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III. JURISPRUDENCE

ICCPR

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

...
12. The Committee...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 connexion 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...
...
16. The Human Rights Committee...is of the view that these facts, in so far as they have occurred after 23 March 1976 (the date on which the Covenant entered into force in respect of Uruguay), disclose violations of the Covenant, in particular:

> ...
> of article 19 (2) because he was detained for having disseminated information relating to trade-union activities...

- *Pietraroia v. Uruguay* (44/1979) (R.10/44), ICCPR, A/36/40 (27 March 1981) 153 at paras. 13.1, 13.2, 15 and 17.

...
13.1 The Human Rights Committee...hereby 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:

13.2 Rosario Pietraroia Zapala was arrested in Uruguay, without a warrant for arrest, early in 1976 (according to the author on 19 January 1976; according to the State party on 7 March 1976), and held incommunicado under the prompt security measures for four to six months...His trial began on 10 August 1976, when he was charged by a military court with the offences of "subversive association ("*asociación subversiva*") and "conspiracy to violate the Constitution, followed by acts preparatory thereto" ("*atentado contra la Constitución en el grado de conspiración sequida de actos preparatorios*"). In this connexion, the Committee notes that the Government of Uruguay has offered no explanations as regards the concrete factual basis of the offences for which Rosario Pietraroia was charged in order to refute the claim that he was arrested, charged and convicted on account of his prior political and trade-union activities which had been lawful at the time engaged in. In May 1977, the military prosecutor called for a penalty of 12 years' rigorous imprisonment and on 28 August 1978 Rosario Pietraroia was sentenced to 12 years' imprisonment, in a closed trial, conducted in writing and without his presence...On 9 October 1979, the Supreme Military Court rendered a Judgement of second instance, confirming the judgement of the first instance. The Committee notes 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...

...

15. As regards article 19, the Covenant provides that everyone shall have the right to hold opinions without interference and that the freedom of expression set forth in paragraph 2 of that article shall be subject only to such restrictions as are necessary (a) for respect of the rights and reputations of others or (b) for the protection of national security or of public order ("*ordre public*"), or of public health or morals. The Government of Uruguay has submitted no evidence regarding the nature of the activities in which Rosario Pietraroia was alleged to have been engaged and which led to his arrest, detention and committal for trial. Bare information from the State party that he was charged with subversive association and conspiracy to violate the Constitution, followed by preparatory acts thereto, is not in itself sufficient, without details of the alleged charges and copies of the court proceedings. The Committee is therefore unable to conclude on the information before it that the arrest, detention and trial of Rosario Pietraroia was justified on any of the grounds mentioned in article 19(3) of the Covenant.

...

17. The Human Rights Committee...is of the view that these facts, in so far as they occurred after 23 March 1976 (the date on which the Covenant entered into force in respect of Uruguay), disclose violations cf the Covenant, in particular:

> ...
> of article 19 (2), because he was arrested, detained and tried for his political and trade-union activities...

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- *Burgos v. Uruguay* (52/1979) (R.12/52), ICCPR, A/36/40 (29 July 1981) 176 at paras. 10.1, 10.2, 11.5, 13 and 14.

...
10.1 The Human Rights Committee has considered the present communication in the light of all information made available to it by the parties...The Committee bases its views *inter alia* on the following undisputed facts:

10.2 Sergio Rubén López Burgos was living in Argentina as a political refugee until his disappearance on 13 July 1976; he subsequently reappeared in Montevideo, Uruguay, not later than 23 October 1976, the date of his purported arrest by Uruguayan authorities, and was detained under "prompt security measures". On 4 November 1976 pre-trial proceedings commenced when the second military examining magistrate charged him with the offence of "subversive association", but the actual trial began in April 1978 before a military court of first instance, which sentenced him on 8 March 1979 to seven years' imprisonment...
...
11.5 The State party has also not specified in what "subversive activities" López Burgos was allegedly involved or clarified how or when he engaged in these activities. It would have been the duty of the State party to provide specific information in this regard, if it wanted to refute the allegations of the author that López Burgos has been persecuted because of his involvement in the trade-union movement...
...
13. The Human Rights Committee...is of the view that the communication discloses violations of the Covenant, in particular:

> ...
> of article 22 (1) in conjunction with article 19 (1) and (2) because Lopez Burgos has suffered persecution for his trade union activities.

14. The Committee, accordingly, is of the view that the State party is under an obligation pursuant to article 2 (3) of the Covenant to provide effective remedies to López Burgos, including immediate release, permission to leave Uruguay and compensation for the violations which he has suffered and to take steps to ensure that similar violations do not occur in the future.

- *M. A. v. Italy* (117/1981), ICCPR, A/39/40 (10 April 1984) 190 at paras. 1.2 and 13.1-13.3.

...
1.2 The alleged victim is M.A. who at the time of submission was serving a sentence upon conviction of involvement in "reorganizing the dissolved fascist party", which is prohibited

by an Italian penal law of 20 June 1952. By order of the Court of Appeals of Florence, M.A. was conditionally released and placed under mandatory supervision on 29 July 1983.

...

13.1 The Human Rights Committee observes that in so far as the author's complaints relate to the conviction and sentence of M.A. for the offence, in Italian penal law, of "reorganizing the dissolved fascist party" they concern events which took place prior to the entry into force of the International Covenant on Civil and Political Rights and the Optional Protocol for Italy (i.e. before 15 December 1978) and consequently they are inadmissible under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant, *ratione temporis*.

13.2 In so far as the authors' complaints relate to the consequences, after the entry into force of the Covenant and the Optional Protocol for Italy, of M.A.'s conviction and sentence, it must be shown that there were consequences which could themselves have constituted a violation of the Covenant. In the opinion of the Committee there were no such consequences in the circumstances of the present case.

13.3 The execution of a sentence of imprisonment imposed prior to the entry into force of the Covenant is not in itself a violation of the Covenant. Moreover, it would appear to the Committee that the acts of which M.A. was convicted (reorganizing the dissolved fascist party) were of a kind which are removed from the protection of the Covenant by article 5 thereof and which were in any event justifiably prohibited by Italian law having regard to the limitations and restrictions applicable to the rights in question under the provisions of articles 18 (3), 19 (3), 22 (2) and 25 of the Covenant. In these respects therefore the communication is inadmissible under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant, *ratione materiae*.

- *Muteba v. Zaire* (124/1982), ICCPR, A/39/40 (24 July 1984) 182 at paras. 10.1, 10.2 and 12.

...

10.1 The Human Rights Committee, having considered the present communication in the light of all the information made available to it by the authors as provided in article 5 (1) of the Optional Protocol, hereby decides to base its views on the following facts, which, in the absence of any submission from the State party, are uncontested.

10.2 Mr. Tshitenge Muteba was arrested on 31 October 1981 by members of the Military Security of Zaire at Ngobila Beach, Zaire, when arriving from Paris via Brazzaville (Congo). From the time of his arrest until about March 1982 he was detained at the "OUA II" prison. During the first nine days of detention he was interrogated and subjected to various forms of torture including beatings, electric shocks and mock executions. He was kept incommunicado for several months and had no access to legal counsel...Although in the

prison register he was charged with attempts against the internal and external security of the State and with the foundation of a secret political party, he was never brought before a judge nor brought to trial. After more than a year and a half of detention he was granted amnesty under a decree of 19 May 1983 and allowed to return to France. Mr. Muteba was arrested, detained and subjected to the ill-treatment described above for political reasons, as he was considered to be an opponent of the Government of Zaire.

...

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

...

- of article 19, because he suffered persecution for his political opinions.

- *Jaona v. Madagascar* (132/1982), ICCPR, A/40/40 (1 April 1985) 179 at paras. 12.1, 12.2 and 14.

...

12.1 The Human Rights Committee...hereby decides to base its views on the following facts, which appear uncontested, except for denials of a general character offering no particular information or explanations.

12.2 Monja Jaona is a 77-year-old Malagasy national and leader of MONIMA, a political opposition party. In the elections held in Madagascar in November 1982 he was the presidential candidate of his party. Following the re-election of President Ratsiraka, Mr. Jaona challenged the results and called for new elections at a press conference. Shortly afterwards, on 15 December 1982, Mr. Jaona was placed under house arrest in Tananarive and subsequently detained at the military camp of Kelivondrake, 600 km south of Tananarive. He was not informed of the grounds for his arrest and there is no indication that charges were ever brought against him or investigated. An appeal against his arrest was lodged on 15 March 1983, but there is no indication that the appeal was ruled on. Mr. Jaona was released on 15 August 1983. He was elected deputy to the National People's Assembly in elections held on 28 August 1983.

...

14. The Human Rights Committee...is of the view that these facts disclose violations of the Covenant:

...

- Of article 19, paragraph 2, because he suffered persecution on account of his political opinions.

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- *L. T. K. v. Finland* (185/1984), ICCPR, A/40/40 (9 July 1985) 240 at paras. 5.2 and 7.

...
5.2 The Human Rights Committee observes in this connection that, according to the author's own account he was not prosecuted and sentenced because of his beliefs or opinions as such, but because he refused to perform military service. The Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19 of the Covenant, especially taking into account paragraph 3 (c) (ii) of article 8, can be construed as implying that right. The author does not claim that there were any procedural defects in the judicial proceedings against him, which themselves could have constituted a violation of any of the provisions of the Covenant, or that he was sentenced contrary to law.
...
7. The Human Rights Committee therefore decides:

The communication is inadmissible.

- *Mpandanjila v. Zaire* (138/1983), ICCPR, A/41/40 (26 March 1986) 121 at paras. 8.1, 8.2 and 10.

...
8.1 The Human Rights Committee...hereby decides to base its views on the following facts, which, in the absence of any submission from the State party, are uncontested.

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 regime and planning the creation of a political party, and of secreting documents concerning the establishment of said party. The trial was not held in public; no summonses were served on two of the accused; and in three cases the accused were not heard at the pre-trial stage. 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. The banned family members include children still of elementary-school age, adolescent boys and girls and married others who are heads of families and whose wives have been left in Kinshasa alone with small

children and without any means of support. The authors were subjected ill-treatment during the period of banishment and deprived of adequate medical attention.

...

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

...

Article 19, because they suffered persecution because of their opinions...

- *Mpaka-Nsusu v. Zaire* (157/1983), ICCPR, A/41/40 (26 March 1986) 142 at paras. 8.1, 8.2 and 10.

...

8.1 The Human Rights Committee...hereby decides to base its views on the following facts, which have not been contested by the State party.

8.2 Mr. Andre Alphonse Mpaka-Nsusu is a Zairian national at present living in exile. In 1977, he presented his candidacy for the presidency of Zaire in conformity with existing Zairian law. His candidacy, however, was rejected. On 1 July 1979, he was arrested and subsequently detained in the prison of the State Security Police without trial until 31 January 1981. After being released from prison he was banished to his village of origin for an indefinite period. He fled the country on 15 February 1983.

...

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

...

Article 19, because he suffered persecution for his political opinions...

- *R. T. v. France* (262/1987), ICCPR, A/44/40 (30 March 1989) 277 at paras. 2.1, 2.2 and 7.3.

...

2.1 The author states that he has taught the Breton language at a number of high schools in Paris for the past 10 years. The French authorities have allegedly tried to deny him the right to teach Breton and exerted pressure on him by, for example, reducing his salary. The author claims that there is no justification for this pressure, because over a million Bretons live in the Greater Paris area and there is a growing demand for the teaching of Breton among high school students.

2.2 The author states that he has taught only Breton over the past 10 years, and that he is the only teacher of the subject in the Paris Educational District. The French authorities have

never officially recognized this fact and have instead classified him as a "teaching assistant" (*adjoint d'enseignement*) for English (which the author claims he has never taught) and an "auxiliary teacher" (*maître auxiliaire*) of Armenian (which he says he does not know). With effect from the school year 1987/88, the French authorities are said to have attempted to force him to teach English. Upon his refusing to comply, the Paris Educational District apparently threatened to consider him as having abandoned his post, which would mean that he would not be entitled to unemployment benefits. Since the Academy has in the past discontinued the teaching of other regional languages such as Basque and Catalan, the author considers himself particularly threatened.

...

7.3 With regard to the State party's submission that the communication should be declared inadmissible pursuant to article 3 of the Optional Protocol as incompatible with the provisions of the Covenant, the Committee observes that the author cannot invoke a violation of his right to freedom of expression under article 19, paragraph 2, of the Covenant, on grounds of having been denied tenure as a teacher of the Breton language...

- *Delgado Páez v. Colombia* (195/1985), ICCPR, A/45/40 vol. II (12 July 1990) 43 at paras. 2.1, 2.2, 2.4 and 5.8.

...

2.1 In March 1983, the author was appointed by the Ministry of Education as a teacher of religions 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...

...

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 artesanias*), for which he had no training or experience, was assigned to him...

...

5.8 Article 19 protects, *inter alia*, the right of freedom of expression and of opinion. This will usually cover the freedom of teachers to teach their subjects in accordance with their own views, without interference. However, in the particular circumstances of the case, the special relationship between Church and State in Colombia, exemplified by the applicable Concordat, the Committee finds that the requirement, by the Church, that religion be taught in a certain way does not violate article 19.

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- *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 paras. 2.1, 2.2, 4.4, 11.1, 11.3, 11.4 and 13.

...

2.1 The authors of the first communication (No. 359/1989), Mr. Ballantyne and Ms. Davidson, sell clothes and paintings to a predominantly English-speaking clientele, and have always used English signs to attract customers.

2.2 The author of the second communication (No. 385/1989), Mr. McIntyre, states that in July 1988, he received notice from the Commissioner-Enquirer of the "*Commission de protection de la langue française"* that following a "checkup" it had been ascertained that he had installed a sign carrying the firm name "Kelly Funeral Home" on the grounds of his establishment, which constituted an infraction of the Charter of the French Language. He was requested to inform the Commissioner within 15 days in writing of measures taken to correct the situation and to prevent the recurrence of a similar incident. The author has since removed his company sign.

...

4.4 Section 58 of the Charter, as modified in 1989 by section 1 of Bill No. 178, now reads:

> "58. Public signs and posters and commercial advertising, outside or intended for the public outside, shall be solely in French...

...

11.1 On the merits, three major issues are before the Committee:

> (a) whether Sec. 58 of the Charter of the French Language, as amended by Bill 178, Sec. 1, violates any right that the authors might have by virtue of article 27;
>
> (b) whether Sec. 58 of the Charter of the French Language, as amended by Bill 178, Sec. 1, violates the authors' right to freedom of expression; and
>
> (c) whether the same provision is compatible with the authors' right to equality before the law.

...

11.3 Under article 19 of the Covenant, everyone shall have the right to freedom of expression; this right may be subjected to restrictions, conditions for which are set out in article 19, paragraph 3. The Government of Quebec has asserted that commercial activity such as outdoor advertising does not fall within the ambit of article 19. The Committee does not share this opinion. Article 19, paragraph 2, must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are

compatible with article 20 of the Covenant, of news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression. In the Committee's opinion, the commercial element in an expression taking the form of outdoor advertising cannot have the effect of removing this expression from the scope of protected freedom. The Committee does not agree either that any of the above forms of expression can be subjected to varying degrees of limitation, with the result that some forms of expression may suffer broader restrictions than others.

11.4 Any restriction of the freedom of expression must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3 (a) and (b) of article 19, and must be necessary to achieve the legitimate purpose. While the restrictions on outdoor advertising are indeed provided for by law, the issue to be addressed is whether they are necessary for the respect of the rights of others. The rights of others could only be the rights of the francophone minority within Canada under article 27. This is the right to use their own language, which is not jeopardized by the freedom of others to advertise in other than the French language. Nor does the Committee have reason to believe that public order would be jeopardized by commercial advertising outdoors in a language other than French. The Committee notes that the State party does not seek to defend Bill 178 on these grounds. Any constraints under paragraphs 3 (a) and 3 (b) of article 19 would in any event have to be shown to be necessary. The Committee believes that it is not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English. This protection may be achieved in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade. For example, the law could have required that advertising be in both French and English. A State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice. The Committee accordingly concludes that there has been a violation of article 19, paragraph 2.

...

13. The Committee calls upon the State party to remedy the violation of article 19 of the Covenant by an appropriate amendment to the law.

For dissenting opinion in this context, see 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 Individual Opinion by Mr. Birame Ndiaye.

EXPRESSION - FREEDOM OF - GENERAL

- *Bwalya v. Zambia* (314/1988), ICCPR, A/48/40 vol. II (14 July 1993) 52 (CCPR/C/48/D/314/1988) at paras. 2.1-2.4 and 6.2.

...

2.1 In 1983, at the age of 22, the author ran for a parliamentary seat in the Constituency of Chifubu, Zambia. He states that the authorities prevented him from properly preparing his candidacy and from participating in the electoral campaign. The authorities' action apparently helped to increase his popularity among the poorer strata of the local population, as the author was committed to changing the Government's policy towards, in particular, the homeless and the unemployed. He claims that in retaliation for the propagation of his opinions and his activism, the authorities subjected him to threats and intimidation, and that in January 1986 he was dismissed from his employment. The Ndola City Council subsequently expelled him and his family from their home, while the payment of his father's pension was suspended indefinitely.

2.2 Because of the harassment and hardship to which he and his family were being subjected, the author emigrated to Namibia, where other Zambian citizens had settled. Upon his return to Zambia, however, he was arrested and placed in custody; the author's account in this respect is unclear and the date of his return to Zambia remains unspecified.

2.3 The author notes that by September 1988 he had been detained for 31 months, on charges of belonging to the People's Redemption Organization an association considered illegal under the terms of the country's one-party Constitution and for having conspired to overthrow the Government of the then President Kenneth Kaunda. On an unspecified subsequent date, he was released; again, the circumstances of his release remain unknown. At an unspecified later date, Mr. Bwalya returned to Zambia.

2.4 On 25 March 1990, the author sought the Committee's direct intercession in connection with alleged discrimination, denial of employment and refusal of a passport. By letter of 5 July 1990, the author's wife indicated that her husband had been rearrested on 1 July 1990 and taken to the Central Police Station in Ndola, where he was reportedly kept for two days. Subsequently, he was transferred to Kansenshi prison in Ndola; the author's wife claims that she was not informed of the reasons for her husband's arrest and detention.

...

6.2 In respect of issues under article 19, the Committee considers that the uncontested response of the authorities to the attempts of the author to express his opinions freely and to disseminate the political tenets of his party constitute a violation of his rights under article 19.

EXPRESSION - FREEDOM OF - GENERAL

- *Kalenga v. Zambia* (326/1988), ICCPR, A/48/40 vol. II (27 July 1993) 68 at paras. 2.1, 2.2, 3.1 and 6.2.

...

2.1 On 11 February 1986, the author was arrested by the police of the city of Masala; he was forced to spend the night in a police lock-up. On 12 February 1986, a statement was taken from him. The following day, a police detention order was issued against him pursuant to Regulation 33 (6) of the Preservation of Public Security Act. This order was revoked on 27 February 1986 but immediately replaced by a Presidential detention order, issued under Regulation 33 (1) of the said Act.

2.2 The author notes that the Preservation of Public Security Regulations allow the President of Zambia to authorize the administrative detention of persons accused of political offences for an indefinite period of time, "for purposes of preserving public security". The author was informed of the charges brought against him on 13 March 1986, that is over one month after his arrest. He was subsequently kept in police detention, on charges of (a) being one of the founding members and having sought to disseminate the views of a political organization, the so-called People's Redemption Organization - an organization considered illegal under Zambia's (then) one-party Constitution -and (b) of preparing subversive activities aimed at overthrowing the regime of (then) President Kenneth Kaunda. The author was released on 3 November 1989, following a Presidential order.

...

3.1 Mr. Kalenga contends that at the time of his arrest, he was not engaged in any political activities aimed at undermining the government. Instead, he had been promoting campaigns protesting the government's national education, military and economic policies. He adds that the subversive activities he was accused of amounted to no more than burning the card affiliating him with President Kaunda's party, UNIP...

...

6.2 In respect of issues under article 19, the Committee is of the opinion that the uncontested response of the Zambian authorities to the author's attempts to express his opinions freely and to disseminate the tenets of the People's Redemption Organization constitute a violation of his rights under article 19 of the Covenant...

- *Kivenmaa v. Finland* (412/1990), ICCPR, A/49/40 vol. II (31 March 1994) 85 (CCPR/C/50/D/412/1990) at paras. 2.1-2.4, 9.3 and 10.

...

2.1 On 3 September 1987, on the occasion of a visit of a foreign head of State and his meeting with the president of Finland, the author and about 25 members of her organization, amid a larger crowd, gathered across from the Presidential Palace where the leaders were

meeting, distributed leaflets and raised a banner critical of the human rights record of the visiting head of State. The police immediately took the banner down and asked who was responsible. The author identified herself and was subsequently charged with violating the Act on Public Meetings by holding a "public meeting" without prior notification.

2.2 The above-mentioned Act on Public Meetings has not been amended since 1921, nor upon entry into force of the Covenant. Section 12(1) of the Act makes it a punishable offence to call a public meeting without notification to the police at least six hours before the meeting...

2.3 Although the author argued that she did not organize a public meeting, but only demonstrated her criticism of the alleged human rights violations by the visiting head of State, the City Court, on 27 January 1988, found her guilty of the charge and fined her 438 *markkaa*. The Court was of the opinion that the group of 25 persons had, through their behaviour, been distinguishable from the crowd and could therefore be regarded as a public meeting. It did not address the author's defence that her conviction would be in violation of the Covenant.

2.4 The Court of Appeal, on 19 September 1989, upheld the City Court's decision, while arguing, *inter alia*, that the Act on Public Meetings, "in the absence of other legal provisions" was applicable also in the case of demonstrations; that the entry into force of the Covenant had not repealed or amended said Act; that the Covenant allowed restrictions of the freedom of expression and of assembly, provided by law; and that the requirement of prior notification was justified in the case because the "demonstration" was organized against a visiting head of State.

...

9.3 The right for an individual to express his political opinions, including obviously his opinions on the question of human rights, forms part of the freedom of expression guaranteed by article 19 of the Covenant. In this particular case, the author of the communication exercised this right by raising a banner. It is true that article 19 authorizes the restriction by the law of freedom of expression in certain circumstances. However, in this specific case, the State party has not referred to a law allowing this freedom to be restricted or established how the restriction applied to Ms. Kivenmaa was necessary to safeguard the rights and national imperatives set forth in article 19, paragraph 2(a) and (b) of the Covenant.

...

10. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 19 and 21 of the Covenant.

For dissenting opinion in this context, see Kivenmaa v. Finland (412/1990), ICCPR, A/49/40 vol. II (31 March 1994) 85 (CCPR/C/50/D/412/1990) at Individual Opinion by Mr. Kurt Herndl, 92 at paras. 3.1-3.5, 4.1 and 4.2.

EXPRESSION - FREEDOM OF - GENERAL

- *Mika Miha v. Equatorial Guinea* (414/1990), ICCPR, A/49/40 vol. II (8 July 1994) 96 (CCPR/C/51/D/414/1990) at para 6.8.

...
6.8 In respect of issues under article 19, finally, the Committee notes that the State party has not refuted the author's claim that he was arrested and detained solely or primarily because of his membership in, and activities for, a political party in opposition to the regime of President Obiang Nguema. In the circumstances of the case, the Committee concludes that the State party has unlawfully interfered with the exercise of the author's rights under article 19, paragraphs 1 and 2.

- *Mukong v. Cameroon* (458/1991), ICCPR, A/49/40 vol. II (21 July 1994) 171 (CCPR/C/51/D/458/1991) at paras. 9.6 and 9.7.

...
9.6 The author has claimed a violation of his right to freedom of expression and opinion, as he was persecuted for his advocacy of multi-party democracy and the expression of opinions inimical to the State party's government. The State party has replied that restrictions on the author's freedom of expression were justified under the terms of article 19, paragraph 3.

9.7 Under article 19, everyone shall have the right to freedom of expression. Any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3 (a) and (b) of article 19, and must be necessary to achieve the legitimate purpose. The State party has indirectly justified its actions on grounds of national security and/or public order, by arguing that the author's right to freedom of expression was exercised without regard to the country's political context and continued struggle for unity. While the State party has indicated that the restrictions on the author's freedom of expression were provided for by law, it must still be determined whether the measures taken against the author were necessary for the safeguard of national security and/or public order. The Committee considers that it was not necessary to safeguard an alleged vulnerable state of national unity by subjecting the author to arrest, continued detention and treatment in violation of article 7. It further considers that the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights; in this regard, the question of deciding which measures might meet the "necessity" test in such situations does not arise. In the circumstances of the author's case, the Committee concludes that there has been a violation of article 19 of the Covenant.

EXPRESSION - FREEDOM OF - GENERAL

- *Singer v. Canada* (455/1991), ICCPR, A/49/40 vol. II (26 July 1994) 155 (CCPR/C/51/D/455/1991) at paras. 12.1 and 12.2.

...
12.1 As to the merits of the case, the Committee observes that its observations on communications Nos. 359/1989 (*Ballantyne/Davidson v. Canada*) and 385/1989 (*McIntyre v. Canada*) apply, *mutatis mutandis*, to the case of Mr. Singer.

12.2 Concerning the question whether section 58 of Bill No. 101, as amended by Bill No. 178, section 1, violated Mr. Singer's right, under article 19 of the Covenant, to freedom of expression, the Committee, having concluded that a State party to the Covenant may choose one or more official languages, but that it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice, finds that there has been a violation of article 19, paragraph 2...

- *Sohn v. Republic of Korea* (518/1992), ICCPR, A/50/40 vol. II (19 July 1995) 98 (CCPR/C/54/D/518/1992) at paras. 10.2-10.4 and 12.

...
10.2 The Committee has taken note of the State party's argument that the author participated in a violent demonstration in November 1990, for which he was convicted under the Act on Assembly and Demonstration. The Committee has also noted that the author's complaint does not concern this particular conviction, but only his conviction for having issued the statement of the Solidarity Forum in February 1991. The Committee considers that the two convictions concern two different events, which are not related. The issue before the Committee is therefore only whether the author's conviction under article 13, paragraph 2, of the Labour Dispute Adjustment Act for having joined in issuing a statement supporting the strike at the Daewoo Shipyard Company and condemning the Government's threat to send in troops to break the strike violates article 19, paragraph 2, of the Covenant.

10.3 Article 19, paragraph 2, of the Covenant guarantees the right to freedom of expression and includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media". The Committee considers that the author, by joining others in issuing a statement supporting the strike and criticizing the Government, was exercising his right to impart information and ideas within the meaning of article 19, paragraph 2, of the Covenant.

10.4 The Committee observes that any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3 (a) and (b)

of article 19, and must be necessary to achieve the legitimate purpose. While the State party has stated that the restrictions were justified in order to protect national security and public order and that they were provided for by law, under article 13(2) of the Labour Dispute Adjustment Act, the Committee must still determine whether the measures taken against the author were necessary for the purpose stated. The Committee notes that the State party has invoked national security and public order by reference to the general nature of the labour movement and by alleging that the statement issued by the author in collaboration with others was a disguise for the incitement to a national strike. The Committee considers that the State party has failed to specify the precise nature of the threat which it contends that the author's exercise of freedom of expression posed and finds that none of the arguments advanced by the State party suffice to render the restriction of the author's right to freedom of expression compatible with paragraph 3 of article 19.

...

12. The Committee is of the view that Mr. Sohn is entitled, under article 2, paragraph 3(a), of the Covenant, to an effective remedy, including appropriate compensation, for having been convicted for exercising his right to freedom of expression. The Committee further invites the State party to review article 13(2) of the Labour Dispute Adjustment Act. The State party is under an obligation to ensure that similar violations do not occur in the future.

- *Aduayom, Diasso and Dobou v. Togo* (422/1990, 423/1990 and 424/1990), ICCPR, A/51/40 vol. II (12 July 1996) 17 (CCPR/C/51/D/422/1990/423/1990/424/1990) at para. 7.4.

...

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

EXPRESSION - FREEDOM OF - GENERAL

- *Park v. Republic of Korea* (628/1995), ICCPR, A/54/40 vol. II (20 October 1998) 85 (CCPR/C/64/D/628/1995) at paras. 2.1-2.4, 10.3 and 12.

...
2.1 On 22 December 1989, the Seoul Criminal District Court found the author guilty of breaching paragraphs 1 and 3 of article 7 of the 1980 National Security Law. The National Security Law was amended on 31 May 1991. The law applied to the author, however, was the 1980 law, article 7 of which reads (translation provided by the author):

> "(1) Any person who has benefited the anti-State organization by way of praising, encouraging, or siding with or through other means the activities of an anti-State organization, its member or a person who had been under instruction from such organization, shall be punished by imprisonment for not more than 7 years."
> ...
> "(3) Any person who has formed or joined the organization which aims at committing the actions as stipulated in paragraph 1 of this article shall be punished by imprisonment for more than one year."
> ...
> "(5) Any person who has, for the purpose of committing the actions as stipulated in paragraphs 1 through 4 of this article, produced, imported, duplicated, possessed, transported, disseminated, sold or acquired documents, drawings or any other similar means of expression shall be punished by the same penalty as set forth in each paragraph."

...
2.2 The author's conviction was based on his membership and participation in the activities of the Young Koreans United (YKU), during his study at the University of Illinois in Chicago, USA, in the period 1983 to 1989. The YKU is an American organization, composed of young Koreans, and has as its aim to discuss issues of peace and unification between North and South Korea. The organization was highly critical of the then military government of the Republic of Korea and of the US support for that government. The author emphasizes that all YKU's activities were peaceful and in accordance with the US laws.

2.3 The Court found that the YKU was an organization which had as its purpose the commission of the crimes of siding with and furthering the activities of the North Korean Government and thus an "enemy-benefitting organization". The author's membership in this organization constituted therefore a crime under article 7, paragraph 3, of the National Security Law. Moreover, the author's participation in demonstrations in the USA calling for the end of US' intervention constituted siding with North Korea, in violation of article 7, paragraph 1, of the National Security Law. The author points out that on the basis of the

judgment against him, any member of the YKU can be brought to trial for belonging to an "enemy-benefitting organization".

2.4 From the translations of the court judgments in the author's case, submitted by counsel, it appears that the conviction and sentence were based on the fact that the author had, by participating in certain peaceful demonstrations and other gatherings in the United States, expressed his support or sympathy to certain political slogans and positions.

...

10.3 The Committee observes that article 19 guarantees freedom of opinion and expression and allows restrictions only as provided by law and necessary (a) for respect of the rights and reputation of others; and (b) for the protection of national security or public order (*ordre public*), or of public health or morals. The right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification. While the State party has stated that the restrictions were justified in order to protect national security and that they were provided for by law, under article 7 of the National Security Law, the Committee must still determine whether the measures taken against the author were necessary for the purpose stated. The Committee notes that the State party has invoked national security by reference to the general situation in the country and the threat posed by "North Korean communists". The Committee considers that the State party has failed to specify the precise nature of the threat which it contends that the author's exercise of freedom of expression posed and finds that none of the arguments advanced by the State party suffice to render the restriction of the author's right to freedom of expression compatible with paragraph 3 of article 19. The Committee has carefully studied the judicial decisions by which the author was convicted and finds that neither those decisions nor the submissions by the State party show that the author's conviction was necessary for the protection of one of the legitimate purposes set forth by article 19 (3). The author's conviction for acts of expression must therefore be regarded as a violation of the author's right under article 19 of the Covenant.

...

12. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Tae-Hoon Park with an effective remedy, including appropriate compensation for having been convicted for exercising his right to freedom of expression. The State party is under an obligation to ensure that similar violations do not occur in the future.

- *Kim v. Republic of Korea* (574/1994), ICCPR, A/54/40 vol. II (3 November 1998) 1 (CCPR/C/64/D/574/1994) at paras. 2.1-2.4, 12.2-12.5 and 13.

...

2.1 The author is a founding member of the National Coalition for Democratic Movement (...hereinafter NCDM). He was the Chief of the Policy Planning Committee and Chairman

of the Executive Committee of that organization. Together with other NCDM members, he prepared documents which criticized the Government of the Republic of Korea and its foreign allies, and appealed for national reunification. At the inaugural meeting of the NCDM on 21 January 1989, these documents were distributed and read out to approximately 4,000 participants; the author was arrested at the conclusion of the meeting.

2.2 On 24 August 1990, a single judge on the Criminal District Court of Seoul found the author guilty of offences against article 7, paragraphs 1 and 5, of the National Security Law, the Law on Assembly and Demonstrations and the Law on Repression of Violent Activities, and sentenced him to three years' imprisonment and one year of suspension of eligibility. The Appeal Section of the same tribunal dismissed Mr. Kim's appeal on 11 January 1991, but reduced the sentence to two years' imprisonment. On 26 April 1991, the Supreme Court dismissed a further appeal...

2.3 The present complaint only relates to the author's conviction under article 7, paragraphs 1 and 5, of the National Security Law. Paragraph 1 provides that "any person who assists an anti-State organization by praising or encouraging the activities of this organization, shall be punished". Paragraph 5 stipulates that "any person who produces or distributes documents, drawings or any other material(s) to the benefit of an anti-State organization, shall be punished". On 2 April 1990, the Constitutional Court held that these provisions are compatible with the Constitution as they are applied [only] when the security of the State is endangered, or when the incriminated activities undermine the basic democratic order.

2.4 The author has provided English translations of the relevant parts of the Courts' judgements, which show that the first instance trial court found that North Korea is an anti-State organization, with the object of violently changing the situation in South Korea. According to the Court, the author, despite knowledge of these aims, produced written material which reflected the views of North Korea and the Court concluded therefore that the author produced and distributed the written material with the object of siding with and benefitting the anti-State organization.

...

12.2 The Committee observes that, in accordance with article 19 of the Covenant, any restriction on the right to freedom of expression must cumulatively meet the following conditions: it must be provided by law, it must address one of the aims set out in paragraph 3 (a) and (b) of article 19 (respect of the rights and reputation of others; protection of national security or of public order, or of public health or morals), and it must be necessary to achieve a legitimate purpose.

12.3 The restriction of the author's right to freedom of expression was indeed provided by law, namely the National Security Law as it is then stood...The only question before the Committee is whether the restriction on freedom of expression, as invoked against the

author, was necessary for one of the purposes set out in article 19, paragraph 3. The need for careful scrutiny by the Committee is emphasized by the broad and unspecific terms in which the offence under the National Security Law is formulated.

12.4 The Committee notes that the author was convicted for having read out and distributed printed material which were seen as coinciding with the policy statements of the DPRK (North Korea), with which country the State party was in a state of war. He was convicted by the courts on the basis of a finding that he had done this with the intention of siding with the activities of the DPRK. The Supreme Court held that the mere knowledge that the activity could be of benefit to North Korea was sufficient to establish guilt. Even taking that matter into account, the Committee has to consider whether the author's political speech and his distribution of political documents were of a nature to attract the restriction allowed by article 19 (3) namely the protection of national security. It is plain that North Korean policies were well known within the territory of the State party and it is not clear how the (undefined) "benefit" that might arise for the DPRK from the publication of views similar to their own created a risk to national security, nor is it clear what was the nature and extent of any such risk. There is no indication that the courts, at any level, addressed those questions or considered whether the contents of the speech or the documents had any additional effect upon the audience or readers such as to threaten public security, the protection of which would justify restriction within the terms of the Covenant as being necessary.

12.5 The Committee considers, therefore, that the State party has failed to specify the precise nature of the threat allegedly posed by the author's exercise of freedom of expression, and that the State party has not provided specific justifications as to why over and above prosecuting the author for contraventions of the Law on Assembly and Demonstration and the Law on Punishment of Violent Activities (which forms no part of the author's complaint), it was necessary for national security, also to prosecute the author for the exercise of his freedom of expression. The Committee considers therefore that the restriction of the author's right to freedom of expression was not compatible with the requirements of article 19, paragraph 3, of the Covenant.

13. The Human Rights Committee...finds that the facts before it disclose a violation of article 19 of the International Covenant on Civil and Political Rights.

For dissenting opinion in this context, see Kim v. Republic of Korea (574/1994), ICCPR, A/54/40 vol. II (3 November 1998) 1 (CCPR/C/64/D/574/1994) at Individual Opinion by Nisuke Ando, 11.

EXPRESSION - FREEDOM OF - GENERAL

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

...

2. On 23 March 1997, in the centre of the city of Mogilev in Belarus, the author distributed leaflets devoted to the anniversary of the proclamation of independence of the People's Republic of Belarus. While distributing the leaflets, the author was approached by officers of the Mogilev Central District Internal Affairs Department who confiscated the 37 copies of the leaflet still in the author's possession and subsequently charged the author under article 172(3) of the Code of Administrative Offences for disseminating leaflets not bearing the required publication data. In accordance with the charge, the author was fined 390 000 roubles by the Administrative Commission. The author appealed the decision to the Central District Court, which on 13 June 1997 rejected his appeal. Further appeals to the Regional Court and the Supreme Court were dismissed respectively on 18 June 1997 and 22 July 1997...

...

8.1 The first issue before the Committee is whether or not the application of article 26 of the Press Act to the author's case, resulting in the confiscation of the leaflets and the subsequent fine, constituted a restriction within the meaning of article 19, paragraph 3, on the author's freedom of expression. The Committee notes that under the Act, publishers of periodicals as defined in article 1 are required to include certain publication data, including index and registration numbers which, according to the author, can only be obtained from the administrative authorities. In the view of the Committee, by imposing these requirements on a leaflet with a print run as low as 200, the State party has established such obstacles as to restrict the author's freedom to <u>impart</u> information, protected by article 19, paragraph 2.

8.2 The Committee observes that article 19 allows restrictions only as provided by law and necessary (a) for respect of the rights and reputation of others; and (b) for the protection of national security or public order (*ordre public*), or of public health or morals. The right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification. <u>1</u>/

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

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

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

...

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

_____

Notes

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

_____

- *Ross v. Canada* (736/1997), ICCPR, A/56/40 vol. II (18 October 2000) 69 at paras. 2.1-2.3, 3.2-3.6, 4.1-4.8, 6.2, 6.8, 10.5, 10.6 and 11.1-11.7.

...

2.1 The author worked as a modified resource teacher for remedial reading in a school

district of New Brunswick from September 1976 to September 1991. Throughout this period, he published several books and pamphlets and made other public statements, including a television interview, reflecting controversial, allegedly religious opinions. His books concerned abortion, conflicts between Judaism and Christianity, and the defence of the Christian religion. Local media coverage of his writings contributed to his ideas gaining notoriety in the community. The author emphasises that his publications were not contrary to Canadian law and that he was never prosecuted for the expression of his opinions. Furthermore, all writings were produced in his own time, and his opinions never formed part of his teaching.

2.2 Following expressed concern, the author's in-class teaching was monitored from 1979 onwards. Controversy around the author grew and, as a result of publicly expressed concern, the School Board on 16 March 1988, reprimanded the author and warned him that continued public discussion of his views could lead to further disciplinary action, including dismissal. He was, however, allowed to continue to teach, and this disciplinary action was removed from his file in September 1989. On 21 November 1989, the author made a television appearance and was again reprimanded by the School Board on 30 November 1989.

2.3 On 21 April 1988, a Mr. David Attis, a Jewish parent, whose children attended another school within the same School District, filed a complaint with the Human Rights Commission of New Brunswick, alleging that the School Board, by failing to take action against the author, condoned his anti-Jewish views and breached section 5 of the Human Rights Act by discriminating against Jewish and other minority students. This complaint ultimately led to the sanctions set out in para 4.3 below.

...

3.2 ...Individuals concerned about speech that denigrates particular minorities may choose to file a complaint with a human rights commission rather than or in addition to filing a complaint with the police.

3.3 The complaint against the School Board was lodged under section 5(1) of the New Brunswick Human Rights Code ...

3.4 In his complaint, Mr. Attis submitted that the School Board had violated section 5 by providing educational services to the public which discriminated on the basis of religion and ancestry in that they failed to take adequate measures to deal with the author. Under section 20(1) of the same Act, if unable to effect a settlement of the matter, the Human Rights Commission may appoint a board of inquiry composed of one or more persons to hold an inquiry. The board appointed to examine the complaint against the School Board made its orders pursuant to section 20 (6.2) of the same Act...

3.5 Since 1982, the Canadian Charter of Rights and Freedoms (“the Charter”) has been part

of the Canadian Constitution, and consequently any law that is inconsistent with its provisions is, to the extent of that inconsistency, of no force or effect.... Provincial human rights codes and any orders made pursuant to such codes are subject to review under the Charter. The limitation of a Charter right may be justified under section 1 of the Charter, if the Government can demonstrate that the limitation is prescribed by law and is justified in a free and democratic society...

3.6 There are also several other legislative mechanisms both at the federal and provincial level to deal with expressions that denigrate particular groups in Canadian society ...

4.1 On 1 September 1988, a Human Rights Board of Inquiry was established to investigate the complaint. In December 1990 and continuing until the spring of 1991, the first hearing was held before the Board ... The Board found that there was no evidence of any classroom activity by the author on which to base a complaint of discrimination. However, the Board of Inquiry also noted that

> "...a teacher's off-duty conduct can impact on his or her assigned duties and thus is a relevant consideration...An important factor to consider, in determining if the Complainant has been discriminated against by Mr. Malcolm Ross and the School Board, is the fact that teachers are role models for students whether a student is in a particular teacher's class or not. In addition to merely conveying curriculum information to children in the classroom, teachers play a much broader role in influencing children through their general demeanour in the classroom and through their off-duty lifestyle. This role model influence on students means that a teacher's off-duty conduct can fall within the scope of the employment relationship. While there is a reluctance to impose restrictions on the freedom of employees to live their independent lives when on their own time, the right to discipline employees for conduct while off-duty, when that conduct can be shown to have a negative influence on the employer's operation has been well established in legal precedent".

4.2 In its assessment of the author's off-duty activities and their impact, the Board of Inquiry made reference to four published books or pamphlets entitled respectively Web of Deceit, The Real Holocaust, Spectre of Power and Christianity vs. Judeo-Christianity, as well as to a letter to the editor of The Miramichi Leader dated 22 October 1986 and a local television interview given in 1989. The Board of Inquiry stated, inter alia, that it had

> "... no hesitation in concluding that there are many references in these published writings and comments by Malcolm Ross which are prima facie discriminatory against persons of the Jewish faith and ancestry. It would be

> an impossible task to list every prejudicial view or discriminatory comment contained in his writings as they are innumerable and permeate his writings. These comments denigrate the faith and beliefs of Jews and call upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy and Christian beliefs and values. Malcolm Ross identifies Judaism as the enemy and calls on all Christians to join the battle.
>
> Malcolm Ross has used the technique in his writings of quoting other authors who have made derogatory comments about Jews and Judaism. He intertwines these derogatory quotes with his own comments in a way such that he must reasonably be seen as adopting the views expressed in them as his own. Throughout his books, Malcolm Ross continuously alleges that the Christian faith and way of life are under attack by an international conspiracy in which the leaders of Jewry are prominent.
>
> ...The writings and comments of Malcolm Ross cannot be categorized as falling within the scope of scholarly discussion which might remove them from the scope of section 5 [of the Human Rights Act]. The materials are not expressed in a fashion that objectively summarizes findings and conclusions or propositions. While the writings may have involved some substantial research, Malcolm Ross' primary purpose is clearly to attack the truthfulness, integrity, dignity and motives of Jewish persons rather than the presentation of scholarly research."

4.3 The Board of Inquiry heard evidence from two students from the school district who described the educational community in detail. *Inter alia*, they gave evidence of repeated and continual harassment in the form of derogatory name calling of Jewish students, carving of swastikas into desks of Jewish children, drawing of swastikas on blackboards and general intimidation of Jewish students. The Board of Inquiry found no direct evidence that the author's off-duty conduct had impacted on the school district, but found that it would be reasonable to anticipate that his writings were a factor influencing some discriminatory conduct by the students. In conclusion, the Board of Inquiry held that the public statements and writings of Malcolm Ross had continually over many years contributed to the creation of a "poisoned environment within School District 15 which has greatly interfered with the educational services provided to the Complainant and his children". Thus, the Board of Inquiry held that the School Board was vicariously liable for the discriminatory actions of its employee and that it was directly in violation of the Act due to its failure to discipline the author in a timely and appropriate manner, so endorsing his out-of-school activities and writings. Therefore, on 28 August 1991, the Board of Inquiry ordered

(2) That the School Board

(a) immediately place Malcolm Ross on a leave of absence without pay for a period of eighteen months;

(b) appoint Malcolm Ross a non-teaching position if,... , a non-teaching position becomes available in School District 15 for which Malcolm Ross is qualified.

(c) terminate his employment at the end of the eighteen months leave of absence without pay if, in the interim, he has not been offered and accepted a non-teaching position.

(d) terminate Malcolm Ross' employment with the School Board immediately if, at any time during the eighteen month leave of absence or of at any time during his employment in a non-teaching position, he (i) publishes or writes for the purpose of publication, anything that mentions a Jewish or Zionist conspiracy, or attacks followers of the Jewish religion, or (ii) publishes, sells or distributes any of the following publications, directly or indirectly: *Web of Deceit, The Real Holocaust (The attack on unborn children and life itself), Spectre of Power, Christianity vs Judeo-Christianity (The battle for truth)*."

4.4 Pursuant to the Order, the School Board transferred the author to a non-classroom teaching position in the School District. The author applied for judicial review requesting that the order be removed and quashed. On 31 December 1991, Creaghan J. of the Court of Queen's Bench allowed the application in part, quashing clause 2(d) of the order, on the ground that it was in excess of jurisdiction and violated section 2 of the Charter. As regards clauses (a), (b), and (c) of the order, the court found that they limited the author's Charter rights to freedom of religion and expression, but that they were saved under section 1 of the Charter.

4.5 The author appealed the decision of the Court of Queen's Bench to the Court of Appeal of New Brunswick. At the same time, Mr. Attis cross-appealed the Court's decision regarding section 2(d) of the Order. The Court of Appeal allowed the author's appeal, quashing the order given by the Board of Inquiry, and accordingly rejected the cross-appeal. By judgement of 20 December 1993, the Court held that the order violated the author's rights under section 2 (a) and (b) of the Charter in that they penalised him for publicly expressing his sincerely held views by preventing him from continuing to teach. The Court considered that, since it was the author's activities outside the school that had attracted the complaint, and since it had never been suggested that he used his teaching position to further his religious views, the ordered remedy did not meet the test under section 1 of the Charter ...

To find otherwise would, in the Court's view, have the effect of condoning the suppression of views that are not politically popular any given time. One judge, Ryan J.A., dissented and held that the author's appeal should have been dismissed and that the cross-appeal should have been allowed, with the result that section 2(d) of the Order should have been reinstated.

4.6 Mr. Attis, the Human Rights Commission and the Canadian Jewish Congress then sought leave to appeal to the Supreme Court of Canada, which allowed the appeal and, by decision of 3 April 1996, reversed the judgment of the Court of Appeal, and restored clauses 2(a), (b) and (c) of the order. In reaching its decision, the Supreme Court first found that the Board of Inquiry's finding of discrimination contrary to section 5 of the Human Rights Act on the part of the School Board was supported by the evidence and contained no error. With regard to the evidence of discrimination on the part of the School Board generally, and in particular as to the creation of a poisoned environment in the School District attributable to the conduct of the author, the Supreme Court held

> "...that a reasonable inference is sufficient in this case to support a finding that the continued employment of [the author] impaired the educational environment generally in creating a 'poisoned' environment characterized by a lack of equality and tolerance. [The author's] off-duty conduct impaired his ability to be impartial and impacted upon the educational environment in which he taught. (para. 49)
>
> ...The reason that it is possible to 'reasonably anticipate' the causal relationship in this appeal is because of the significant influence teachers exert on their students and the stature associated with the role of a teacher. It is thus necessary to remove [the author] from his teaching position to ensure that no influence of this kind is exerted by him upon his students and to ensure that educational services are discrimination free." (para 101)

4.7 On the particular position and responsibilities of teachers and on the relevance of a teacher's off duty conduct, the Supreme Court further commented:

> "...Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions. The conduct of a teacher bears directly upon the community's perception of the ability of the teacher to fulfill such a position of trust and influence, and upon the community's confidence in the public school system as a whole.
>
> ...By their conduct, teachers as 'medium' must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system.

> The conduct of a teacher is evaluated on the basis of his or her position, rather than whether the conduct occurs within the classroom or beyond. Teachers are seen by the community to be the medium for the educational message and because of the community position they occupy, they are not able to 'choose which hat they will wear on what occasion'.
>
> ...It is on the basis of the position of trust and influence that we can hold the teacher to high standards both on and off duty, and it is an erosion of these standards that may lead to a loss in the community of confidence in the public school system. I do not wish to be understood as advocating an approach that subjects the entire lives of teachers to inordinate scrutiny on the basis of more onerous moral standards of behaviour. This could lead to a substantial invasion of the privacy rights and fundamental freedoms of teachers. However, where a 'poisoned' environment within the school system is traceable to the off-duty conduct of a teacher that is likely to produce a corresponding loss of confidence in the teacher and the system as a whole, then the off-duty conduct of the teacher is relevant." (paras. 43-45)

4.8 Secondly, the Court examined the validity of the impugned Order under the Canadian Constitution. In this regard, the Court first considered that the Order infringed sections 2(a) and 2(b) of the Charter as it in effect restricted respectively the author's freedom of religion and his freedom of expression. The Court went on to consider whether these infringements were justifiable under section 1 of the Charter, and found that the infringements had occurred with the aim of eradicating discrimination in the provision of educational services to the public, a 'pressing and substantial' objective. The Court further found that the measures (a) (b) and (c) imposed by the order could withstand the proportionality test, that is there existed a rational connection between the measures and the objective, the impairment of the author's right was minimal, and there was proportionality between the effects of the measures and their objective. Clause (d) was found not to be justified since it did not minimally impair the author's constitutional freedoms, but imposed a permanent ban on his expressions.

...

6.2 The State party submits that the communication should be deemed inadmissible as incompatible with the provisions of the Covenant because the publications of the author fall within the scope of article 20, paragraph 2, of the Covenant, i.e. they must be considered "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". In this regard, the State party points out that the Supreme Court of Canada found that the publications denigrated the faith and beliefs of Jewish people and called upon "true Christians" to not merely question the validity of those beliefs but to hold those of the Jewish faith in contempt. Furthermore, it is stated that the author identified Judaism as the enemy and called upon "Christians" to join in the battle.

...

6.8 As to the merits of the communication, the State party first submits that the author has not established how his rights to freedom of religion and expression have been limited or restricted by the Order of the Board of Inquiry as upheld by the Supreme Court. It is argued that the author is free to express his views while employed by the school board in a non-teaching position or while employed elsewhere.

...

10.5 The Committee notes that the State party has contested the admissibility of the remainder of the communication on several grounds. First, the State party invokes article 20, paragraph 2, of the Covenant, claiming that the author's publications must be considered "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". Citing the decision of the Committee in *J. R. T. and W. G. v Canada*, the State party submits that, as a matter of consequence, the communication must be deemed inadmissible under article 3 of the Optional Protocol as being incompatible with the provisions of the Covenant.

10.6 While noting that such an approach indeed was employed in the decision in *J.R.T. and W.G. v Canada*, the Committee considers that restrictions on expression which may fall within the scope of article 20 must also be permissible under article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible. In applying those provisions, the fact that a restriction is claimed to be required under article 20 is of course relevant. In the present case, the permissibility of the restrictions is an issue for consideration on the merits.

...

11.1 With regard to the author's claim under article 19 of the Covenant, the Committee observes that, in accordance with article 19 of the Covenant, any restriction on the right to freedom of expression must cumulatively meet several conditions set out in paragraph 3. The first issue before the Committee is therefore whether or not the author's freedom of expression was restricted through the Board of Inquiry's Order of 28 August 1991, as upheld by the Supreme Court of Canada. As a result of this Order, the author was placed on leave without pay for a week and was subsequently transferred to a non-teaching position. While noting the State party's argument (see para 6.8 supra) that the author's freedom of expression was not restricted as he remained free to express his views while holding a non-teaching position or while employed elsewhere, the Committee is unable to agree that the removal of the author from his teaching position was not, in effect, a restriction on his freedom of expression. The loss of a teaching position was a significant detriment, even if no or only insignificant pecuniary damage is suffered. This detriment was imposed on the author because of the expression of his views, and in the view of the Committee this is a restriction which has to be justified under article 19, paragraph 3, in order to be in compliance with the Covenant.

11.2 The next issue before the Committee is whether the restriction on the author's right to

freedom of expression met the conditions set out in article 19, paragraph 3, i.e. that it must be provided by law, it must address one of the aims set out in paragraph 3 (a) and (b) (respect of the rights and reputation of others; protection of national security or of public order, or of public health or morals), and it must be necessary to achieve a legitimate purpose.

11.3 As regards the requirement that the restriction be provided by law, the Committee notes that there was a legal framework for the proceedings which led to the author's removal from a teaching position. The Board of Inquiry found that the author's off-duty comments denigrated the Jewish faith and that this had adversely affected the school environment. The Board of Inquiry held that the School Board was vicariously liable for the discriminatory actions of its employee and that it had discriminated against the Jewish students in the school district directly, in violation of section 5 of the New Brunswick Human Rights Act, due to its failure to discipline the author in a timely and appropriate manner. Pursuant to section 20 (6.2) of the same Act, the Board of Inquiry ordered the School Board to remedy the discrimination by taking the measures set out in para 4.3 *supra.* In effect, and as stated above, the discrimination was remedied by placing the author on leave without pay for one week and transferring him to a non-teaching position.

11.4 While noting the vague criteria of the provisions that were applied in the case against the School Board and which were used to remove the author from his teaching position, the Committee must also take into consideration that the Supreme Court considered all aspects of the case and found that there was sufficient basis in domestic law for the parts of the Order which it reinstated. The Committee also notes that the author was heard in all proceedings and that he had, and availed himself of, the opportunity to appeal the decisions against him. In the circumstances, it is not for the Committee to reevaluate the findings of the Supreme Court on this point, and accordingly it finds that the restriction was provided for by law.

11.5 When assessing whether the restrictions placed on the author's freedom of expression were applied for the purposes recognized by the Covenant, the Committee begins by noting8/ that the rights or reputations of others for the protection of which restrictions may be permitted under article 19, may relate to other persons or to a community as a whole. For instance, and as held in *Faurisson v. France*, restrictions may be permitted on statements which are of a nature as to raise or strengthen anti-semitic feeling, in order to uphold the Jewish communities' right to be protected from religious hatred. Such restrictions also derive support from the principles reflected in article 20(2) of the Covenant. The Committee notes that both the Board of Inquiry and the Supreme Court found that the author's statements were discriminatory against persons of the Jewish faith and ancestry and that they denigrated the faith and beliefs of Jews and called upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy and Christian beliefs and values. In view of the findings as to the nature and effect of the author's public statements, the Committee concludes that

the restrictions imposed on him were for the purpose of protecting the "rights or reputations" of persons of Jewish faith, including the right to have an education in the public school system free from bias, prejudice and intolerance.

11.6 The final issue before the Committee is whether the restriction on the author's freedom of expression was necessary to protect the right or reputations of persons of the Jewish faith. In the circumstances, the Committee recalls that the exercise of the right to freedom of expression carries with it special duties and responsibilities. These special duties and responsibilities are of particular relevance within the school system, especially with regard to the teaching of young students. In the view of the Committee, the influence exerted by school teachers may justify restraints in order to ensure that legitimacy is not given by the school system to the expression of views which are discriminatory. In this particular case, the Committee takes note of the fact that the Supreme Court found that it was reasonable to anticipate that there was a causal link between the expressions of the author and the "poisoned school environment" experienced by Jewish children in the School district. In that context, the removal of the author from a teaching position can be considered a restriction necessary to protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance. Furthermore, the Committee notes that the author was appointed to a non-teaching position after only a minimal period on leave without pay and that the restriction thus did not go any further than that which was necessary to achieve its protective functions. The Human Rights Committee accordingly concludes that the facts do not disclose a violation of article 19.

11.7 As regards the author's claims under article 18, the Committee notes that the actions taken against the author through the Human Rights Board of Inquiry's Order of August 1991 were not aimed at his thoughts or beliefs as such, but rather at the manifestation of those beliefs within a particular context. The freedom to manifest religious beliefs may be subject to limitations which are prescribed by law and are necessary to protect the fundamental rights and freedoms of others, and in the present case the issues under paragraph 3 of article 18 are therefore substantially the same as under article 19. Consequently, the Committee holds that article 18 has not been violated.

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Notes

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8/ As it did in General Comment No. 10 and Communication No. 550/1993, *Faurisson v. France*, Views adopted on 8 November 1996.

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For dissenting opinion in this context, see Ross v. Canada (736/1997), ICCPR, A/56/40 vol. II (18 October 2000) 69 at Individual Opinion by Hipólito Solari Yrigoyen (dissenting), 87.

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- *Paraga v. Croatia* (727/1996), ICCPR, A/56/40 vol. II (4 April 2001) 58 at paras. 2.5, 2.8, 4.2, 9.6 and 9.7.

...

2.5 On 1 March 1992, an explosion occurred in the offices of the HSP in Vinkovci, where the author had expected to be. Several people died in the blast, but according to the author, no formal investigation has ever taken place. On 21 April 1992, the author was summoned for having called the President of the Republic a dictator. Mr. Paraga claims that these events constitute a violation of article 19 of the Covenant, since the measures against him were aimed at restricting his freedom of expression.

...

2.8 After a trip to the United States during which the author had called the President of the Republic an oppressor, he was charged with slander on 3 June 1993. Parliament stripped the author of his function as vice-chairman of the parliamentary committee on human and ethnic rights. The author claims that a member of the secret police admitted in a statement printed by a weekly newspaper in July 1993 that he had received an order to assassinate the author.

...

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.

...

9.6 In relation to the slander proceedings, the Committee has noted the author's contention that proceedings were instituted against him because he referred to the President of the Republic as a dictator. While the State party has not refuted that the author was indeed charged for this reason, it has informed the Committee that the charges against the author were finally dismissed by the court in January 1999. The Committee observes that a provision in the Penal Code under which such proceedings could be instituted may, in certain circumstances, lead to restrictions that go beyond those permissible under article 19, paragraph 3 of the Government. However, given the absence of specific information provided by the author and the further fact of the dismissal of the charges against the author, the Committee is unable to conclude that the institution of proceedings against the author, by itself, amounted to a violation of article 19 of the Covenant.

9.7 The Committee observes, that the charges brought against Mr. Paraga in November 1991 and the slander charges brought against him in April 1992 raise the issue of undue delay (article 14, paragraph 3 (c) of the Covenant) ... The Committee notes that both procedures took seven years altogether to be finalized, and observes that the State party, although it has provided information on the course of the proceedings, has not given any explanation on why the procedures in relation to these charges took so long and has provided no special reasons that could justify the delay. The Committee considers, therefore, that the author was not given a trial "without undue delay", within the meaning of article 14, paragraph 3 (c) of the Covenant.

- *Dergachev v. Belarus* (921/2000) ICCPR, A/57/40 vol. II (2 April 2002) 252 (CCPR/C/74/D/921/2000) at paras. 2.1-2.3, 7.2 and 8.

...

2.1 On 21 March 1999, the author, a member of Belarus People's Front, a political party in Belarus Republic, carried a poster during a picket he had organized. The poster carried an inscription to the effect that: "Followers of the present regime! You have led the people to poverty for five years. Stop listening to lies. Join the struggle led by the Belarus People's Front for you."

2.2 On 29 March 1999, the author was tried in the Smorgon district court. The court considered the inscription on the poster as amounting to a call for insubordination against the existing government and/or to the destruction of the constitutional order of the Byelorussian Republic. It ruled accordingly that the poster constituted an administrative offence under the Belarus Code of Administrative Offences (art. 167, para. 2). Accordingly, the author was convicted and fined five million Belarussian roubles. It also ordered confiscation of the poster. Militia officers who were present on duty during the picket were summoned to the court as witnesses.

2.3 The author pleaded not guilty during the court hearings and argued that the expression on his poster implied solely a legitimate political expression in the context of democratic elections. On 21 April 1999, the Grodnenski regional court rejected the author's appeal. The author then appealed to the Supreme Court of the Republic of Belarus. On 9 June 1999, the Supreme Court, while allowing the conviction to stand, reduced the sentence imposed by the court and imposed a warning upon the author...

...

7.2 The Committee is of the view that the particular expression of political opinion expressed by the author in carrying the poster in question falls within the scope of freedom of expression protected under article 19 of the Covenant. The State party has not advanced that any of the restrictions set out in article 19, paragraph 3, of the Covenant are applicable.

The Committee therefore considers that the conviction of the author for expression of his views amounted to a violation of his rights under article 19 of the Covenant, and notes that his conviction had not been annulled when the communication was submitted to the Committee.

8. The Human Rights Committee...is of the view that the facts before it disclose violation of article 19 of the Covenant. However, with reference to article 4, paragraph 2, of the Optional Protocol, the Committee considers that the State party, by the annulment of the decisions against the author, subsequent to the submission of the communication, has rectified the situation by a remedy that the Committee deems appropriate within the meaning of article 2 of the Covenant. The State party is requested to publish the Committee's Views.

- *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.

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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).

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- *Zündel v. Canada* (953/2000), ICCPR, A/58/40 vol. II (27 July 2003) 483 (CCPR/C/78/D/953/2000) at paras. 2.1-2.5, 8.4, 8.5 and 9.

...

2.1 The author describes himself as a publisher and activist who has defended the German ethnic group against false atrocity allegations concerning German conduct during World War

II. His communication originates from a case before the Canadian Human Rights Tribunal in which he was held responsible under the Canadian Human Rights Act of exposing Jews to hatred and contempt on an Internet website known as the "Zundelsite". From the materials submitted to the Committee by the parties it transpires that, for instance, one of the author's articles posted on that site, entitled "Did Six Million Jews Really Die?", disputes that six million Jews were killed during the Holocaust.

2.2 In May 1997, after a Holocaust survivor had lodged a complaint with the Canadian Human Rights Commission against the author's website, the Canadian Human Rights Tribunal initiated an inquiry into the complaint. During the hearings, on 25 May 1998, the Human Rights Tribunal refused to permit the author to raise a defense of truth against the complaint by proving that the statements on the "Zundelsite" are true. The Tribunal did not consider it appropriate to debate the truth or falsity of the statements found on the author's website since this would only "add a significant dimension of delay, cost and affront to the dignity of those who are alleged to have been victimized by these statements".2/

2.3 Shortly thereafter, the author obtained a booking from the Canadian Parliamentary Press Gallery, a non-governmental and non-profit organization to which the day to day administration of the Canadian Parliament's press facilities has been delegated, to hold a press briefing on 5 June 1998 in the Charles Lynch Press Conference Room in the Centre Block of the Parliament buildings. According to the author, he met the criteria for booking this conference room. In the press release announcing the press conference, dated 3 June 1998, the author indicated that he would discuss the interim ruling of the Human Rights Tribunal refusing to admit the defense of truth. In its pertinent parts, the press release reads:

> "The New Inquisition in Toronto! Government tries to grab control of the Internet!
>
> Ernst Zündel is told by the Canadian Human Rights Commission and its tribunal:
>
> - Truth is not a defence
>
> - Intent is not a defence
>
> - That the statements communicated are *true* is *irrelevant!*
>
> The interim ruling was rendered after one year of CHRT hearings, on May 25, 1998 by a Canadian Human Rights Tribunal now sitting in judgment over an American based website called the Zundelsite at http://www.webcom.com/ezundel
>
> (For the complete decision see attached pages.)"3/

2.4 On 4 June 1998, after several Members of Parliament had been contacted by opponents of the author's views who had protested against the author's use of the Charles Lynch Press Conference Room and, after the Press Gallery had refused to cancel the booking of the room, the House of Commons passed the following unanimous motion: "That this House order that Ernst Zundel be denied admittance to the precincts of the House of Commons during and for the remainder of the present session."

2.5 As a result of this motion, the author was banned from the parliamentary precincts and prevented from holding the press conference in the Charles Lynch Press Conference Room. He held an informal press conference outside the Parliament buildings on the sidewalk.

...

8.4 With respect to the alleged violation of article 19, paragraph 2, of the Covenant, the Committee observes that the State party does not contest the author's claim that domestic remedies are exhausted in respect of the decision to exclude the author from the precincts of the House of Commons "during and for the remainder of the present session", with the consequence of preventing the author from holding the press conference he had announced. Consequently, the author's claim under article 19, paragraph 2, is not inadmissible under article 5, paragraph 2(b), of the Optional Protocol.

8.5 However, and despite the State party's willingness to address the merits of the communication, the Committee considers that the author's claim is incompatible with article 19 of the Covenant and therefore inadmissible *ratione materiae* under article 3 of the Optional Protocol. Although the right to freedom of expression, as enshrined in article 19, paragraph 2, of the Covenant, extends to the choice of medium, it does not amount to an unfettered right of any individual or group to hold press conferences within the Parliamentary precincts, or to have such press conferences broadcast by others. While it is true that the author had obtained a booking with the Press Gallery for the Charles Lynch Press Conference Room and that this booking was made inapplicable through the motion passed unanimously by Parliament to exclude the author's access to the Parliamentary precincts, the Committee notes that the author remained at liberty to hold a press conference elsewhere. The Committee therefore takes the position, after a careful examination of the material before it, that the author's claim, based on the inability to hold a press conference in the Charles Lynch press Conference Room, falls outside the scope of the right to freedom of expression, as protected under article 19, paragraph 2, of the Covenant.

...

9. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2, 3 and 5, paragraph 2 (b), of the Optional Protocol;

...

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Notes

...

2/ Canadian Human Rights Tribunal, *Citron v. Zundel*, interim decision of 25 May 1998.

3/ Italics, bolds and underlines as used in the original press release.

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- *Nam v. Republic of Korea* (693/1996), ICCPR, A/58/40 vol. II (28 July 2003) 390 (CCPR/C/78/D/693/1996) at para. 10.

...

10. In the light of the submissions by the parties, the Committee observes that the communication, as construed by the parties, does not relate to a prohibition of non-governmental publication of textbooks as was originally complained of...and found admissible by the Committee...Rather, the communication relates to the author's allegation that there is no process of scrutiny in place for the purpose of submitting non-governmental publications for approval by the authorities, for their use as school textbooks. While affirming that the right to write and publish textbooks intended for use at school falls under the protection of article 19 of the Covenant, the Committee notes that the author claims that he is entitled to have the textbook prepared by him scrutinized and approved/rejected by the authorities for use as textbook in public middle schools. This claim, in the Committee's opinion, falls outside the scope of article 19 and consequently it is inadmissible under article 3 of the Optional Protocol.

- *Baban et al. v. Australia* (1014/2001), ICCPR, A/58/40 vol. II (6 August 2003) 331 (CCPR/C/78/D/1014/2001) at paras. 2.4 and 6.7.

...

2.4 On 24 July 2000, the author, along with other detainees, participated in a hunger strike in a recreation room at Villawood Detention Centre, Sydney. On 26 July 2000, the hunger strikers were allegedly cut off from power and contact with the outside world. Allegedly drugged bottled water was supplied. Guards were alleged to have forcibly deprived the hunger strikers of sleep by making noise. On 27 July 2000, the hunger strikers (and the author's son) were forcibly removed and transferred to another detention centre in Port Hedland, Western Australia. At Port Hedland, the author and his son were detained in an isolation cell without window or toilet. On the fifth day of his detention in isolation (his son was regularly fed from the day *after* arrival), the author discontinued his hunger strike, and, eight days later, he was removed from the cell. During the period of isolation, the author contends that access to his legal adviser was denied. On 15 August 2000, the author and his

son were returned to the Villawood detention centre in Sydney to attend their hearing in the Full Federal Court.

...

6.7 Concerning the author's claims under article 19, the Committee, even assuming for the sake of argument that a hunger strike may be subsumed under the right to freedom and expression protected by that article, considers that in the light of the concerns invoked by the State party about the health and safety of detainees, including young children, and other persons, steps lawfully taken to remove the hunger strikers from a location giving rise to these concerns may properly be understood to fall within the legitimate restrictions provided for in article 19, paragraph 3. It follows that the author has not substantiated, for the purposes of admissibility, his claim of a violation of his rights under article 19 of the Covenant.

- *Shin v. Republic of Korea* (926/2000), ICCPR, A/59/40 vol. II (16 March 2004) 118 at paras. 2.1-2.4, 7.2, 7.3, 8 and 9.

...

2.1 Between July 1986 and 10 August 1987, the author, a professional artist, painted a canvas-mounted picture sized 130 cm by 160 cm. The painting, entitled "Rice Planting (Monaeki)" was subsequently described by the Supreme Court in the following terms:

> "The painting as a whole portrays the Korean peninsula in that its upper right part sketches Baek-Doo-San, while its lower part portrays the southern sea with waves. It is divided into lower and upper parts each of which portrays a different scene. The lower part of the painting describes a rice-planting farmer ploughing a field using a bull which tramps down on E. T. [the movie character 'Extraterrestial'], symbolizing foreign power such as the so-called American and Japanese imperialism, Rambo, imported tobacco, Coca Cola, Mad Hunter, Japanese samurai, Japanese singing and dancing girls, the then [United States'] President Ronald Reagan, the then [Japanese] Prime Minister Nakasone, the then President [of the Republic of Korea] Doo Hwan Chun who symbolizes a fascist military power, tanks and nuclear weapons which symbolize the U.S. armed forces, as well as men symbolizing the landed class and comprador capitalist class. The farmer, while ploughing a field, sweeps them out into the southern sea and brings up wire-entanglements of the 38th parallel. The upper part of the painting portrays a peach in a forest of leafy trees in the upper left part of which two pigeons roost affectionately. In the lower right part of the forest is drawn Bak-Doo-San, reputed to be the Sacred Mountain of Rebellion [located in the Democratic People's Republic of Korea (DPRK)], on the left lower part of which flowers are in full blossom and a straw-roofed house as well as a lake is portrayed. Right below the house are shown farmers setting up a feast in celebration of

fully-ripened grains and a fruitful year and either sitting around a table or dancing, and children with an insect net leaping about."

The author states that as soon as the picture was completed, it was distributed in various forms and was widely publicized.

2.2 On 17 August 1989, the author was arrested on a warrant by the Security Command of the National Police Agency. The painting was seized and allegedly damaged by careless handling of the prosecutor's office. On 29 September 1989, he was indicted for alleged breach of article 7 of the National Security Law, in that the picture constituted an "enemy-benefiting expression"1/. On 12 November 1992, a single judge of the Seoul Criminal District Court, at first instance, acquitted the author. On 16 November 1994, three justices of the 5th panel of the Seoul District Criminal Court dismissed the prosecutor's appeal against acquittal, considering article 7 of the National Security Law applicable only to acts which were "clearly dangerous enough to engender national existence/security or imperil the free democratic basic order". On 13 March 1998, however, the Supreme Court upheld the prosecutor's further appeal, holding that the lower court had erred in its finding that the picture was not an "enemy-benefiting expression", contrary to article 7 of the National Security Law. In the Court's view, that provision is breached "when the expression in question is actively and aggressively threatening the security and country or the free and democratic order". The case was then remitted for retrial before three justices of the Seoul District Criminal Court.

2.3 During the retrial, the author moved that the Court refer to the Constitutional Court the question of the constitutionality of the Supreme Court's allegedly broad construction of article 7 of the National Security Law in the light of the Constitutional Court's previous confirmation of the constitutionality of an allegedly narrower construction of this article. On 29 April 1999, the Constitutional Court dismissed a third party's constitutional application raising the identical issue on the basis that, having previously found the provision in question to be constitutional, it was within the remit of the Supreme Court to define the scope of the provision. As a result, the Seoul District Criminal Court dismissed the motion for a constitutional reference.

2.4 On 13 August 1999, the author was convicted and sentenced to probation, with the court ordering confiscation of the picture. On 26 November 1999, the Supreme Court dismissed the author's appeal against conviction, holding simply that "the lower court decision [convicting the author] was reasonable because it followed the previous ruling of the Supreme Court overturning the lower court's original decision". With the conclusion of proceedings against the author, the painting was thus ready for destruction following its earlier seizure.

...

7.2 The Committee observes that the picture painted by the author plainly falls within the scope of the right of freedom of expression protected by article 19, paragraph 2; it recalls that this provision specifically refers to ideas imparted "in the form of art". Even if the infringement of the author's right to freedom of expression, through confiscation of his painting and his conviction for a criminal offence, was in the application of the law, the Committee observes that the State party must demonstrate the necessity of these measures for one of the purposes enumerated in article 19 (3). As a consequence, any restriction on that right must be justified in terms of article 19 (3), i.e. besides being provided by law it also must be necessary for respect of the right or reputations of others, or for the protection of national security or public order (*ordrepublic*) or of public health and morals ("the enumerated purposes").

7.3 The Committee notes that the State party's submissions do not seek to identify which of these purposes are applicable, much less the necessity thereof in the particular case; it may however be noted that the State party's superior courts identified a national security basis as justification for confiscation of the painting and the conviction of the author. As the Committee has consistently found, however, the State party must demonstrate in specific fashion the precise nature of the threat to any of the enumerated purposes caused by the author's conduct, as well as why seizure of the painting and the author's conviction were necessary. In the absence of such justification, a violation of article 19, paragraph 2, will be made out5/. In the absence of any individualized justification therefore of why the measures taken were necessary in the present case for an enumerated purpose, therefore, the Committee finds a violation of the author's right to freedom of expression through the painting's confiscation and the author's conviction.

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 19, paragraph 2, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation for his conviction, annulment of his conviction, and legal costs. In addition, as the State party has not shown that any infringement on the author's freedom of expression, as expressed through the painting, is justified, it should return the painting to him in its original condition, bearing any necessary expenses incurred thereby. The State party is under an obligation to avoid similar violations in the future.

Notes

1/ Article 7 of the National Security Law provides, *inter alia*,

"Any person who has benefited the anti-State organization by way of praising, encouraging

or siding with or through other means the activities of an anti-State organization, its member or a person who had been under instruction from such organization, shall be punished by imprisonment for not more than seven years.

…Any person who has, for the purpose of committing the actions stipulated in paragraphs 1 through 4 of this article, produced, imported, duplicated, processed, transported, disseminated, sold or acquired documents, drawings or any other similar means of expression shall be punished by the same penalty as set forth in each paragraph." [author's translation]
...
5/ See, for example, *Tae Hoon Park v. Republic of Korea* case No. 628/1995, Views adopted 20 October 1998, at para. 10.3, and *Keun-Tae Kim v. Republic of Korea* case No. 574/1994, Views adopted 3 November 1998, at paras. 12.4-12.5.

- *Lovell v. Australia* (920/2000), ICCPR, A/59/40 vol. II (24 March 2004) 101 at paras. 2.1-2.3 and 9.2-9.4.

...
2.1 The author was retained as an industrial advocate by a trade union, the Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Workers' Union of Australia, Engineering and Electric Division, Western Australia Branch (CEPU), when it became involved in industrial action against Hamersley Iron PTY Ltd (Hamersley) in 1992. Hamersley, represented by the law firm Freehill, Hollingdale and Page (Freehill), commenced civil proceedings in the Supreme Court of Western Australia against the CEPU and a number of its officials, seeking injunctions and compensatory damages on a number of grounds. During these proceedings, Hamersley was required to make available for discovery by the CEPU and its officials all relevant documents for which privilege could not be claimed. These documents were obtained and inspected by the author and the CEPU. Included in these documents were five documents, in relation to which Hamersley alleged that the author and the CEPU, by revealing their contents publicly in a radio interview, in newspaper articles and in a series of briefings prepared for distribution to members of the CEPU and other unions, and by using them contrary to the rules of discovery, had committed contempt of court.

2.2 On 22 May 1998, the author and the CEPU were convicted at first instance in the Full Court of the Supreme Court of Western Australia (three judges) on two accounts of contempt of court. The first was the misuse of the five discovered documents, in that the author had used them contrary to the implied undertaking not to use discovered documents which had been obtained from the other party in the civil action in the process of discovery, or to communicate their contents other than for the purposes of the litigation for which the

documents were discovered. The second was the interference with due administration of justice, in that the author's conduct, by disclosing the contents of the discovered documents, was intended and placed improper pressure on Hamersley, in regard to the main proceedings, it invited public prejudgement of the issues, and had the tendency to frighten off potential witnesses.

2.3 The author's defence with regard to the first contempt charge, had been, *inter alia*, that the documents in question, once referred to in open court, had become part of the public domain and there was no limitation any longer on their use; that Hamersley, by responding to the allegations made by the author in reliance on material contained in the discovered documents, had waived its right to confidentiality of the discovered documents; and that publication and use of the documents was consistent with his freedom of political communication protected by the Australian Constitution. On 22 July 1998, the Court fined the author $A 40,000 (plus costs), and the union $A 55,000 (plus costs).

...

9.2 With regard to the author's claim under article 19, paragraph 2, that he was convicted and fined for publishing documents that had been referred to in an open court, the Committee recalls that article 19, paragraph 2, guarantees the right to freedom of expression and includes the "*freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media*". It considers that the author, by publishing documents that were referred to in an open court, by virtue of different media, was exercising his right to impart information within the meaning of article 19, paragraph 2.

9.3 The Committee observes that any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3 (a) and (b) of article 19, and must be necessary to achieve the legitimate purpose.

9.4 The Committee notes that the institution of contempt of court is an institution provided by law restricting freedom of expression for achieving the aim of protecting the right of confidentiality of a party to the litigation or the integrity of the court or public order. Here in the present case, though the five documents were directed to be discovered on the application of the author and CEPU, they were not allowed to be adduced in evidence with the result that they did not become part of the published record of the case. It may be noted that these five documents were not read aloud in court and their contents were not made known to anyone except the parties to the litigation and their lawyers. There was clearly, in the circumstances, a restriction on the publication of these five documents, implied from the refusal of the court to allow them to be adduced in evidence and not taking them as part of the public record of the case. This restriction was provided by the law of contempt of court and it was necessary for achieving the aim of protecting the rights of others, i.e. Hamersley,

or for the protection of public order (*ordre public*). The Committee accordingly concludes that the author's conviction for contempt was a permissible restriction of his freedom of expression, in accordance with article 19, paragraph 3, and that there has been no violation of article 19, paragraph 2, of the Covenant.

- *Svetik v. Belarus* (927/2000), ICCPR, A/59/40 vol. II (8 July 2004) 125 at paras. 2.1, 2.3, 7.2, 7.3, 8, 9, and Individual Opinion of Sir Nigel Rodley (concurring), at 131.

...

2.1 The author - a teacher in a high school - is a representative of the NGO - Belarusian Helsinki Committee (BHC) in the city of Krichev (Belarus). On 24 March 1999, the national newspaper *Narodnaya Volya* (People's Will) published a declaration, criticizing the policy of the authorities in power. The declaration was written and signed by representatives of hundreds of Belarusian regional political and non-governmental organizations (NGOs), including the author. The latter observes that the declaration contained an appeal not to take part in the forthcoming local elections as a protest against the electoral law which the signatories believed was incompatible with "the Belarusian Constitution and the international norms".

...

2.3 On 26 April 1999, the author was summoned to appear before the Krichev District Court. The judge informed him that his signature on the open letter amounted to an offence under article 167, part 3, 1/ of the Belarusian Code on Administrative Offences (CAO) and ordered him to pay a fine of 1 million Belarusian rubles, the equivalent of two minimum salaries. 2/ According to the author, the judge was not impartial and threatened to sentence him to the maximum penalty - 10 minimum monthly salaries, as well as to report him to his employer if he did not confess his guilt.

...

7.2 The author claims that his right under article 19 has been violated, as he was subjected to an administrative penalty for the sole expression of his political opinion. The State party only objects that the author was sentenced in compliance with the applicable law, and that, pursuant to paragraph 3 of article 19, the rights protected by paragraph 2 are subject to limitations. The Committee recalls that article 19 allows restrictions only to the extent that they are provided by law and only if they are necessary (a) for respect of the rights and reputation of others; and (b) for the protection of national security or public order (*ordre public*), or of public health or morals.6/ The Committee thus has to decide whether or not punishing a call to boycott a particular election is a permissible limitation of the freedom of expression.

7.3 The Committee recalls that according to article 25 (b), every citizen has the right to vote. In order to protect this right, States parties to the Covenant should prohibit intimidation or

coercion of voters by penal laws and those laws should be strictly enforced.7/ The application of such laws constitutes, in principle, a lawful limitation of the freedom of expression, necessary for respect of the rights of others. However, intimidation and coercion must be distinguished from encouraging voters to boycott an election. The Committee notes that voting was not compulsory in the State party concerned and that the declaration signed by the author did not affect the possibility of voters to freely decide whether or nor to participate in the particular election. The Committee concludes that in the circumstances of the present case the limitation of the liberty of expression did not legitimately serve one of the reasons enumerated in article 19, paragraph 3, of the Covenant and that the author's rights under article 19, paragraph 2, of the Covenant have been violated.

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 19, paragraph 2, of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation amounting to a sum not less than the present value of the fine and any legal costs paid by the author.8/ The State party is also under an obligation to prevent similar violations in the future.

Notes

1/ Article 167-3, CAO. (Violation of electoral legislation). Article 167-3 was introduced by the Law of 5 December 1989 - Collection of Laws BSSR, 1989, No. 35, art. 386; edition of the Law of 30 March 1994 - of the Supreme Court of Belarus, 1994, No. 14, p. 190.

2/ A copy of the decision has been provided by the author. The Court concluded that on 24 March 1999, "representatives of regional political and non-governmental organizations published a statement in the *Narodnaya Volya* newspaper, which contained public appeals to boycott the forthcoming local elections for counsels of deputies. The representative of the Krichev Section of the Belarusian Helsinki Committee, L.V. Svetik, agreed with the text of the appeal and put his signature on it".

...

6/ See, *inter alia*, communication No. 574/1994, *Kim v. Republic of Korea*, Views dated 3 November 1998; communication No. 628/1995, *Park v. Republic of Korea*, Views dated 20 October 1998; communication No. 780/1997, *Laptsevich v. Belarus*, Views dated 13 April 2000.

7/ For the proposed remedy, see communication No. 780/1997, *Laptsevich v. Belarus*, Views dated 13 April 2000.

8/ General comment No. 25 (1996), para. 11.

Individual Opinion of Sir Nigel Rodley (concurring)

In its consideration of the merits, the Committee "notes that voting was not compulsory in the State party concerned" (paragraph 7.3). The Committee does not spell out the relevance of this observation. It is to be hoped that it is not wittingly or unwittingly indicating that a system of compulsory voting would of itself justify the enforcement of a law that would make advocacy of electoral boycott an offence. Much will depend on the context within which a particular system is established. In a jurisdiction in which there may be forces seeking, not to persuade, but to intimidate voters not to vote, legal compulsion to vote may be an appropriate means to protect voters who wish to vote but are afraid of being seen to disobey the pressures not to vote.

Conversely, history is replete with honourable reasons for opposing regular participation in an electoral process that is believed to be illegitimate. The most blatant example is a vote collection and counting system that is or is expected to be fraudulently manipulated (vote rigging). Another example would be when the voter is offered no choice. A more equivocal example would be when there may be a choice but it is argued that it is not a real choice.

There is no comfortable way in which a body such as the Committee could or should begin credibly to make judgements on matters like these. It will never be in a position itself to pronounce on the legitimacy of advocating this, that or the other form of non-cooperation with a particular electoral exercise in a given jurisdiction. It follows that in any system it must always be possible for a person to advocate non-cooperation with an electoral exercise whose legitimacy that person may wish to challenge. There may be room for flexibility in the means of non-cooperation that may be advocated, be it electoral boycott, the spoiling of ballots, the writing in of alternatives and so on. But, it would be inconsistent with article 19 to prevent the advocacy of any means of non-cooperation as a challenge to the process itself. Indeed, it may similarly be incompatible with the right contained in article 25 to deny to the individual voter, on pain of legally prescribed disadvantage, any possibility whatsoever of manifesting his or her non-cooperation with the process.

- *Marques v. Angola* (1128/2002), ICCPR, A/60/40 vol. II (29 March 2005) 181 at paras. 2.1-2.3, 2.6, 2.8, 2.10, 6.7, 6.8, 7 and 8.

...
2.1 On 3 July, 28 August and 13 October 1999, the author, a journalist and the representative of the Open Society Institute in Angola, wrote several articles critical of Angolan President *dos Santos* in an independent Angolan newspaper, the *Agora*. In these articles, he stated,

inter alia, that the President was responsible "for the destruction of the country and the calamitous situation of State institutions" and was "accountable for the promotion of incompetence, embezzlement and corruption as political and social values."

2.2 On 13 October 1999, the author was summoned before an investigator at the National Criminal Investigation Division (DNIC) and questioned for approximately three hours before being released. In an interview later that day with the Catholic radio station, *Radio Ecclésia*, the author reiterated his criticism of the President and described his treatment by the DNIC.

2.3 On 16 October 1999, the author was arrested at gunpoint by 20 armed members of the Rapid Intervention Police and DNIC officers at his home in Luanda, without being informed about the reasons for his arrest. He was brought to the Operational Police Unit, where he was held for seven hours and questioned before being handed over to DNIC investigators, who questioned him for five hours. He was then formally arrested, though not charged, by the deputy public prosecutor of DNIC.

...

2.6 On 25 November 1999, the author was released from prison on bail and informed of the charges against him for the first time. Together with the director, A. S., and the chief editor, A.J.F., of *Agora*, he was charged with "materially and continuously committ[ing] the crimes characteristic of defamation and slander against His Excellency the President of the Republic and the Attorney General of the Republic…by arts. 44, 46 all of Law no 22/91 of June 15 (the Press Law) with aggravating circumstances 1, 2, 10, 20, 21 and 25, all of articles 34 of the Penal Code." The terms of bail obliged the author "not to leave the country" and "not to engage in certain activities that are punishable by the offence committed and that create the risk that new violations may be perpetrated - Art 270 of the Penal Code". Several requests by the author for clarification of these terms were unsuccessful.

...

2.8 By reference to article 46 2/ of Press Law No. 22/91 of June 15 1991, the Provincial Court ruled that evidence presented by the author to support his defence of the 'truth' of the allegations and the good faith basis upon which they were made, including the texts of speeches of the President, Government resolutions and statements of foreign State officials, was inadmissible. In protest, the author's lawyer left the courtroom, stating that he could not represent his client in such circumstances. When he returned to the courtroom on 25 March, the trial judge prevented him from resuming his representation of the author and ordered that he be disbarred from practising as a lawyer in Angola for a period of six months. The Court then appointed as *ex officio* defence counsel an official of the General Attorney's Office working at the Provincial Court's labour tribunal, who allegedly was not qualified to practise as a lawyer.

...

2.10 On 31 March 2000, the Provincial Court convicted the author of abuse of the press 3/ by defamation 4/ finding that his newspaper article of 3 July 1999, as well as the radio

interview, contained "offensive words and expressions" against the Angolan President and, albeit not raised by the accusation and therefore not punishable, against the Attorney-General in their official and personal capacities. The Court found that the author had "acted with intention to injure" and based the conviction on the combined effect of articles 43, 44, 45 and 46 of Press Law No. 22/91, aggravated by item 1 of article 34 of the Penal Code (premeditation). It sentenced the author to six months' imprisonment and a fine of 1,000,000.00 Kwanzas (Nkz.) to "discourage" similar behaviour, at the same time ordering the payment of NKz. 100,000.00 compensatory damages to "the offended" and of a court tax of NKz. 20,000.00.

...

6.7 The...issue before the Committee is whether the author's arrest, detention and conviction, or his travel constraints, unlawfully restricted his right to freedom of expression, in violation of article 19 of the Covenant. The Committee reiterates that the right to freedom of expression in article 19, paragraph 2, includes the right of individuals to criticize or openly and publicly evaluate their Governments without fear of interference or punishment. 19/

6.8 The Committee refers to its jurisprudence that any restriction on the right to freedom of expression must cumulatively meet the following conditions set out in paragraph 3 of article 19: it must be provided for by law, it must serve one of the aims enumerated in article 19, paragraph 3 (a) and (b), and it must be necessary to achieve one of these purposes. The Committee notes that the author's final conviction was based on article 43 of the Press Law, in conjunction with section 410 of the Criminal Code. Even if it were assumed that his arrest and detention, or the restrictions on his travel, had a basis in Angolan law, and that these measures, as well as his conviction, pursued a legitimate aim, such as protecting the President's rights and reputation or public order, it cannot be said that the restrictions were necessary to achieve one of these aims. The Committee observes that the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. Given the paramount importance, in a democratic society, of the right to freedom of expression and of a free and uncensored press or other media, 20/ the severity of the sanctions imposed on the author cannot be considered as a proportionate measure to protect public order or the honour and the reputation of the President, a public figure who, as such, is subject to criticism and opposition. In addition, the Committee considers it an aggravating factor that the author's proposed truth defence against the libel charge was ruled out by the courts. In the circumstances, the Committee concludes that there has been a violation of article 19.

...

7. The Human Rights Committee...is of the view that the facts before it reveal violations of article 9, paragraphs 1, 2, 3 and 4, and of articles 12 and 19 of the Covenant.

8. In accordance with article 2, paragraph 3, of the Covenant, the author is entitled to an

effective remedy, including compensation for his arbitrary arrest and detention, as well as for the violations of his rights under articles 12 and 19 of the Covenant. The State party is under an obligation to take measures to prevent similar violations in the future.

Notes

...

2/ Article 46 of the Press Law reads: "If the person defamed is the President of the Republic of Angola, or the head of a foreign State, or its representative in Angola, then proof of the veracity of the facts shall not be admitted."

3/ The crime of abuse of the press is defined as follows in article 43 of the Press Law: "(1) For purposes of this law, an abuse of the press shall be deemed to be any act or behavio[u]r that injures the juridical values and interests protected by the criminal code, effected by publication of texts or images through the press, radio broadcasts or television. (2) The criminal code is applicable to the aforementioned crimes as follows: (a) The court shall apply the punishment set forth in the incriminating legislation, which punishment may be aggravated pursuant to general provisions: (b) If the agent of the crime has not previously been found guilty of any abuse of the press, then the punishment of imprisonment may be replaced by a fine of not less than Nkz. 20,000.00."

4/ Article 407 of the Criminal Code describes the crime of defamation as follows: "If one person defames another publicly, *de viva voce*, in writing, in a published drawing, or in any public manner, imputing to him something offensive to his hono[u]r and dignity, or reproduces this, then he shall be condemned to a prison term of up to four months and a fine[…]."

...

19/ See communications Nos. 422/1990, 423/1990 and 424/1990, *Aduayom et al. v. Togo*, Views adopted on 12 July 1996, at para. 7.4.

20/ See Human Rights Committee, general comment No. 25 [57], 12 July 1996, at para. 25.

- *Jong-Choel v. Republic of Korea* (968/2001), ICCPR, A/60/40 vol. II (27 July 2005) 60 at paras. 2.1, 2.2, 8.2, 8.3 and 9.

...

2.1 On 11 December 1997, the author, a journalist, published an article in a national weekly publication, reporting on opinion polls, between 31 July and 11 December 1997, for the Presidential election of 18 December 1997. In February 1998, he was charged by the District Attorney for violating section 108 (1) of the Election for Public Office and Election

Malpractice Prevention Act (hereinafter the "Election Act"), which prohibits publication of public opinion polls during the electoral campaign period 1/. According to article 33 (1), the presidential campaign period is 23 days. The Election Act imposes criminal liability for the disclosure of political opinion polls for the 23-day period running up to and including election day 2/. On 16 July 1998, the author was found guilty as charged by the Seoul Criminal District Court Collegiate Division and fined 1,000,000 won (approx. US$ 445).

2.2 The author appealed this decision and at the same time challenged the constitutionality of the related provisions of the Election Act before the Constitutional Court. On 28 January 1999, the Constitutional Court declared the relevant provisions of the Election Act constitutional, finding that the length of the ban suppressing the publication of polls during the electoral campaign period was reasonable to ensure a fair and undistorted election result. In its judgement, it referred to a study which allegedly demonstrates that a public opinion poll may encourage voters to move toward a candidate with a stronger chance of winning (so-called "bandwagon effect"), or may add sympathy votes to the underdog (so-called "underdog effect"), thereby distorting the will of voters. On 13 April 1999, the High Court upheld the District Court's decision, and on 20 August 1999, the Supreme Court dismissed the author's appeal.

...

8.2 The Committee notes that the issue before it is whether the author's conviction, under section 108 (1) of the Election for Public Office and Election Malpractice Prevention Act, for having published an article on the results of opinion polls during the campaign period of the Presidential election, violates article 19, paragraph 2, of the Covenant. Article 19, paragraph 2, of the Covenant guarantees the right to freedom of expression and includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media". The Committee considers that through his articles, the author was exercising his right to impart information and ideas within the meaning of article 19, paragraph 2, of the Covenant.

8.3 The Committee observes that any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address the aims enumerated in paragraph 3 of article 19, and must be necessary to achieve the purpose. The restrictions were provided for by law, under section 108 (1) of the Election for Public Office and Election Malpractice Prevention Act. As to whether the measures addressed one of the aims enumerated in paragraph 3, the Committee notes that the State party maintains that the restriction is justified in terms of the protection of public order (para. 3 (b)). The Committee considers that, to the extent that the restriction relates to the rights of Presidential candidates, this restriction may also fall within the terms of article 19, paragraph 3 (a) (necessary for the respect of the rights of others). The Committee notes the underlying reasoning for such a restriction is based on the wish to provide the electorate with a limited period of reflection, during which they are insulated

from considerations extraneous to the issues under contest in the elections, and that similar restrictions can be found in many jurisdictions. The Committee also notes the recent historical specificities of the democratic political processes of the State party, including those invoked by the State party. Under such circumstances, a law restricting the publication of opinion polls for a limited period in advance of an election does not seem *ipso facto* to fall outside the aims contemplated in article 19, paragraph 3. As to the issue of proportionality, the Committee notes that, while a cut-off date of 23 days prior to the election is unusually long, it need not pronounce itself on the compatibility *per se* of the cut-off date with article 19, paragraph 3, since the author's initial act of publishing previously unreported opinion polls took place within seven days of the election. The author's conviction for such publication cannot be considered excessive in the context of the conditions obtaining in the State party. The Committee also notes that the sanction visited on the author, albeit one or criminal law, cannot be categorized as excessively harsh. It is not, therefore, in a position to conclude that the law, as applied to the author, is disproportionate to its aim. Accordingly, the Committee does not find a violation of article 19 of the Covenant in this regard.

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

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Notes

1/ It stipulates that "No person may publish or quote in a report the details and result of a public opinion poll (including a mock voting or popularity poll) making a degree of support to a political party or a successful candidate anticipated, in connection with an election, from the day the election period commences to the time the voting is closed on the election day."

2/ According to article 256 (1), as amended, "any person who discloses the details and result of a survey of public opinion, or makes a report citing them or makes another person do so, in contravention of the provisions of article 108 (1)…with imprisonment for not more than two years, or a fine not exceeding four million won."

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For dissenting opinion in this context, see Jong-Choel v. Republic of Korea (968/2001), ICCPR, A/60/40 vol. II (27 July 2005) 54 at Individual Opinion of Ms. Christine Chanet and Messrs. Abdelfattah Amor, Prafullachandra Natwarlal Bhagwati, Alfredo Castillero Hoyos, Ahmed Tawfik Khalil,and Rajsoomer Lallah, 66, and Individual Opinion of Ms. Ruth Wedgwood, 67.

- *Faurisson v. France* (550/1993), ICCPR, A/52/40 vol. II (8 November 1996) 84 (CCPR/C/58/D/550/1993). For text of communication, see **EXPRESSION - FREEDOM OF** - HATE SPEECH AND LIMITS ON PROPAGANDA.