paras. 1.2, 6.2 and 7.

...
1.2 In the province of Ontario Roman Catholic schools are the only non-secular schools receiving full and direct public funding. The authors, however, belong to different religious denominations, i.e. United Church of Canada, Lutheran Church, Serbian Orthodox Church and Humanist. They all have children in the school going age and their children are being educated in the public school system.
...
6.2 The State party has challenged the admissibility of the communication on the basis that the authors cannot claim to be victims of a violation of the Covenant. In this context, the Committee notes that the authors while claiming to be victims of discrimination, do not seek publicly funded religious schools for their children, but on the contrary seek the removal of the public funding to Roman Catholic separate schools. Thus, if this were to happen, the authors' personal situation in respect of funding for religious education would not be improved. The authors have not sufficiently substantiated how the public funding given to the Roman Catholic separate schools at present causes them any disadvantage or affects them adversely. In the circumstances, the Committee considers that they cannot claim to be victims of the alleged discrimination, within the meaning of article 1 of the Optional Protocol.

7. Accordingly, the Human Rights Committee decides:

(a) that the communication is inadmissible under article 1 of the Optional Protocol ...

For dissenting opinion in this context, see Tadman et al. v. Canada (816/1998), ICCPR, A/55/40 vol. II (29 October 1999) 218 at Individual Opinion by P. Bhagwati, E. Evatt, L. Henkin and C. Medina Quiroga, 226.

- *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.

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

- *Waldman v. Canada* (694/1996), ICCPR, A/55/40 vol. II (3 November 1999) 86 (CCPR/C/67/D/694/1996) at paras. 10.2, 10.4-10.6 and Individual Opinion by Martin Scheinin (concurring), 100 at paras. 3-5.

...

10.2 The issue before the Committee is whether public funding for Roman Catholic schools, but not for schools of the author's religion, which results in him having to meet the full cost of education in religious school, constitutes a violation of the author's rights under the Covenant.

...

10.4 The Committee begins by noting that the fact that a distinction is enshrined in the Constitution does not render it reasonable and objective. In the instant case, the distinction was made in 1867 to protect the Roman Catholics in Ontario. The material before the Committee does not show that members of the Roman Catholic community or any identifiable section of that community are now in a disadvantaged position compared to those members of the Jewish community that wish to secure the education of their children in religious schools. Accordingly, the Committee rejects the State party's argument that the preferential treatment of Roman Catholic schools is nondiscriminatory because of its Constitutional obligation.

10.5 With regard to the State party's argument that it is reasonable to differentiate in the allocation of public funds between private and public schools, the Committee notes that it is not possible for members of religious denominations other than Roman Catholic to have their religious schools incorporated within the public school system. In the instant case, the author has sent his children to a private religious school, not because he wishes a private non-government dependent education for his children, but because the publicly funded school system makes no provision for his religious denomination, whereas publicly funded religious schools are available to members of the Roman Catholic faith. On the basis of the facts before it, the Committee considers that the differences in treatment between Roman Catholic religious schools, which are publicly funded as a distinct part of the public education system, and schools of the author's religion, which are private by necessity, cannot be considered reasonable and objective.

10.6 The Committee has noted the State party's argument that the aims of the State party's secular public education system are compatible with the principle of nondiscrimination laid down in the Covenant. The Committee...notes, however, that the proclaimed aims of the system do not justify the exclusive funding of Roman Catholic religious schools...[T]he

Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria. In the instant case, the Committee concludes that the material before it does not show that the differential treatment between the Roman Catholic faith and the author's religious denomination is based on such criteria. Consequently, there has been a violation of the author's rights under article 26 of the Covenant to equal and effective protection against discrimination.

...

Individual Opinion by Martin Scheinin (concurring)

While I concur with the Committee's finding that the author is a victim of a violation of article 26 of the Covenant, I wish to explain my reasons for such a conclusion.

...

3. In the present case the Committee correctly focussed its attention on article 26. Although both General Comment No. 22 [48] and the *Hartikainen* case are related to article 18, there is a considerable degree of interdependence between that provision and the non-discrimination clause in article 26. In general, arrangements in the field of religious education that are in compliance with article 18 are likely to be in conformity with article 26 as well, because non-discrimination is a fundamental component in the test under article 18 (4). In the cases of *Blom v. Sweden* (Communication No. 191/1985) and *Lundgren et al. and Hjord et al. v. Sweden* (Communications 288 and 299/1988) the Committee elaborated its position in the question what constitutes discrimination in the field of education. While the Committee left open whether the Covenant entails, in certain situations, an obligation to provide some public funding for private schools, it concluded that the fact that private schools, freely chosen by the parents and their children, do not receive the same level of funding as public schools does not amount to discrimination.

4. In the Province of Ontario, the system of public schools provides for religious instruction in one religion but adherents of other religious denominations must arrange for their religious education either outside school hours or by establishing private religious schools. Although arrangements exist for indirect public funding to existing private schools, the level of such funding is only a fraction of the costs incurred to the families, whereas public Roman Catholic schools are free. This difference in treatment between adherents of the Roman Catholic religion and such adherents of other religions that wish to provide religious schools for their children is, in the Committee's view, discriminatory. While I concur with this finding I wish to point out that the existence of public Roman Catholic schools in Ontario is related to a historical arrangement for minority protection and hence needs to be addressed not only under article 26 of the Covenant but also under articles 27 and 18. The question whether the arrangement in question should be discontinued is a matter of public policy and

the general design of the educational system within the State party, not a requirement under the Covenant.

5. When implementing the Committee's views in the present case the State party should in my opinion bear in mind that article 27 imposes positive obligations for States to promote religious instruction in minority religions, and that providing such education as an optional arrangement within the public education system is one permissible arrangement to that end. Providing for publicly funded education in minority languages for those who wish to receive such education is not as such discriminatory, although care must of course be taken that possible distinctions between different minority languages are based on objective and reasonable grounds. The same rule applies in relation to religious education in minority religions. In order to avoid discrimination in funding religious (or linguistic) education for some but not all minorities States may legitimately base themselves on whether there is a constant demand for such education. For many religious minorities the existence of a fully secular alternative within the public school system is sufficient, as the communities in question wish to arrange for religious education outside school hours and outside school premises. And if demands for religious schools do arise, one legitimate criterion for deciding whether it would amount to discrimination not to establish a public minority school or not to provide comparable public funding to a private minority school is whether there is a sufficient number of children to attend such a school so that it could operate as a viable part in the overall system of education. In the present case this condition was met. Consequently, the level of indirect public funding allocated to the education of the author's children amounted to discrimination when compared to the full funding of public Roman Catholic schools in Ontario.

- *Lestourneaud v. France* (861/1999), ICCPR, A/55/40 vol. II (3 November 1999) 234 at paras. 4.2 and 5.

...
4.2 The Committee notes that the author's claim is based upon the difference in remuneration between legal aid services performed by counsel for the civil claimant and those performed by counsel for the defendant. The Committee recalls that differences in treatment do not constitute discrimination, when they are based on objective and reasonable criteria. In the present case, the Committee considers that representation of a person presenting a civil claim in a criminal case cannot be equalled to representing the accused. The arguments advanced by the author and the material he provided do not substantiate, for purposes of admissibility, the author's claim that he is a victim of discrimination.
...
5. Accordingly, the Human Rights Committee decides:

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

- *Diergaardt et al. v. Namibia* (760/1997), ICCPR, A/55/40 vol. II (25 July 2000) 140 at paras. 10.10, 12 and Individual Opinion by Elizabeth Evatt, Eckart Klein, David Kretzmer and Cecilia Medina Quiroga (concurring), 156.

...
10.10 The authors have...claimed that the lack of language legislation in Namibia has had as a consequence that they have been denied the use of their mother tongue in administration, justice, education and public life. The Committee notes that the authors have shown that the State party has instructed civil servants not to reply to the authors' written or oral communications with the authorities in the Afrikaans language, even when they are perfectly capable of doing so. These instructions barring the use of Afrikaans do not relate merely to the issuing of public documents but even to telephone conversations. In the absence of any response from the State party the Committee must give due weight to the allegation of the authors that the circular in question is intentionally targeted against the possibility to use Afrikaans when dealing with public authorities. Consequently, the Committee finds that the authors, as Afrikaans speakers, are victims of a violation of article 26 of the Covenant.
...
12. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide the authors and the other members of their community an effective remedy by allowing its officials to respond in other languages than the official one in a nondiscriminatory manner. The State party is under an obligation to ensure that similar violations do not occur in the future.

Individual Opinion by Elizabeth Evatt, Eckart Klein, David Kretzmer and Cecilia Medina Quiroga

We agree with the Committee's Views in this matter. However, we consider that the instruction given by the State party to civil servants not to respond in the Afrikaans language, even if they have the personal capacity to do so, restricts the freedom of the authors to receive and impart information in that language (art. 19, para. 2 of the Covenant). In the absence of a justification for this restriction, which meets the criteria set out in paragraph 3 of article 19, we consider that there has been a violation of the authors' right to freedom of expression under article 19 of the Covenant.

For dissenting opinions in this context, see Diergaardt et al. v. Namibia (760/1997), ICCPR, A/55/40 vol. II (25 July 2000) 140 at Individual Opinion by Abdalfattah Amor, 149, Individual Opinion by Nisuke Ando, 151, Individual Opinion by P.N. Bhagwati, Lord Colville, and Maxwell Yalden, 152 at paras. 7 and 8 and Individual Opinion by Rajsoomer Lallah, 158 at paras. 6-8.

EQUALITY AND DISCRIMINATION - GENERAL

- *Toala et al. v. New Zealand* (675/1995), ICCPR, A/56/40 vol. II (2 November 2000) 35 at paras. 2.1, 2.5-2.7 and 11.6.

...

2.1 The authors were all born in Western Samoa: Mr. Toala was born in 1932, Mrs. Toala in 1934, and their adopted child, Eka Toala, in 1984, 1/ Mr. Tofaeono in 1934 and Mrs. Tofaeono in 1933. At the time of the communication, the families were residing in New Zealand, where deportation orders were recently issued against them. The families went into hiding in New Zealand, so as to avoid deportation. The authors claim that they are New Zealand citizens, and that the acts of the New Zealand Government which seek to remove them from New Zealand violate the Covenant.

...

2.5 The authors claim that they are New Zealand citizens pursuant to the decision of the Judicial Committee of the Privy Council in *Lesa v. The Attorney-General of New Zealand* [1983] 2 A.C.20. 2/ In this case, the Privy Council held that by virtue of the British Nationality and Status of Aliens (in New Zealand) Act 1928, persons born in Western Samoa between 13 May 1924 and 1 January 1949 (and their descendants) are New Zealand citizens.

2.6 It is stated that there was considerable adverse reaction in New Zealand to the Lesa judgement, which was delivered by the Privy Council in July 1982. It was estimated that some 100,000 Samoans out of a total population of 160,000 would be affected by the decision.

2.7 The response of the New Zealand Government was to negotiate a Protocol to the Treaty of Friendship between New Zealand and Western Samoa. The Protocol was ratified on 13 September 1982 by the two parties. Within one month, the New Zealand Government passed into law the Citizenship (Western Samoa) Act of 1982, which gave effect to the Protocol in New Zealand, and nullified the effect of the "Lesa" decision, except for Ms. Lesa herself and a very limited number of persons.

...

11.6 As to the claim that the 1982 Act was discriminatory, the Committee observes that the Act applied only to those Western Samoans were not resident in New Zealand and that the authors at that time were not resident in New Zealand and had no ties with that country. There is no basis for concluding that the application of the Act to the authors was discriminatory contrary to article 26 of the Covenant.

_____

Notes

1/ It is stated that Eka Toala is adopted by Mr. and Mrs. Toala, and as a descendent to them entitled to all rights that they are entitled to; reference is made to the New Zealand Adoption

Act 1955, Section 16 (2): "The adopted child shall be deemed to become the child of the adoptive parent, and the adoptive parent shall be deemed to become the parent of the child, as if the child had been born to that parent in lawful wedlock."

2/ Judgment delivered on 28 July 1982.

- *Paraga v. Croatia* (727/1996), ICCPR, A/56/40 vol. II (4 April 2001) 58 at paras. 4.2 and 9.8.

...

4.2 The author affirms that he is a victim of a violation of article 26, on the grounds that he has been discriminated against because of his political opinions. On 7 October 1997, the County Court of Zagreb initiated proceedings against the author on the basis of article 191 of the Criminal Code of Croatia, for spreading false information; the author notes that he may be sentenced to six months' imprisonment if found guilty. On 4 December 1997, the author was arrested at the Austrian border, allegedly after misinformation about the purpose of the author's visit had wilfully been given to the Austrian authorities by the Croatian Ministry of Foreign Affairs - the author was kept 16 hours in Austrian detention. A similar event had already occurred on the occasion of a visit by the author to Canada, when he was kept detained for six days in Toronto in June 1996, allegedly because the Croatian Government had accused him of subversive activities.

...

9.8 As to the author's claim that he is a victim of discrimination because of his political opposition to the then Government of Croatia, the Committee notes that the proceedings which were instituted against the author on 7 October 1997 were dismissed, a few months later, on 26 January 1998. In view of this fact, and lacking any further information that would substantiate this claim, the Committee cannot find a violation of any of the articles of the Covenant in this regard.

- *Marín Gómez v. Spain* (865/1999), ICCPR, A/57/40 vol. II (22 October 2001) 198 (CCPR/C/73/D/865/1999) at paras. 2.1-2.4, 3.1, 9.2, 9.3 and 10.

...

2.1 The author joined the Guardia Civil on 1 March 1981, when he was 19,1/ and remained on active duty until 15 November 1990, when he went on "active reserve" status owing to the loss of psychological and physical fitness.2/ On 15 November 1994, when he had been in the active reserve for four years, the District Military Medical Court handed down a ruling unanimously recognizing him as fit for active duty. 3/

2.2 In a decision dated 28 April 1995, the Ministry of Defence rejected the application the author made to return to active duty in February 1995. The decision was based on the fact that "the transitional provision in question, which allows a return to active duty, does not apply to the person in question because the reason for his change to active reserve status was not that referred to in article 4, paragraph 1 (a), of Act No. 20/1981,4/ but, rather, psychological and physical unfitness, as referred to in article 4, paragraph 1 (d)".

2.3 The author applied for judicial review against the decision by the Ministry of Defence dated 28 April 1995; the application was ruled on by the Fifth Administrative Law Division of the National High Court on 28 February 1997, which upheld the decision by the Ministry of Defence. That Division based its decision on the fact that, unlike the acceptance of the return to active duty of persons who were on reserve status for reasons of age, the rejection of the return to active duty by persons who were on active reserve status owing to the loss of psychological and physical fitness, which was later recovered, does not involve a violation of the right to equal access to public service. The National High Court concluded that the two situations are different and that there is thus no discrimination.

2.4 The author filed a remedy of *amparo*, which was rejected by the Constitutional Court on 3 November 1997 on the grounds that the ruling in question is not contrary to the principle of equality, since it deals with different problems on the basis of different criteria.

...

3.1 The author considers that the rights provided for in articles 25 (c) and 26 of the Covenant were violated when he was prevented from returning to active duty in the Guardia Civil after being declared fit by a Medical Court following the illness which had led to his change to reserve status, since reincorporation is allowed for civil guards who were on active reserve status for reasons of age. In this regard, the author maintains that the second transitional provision of Act No. 28/1994 (5) creates discrimination. It is also contrary to the right to access to public service in the Guardia Civil, which must be performed in conditions of equality.

...

9.2 With regard to the author's allegations that he is a victim of a violation of article 26 of the Covenant, the Committee notes that he was declared fit for active duty on 15 November 1994 and that he was notified of the Medical Court's agreement on 15 December. However, the author did not request a transfer to active duty at that time. The Committee notes that new Act No. 20/1994 entered into force on 20 January 1995 and that it eliminated the "active reserve status" category, leaving only the "reserve status" category, which, according to article 103 of Act No. 17/1989, does not allow military personnel on reserve status to change to active duty. The Committee notes that the author was affected by Act No. 20/1994 only to the extent that, as of 20 January 1995, he could not request a transfer to active duty. The Committee also notes that, since the author did not take the opportunity to request a transfer to active duty prior to 20 January 1995, the situation is of his own making, not that of the

State party. The Committee takes note of the author's allegation that Act No. 20/1994 is discriminatory because it allows a return to active duty only for persons who went on reserve status for reasons of age. However, the Committee considers that this Act is not discriminatory, since it merely extends the retirement age to 56 years and allows persons who went on active reserve status at age 50 to apply to return to active duty, as provided for by law, and then base themselves on the new age to change to reserve status. Consequently, the Committee takes the view that the facts as submitted by the author do not disclose a violation of article 26 of the Covenant.

9.3 For the same reasons as those cited in the preceding paragraph, the Committee considers that there has been no violation of the right to equality of access to public service, as provided for in article 25 (c) of the Covenant.

10. The Human Rights Committee...is of the view that the facts before it do not disclose a violation by Spain of any of the provisions of the Covenant.

_____

Notes

1/ He was born on 25 July 1961.

2/ Article 4, paragraph 1 (d), of Act No. 20/1981 of 6 July establishing active reserve status and setting ages of retirement for professional military personnel.

3/ He has not submitted a copy of the ruling to the secretariat.

4/ Article 4, paragraph 1 (a), refers to a change to active reserve status upon reaching the ages set in article 5 of Act No. 20/1981.

_____

For dissenting opinion in this context, see Alejandro Marín Gómez v. Spain (865/1999), ICCPR, A/57/40 vol. II (22 October 2001) 198 (CCPR/C/73/D/865/1999) at Individual Opinion by Ms. Christine Chanet.

- *Riley et. al. v. Canada* (1048/2002), ICCPR, A/57/40 vol. II (21 March 2002) 356 (CCPR/C/74/D/1048/2002) at paras. 2.1, 2.2, 4.2 and 5.

...

2.1 In 1990, the Canadian government revised the Royal Canadian Mounted Police ("RCMP") regulations allowing the Commissioner, under section 64 (2) of these regulations, to "exempt any member from wearing any item of the significant uniform...on the basis of

the member's religious beliefs." Subsequently, one Khalsa Sikh officer was authorised to substitute turbans for the traditional wide brimmed "mountie" stetson and forage cap.

2.2 Riley and Davis are both retired from the Royal Canadian Mounted Police ("RCMP") and are members of an organisation whose goal is to maintain tradition within the RCMP. The authors sought an order from the Federal Court of Canada (Trial Division), that the Commissioner of the RCMP be prohibited from allowing the wearing of religious symbols as part of the RCMP uniform. In particular, they claimed that the Commissioner's decision to allow the wearing of the Khalsa Sikh turban instead of the stetson is unconstitutional. On 8 July 1994, the Federal Court dismissed the author's claim deciding that there was no violation of the Canadian Charter.

...

4.2 The Committee has noted the authors' claims that they are victims of violations of articles 3, 9, paragraph 1, 18, 23, paragraphs 3 and 4, 26, and 2, paragraph 1, because Khalsa Sikh officers of the RCMP are authorised to wear religious symbols as part of their RCMP uniform. In particular, the Committee notes the authors' claim under articles 26, and 2, paragraph 1, that this is a special status allowed to Khalsa Sikhs, which is denied to other religious groups. The Committee is of the view that the authors have failed to show how the enjoyment of their rights under the Covenant has been affected by allowing Khalsa Sikh officers to wear religious symbols. Therefore, they cannot be considered to be "victims" within the meaning of article 1 of the Optional Protocol.

5. The Committee, therefore, decides:

(a) that the communication is inadmissible;

...

- *Teesdale v. Trinidad and Tobago* (677/1996) ICCPR, A/57/40 vol. II (1 April 2002) 36 (CCPR/C/74/D/677/1996) at paras. 2.1, 3.9 and 9.8.

...

2.1 On 28 May 1988, the author was detained by the police and taken to hospital. On 31 May 1988 he was discharged from the hospital and on 2 June 1988 he was formally charged with the murder of his cousin "Lucky" Teesdale on 27 May 1988. After a trial, which started on 6 October 1989, the author was convicted and sentenced to death on 2 November 1989 by the San Fernando Assizes Court. He applied for leave to appeal against conviction and sentence. The Court of Appeal of Trinidad and Tobago dismissed the author's appeal on 22 March 1994, with reasons given on 26 October 1994. On 13 March 1995, the Judicial Committee of the Privy Council dismissed his petition for special leave to appeal. On 8 March 1996, a warrant for execution on 13 March was read out to the author. On 11 March,

the author filed a constitutional motion to the High Court against the execution; the High Court granted a stay of execution. The Attorney General withdrew the case from the High Court and presented it before the Advisory Committee on the Power of Pardon. On 26 June, the author was informed that the President had commuted his death sentence to 75 years imprisonment with hard labour. It is submitted that all domestic remedies have been exhausted.

...

3.9 With regard to the commutation of his death sentence in June 1996, the author complains that the decision of the President to sentence him to 75 years of imprisonment with hard labour was unlawful and discriminatory. The author refers to the decision of the Judicial Committee of the Privy Council in the cases of *Earl Pratt and Ivan Morgan* and of *Lincoln Anthony Guerra*, and claims that his sentence should have been commuted to life imprisonment. The author submits that 53 other prisoners, who had been on death row for murder for more than five years, saw their sentence commuted to life imprisonment, which according to the author, means that they will be released after an average period of 12 to 15 years, whereas such parole is not available to him.

...

9.8 Concerning the author's claim that he is a victim of discrimination because of the commutation of his death sentence to 75 years of imprisonment with hard labour, the Committee notes that according to information provided by the author, the State party in 1996 commuted death sentences of prisoners who had been on death row for more then five years to life imprisonment in 53 cases, on the basis of constitutional provisions on commutation of death sentences. The Committee recalls its established jurisprudence that article 26 of the Covenant prohibits discrimination in law and in fact in any field regulated and protected by public authorities. The Committee considers that the decision to commute a death sentence and the determination of a term of imprisonment is within the discretion of the President and that he exercises this discretion on the basis of many factors. Although the author has referred to 53 cases where the death penalty was commuted to life imprisonment, he has not provided information on the number or nature of cases where death sentences were commuted to imprisonment with hard labor for a fixed term. The Committee is therefore unable to make a finding that the exercise of this discretion in the author's case was arbitrary and in violation of article 26 of the Covenant.

For dissenting opinions in this context, see 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).

EQUALITY AND DISCRIMINATION - GENERAL

- *Wackenheim v. France* (854/1999), ICCPR, A/57/40 vol. II (15 July 2002) 179 at paras. 2.1-2.3, 2.5, 3 and 7.2-7.6.

...
2.1 The author, who suffers from dwarfism, began in July 1991 to appear in "dwarf tossing" events organized by a company called Société Fun-Productions. Wearing suitable protective gear, he would allow himself to be thrown short distances onto an air bed by clients of the establishment staging the event (a discotheque).

2.2 On 27 November 1991, the French Ministry of the Interior issued a circular on the policing of public events, in particular dwarf tossing, which instructed prefects to use their policing powers to instruct mayors to keep a close eye on spectacles staged in their communes. The circular said that dwarf tossing should be banned on the basis of, among other things, article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

2.3 On 30 October 1991 the author applied to the administrative court in Versailles to annul an order dated 25 October 1991 by the mayor of Morsang-sur-Orge banning a dwarf tossing event scheduled to take place in a local discotheque. The court annulled the mayor's order in a ruling on 25 February 1992 ...
...
2.5 By an order dated 27 October 1995 the Council of State overturned the ruling on the grounds, first, that dwarf tossing was an attraction that affronted human dignity, respect for human dignity being part of public order and the authority vested in the municipal police being the means of ensuring it, and second, that respect for the principle of freedom of employment and trade was no impediment to the banning of an activity, licit or otherwise, in exercise of that authority if the activity was of a nature to disrupt public order. The Council of State went on to say that the attraction could be banned even in the absence of particular local circumstances.
...
3. The author affirms that banning him from working has had an adverse effect on his life and represents an affront to his dignity. He claims to be the victim of a violation by France of his right to freedom, employment, respect for private life and an adequate standard of living, and of an act of discrimination. He further states that there is no work for dwarves in France and that his job does not constitute an affront to human dignity since dignity consists in having a job...
...
7.2 The Committee must decide whether the authorities' ban on dwarf tossing constitutes discrimination within the meaning of article 26 of the Covenant, as the author asserts.

7.3 The Committee recalls its jurisprudence whereby not every differentiation of treatment

of persons will necessarily constitute discrimination, which is prohibited under article 26 of the Covenant. Differentiation constitutes discrimination when it is not based on objective and reasonable grounds. The question, in the present case, is whether the differentiation between the persons covered by the ban ordered by the State party and persons to whom this ban does not apply may be validly justified.

7.4 The ban on throwing ordered by the State party in the present case applies only to dwarves (as described in paragraph 2.1). However, if these persons are covered to the exclusion of others, the reason is that they are the only persons capable of being thrown. Thus, the differentiation between the persons covered by the ban, namely dwarves, and those to whom it does not apply, namely persons not suffering from dwarfism, is based on an objective reason and is not discriminatory in its purpose. The Committee considers that the State party has demonstrated, in the present case, that the ban on dwarf tossing as practised by the author did not constitute an abusive measure but was necessary in order to protect public order, which brings into play considerations of human dignity that are compatible with the objectives of the Covenant. The Committee accordingly concludes that the differentiation between the author and the persons to whom the ban ordered by the State party does not apply was based on objective and reasonable grounds.

7.5 The Committee is aware of the fact that there are other activities which are not banned but which might possibly be banned on the basis of grounds similar to those which justify the ban on dwarf tossing. However, the Committee is of the opinion that, given that the ban on dwarf tossing is based on objective and reasonable criteria and the author has not established that this measure was discriminatory in purpose, the mere fact that there may be other activities liable to be banned is not in itself sufficient to confer a discriminatory character on the ban on dwarf tossing. For these reasons, the Committee considers that, in ordering the above-mentioned ban, the State party has not, in the present case, violated the rights of the author as contained in article 26 of the Covenant.

7.6 The Human Rights Committee...is of the view that the facts before it do not reveal any violation of the Covenant.

- *Gillot v. France* (932/2000), ICCPR, A/57/40 vol. II (15 July 2002) 270 (CCPR/C/75/D/932/2000) at paras. 2.1-2.7, 11.2, 12.1, 12.2, 13.1-13.8, 14.1-14.7 and 15.

...

2.1 On 5 May 1998, two political organizations in New Caledonia, the *Front de Libération Nationale Kanak Socialiste* (FLNKS) and the *Rassemblement pour la Calédonie dans la République* (RPCR), together with the Government of France, signed the so-called Noumea Accord. The Accord, which forms part of a process of self-determination, established the

framework for the institutional development of New Caledonia ... over the next 20 years.

2.2 Implementation of the Noumea Accord led to a constitutional amendment in that it involved derogations from certain constitutional principles, such as the principle of equality of political rights (restricted electorate in local ballots). Thus, by a joint vote of the French Parliament and Senate, and approval of a draft constitutional amendment by the Congress, the Constitution Act of New Caledonia (No. 98-610) of 20 July 1998 inserted a title XIII reading "Transitional provisions concerning New Caledonia" in the Constitution. The title comprises the following articles 76 and 77:

Article 76 of the Constitution provides that:

> "The people of New Caledonia shall, before 13 December 1998, express their views on the provisions of the accord signed at Noumea on 5 May 1998 and published on 27 May 1998 in the *Journal Officiel* of the French Republic. Those persons fulfilling the requirements established in article 2 of Act No. 88-1028 of 9 November 1988 shall be eligible to vote. The measures required for the conduct of the voting shall be taken by decree of the Council of State, after consideration by the Council of Ministers."

Article 77 provides that:

> "Following approval of the Accord in the referendum provided for in article 76, the Organic Law, adopted following consultation with the deliberative assembly of New Caledonia, shall establish, to ensure the development of New Caledonia with due respect for the guidelines provided for in the Accord and in accordance with the procedures necessary for its implementation: [...] - regulations on citizenship, the electoral system [...] - the conditions and time frame for a decision by the people concerned in New Caledonia on accession to full sovereignty."

2.3 An initial referendum was held on 8 November 1998. The Noumea Accord was approved by 72 per cent of those voting, and it was established that one or more referendums would be held thereafter. The authors were not eligible to participate in that ballot.

2.4 The authors contest the way in which the electorates for these various referendums, as established under the Noumea Accord and implemented by the French Government, were determined.

2.5 For the first referendum on 8 November 1998, Decree No. 98-733 of 20 August 1998 on organization of a referendum of the people of New Caledonia, as provided for by article 76 of the Constitution, determined the electorate with reference to article 2 of Act No.

88-1028 of 9 November 1988 (also determined in article 6.3 of the Noumea Accord), namely: "Persons registered on the electoral rolls for the territory on that date and resident in New Caledonia since 6 November 1988 shall be eligible to vote."

2.6 For future referendums, the electorate was determined by the French Parliament in article 218 of the Organic Law of New Caledonia (No. 99-209) of 19 March 1999 (reflecting article 2.2 of the Noumea Accord)2/, pursuant to which:

> "Persons registered on the electoral roll on the date of the referendum and fulfilling one of the following conditions shall be eligible to vote:
>
> (a) They must have been eligible to participate in the referendum of 8 November 1998;
>
> (b) They were not registered on the electoral roll for the referendum of 8 November 1998, but fulfilled the residence requirement for that referendum;
>
> (c) They were not registered on the electoral roll for the 8 November 1998 referendum owing to non-fulfilment of the residence requirement, but must be able to prove that their absence was due to family, professional or medical reasons;
>
> (d) They must enjoy customary civil status or, having been born in New Caledonia, they must have their main moral and material interests in the territory;
>
> (e) Having one parent born in New Caledonia, they must have their main moral and material interests in the territory;
>
> (f) They must be able to prove 20 years continuous residence in New Caledonia on the date of the referendum or by 31 December 2014 at the latest;
>
> (g) Having been born before 1 January 1989, they must have been resident in New Caledonia from 1988 to 1998;
>
> (h) Having been born on or after 1 January 1989, they must have reached voting age on the date of the referendum and have one parent who fulfilled the conditions for participation in the referendum of 8 November 1998.
>
> Periods spent outside New Caledonia for the performance of national service, for study or training, or for family, professional or medical reasons shall, in the case of persons previously domiciled in the territory, be included in the periods taken into consideration in order to determine domicile."

2.7 The authors, who did not fulfil the above criteria, state that they were excluded from the referendum of 8 November 1998 and that they will also be excluded from referendums planned from 2014 onwards.

...

11.2 The Committee has to determine whether the restrictions imposed on the electorate for the purposes of the local referendums of 8 November 1998 and in 2014 or thereafter constitute a violation of articles 25 and 26 of the Covenant, as the authors maintain.

12.1 The authors maintain, first, that they have an absolute, acquired and indivisible right to vote in all political ballots organized in their place of residence.

12.2 On this point the Committee recalls its decisions in relation to article 25 of the Covenant, namely that the right to vote is not an absolute right and that restrictions may be imposed on it provided they are not discriminatory or unreasonable.22/

13.1 The authors maintain, secondly, that the criteria used to determine the electorates in local ballots represent a departure from French rules on electoral matters (the right to vote can be made dependent only on the criterion of inclusion on an electoral roll, either of the commune of domicile, irrespective of the period of residence, or of the commune of actual residence for at least 6 months) and thereby impose on them discriminatory restrictions which are contrary to the International Covenant on Civil and Political Rights.

13.2 In order to determine the discriminatory or non-discriminatory character of the criteria in dispute, in conformity with its above-mentioned decisions, the Committee considers that the evaluation of any restrictions must be effected on a case-by-case basis, having regard in particular to the purpose of such restrictions and the principle of proportionality.

13.3 In the present case, the Committee has taken note of the fact that the local ballots were conducted in the context of a process of self-determination of the population of New Caledonia. In this connection, it has taken into consideration the State party's argument that these referendums - for which the procedures were fixed by the Noumea Accord and established according to the type of ballot by a vote of Congress 23/ or Parliament 24/ - must, by virtue of their purpose, provide means of determining the opinion of, not the whole of the national population, but the persons "concerned" by the future of New Caledonia.

13.4 Although the Committee does not have the competence under the Optional Protocol to consider a communication alleging violation of the right to self-determination protected in article 1 of the Covenant, it may interpret article 1, when this is relevant, in determining whether rights protected in parts II and III of the Covenant have been violated. The Committee is of the view, therefore, that, in this case, it may take article 1 into account in interpretation of article 25 of the Covenant.

13.5 In relation to the authors' complaints, the Committee observes, as the State party indeed confirms, that the criteria governing the right to vote in the referendums have the effect of establishing a restricted electorate and hence a differentiation between (a) persons deprived of the right to vote, including the author(s) in the ballot in question, and (b) persons permitted to exercise this right, owing to their sufficiently strong links with the territory whose institutional development is at issue. The question which the Committee must decide, therefore, is whether this differentiation is compatible with article 25 of the Covenant. The Committee recalls that not all differentiation constitutes discrimination if it is based on objective and reasonable criteria and the purpose sought is legitimate under the Covenant.

13.6 The Committee has, first of all, to consider whether the criteria used to determine the restricted electorates are objective.

13.7 The Committee observes that, in conformity with the issue in each ballot, apart from the requirement of inclusion on the electoral rolls, the criteria used are: (a) for the 1998 referendum relating to the continuation or non-continuation of the process of self-determination, the condition of length of residence in New Caledonia; and (b) for the purpose of future referendums directly relating to the option of independence, additional conditions relating to possession of customary civil status, the presence in the territory of moral and material interests, combined with birth of the person concerned or his parents in the territory. It accordingly follows, as the date for a decision on self-determination approaches, that the criteria are more numerous and take into account the specific factors attesting to the strength of the links to the territory. To the length of residence condition (as opposed to the cut-off points for length of residence) for determining a general link with the territory are added more specific links.

13.8 The Committee considers that the above-mentioned criteria are based on objective elements for differentiating between residents as regards their relationship with New Caledonia, namely the different forms of ties to the territory, whether specific or general - in conformity with the purpose and nature of each ballot. The question of the discriminatory or non-discriminatory effects of these criteria nevertheless arises.

...

14.1 Lastly, the authors argue that the cut-off points set for the length of residence requirement, 10 and 20 years respectively for the referendums in question, are excessive and affect their right to vote.

14.2 The Committee considers that it is not in a position to determine the length of residence requirements. It may, however, express its view on whether or not these requirements are excessive. In the present case, the Committee has to decide whether the requirements have the purpose or effect of restricting in a disproportionate manner, given the nature and purpose of the referendums in question, the participation of the "concerned" population of New

Caledonia.

14.3 In addition to the State party's position that the criteria used for the determination of the electorates favour long-term residents over recent arrivals owing to actual differences in concern with regard to New Caledonia, the Committee notes, in particular, that the cut-off points for length of residence are designed, according to the State party, to ensure that the referendums reflect the will of the population "concerned" and that their results cannot be undermined by a massive vote by people who have recently arrived in the territory and have no proven, strong ties to it.

14.4 The Committee notes that the 21 authors were excluded from the 1998 referendum because they did not meet the 10 years' continuous residence requirement. It also notes that one author will not be able to participate in the next referendum because of the 20 years' continuous residence requirement, whereas the other 20 authors do, as things stand, have the right to vote in that referendum - 18 authors on the basis of the residence criterion and 2 others on the strength of having been born in New Caledonia, their ethnic origin and national extraction being of no consequence in this respect.

14.5 The Committee considers, first, that the cut-off points adopted do not have a disproportionate effect, given the nature and purpose of the referendums in question, on the authors' situation, particularly since their non-participation in the first referendum manifestly has no consequences for nearly all of them as regards the final referendum.

14.6 The Committee further considers that each cut-off point should provide a means of evaluating the strength of the link to the territory, in order that those residents able to prove a sufficiently strong tie are able to participate in each referendum. The Committee considers that, in the present case, the difference in the cut-off points for each ballot is linked to the issue being decided in each vote: the 20-year cut-off point - rather than 10 years as for the first ballot - is justified by the time frame for self-determination, it being made clear that other ties are also taken into account for the final referendum.

14.7 Noting that the length of residence criterion is not discriminatory, the Committee considers that, in the present case, the cut-off points set for the referendum of 1998 and referendums from 2014 onwards are not excessive inasmuch as they are in keeping with the nature and purpose of these ballots, namely a self-determination process involving the participation of persons able to prove sufficiently strong ties to the territory whose future is being decided. This being the case, these cut-off points do not appear to be disproportionate with respect to a decolonization process involving the participation of residents who, over and above their ethnic origin or political affiliation, have helped, and continue to help, build New Caledonia through their sufficiently strong ties to the territory.

EQUALITY AND DISCRIMINATION - GENERAL

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

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Notes

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2/ Article 2.2 of the Noumea Accord: "The electorate for the referendums on the political organization of New Caledonia to be held once the period of application of this Accord has ended (sect. 5) shall consist only of: voters registered on the electoral rolls on the dates of the referendums provided for under section 5 who were eligible to participate in the referendum provided for in article 2 of the Referendum Act, or who fulfilled the conditions for participating in that referendum; those who are able to prove that any interruptions in their continuous residence in New Caledonia were attributable to professional or family reasons; those who have customary status or were born in New Caledonia and whose property and personal ties are mainly in New Caledonia; and those who, although they were not born in New Caledonia, have one parent born there and whose property and personal ties are mainly in New Caledonia. Young people who have reached voting age and are registered on the electoral rolls and who, if they were born before 1988, resided in New Caledonia from 1988 to 1998, or, if they were born after 1988, have one parent who fulfilled or could have fulfilled the conditions for voting in the referendum held at the end of 1998, shall also be eligible to vote in these referendums. Persons who, in 2013, are able to prove that they have resided continuously in New Caledonia for 20 years may also vote in these referendums."

...

22/ Communications No. 500/1992, *J. Debreczeny v. Netherlands*; No. 44/1979, Alba Pietraroia on behalf of *Rosario Pietraroia Zapala v. Uruguay*; General Comment No. 18 relating to article 25 (fifty-seventh session, 1996), paras. 4, 10, 11 and 14.

23/ Constitutional Act (No. 98-610) of 20 July 1998, whose article 76 determined conditions for participation in the 1998 ballot. Congress is constituted by the meeting of the National Assembly and the Senate for the purposes of amending the Constitution, in accordance with article 89 of the Constitution of 4 October 1958.

24/ Organic Law (No. 99-209) of 19 March 1999, whose article 218 determines conditions for participation in ballots as from 2014.

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- *Chira Vargas v. Peru* (906/2000) ICCPR, A/57/40 vol. II (22 July 2002) 228 (CCPR/C/75/D/906/2000) at paras. 2.3-2.5, 2.7-2.10, 7.4, 8 and 9.

...

2.3 On 16 October 1991, an administrative decision relieved the author of his duties as a

disciplinary measure, after 26 years of service.1/ The decision was based on a report dated 8 October 1991, which contained conclusions based on a police report that the author claims never existed, and a second disciplinary report dated 16 October 1991, in which the author was accused of violating article 84.C.6 of the Disciplinary Regulations, although he contends that the article in question was intended to cover a different situation.

2.4 The same day, an order was issued for the author's arrest, without a judicial order and without his being apprehended in *flagrante delicto*. The author was taken to Lima, where he was forced to attend a press conference. The author claims that no charges were ever brought against him, in either the ordinary or the military courts, for criminal negligence or liability in the course of his duties, or for any other criminal offence arising from the death of Mr. Pérez Arévalo, and that he was neither tried nor sentenced.

2.5 On 25 October 1991, the Office of the National Police Headquarters Legal Adviser issued a report stating that the author, in his capacity as Chief of the Drug Department, had failed to inform his superiors of the action he had taken against Mr. Pérez Arévalo for illicit drug trafficking. The author, however, maintains that the Institutional Command was informed immediately and expediently of the detention of certain individuals for drug trafficking, in the report of the Trujillo Police Department secretariat dated 1 October 1991. The Ministry of the Interior was also informed of the arrest of Mr. Pérez Arévalo and others, in a letter dated 4 October 1991 from the National Police Directorate-General.

...

2.7 On 30 January 1995, the author submitted an application for *amparo* to the Trujillo Third Special Civil Court, requesting that the Supreme Decision relieving him of his duties should be declared unenforceable. In its judgement of 2 March 1995, the Court declared the decision unenforceable and ordered the reinstatement of the author to active service in the National Police with the rank of commander. The judgement was appealed by the Public Prosecutor of the Ministry of the Interior in the Trujillo First Civil Division which, on 20 June 1995, upheld the order for the author's reinstatement. The Public Prosecutor then appealed to the Constitutional Division of the Supreme Court, which, in its decision of 6 December 1995, declared itself incompetent to hear the appeal. On 27 December 1995, the appeal was declared inadmissible by the Trujillo First Civil Division.

2.8 On 12 January 1996, the Trujillo Third Special Civil Court ordered the execution of the judgement of 2 March 1995, with the reinstatement of the author as commander in the police force. In a written submission dated 1 February 1996, the Public Prosecutor opposed the author's reinstatement, arguing that administrative procedures must be carried out prior to such reinstatement.

2.9 On 15 February 1996, the author requested the Trujillo Third Special Civil Court to urge the Ministry of the Interior to implement the Supreme Decision ordering his reinstatement

and to publish it in the Official Gazette. On 23 May 1996, the Court issued a decision giving the Ministry of the Interior 10 days to implement and publish the Supreme Decision. However, on 28 May 1996, the National Police Public Prosecutor declared the decision null and void, claiming that the relevant procedures had not been completed and that the decision should be signed by the President of the Republic.

2.10 The author sent notarized communications to the Ministry of the Interior and to the President of the Republic on 8 and 12 August 1996 respectively, informing them that the judicial order had not been executed. The Trujillo Third Special Civil Court sent a note dated 9 April 1997 to the Secretary of the Office of the President of Peru requesting information on the outcome of the draft Supreme Decision that the Minister of the Interior had transmitted to the President on 15 February 1996. On 25 June 1997, the Court again requested the President to sign the decision, to no avail.

...

7.4 Although not explicitly stated by the author, the Committee considers that the communication raises issues under article 25 (c) concerning every citizen's right to have access, on general terms of equality, to public service in his country, together with the right to the execution of decisions and judgements. In this regard, the Committee notes the author's claims that, notwithstanding the Supreme Decision of 21 August 1997, he was never reinstated in his post, and that another Supreme Decision was issued on 29 August 1997 forcing him to retire owing to the reorganization of the police force. Considering that the State party has not demonstrated in what way it reinstated the author in service, what rank he was given or on what date he resumed his post, as required by law in the light of the annulment ruling of 2 March 1995, the Committee considers that there has been a violation of article 25 (c), in conjunction with article 2, paragraph 3, of the Covenant.

8. The Human Rights Committee...is of the view that the facts that have been set forth constitute violations of article 25 (c) of the Covenant, in conjunction with article 2, paragraph 3, of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee is of the view that the author is entitled to an appropriate remedy, namely: (a) effective reinstatement to his duties and to his post, with all the consequences that that implies, at the rank that he would have held had he not been dismissed in 1991, or to a similar post;4/ (b) compensation comprising a sum equivalent to the payment of the arrears of salary and remuneration that he would have received from the time at which he was not reinstated to his post.5/ Finally, the State party must ensure that similar violations do not recur in the future.

Notes

1/ According to the decision, the author had committed serious breaches of discipline and

police regulations through his improper handling of a drug trafficking case, which resulted in the death of the suspect, Áureo Pérez Arévalo.

...

4/ See the Committee's Views concerning communication No. 630/1995, *Abdoulaye Mazou v. Cameroon*, paragraph 9, and communication 641/1995, *Gedumbe v. Democratic Republic of the Congo*.

5/ See the Views concerning communications No. 422/1990, No. 423/1990 and No. 424/1990, *Adimado M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, paragraph 9.

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- *Mátyus v. Slovakia* (923/2000) ICCPR, A/57/40 vol. II (22 July 2002) 257 (CCPR/C/75/D/923/2000) at paras. 2.1, 2.2, 3.1, 3.2, 9.2, 10 and 11.

...

2.1 The author states that, on 5 November 1998, the Roň Áava Town Council passed Resolution 193/98 establishing five voting districts in the region and 21 representatives in total, for the elections to the Roň Áava Town Council, due to take place on 18 and 19 of December 1998. Each voting district was to have the following number of representatives: five in voting district number one; five in voting district number two; seven in voting district number three; two in voting district number four; two in voting district number five. In accordance with paragraph 9 section 1 of Law no. 346/1990 Coll. on elections to municipal bodies, "in every town, multi-mandate voting districts shall be established in which representatives shall be elected to the village or town council proportional to the number of inhabitants in the town, and at most 12 representatives in one electoral district".

2.2 According to the author, when comparing the number of residents per representative in the individual voting districts in the town of Roň Áava, he came up with the following figures; one representative per 1,000 residents in district number one; one per 800 residents in district number two; one per 1,400 residents in district number three; one per 200 residents in district number four; and one per 200 residents in district number five. The number of representatives in each district was not therefore proportional to the number of inhabitants therein. The author was a candidate in voting district number three but failed to secure a seat as he came number eighth and only seven deputies were elected for this district.

...

3.1 The author contends that the rights of the "citizens of Roň Áava", under article 25(a) and (c) of the Covenant, were violated as they were not given an equal opportunity to influence the results of the elections, in exercising their right to take part in the conduct of public affairs, through the election of representatives. In addition, the author states that their rights

were violated as they were not given an equal opportunity to exercise their right to be elected to posts in the town council.

3.2 The author contends that his rights, under article 25(a) and (c), were violated, as he would have needed substantially more votes to be elected to the town council than candidates in other districts, due to the fact that the number of representatives in each district was not proportional to the number of inhabitants therein. The author claims that this resulted in his loss of the election.

...

9.2 As regards the question whether article 25 of the Covenant was violated, the Committee notes that the Constitutional Court of the State party held that by drawing election districts for the same municipal council with substantial differences between the number of inhabitants per elected representative, despite the election law which required those voting districts to be proportional to the number of inhabitants, the equality of election rights required by the State party's constitution was violated. In the light of this pronouncement, based on a constitutional clause similar to the requirement of equality in article 25 of the Covenant, and in the absence of any reference by the State party to factors that might explain the differences in the number of inhabitants or registered voters per elected representative in different parts of Roň Áava, the Committee is of the opinion that the State party violated the author's rights under article 25 of the Covenant.

10. The Human Rights Committee...is of the view that the facts as found by the Committee reveal a violation by Slovakia of article 25 paragraphs (a) and (c) of the Covenant.

11. The Committee acknowledges that cancelling elections after they have already taken place may not always be the appropriate remedy in the case of an inequality in the elections, especially when the inequality was inherent in the laws and regulations laid down before the elections, rather than irregularities in the elections themselves. Furthermore, in the specific circumstances of the case, given the time lapse since the elections in December 1998, the Committee is of the opinion that its finding of a violation is of itself a sufficient remedy. The State party is under an obligation to prevent similar violations in the future.

- *Kang v. Republic of Korea* (878/1999), ICCPR, A/58/40 vol. II (15 July 2003) 152 (CCPR/C/78/D/878/1999) at paras. 2.1, 2.2, 2.5 and 7.2.

...

2.1 The author, along with other acquaintances, was an opponent of the State party's military regime of the 1980s. In 1984, he distributed pamphlets criticizing the regime and the use of security forces to harass him and others. At that time, he also made an unauthorized (and therefore criminal) visit to North Korea. In January, March and May

1985, he distributed dissident publications covering numerous political, historical, economic and social issues.

2.2 The author was arrested without warrant on 1 July 1985 by the Agency for National Security Planning (ANSP). He was held *incommunicado* and interrogated in ANSP detention, suffering "torture and other mistreatments", over 36 days. Under torture, he confessed to joining the North Korean Labour Party and receiving instructions for espionage from North Korea. Only on 5 August 1985, was a judicial warrant issued for his arrest. Remaining in detention, he was formally indicted on 4 September 1985 for alleged violations of the National Security Law of 31 December 1980.1/ These allegations encompassed meeting with another member of a spy ring, "enemy-benefitting activities" in favour of North Korea, gathering and divulging state or military secrets (espionage), and conspiracy.

...

2.5 After his conviction, the author was held in solitary confinement. He was classified as a communist "confident criminal"4/ under the "ideology conversion system", a system given legal foundation by the 1980 Penal Administration Law and designed to induce change to a prisoner's political opinion by the provision of favourable benefits and treatment in prison. Due to this classification, he was not eligible for more favourable treatment. On 14 March 1991, the author's detention regime was reclassified by the Regulation on the Classification and Treatment of Convicts ('the 1991 Regulation') to "those who have not shown signs of repentance after having committed crimes aimed at destroying the free and democratic basic order by denying it". Moreover, having been convicted under the National Security Law, the author was subject to an especially rigorous parole process.5/

...

7.2 As to the author's claim that the "ideology conversion system" violates his rights under articles 18, 19 and 26, the Committee notes the coercive nature of such a system, preserved in this respect in the succeeding "oath of law-abidance system", which is applied in discriminatory fashion with a view to alter the political opinion of an inmate by offering inducements of preferential treatment within prison and improved possibilities of parole.15/ The Committee considers that such a system, which the State party has failed to justify as being necessary for any of the permissible limiting purposes enumerated in articles 18 and 19, restricts freedom of expression and of manifestation of belief on the discriminatory basis of political opinion and thereby violates articles 18, paragraph 1, and 19, paragraph 1, both in conjunction with article 26.

Notes

1/ The Law was enacted by the "National Security Legislative Council", an unelected body organized as a legislature following the 1980 military *coup d'état*. Forming or joining an "anti-State organization", and espionage or other activities under instruction of an anti-State organization are punishable with heavy penalties under articles 3 and 4, respectively.

...
4/ "Confident criminal" is not specifically defined, but appears from the context of the communication to be a prisoner who fails to comply with the ideology conversion system and its renunciation requirements...

5/ Under the Parole Administration Law, in such cases, the Parole Examination Committee "shall examine whether the convict has converted the [sic] thought, and, when deemed necessary, shall request the convict to submit an announcement or statement of conversion".
...
15/ See the comments of the State party arguing the contrary with regard to the Committee's Concluding Observations on their second periodic report. (CCPR/C/79/Add.122, at para 2).

- *Althammer et al. v. Austria* (998/2001), ICCPR, A/58/40 vol. II (8 August 2003) 317 (CCPR/C/78/D/998/2001) at paras. 2.1, 2.2, 8.3, 8.4 and 10.2.

...
2.1 The authors are retired employees of the Social Insurance Board in Salzburg (*Salzburger Gebietskrankenkasse*). Counsel states that they receive retirement benefits under the relevant schemes of the Regulations A of Service for Employees of the Social Insurance Board (*Dienstordnung A für die Angestellten bei den Sozialversicherungsträgern*).

2.2 Amongst various monthly entitlements, the Regulations provided for monthly household entitlements of ATS 220 and children's entitlements of ATS 260 per child for those with children up to the age of 27. On 1 January 1996, an amendment to the regulations came into effect which abolished the monthly household entitlement and increased the children's benefits to ATS 380 per child.
...
8.3 The Committee notes that the State party has invoked the reservation it made under article 5, paragraph 2 (a), of the Optional Protocol, which precludes the Committee from considering claims that have previously been "examined" by the "European Commission on Human Rights". As to the author's argument that the application which he submitted to the European Commission was, in fact, never examined by that organ but declared inadmissible by the European Court of Human Rights, the Committee observes that the European Court, as a result of treaty amendment by virtue of Protocol No. 11, has legally assumed the former European Commission's tasks of receiving, deciding on the admissibility of, and making a first assessment on the merits of applications submitted under the European Convention. The Committee observes, for purposes of ascertaining the existence of parallel or, as the case may be, successive proceedings before the Committee and the Strasbourg organs, that the new European Court of Human Rights has succeeded to the former European

Commission by taking over its functions.

8.4 Having concluded that the State party's reservation applies, the Committee needs to consider whether the subject matter of the present communication is the same matter as the one which was presented under the European system. In this connection, the Committee recalls that the same matter concerns the same authors, the same facts and the same substantive rights. The Committee on earlier occasions has already decided that the independent right to equality and non-discrimination embedded in article 26 of the Covenant provides a greater protection than the accessory right to non-discrimination contained in article 14 of the European Convention. The Committee has taken note of the decision taken by the European Court on 12 January 2001 rejecting the authors' application as inadmissible as well as of the letter from the Secretariat of the European Court explaining the possible grounds of inadmissibility. It notes that the authors' application was rejected because it did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols as it did not raise issues under the right to property protected by article 1 of Protocol No. 1. As a consequence, in the absence of an independent claim under the Convention or its Protocols, the Court could not have examined whether the authors' accessory rights under article 14 of the Convention had been breached. In the circumstances of the present case, therefore, the Committee concludes that the question whether or not the authors' rights to equality before the law and non-discrimination have been violated under article 26 of the Covenant is not the same matter that was before the European Court.

...

10.2 The authors claim that they are victims of discrimination because the abolition of the household benefits affects them, as retired persons, to a greater extent than it affects active employees. The Committee recalls that a violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate.7/ However, such indirect discrimination can only be said to be based on the grounds enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds. In the circumstances of the instant case, the abolition of monthly household payments combined with an increase of children's benefits is not only detrimental for retirees but also for active employees not (yet or no longer) having children in the relevant age bracket, and the authors have not shown that the impact of this measure on them was disproportionate. Even assuming, for the sake of argument, that such impact could be shown, the Committee considers that the measure, as was stressed by the Austrian courts...was based on objective and reasonable grounds. For these reasons, the Committee concludes that, in the circumstances of the instant case, the abolition of monthly household payments, even if examined in the light of previous changes of the Regulations of Service for Employees of the Social Insurance Board, does not amount

to discrimination as prohibited in Article 26 of the Covenant.

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Notes

...

7/ See the Committee's general comment No. 18 on non-discrimination and the Committee's Views adopted on 19 July 1995 in Case No. 516/1992 (*Simunek et al. v. the Czech Republic*) (CCPR/C/54/D/516/1992, para. 11.7).

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- *Hoyos v. Spain* (1008/2001), ICCPR, A/59/40 vol. II (30 March 2004) 472 at paras. 2.1-2.5, 6.5, 7 and Individual Opinion of Ruth Wedgwood (concurring), at 487-488.

...

2.1 The author was the firstborn daughter of Mr. Alfonso de Hoyos y Sánchez, who died on 15 July 1995. Subsequently, she applied to the King for succession to the ranks and titles held by her father, including the *Dukedom of Almodóvar del Río*, with the rank of *Grandee of Spain*. She asserts that she made a formal application with the intention of placing on record her greater right to succession to the title in question.

2.2 In an Order published in the *Boletín Oficial del Estado* of 21 June 1996, succession to the title of *Duke of Almodóvar del Río* was granted to the author's brother, Isidoro Hoyos y Martínez de Irujo.

2.3 The author asserts that, although as firstborn daughter she had the greater right, she had agreed to renounce the title under an agreement she had made with her brothers on the distribution of their father's titles of nobility. She asserts that at the time this took place, the criterion established by the judgement of the Supreme Court of 20 June 1987, pronouncing the precedence for males in succession to titles of nobility discriminatory and unconstitutional, was in force. However, the Constitutional Court's judgement of 3 July 1997 abrogated that decision; it stated that male primacy in the order of succession to the titles provided for in the Acts of 4 May 1948 and 11 October 1820, was neither discriminatory nor unconstitutional, given that article 14 of the Spanish Constitution, which guaranteed equality before the law, was not applicable in view of the historical and symbolic nature of the institution. 1/ The author argues that this led to her brothers initiating legal proceedings to strip her of her titles.

2.4 As a result, in June 1999, the author instituted legal proceedings against her brother Isidoro in Majadahonda Court of First Instance No. 6, asserting her greater right to the title.

2.5 In its judgement of 11 May 2000, the Majadahonda Court dismissed the claim, in accordance with the Constitutional Court's judgement of 3 July 1997. The judge said,

however, that she sympathized with the author's position but she could not deviate from the interpretation the Constitutional Court had given to the laws and provisions of the legal regime.

...

6.5 The Committee notes that while the State party has argued that hereditary titles of nobility are devoid of any legal and material effect, they are nevertheless recognized by the State party's laws and authorities, including its judicial authorities. Recalling its established jurisprudence, 7/ the Committee reiterates that article 26 of the Covenant is a free-standing provision which prohibits all discrimination in any sphere regulated by a State party to the Covenant. However, the Committee considers that article 26 cannot be invoked in support of claiming a hereditary title of nobility, an institution that, due to its indivisible and exclusive nature, lies outside the underlying values behind the principles of equality before the law and non-discrimination protected by article 26. It therefore concludes that the author's communication is incompatible *ratione materiae* with the provisions of the Covenant, and thus inadmissible pursuant to article 3 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 3 of the Optional Protocol;

...

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Notes

1/ Two individual votes by three judges dissented from the content of the judgement; they considered that the provision in question should have been declared unconstitutional.

...

7/ See e.g. Views on communication No. 182/1984 (*Zwaan de Vries v. The Netherlands*), Views adopted 9 April 1987.

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Individual Opinion of Ruth Wedgwood (concurring)

In its review of country reports, as well as in its views on individual communications, the Human Rights Committee has upheld the rights of women to equal protection of the law, even in circumstances where compliance will require significant changes in local practice. It is thus troubling to see the Committee dismiss so cavalierly the communication of Isabel Hoyos Martínez de Irujo.

The distribution of family titles in Spain is regulated by public law. Decisions on succession to titles of honour or nobility are published as official acts of State in the *Boletin Oficial del Estado*. The order of succession is not a matter of private preference of the current

titleholder. Rather, female descendants are statutorily barred from any senior claim to a title, pursuant to the preference for males, regardless of the wishes of the ascendant titleholder. Such a statutory rule, see statute of 4 June 1948, would seem to be a public act of discrimination.

The Committee's stated reasons for dismissing the communication of Ms. Hoyos Martínez de Iraujo, in her claim to inheritance of the title of the Duchy of Almodovar de Rio, can give no comfort to the State party. In rejecting her petition, as inadmissible *ratione materiae*, the Committee writes that hereditary titles of nobility are "an institution that … lies outside the underlying values behind the principles of equality before the law and non-discrimination protected by article 26". This cryptic sentence could be read to suggest that the continuation of hereditary titles is itself incompatible with the Covenant. One hopes that the future jurisprudence of the Committee will give appropriate weight to the desire of many countries to preserve the memory of individuals and families who figured prominently in the building of the national State.

The use of titles can be adapted to take account of the legal equality of women. Even within the tradition of a title, a change of facts may warrant a change in discriminatory rules. For example, in an age of national armies, it is no longer expected that a titleholder must have the ability to fight on the battlefield. (Admittedly, Jeanne d'Arc might suggest a wider range of reference as well.)

In its accession to modern human rights treaties, Spain recognized the difficulties posed by automatic male preference. Spain ratified the International Covenant on Civil and Political Rights on 27 July 1977. Spain also approved the Convention on the Elimination of All Forms of Discrimination against Women on 16 December 1983. In the latter accession, Spain made a single reservation that has importance here. Spain noted that the Convention shall not affect the constitutional provisions concerning succession to the Spanish crown. This unique protection for royal succession was not accompanied by any other similar reservation concerning lesser titles.

Spain did not make any similar reservation to the International Covenant on Civil and Political Rights in 1977. Still, good practice would suggest that Spain should be given the benefit of the same reservation in the application of the Covenant, in light of the Committee's later interpretation of article 26 as an independent guarantee of equal protection of the law. But the bottom line is that, even with this reservation, Spain did not attempt to carve out any special protection to perpetuate gender discrimination in the distribution of other aristocratic titles.

It is not surprising that a State party should see the inheritance of the throne as posing a unique question, without intending to perpetuate any broader practice of placing women last

in line. Indeed, we have been reminded by the incumbent King of Spain that even a singular and traditional institution such as royalty may be adapted to norms of equality. King Juan Carlos recently suggested that succession to the throne of Spain should be recast. Under Juan Carlos' proposal, after his eldest son completes his reign, the son's first child would succeed to the throne, regardless of whether the child is a male or a female. In an age when many women have served as heads of State, this suggestion should seem commendable and unremarkable.

In its judgement of 20 June 1987, upholding the equal claim of female heirs to non-royal titles, the Supreme Court of Spain referenced the Convention on the Elimination of All Forms of Discrimination against Women, as well as article 14 of the 1978 Spanish Constitution. In its future deliberations, Spain may also wish to reference general comment No. 18 of the Human Rights Committee, which states that article 2 of the Covenant "prohibits discrimination in law or in fact in any field regulated and protected by public authorities". And it is worth recalling that under the rules of the Committee, the disposition of any particular communication does not constitute a formal precedent in regard to any other communication or review of country reports.

The hereditary title in question here has been represented by the State party as "devoid of any material or legal content" and purely *nomen honoris*... Thus, it is important to note the limits of the Committee's instant decision. The Committee's Views should not be taken as sheltering any discriminatory rules of inheritance where real or chattel property is at stake. In addition, these views do not protect discrimination concerning traditional heritable offices that may, in some societies, still carry significant powers of political or judicial decision-making. We sit as a monitoring committee for an international covenant, and cannot settle broad rules in disregard of these local facts.

See also:

- *Barcaiztegui v. Spain* (1019/2001), ICCPR, A/59/40 vol. II (30 March 2004) 489 at paras. 2.1, 2.2, 2.4, 6.4 and Individual Opinion of Ruth Wedgwood, 503-504.

For dissenting opinions in this context, see Hoyos v. Spain (1008/2001), ICCPR, A/59/40 vol. II (30 March 2004) 472 at Individual Opinion of Rafael Rivas Posada, 481-482 and Individual Opinion of Mr. Hipólito Solari Yrigoyen, 483-486.

- *G. Pohl et al. v. Austria* (1160/2003), ICCPR, A/59/40 vol. II (9 July 2004) 378 at paras. 2.1-2.6, 9.3-9.6 and 9.8.

...

2.1 The first and second authors jointly own, and reside on, property measuring some 1,600

square metres located in the community of Aigen (part of the Municipality of Salzburg). The third author formerly owned a plot of land of some 2,300 square metres, also located in Aigen, adjacent to the plot owned by the first and second authors. On 15 June 1998, the fourth author purchased the plot formerly owned by the third author from a company, which had acquired it at a public auction. As the current owner of the plot, on which he also resides, the fourth author is contractually obliged to reimburse the third author for any expenses associated with that plot.

2.2 Both plots of land are designated as "rural areas", in accordance with the 1998 Salzburg Provincial Zoning Law, which divides real estate located in the Province of Salzburg into "building land", "traffic/transportation areas" and "rural areas".

2.3 On 1 December 1998, the Municipality of Salzburg informed the first, second and third authors of a preliminary assessment of the financial implications of the construction, in 1997, of a residential sewerage adjacent to their plots and gave them an opportunity to comment on the assessment.

2.4 According to Section 11 of the Salzburg Provincial Landowners' Contributions Act (1976), which regulates financial contributions of landowners to certain public services in the Municipality of Salzburg, owners of plots of land located adjacent to a newly constructed sewerage must contribute to the construction costs; the contribution is calculated pursuant to a formula based on the square measure of a plot, from which an abstract "length" is deducted. Contributions of landowners in all other municipalities of the Province of Salzburg are regulated by the Provincial Act on Landowners' Contributions to the Construction of Municipal Sewerages in all Municipalities of the Province of Salzburg with the Exception of the City of Salzburg (1962), which provides that owners of land, from which wastewater is dumped into the sewerage, are required to pay contributions for newly constructed sewerages, calculated on the basis of a formula that links the construction costs to the living space of the dwellings built on the plots. The number of "points", calculated on the basis of living space (in square metres), are multiplied by the amount to be paid per point to arrive at an individual landowner's contribution.

2.5 In their observations on the preliminary assessment, the authors argued that the envisaged calculation of their contributions based on the length of the plot was discriminatory, if compared to the calculation of contributions of owners of plots in areas designated as "building land", as it disregarded the special situation of plots in rural areas, which were significantly larger than average parcels in areas designated as "building land". The calculation method in all other municipalities in the Province of Salzburg was therefore based on available living space instead of the abstract length criterion so as to take such special circumstances into account. The authors also stated that the existing waste-water disposal facilities were adequate.

2.6 On 22 February 1999, the Municipality of the City of Salzburg issued two administrative acts, requiring the first and second authors to pay ATS 193,494.20 (€14,061.77) and the third author to contribute ATS 262,838.70 (€19,101.23), pursuant to Section 11 of the Landowners' Contribution Act. It rejected the third author's objection to his treatment as a party to the proceedings despite the fact that he was no longer the registered owner of the plot, stating that the owner registered at the time of the construction of the sewerage was to be considered the obligated party.

...

9.3 The question before the Committee is whether the relevant legislation regarding the financial contributions of landowners in the Municipality of Salzburg to the construction of municipal sewerages violates article 26 of the Covenant by first not distinguishing between plots of an urban character designated as "building land" and "rural" plots of land with a building site, and second by using the size of plots of land (so called "length") as basis for the calculation of the contributions instead of linking them to the size of living space as is done in all other municipalities of the Province of Salzburg.

9.4 The Committee recalls that under article 26, discrimination in the equal protection of the law is prohibited on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 12/ It notes that an indirect discrimination may result from a failure to treat different situations differently, if the negative results of such failure exclusively or disproportionally affect persons of a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 13/ While the Committee does not exclude that "residence" may be a "status" that prohibits discrimination, it notes that the alleged failure to distinguish between "urban" and "rural" plots of land is not linked to a particular place of residence within the municipality of Salzburg but depends on their assignment to a particular zoning area. The Committee also takes note of the State party's explanation that the degree of contributions for "rural" parcels does depend on how much of the plot its owner sought to have designated as an area where a building may be constructed. The Committee concludes that the failure to distinguish between urban "building land" and "rural" plots of land with a building site is neither discriminatory by reference to any of the grounds mentioned in article 26 of the Covenant, nor arbitrary.

9.5 With regard to the claim that the different treatment of landowners in the City of Salzburg and landowners elsewhere in the Province of Salzburg, concerning the calculation of their landowners' contributions for the construction of new sewer systems for their plots of land, is not based on objective and reasonable criteria, as required by article 26 of the Covenant, the Committee considers that the authors' argument relating to the perceived more dynamic increases in population and incidence of construction in other parts of the Province of Salzburg does not exclude that the construction costs for the sewer network in the more densely populated Municipality of Salzburg may still be higher than in the rest of the

Province, as claimed by the State party.

9.6 In this connection, the Committee notes that the authors admit that their landowners' contributions would still be three to four times higher, if compared to the rest of the Province, even if the calculation was based on the size of the living space of the dwelling situated on the plot of land. It cannot therefore be concluded that the different levels of contributions in and outside the City of Salzburg result exclusively from the different calculation methods applied under the 1976 Salzburg Provincial Landowners' Contributions Act and the 1962 Act applicable to the other municipalities in the Province of Salzburg. The Committee therefore considers that the authors have failed to demonstrate that their different treatment was not based on objective and reasonable criteria.

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9.8 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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12/ Communication No. 196/1983, *Gueye v. France,* Views adopted on 3 April 1989, at para. 9.4.

13/ See, e.g., communication No. 998/2001, *Althammer v. Austria*, Views adopted on 8 August 2003, at para. 10.2.

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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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- *Olavi v. Finland* (1076/2002), ICCPR, A/60/40 vol. II (15 March 2005) 118 at paras. 2.1, 2.2, 3, 7.3, 8.2 and 9.

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2.1 On 26 March 1987, the Council of State authorized the expropriation of part of the authors' lands (covering 65.97 hectares). The expropriated area forms part of the larger area of Linnansaari National Park. On 18 February 1988, the Expropriation Commission issued an expropriation order and defined the amount to be paid.

2.2 The authors state that their lands were expropriated by the Government at a price considerably below the current price in comparison with voluntary purchases and other expropriations in the region.

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3. The authors argue that their rights under articles 2, paragraph 1, 3, and 26 of the Covenant have been violated because they did not receive equal treatment in relation to the compensation paid for expropriated land property. They also claim to be victims of a violation of article 14, paragraph 1, of the Covenant, because of the failure of the Supreme

Court to disclose the names of the judges participating in the decision on their application.
...
7.3 As above-mentioned acts were inflicted by the investigators on Mr. Khalilov to make him to confess guilt in several crimes, the Committee furthermore considers that the facts before it also disclose a violation of article 14, paragraph 3 (g), of the Covenant.
...
8.2 In respect to the authors' claim that they are the victims of a violation of article 14, paragraph 1 of the Covenant, the Committee notes the State party's explanation, which has not been contested by the authors, that the authors could at any time have requested the names of the judges participating in the decision from the Registry of the Supreme Court. The Committee therefore considers that the facts before it do not reveal any violation of article 14, paragraph 1 of the Covenant.

9. The Human Rights Committee...is of the view that the facts before it do not disclose a violation of any of the provisions of the International Covenant on Civil and Political Rights.

- *Oulajin and Kaiss v. The Netherlands* (406/1990 and 426/1990), ICCPR, A/48/40 vol. II (23 October 1992) 131 (CCPR/C/46/D/406/1990/426/1990) at paras. 7.3-7.5 and Individual Opinion by Messrs. Kurt Herndl, Rein Mullerson, Birame N'Diaye and Waleed Sadi, 9. For text of communication, see **EQUALITY AND DISCRIMINATION -** FAMILY.