LEGAL RIGHTS - CRIMINAL -
Protection Against Retroactive Criminalization

III. JURISPRUDENCE

ICCPR

- *Pietraroia v. Uruguay* (R.10/44), ICCPR, A/36/40 (27 March 1981) 153 at paras. 13.1, 13.2 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...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...
> ...
> 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 of the Covenant, in particular:
>
> > ...
> > of article 15 (1), because the penal law was applied retroactively against him...

See also:

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

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- *Van Duzen v. Canada* (R.12/50), ICCPR, A/37/40 (7 April 1982) 150 at paras. 2.1- 2.4 and 10.1-10.4.

...
2.1 The author alleges that he is the victim of a breach by Canada of article 15 (1) of the International Covenant on Civil and Political Rights. The relevant facts, which are not in dispute, are as follows:

2.2 On 17 November 1967 and 12 June 1968, respectively, the author was sentenced upon conviction of different offences to a three year and a 10-year prison term. The latter term was to be served concurrently with the former, so that the combined terms were to expire on 11 June 1978. On 31 May 1971, the author was released on parole under the Parole Act 1970, then in force. On 13 December 1974, while still on parole, the author was convicted of the indictable offence of breaking and entering and, on 23 December 1974, sentenced to imprisonment for a term of three years. By application, of section 17 of the Parole Act 1970 his parole was treated as forfeited on 13 December 1974. As a consequence, the author's combined terms have been calculated to expire on 4 January 1985...In 1977 several sections of the Parole Act 1970, among them section 17, were repealed. New provisions came into force on 15 October 1977 (Criminal Law Amendment Act 1977).

2.3 According to the author the combined effect of the new law was that forfeiture of parole was abolished and the penalty for committing an indictable offence while on parole was made lighter, provided the indictable offence was committed on or after 15 October 1977, because, *inter alia*, pursuant to the new provisions, time spent on parole after 15 October 1977 and before suspension of parole, was credited as time spent under sentence. Therefore, a parolee whose parole was revoked after that date was not required to spend an equivalent time in custody under the previous sentence.

2.4 The author alleges that, by not making the "lighter penalty" retroactively applicable to persons who have committed indictable offences while on parole before 15 October 1977, the Parliament of Canada has enacted a law which deprives him of the benefit of article 15 of the Covenant and thereby failed to perform its duty, under article 2 of the Covenant, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to take the necessary steps to adopt such legislative measures as may be necessary to give effect to those rights.
...
10.1 The Human Rights Committee notes that the main point raised and declared admissible

in the present communication is whether the provision for the retroactivity of a 'lighter penalty' in article 15 (l) of the Covenant is applicable in the circumstances of the present case. In this respect, the Committee recalls that the Canadian legislation removing the automatic forfeiture or parole for offences committed while on parole was made effective from 15 October 1977, at a time when the alleged victim was serving the sentence imposed on him under the earlier legislation. He now claims that under article 15 (l) he should benefit from this subsequent change in the law.

10.2 ...The parties have made extensive submissions, in particular as regards the meaning of the word "penalty' and as regards relevant Canadian law and practice. The Committee appreciates their relevance for the light they shed on the nature of the issue in dispute. On the other hand, the meaning of the word "penalty" in Canadian law is not, as such, decisive. Whether the word "penalty" in article 15 (1) should be interpreted narrowly or widely, and whether it applies to different kinds of penalties, "criminal" and "administrative", under the Covenant, must depend on other factors. Apart from the text of article 15 (1), regard must be had, *inter alia*, to its object and purpose.

10.3 However, in the opinion of the Committee, it is not necessary for the purposes of the present case to go further into the very complex issues raised concerning the interpretation and application of article 15 (1). In this respect regard must be had to the fact that the author has subsequently been released, and that this happened even before the date when he claims he should be free. Whether or not this claim should be regarded as justified under the Covenant, the Committee considers that, although his release is subject to some conditions, for practical purposes and without prejudice to the correct interpretation of article 15 (1), he has in fact obtained the benefit he has claimed. It is true that he has maintained his complaint and that his status upon release is not identical in law to the one he has claimed. However, in the view of the Committee, since the potential risk of re-imprisonment depends upon his own behaviour, this risk cannot, in the circumstances, represent any actual violation of the right invoked by him.

10.4 For the reasons set out in paragraph 10.3, the Human Rights Committee...is of the view that the present case does not disclose a violation of the Covenant.

- *MacIsaac v. Canada* (55/1979) (R.13/55), ICCPR, A/38/40 (14 October 1982) 111 at paras. 2.1-2.4 and 11-14.

...
2.1 The author alleges that he is a victim of a breach by Canada of article 15 (1) of the International Covenant on Civil and Political Rights. The relevant facts which are not in

dispute, are as follows:

2.2 On 26 November 1968, the author was sentenced to a term of eight years imprisonment on counts of armed robbery. On 21 March 1972, after serving *circa* three years and four months, the author was released on parole from a federal penitentiary in Campbellford, Ontario. On 27 June 1975, he was convicted of a criminal offence while still being on parole and, on 25 July 1975, he was sentenced to a term of 14 months imprisonment. Pursuant to the conviction, by operation of the Parole Act 1970, the time which the author had spent on parole from 21 March 1972 to 27 June 1975 (three years, three months and six days) was automatically forfeited and he was required to re-serve that time. The author was again released on 7 May 1979, to serve the remaining part of his sentence under mandatory supervision.

2.3 On 15 October 1977, the Criminal Law Amendment Act 1977 was proclaimed in force. The new law, *inter alia*, repealed certain provisions of the Parole Act 1970 and, in effect, abolished automatic forfeiture of time spent on parole (forfeiture of parole) upon subsequent conviction for an indictable offence committed while still on parole. The Criminal Law Amendment Act 1977 now stipulates that only the sanction of revocation of parole is presently applicable to persons on parole, which sanction is invoked at the discretion of the National Parole Board rather than automatically by law upon conviction of an indictable offence. Section 31 (2) (a) of the Criminal Law Amendment Act 1977 provides further that, upon revocation of parole, any time that a person had spent on parole after the coming into force of this provision, that is after 15 October 1977, is credited against his/her sentence. Consequently, a person presently in the position in which the author found himself on 27 June 1975 would not necessarily attract any sanction concerning revocation of parole and, even if such a sanction were to be invoked, would not be required to re-serve the period of time spent on parole after 15 October 1977.

2.4 The author claims that, by specifying that section 31 (2) (a) of the Criminal Law Amendment Act 1977 shall not be retroactive, the Government of Canada has contravened article 15 (1) of the Covenant. He submits that section 31 (2) (a), in providing that time spent on parole after 15 October 1977 is not to be re-served in prison upon revocation of that parole, constitutes a lighter penalty within the meaning of article 15 of the Covenant. He further submits that, contrary to article 2 (2) of the Covenant, the Government of Canada has failed to enact legislation to give effect to article 15.

...

11. In the absence of more precise submissions from the author in the present case, the Committee has attempted to examine in what way, if any, the position of the alleged victim was affected by the situation of which he basically complains. It notes that the system for dealing with recidivists was changed by the 1977 Act, to make it more flexible. The Act as

amended provides, instead of the automatic forfeiture of parole, for a system of revocation at the discretion of the National Parole Board and sentencing for the recidivist offence at the discretion of the judge. However, the recidivist cannot be made to re-serve the full time spent on parole. Apparently, the author's claim in the present case is that he would have been released earlier on the hypothesis that the new provisions had been applied to him retroactively. The Committee notes that it is not clear how this should have been done. However, here a comparison with the system existing before 1977 is necessary. Under the old system, the judge exercised his discretion in deciding the length of a penalty to be imposed. In the case of Mr. MacIsaac, whose second sentence was rendered in 1975, the recidivist offence carried a possible sentence of up to 14 years. While noting that Mr. MacIsaac's criminal record was "serious" and explicitly mentioning the fact that Mr. MacIsaac's parole had been forfeited, the judge in 1975 sentenced him to 14 months. The Committee notes that one cannot focus only on the favourable aspects of a hypothetical situation and fail to take into account that the imposition of the 14-month sentence on Mr. MacIsaac for a recidivist offence was explicitly linked with the forfeiture of parole. In Canadian law there is no single fixed penalty for a recidivist offence. The law allows a scale of penalties for such offences and full judicial discretion to set the term of imprisonment (e.g. up to 14 years for the offence of breaking and entering and theft as in Mr. MacIsaac's case). It follows that Mr. MacIsaac has not established the hypothesis that if parole had not been forfeited, the judge would have imposed the same sentence of 14 months and that he would therefore have been actually released prior to May of 1979. The Committee is not in a position to know, nor is it called upon to speculate, how the fact that his earlier parole was forfeited may have influenced the penalty meted out for the offence committed while on parole. The burden of proving that in 1977 he has been denied an advantage under the new law and that he is therefore a "victim" lies with the author. It is not the Committee's function to make a hypothetical assessment of what would have happened if the new Act had been applicable to him.

12. The Canadian Criminal Law Amendment Act 1977 in this light, and as explained by the State party, only entails a modification in the system of dealing with recidivist cases and leaves the question as to whether the total effect in the individual case will be a "lighter penalty" to the judge who sentences the recidivist offender. The new law does not necessarily result automatically, for those to whom it is applied, in a lighter penalty compared to that under the earlier legislation. The judge entrusted with sentencing the recidivist - now as before - is bound to take into account the facts of every case, including, of course, the revocation or forfeiture of parole, and exercise his discretion in sentencing within the prescribed scale of statutory minimum and maximum penalties.

13. These considerations lead to the conclusion that it cannot be established that in fact or law the alleged victim was denied the benefit of a "lighter" penalty to which he would have

been entitled under the Covenant.

14. For these reasons the Human Rights Committee...is of the view that the facts of the present case do not disclose any violation of article 15 (1) 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, 2.3, 2.4, 3 and 9.4.

...
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.
...
2.3 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.
...
3. ...[The author] contends that such an application of the Act to the circumstances of the events in question amounts to a violation of article 15 of the Covenant *(nullum crimen sine lege, nulla poena sine lege*), since there is no law making it a crime to hold a political demonstration...
...
9.4 The Committee notes that, while claims under article 15 have been made, no issues

under this provision arise in the present case.

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.

- *de Groot v. The Netherlands* (578/1994), ICCPR, A/50/40 vol. II (14 July 1995) 179 (CCPR/C/54/D/578/1994) at para. 4.3.

  ...
  4.3 The author has further claimed to be a victim of a violation of article 15 of the Covenant, because he could not have foreseen that article 140 of the Criminal Code, on the basis of which he was convicted, was applicable to his case by virtue of its imprecision. The Committee refers to its established jurisprudence 8/ that interpretation of domestic legislation is essentially a matter for the courts and authorities of the State party concerned. Since it does not appear from the information before the Committee that the law in the present case was interpreted and applied arbitrarily or that its application amounted to a denial of justice, the Committee considers that this part of the communication is inadmissible under article 3 of the Optional Protocol.
  ...

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  Notes

  ...
  8/ See, *inter alia*, the Committee's decision in Communication No. 58/1979 (*Anna Maroufidou v. Sweden*), para. 10.1 (Views adopted on 9 April 1981).

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- *Westerman v. The Netherlands* (682/1996), ICCPR, A/55/40 vol. II (3 November 1999) 41 at para. 9.2.

  ...
  9.2 The Committee notes that at the time when the author refused to obey an order and persisted in his refusal to carry out military orders, these acts constituted an offence under the Military Criminal Code, for which he was charged. Subsequently, and before the author was convicted, the Code was amended and the amended Code was applied to the author. Under the new Code, the author's refusal to obey military orders still constituted a criminal offence. The Committee has noted the author's argument that the nature of the offence in the new Code is different from the one in the old Code, in that it is constituted by total refusal, an attitude, rather than a single refusal of orders. The Committee notes that the acts which

constituted the offence under the new Code were that the author refused to perform *any* military duty. Those acts were an offence at the time they were committed, under the old Code, and were then punishable by 21 months' imprisonment (for a single act) or by 42 months' imprisonment (for repeated acts). The sentence of 9 months imposed on the author was not heavier than that applicable at the time of the offence. Consequently, the Committee finds that the facts of the case do not reveal a violation of article 15 of the Covenant.

- *Rogerson v. Australia* (802/1998), ICCPR, A/57/40 vol. II (3 April 2002) 150 (CCPR/C/74/805/1998) at paras. 2.3 and 9.4.

...
2.3 From 2 to 4 and on 9 September 1992, the Northern Territory Supreme Court heard an action for contempt of court against the author. Since 3 September, the author was represented by counsel. On 9 October 1992, the Court delivered its decision finding the author guilty of contempt of court. The Court fined the author a sum of $ 5,000 and ordered him to pay the plaintiffs' costs on a solicitor and own client basis. Upon appeal of the author, heard from 22 to 24 March 1993, the Northern Territory Court of Appeals, on 17 March 1995, upheld the Supreme Court decision but quashed the fine and remitted this matter to the Supreme Court for reconsideration. On 22 June 1995, the High Court of Australia refused Special Leave to Appeal.
...
9.4 With respect to the alleged violation of article 15, paragraph 1, of the Covenant by the Northern Territory Supreme Court in the procedures on contempt, the Committee considers that the term "criminal offence" has to be interpreted in conformity with the term "criminal charge" in article 14, paragraph 3, and, thus, finds that article 15, paragraph 1, is applicable in the present case.9/ The Committee notes that it appears from the submissions of both parties that, before the author was convicted, contempt of court for breach of an injunction order already constituted an offence under Australian law.10/ Therefore, the Committee finds that the facts of the case do not reveal a violation of article 15, paragraph 1, of the Covenant.

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Notes

...
9/ See the similar case of *J.L. v. Australia*, Case No. 491/1992, decision of 28 July 1992, para. 4.3.

10/ See *Westerman v. The Netherlands*, Case No. 682/1996, Views of 3 November 1999.

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- *Strik v. The Netherlands* (1001/2001), ICCPR, A/58/40 vol. II (1 November 2002) 547 (CCPR/C/76/D/1001/2001) at paras. 3.1, 3.2 and 7.3.

...

3.1 The author claims that his right to be compensated according to law for the unlawful punishment he was submitted to, not to be punished again for an offence for which he has already been finally punished, his right not to be punished for an act which did not constitute a criminal offence at the time when it was committed, his right not to be discriminated against on the basis of his age, his right to hold opinions without interference, and his right not to be subjected to inhuman treatment, have been violated.

3.2 The author claims that he was punished several times for the same act, in decisions of 25 September 1990, 5 January and 8 June 1993 by his employer, and that this was not repaired in spite of the Central Board of Appeal's ruling in his favour, in violation of article 14, paragraphs 6 and 7.

...

7.3 With regard to the author's claims that he was punished several times for the same act, in decisions of 25 September 1990, 5 January and 8 June 1993 by his employer, that this was not repaired in spite of the Central Board of Appeal's ruling in his favour, and that the Central Board of Appeal by combining the penalty of resignation with other penalties, imposed a heavier penalty on him, than the one that was applicable at the time of the criminal offence, in violation of articles 14, paragraphs 6 and 7, and 15 of the Covenant, the Committee notes that these articles of the Covenant relate to criminal offences, whereas in the author's case only disciplinary measures were imposed and the material before the Committee does not show that the imposition of these measures related to a "*criminal charge*" or a "*criminal offence*" in the meaning of article 14 or 15 of the Covenant. This part of the claim is therefore outside the scope of the Covenant, and inadmissible, *ratione materiae,* under article 3 of the Optional Protocol.

- *Van Grinsven v. The Netherlands* (1142/2002), ICCPR, A/58/40 vol. II (27 March 2003) 603 (CCPR/C/77/D/1142/2002) at para. 5.7.

...

5.7 In respect of the author's claim that the courts imposed a heavier penalty on him than prescribed by law and that he was denied the right to benefit from lighter penalties prescribed by law, in violation of article 15, the Committee notes that this Covenant provision relates

to criminal offences, whereas the author's claim relates to the child custody case. The material before the Committee does not support any argument or claim that those proceedings related to a *"criminal charg*e" or a *"criminal offenc*e" within the meaning of article 15 of the Covenant. This claim and any part of the author's claims that potentially relate to the presumed applicability of article 14, paragraph 3, of the Covenant to the custody proceedings are outside the scope of the Covenant provisions invoked by the author, and inadmissible, *ratione materia*e, pursuant to article 3 of the Optional Protocol.

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

...
2.1 The victim was a student at the Faculty of Dentistry of the Inca Garcilaso de la Vega University, and also worked in the family restaurant. On 3 October 1986 he was arrested in a building near to his home, where he had gone to clean up after being stopped at gunpoint by the police. The arrest was made without any arrest warrant, and without the detainee having been arrested in *flagrante delicto*; he was taken to the offices of DIRCOTE,1/ where he was locked in the cells while the police made inquiries.
...
2.5 In the oral proceedings, the judges confined themselves to questioning the alleged victim on the basis of the contentions in the police report, without taking into account events at the pre-trial stage. On 22 December 1988 Lima Seventh Correctional Court acquitted him, declaring him innocent of the charges brought against him.

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

2.7 On 11 September 1997 the police arrested Mr. Ricardo Ernesto Gómez Casafranca at his home for an appearance at further oral proceedings based on the same charges; this time, on 30 January 1998, he was sentenced to 25 years' imprisonment by the Special Criminal Counter-Terrorism Division. The sentence was confirmed by the Supreme Court on 18 September 1998.
...
7.4 With regard to the author's claims that there was a violation of the principles of non-retroactivity and equality before the law as a result of the application of Act No. 24651 of 6 March 1987, subsequent to the events in the case, the Committee notes that the State party acknowledges that this occurred. While it is true, as asserted by the State party, that acts of terrorism at the time of the events were already offences under Legislative Decree No.

46 of March 1981, it is equally true that Act No. 24651 of 1987 amended the penalties, by imposing higher minimum sentences and thereby making the situation of guilty parties worse.6/ Although Mr. Gómez Casafranca was sentenced to the minimum term of 25 years under the new law, this was more than double compared to the minimum term under the previous law, and the Court gave no explanation as to what would have been the sentence under the old law if still applicable. Accordingly, the Committee finds that there was a violation of article 15 of the Covenant.

...

8. The Human Rights Committee...is of the view that the facts as found by the Committee constitute violations of articles 7; 9, paragraphs 1 and 3; 14 and 15 of the Covenant.

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

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Notes

1/ Department of Counter-Terrorism.

...

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

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- *Baumgarten v. Germany* (960/2000), ICCPR, A/58/40 vol. II (31 July 2003) 261 (CCPR/C/78/D/960/2000) at paras. 2.1, 2.2, 3.1, 3.2, 4.1, 4.2 and 9.2-9.5.

...

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

2.2 On 10 September 1996, the Regional Court of Berlin (*Landgericht Berlin*) convicted the author of homicide2/ and attempted homicide in several cases occurring between 1980 and 1989, sentencing him to a prison term of six years and six months. The Court found that the author was responsible for the killing or attempted killing of the persons concerned, who, upon attempting to cross the border between the former GDR and the Federal Republic of Germany (FRG) including West Berlin, were shot by border guards or set off mines. On 30

April 1997, the Federal Court (*Bundesgerichtshof*) dismissed the author's appeal. The Federal Constitutional Court (*Bundesverfassungsgericht*) rejected his constitutional motion on 21 July 1997, holding that the previous court decisions did not violate constitutional law.
...
3.1 Between 1949 and 1961, approximately two and a half million Germans fled from the German Democratic Republic to the Federal Republic of Germany, including West Berlin. To stop this flow of refugees, the GDR started construction of the Berlin Wall on 13 August 1961 and reinforced security installations along the inner-German border, in particular by installing landmines, later replaced by SM-70 fragmentation mines. Hundreds of persons lost their lives attempting to cross the border, either because they set off mines, or because they were shot by East German border guards.

3.2 Following German reunification, public prosecutors started to investigate the killings of persons at the former inner-German border on the basis of the Treaty on the Establishment of a Unified Germany of 31 August 1990 (*Einigungsvertrag)*. The Unification Treaty, taken together with the Unification Treaty Act of 23 September 1990 declares, in the transitional provisions relating to the Criminal Code (articles 315 to 315c of the Introductory Act to the Criminal Code), that, as a rule, the law of the place where an offence was committed remains applicable for acts that occurred prior to the time when unification became effective. For offences committed in the former GDR, the Criminal Code of the former GDR remains applicable. Pursuant to section 2, paragraph 3, of the Criminal Code (FRG), the law of the FRG is applicable only if it is more lenient than that of the GDR.
...
4.1 The Berlin Regional Court, in its judgment of 10 September 1996, found that, based on the provisions on homicide of the GDR Criminal Code, the author was responsible for the deaths or injuries inflicted on persons trying to cross the border at the inner-German border or, respectively, the Berlin Wall, by virtue of his annual orders, triggering a chain of subsequent orders and, thereby, inciting the acts committed by border guards in the cases at issue. While the Court recognized that it was not the author's direct intention to cause the death of border violators, it argued that he was fully aware, and accepted, that, as a direct consequence of the application of these orders, persons attempting to cross the border could lose their lives. It rejected the author's claim that he had erred about the prohibited nature of his orders, since such error was avoidable, given his high military rank, his competencies and the fact that his orders manifestly violated the right to life, thereby infringing the criminal laws of the GDR. It held that the author's acts were neither justified by the pertinent service regulations issued by the Minister of National Defence, nor under article 27, paragraph 2, of the State Border Act, arguing that these legal justifications were invalid because they manifestly violated basic principles of justice and internationally protected human rights, as enshrined in the International Covenant on Civil and Political Rights.

4.2 The Court argued that, by giving priority to the inviolability of the GDR's state borders over the right to life of unarmed fugitives who attempted to cross the inner-German border, these grounds of justification violated legal principles based on the intrinsic worth and dignity of the human person and recognized by the community of nations. The Court concluded that in such a case, the positive law had to be superseded by considerations of justice. Such a finding did not constitute a breach of the principle of non-retroactivity in article 103, paragraph 2, of the German Basic Law (*Grundgesetz*), since the expectation that the law, as applied in GDR state practice, would continue to be applied so as to broadly construe a legal justification contrary to human rights, did not merit protection of the law. The Court dismissed order no. 101 as a lawful excuse, holding that under article 258, paragraph 1, of the Criminal Code (GDR), criminal responsibility was not excluded where the execution of an order manifestly violated recognized rules of public international law or a criminal statute. In assessing the punishment, the Court balanced the following aspects: (1) the totalitarian structure of the GDR which left the author only with a limited scope of action, (2) the author's high age and his expressions of regret for the victims, (3) the considerable lapse of time since the commission of the acts, (4) his (albeit avoidable) error as to the unlawfulness of his acts (in his favor), and (5) his participation, at a high level of hierarchy, in the maintenance and increased sophistication of the system of border control (to his detriment). Based on the relevant provisions of the Criminal Code (FRG), which were more lenient than the corresponding norms of the Criminal Code (GDR), the Court decided to impose a reduced sentence.

...

9.2 As regards the author's claim under article 15, the Committee is called upon to determine whether the conviction of the author for homicide and attempted homicide by the German courts amounts to a violation of that article.

9.3 At the same time, the Committee notes that the specific nature of any violation of article 15, paragraph 1, of the Covenant requires it to review whether the interpretation and application of the relevant criminal law by the domestic courts in a specific case appear to disclose a violation of the prohibition of retroactive punishment or punishment otherwise not based on law. In doing so, the Committee will limit itself to the question of whether the author's acts, at the material time of commission, constituted sufficiently defined criminal offences under the criminal law of the GDR or under international law.

9.4 The killings took place in the context of a system which effectively denied to the population of the GDR the right freely to leave one's own country. The authorities and individuals enforcing this system were prepared to use lethal force to prevent individuals from non-violently exercising their right to leave their own country. The Committee recalls that even when used as a last resort lethal force may only be used, under article 6 of the Covenant, to meet a proportionate threat. The Committee further recalls that States parties

are required to prevent arbitrary killing by their own security forces.27/ It finally notes that the disproportionate use of lethal force was criminal according to the general principles of law recognized by the community of nations already at the time when the author committed his acts.

9.5 The State party correctly argues that the killings violated the GDR's obligations under international human rights law, in particular article 6 of the Covenant. It further contends that those same obligations required the prosecution of those suspected of responsibility for the killings. The State party's courts have concluded that these killings violated the homicide provisions of the GDR Criminal Code. Those provisions required to be interpreted and applied in the context of the relevant provisions of the law, such as section 95 of the Criminal Code excluding statutory defences in the case of human rights violations (see paragraph 3.3) and the Border Act regulating the use of force at the border (see paragraph 3.5). The State party's courts interpreted the provisions of the Border Act on the use of force as not excluding from the scope of the crime of homicide the disproportionate use of lethal or potentially lethal force in violation of those human rights obligations. Accordingly, the provisions of the Border Act did not save the killings from being considered by the courts as violating the homicide provisions of the Criminal Code. The Committee cannot find this interpretation of the law and the conviction of the author based on it to be incompatible with article 15 of the Covenant.

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Notes

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

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27/ Human Rights Committee, sixteenth session (1982), general comment No. 6: article 6, at paragraph. 3.

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- *Jan Filipovich v. Lithuania* (875/1999), ICCPR, A/58/40 vol. II (4 August 2003) 145 (CCPR/C/78/D/875/1999) at paras. 3.3 and 7.2.

...

3.3 The author alleges that there was a violation of article 15, paragraph 1, because the penalty imposed was heavier than the one that should have been imposed at the time the offence was committed. He states that, in 1991, the penalty for premeditated murder imposed by article 104 of the Lithuanian Criminal Code was 3 to 12 years' deprivation of liberty. He was, however, sentenced under the new article 104 of the Criminal Code, which

provides for 5 to 12 years' deprivation of liberty, and he was given a term of 6 years. He also alleges that the court never stated either in its ruling or in subsequent decisions that he was convicted under the version of article 104 of the Criminal Code in force since 10 June 1993.2/

...

7.2 With regard to the author's allegations that he was sentenced to a heavier penalty than the one that should have been imposed at the time the offence was committed, the Committee takes note of the author's allegations that none of the sentences against him explained which version of article 104 of the Criminal Code had been applied in imposing six years' deprivation of liberty. However, the Committee also notes that the author's sentence of six years was well within the latitude provided by the earlier law (3 to 12 years), and that the State party has referred to the existence of certain aggravating circumstances. In the circumstances of the case, the Committee cannot, on the basis of the material before it, conclude that the author's penalty was not meted out according to the law that was in force at the time when the offence was committed. Consequently, there was no violation of article 15, paragraph 1, of the Covenant.

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Note

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2/ The new Lithuanian Criminal Code entered into force in June 1993.

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- *Nicholas v. Australia* (1080/2002), ICCPR, A/59/40 vol. II (19 March 2004) 320 at paras. 2.1-2.6, 7.2-7.7 and 8.

...

2.1 On 23 September 1994, Thai and Australian law enforcement officers conducted a "controlled importation" of a substantial (trafficable) quantity of heroin. A Thai narcotics investigator and a member of the Australian Federal Police (AFP) travelled from Bangkok, Thailand, to Melbourne, Australia, to deliver heroin which had been ordered from Australia. After arrival, the Thai investigator, operating in conjunction with the AFP, made a variety of calls arranging for handover of the narcotics, which were duly collected by the author and a friend.

2.2 On 24 September 1994, the author and his friend were arrested shortly after handover of the narcotics, and charged on a variety of federal offences under the *Customs* Act, as well as State offences. An ingredient of the federal offences was that the narcotics were imported into Australia "in contravention of [the federal *Customs* Act]"1/. In April 1995, the High Court of Australia handed down its decision in the unrelated case of *Ridgeway v. The*

Queen,2/ concerning an importation of narcotics in 1989, where it held that that evidence of importation should be excluded when it resulted from illegal conduct on the part of law enforcement officers.

2.3 At arraignment and re-arraignment in October 1995 and March 1996, the author pleaded not guilty on all counts. It was uncontested that the law enforcement officers had imported the narcotics into Australia in contravention of the *Customs* Act.

2.4 In May 1996, at a pre-trial hearing, the author sought a permanent stay of the proceedings on the federal offences, on the basis that (as in *Ridgeway v. The Queen*) the law enforcement officers had committed an offence in importing the narcotics. On 27 May 1996, the stay was granted, however leaving the State offences unaffected.

2.5 On 8 July 1996, the federal *Crimes Amendment (Controlled Operations)* Act 1996, which was passed in response to the High Court's decision in *Ridgeway v. The Queen*, entered into force. Section 15X 3/ of the Act directed the courts to disregard past illegal conduct of law enforcement authorities in connection with the importation of narcotics. On 5 August 1996, the Director of Public Prosecutions applied for the stay order to be vacated. In turn, the author challenged the constitutionality of section 15X of the Act. On 2 February 1998, the High Court, by a majority of five justices to two, upheld the constitutional validity of the amending legislation as well as the validity of lifting the stay on prosecution in the author's case. The matter was thus remitted to the County Court for further hearing.

2.6 As a result, on 1 October 1998, the County Court lifted the stay order and directed that the author be tried. On 27 November 1998, he was convicted of one count of possession of a trafficable quantity of heroin and one count of attempting to obtain possession of a commercial quantity of heroin. The Court sentenced him to 10 years' imprisonment on the first count and 15 years' imprisonment concurrently on the second count. The total effective sentence was thus 15 years' imprisonment, with possibility of release on parole after 10 years. On 7 April 2000, the Victoria Court of Appeal rejected the author's appeal against conviction, but reduced the sentence to 12 years' imprisonment, with a possibility of release on parole after 8 years. On 16 February 2001, the High Court refused the author special leave to appeal.

...

7.2 Before addressing the merits of the author's claim under article 15, paragraph 1, of the Covenant, the Committee notes that the issue before it is not whether the possession by the author of a quantity of heroin was or could under the Covenant permissibly be subject to criminal conviction within the jurisdiction of the State party. The communication before the Committee and all the arguments by the parties are limited to the issue whether the author's conviction under the federal *Customs* Act, i.e. for a crime that was related to the import of

the quantity of heroin into Australia, was in conformity with the said provision of the Covenant. The Committee has noted that the author was apparently also charged with some State crimes but it has no information as to whether these charges related to the same quantity of heroin and whether the author was convicted for those charges.

7.3 As to the claim under article 15, paragraph 1, the Committee observes that the law applicable at the time the acts in question took place, as subsequently held by the High Court in *Ridgeway v. The Queen*, was that the evidence of one element of the offences with which the author was charged, that is to say, the requirement that the prohibited materials possessed had been "imported into Australia in contravention of the *Customs* Act", was inadmissible as a result of illegal police conduct. As a result, an order staying the author's prosecution was entered, which was a permanent obstacle to the criminal proceedings against the author on the (then) applicable law. Subsequent legislation, however, directed that the evidence of illegal police conduct in question be regarded as admissible by the courts. The two issues that thus arise are, firstly, whether the lifting of the stay on prosecution and the conviction of the author resulting from the admission of the formerly inadmissible evidence is a retroactive criminalization of conduct not criminal, at the time it was committed, in violation of article 15, paragraph 1, of the Covenant. Secondly, even if there was no proscribed retroactivity, the question arises whether the author was convicted for an offence, the elements of which, in truth, were not all present in the author's case, and that the conviction was thus in violation of the principle of *nullum crimen sine lege*, protected by article 15, paragraph 1.

7.4 As to the first question, the Committee observes that article 15, paragraph 1, is plain in its terms in that the offence for which a person is convicted to be an offence at the time of commission of the acts in question. In the present case, the author was convicted of offences under section 233 B of the *Customs* Act, which provisions remained materially unchanged throughout the relevant period from the offending conduct through to the trial and conviction. That being so, while the procedure to which the author was subjected may raise issues under other provisions of the Covenant which the author has not invoked, the Committee considers that it therefore cannot conclude that the prohibition against retroactive criminal law in article 15, paragraph 1, of the Covenant was violated in the instant case.

7.5 Turning to the second issue, the Committee observes that article 15, paragraph 1, requires any "act or omission" for which an individual is convicted to constitute a "criminal offence". Whether a particular act or omission gives rise to a conviction for a criminal offence is not an issue which can be determined in the abstract; rather, this question can only be answered after a trial pursuant to which evidence is adduced to demonstrate that the elements of the offence have been proven to the necessary standard. If a necessary element of the offence, as described in national (or international) law, cannot be properly proven to

have existed, then it follows that a conviction of a person for the act or omission in question would violate the principle of *nullum crimen sine lege*, and the principle of legal certainty, provided by article 15, paragraph 1.

7.6 In the present case, under the State party's law as authoritatively interpreted in *Ridgeway v. The Queen* and then applied to the author, the Committee notes that it was not possible for the author to be convicted of the act in question, as the relevant evidence of the unlawful import of narcotics by the police was inadmissible in court. The effect of the definitive interpretation of domestic law, at the time the author's prosecution was stayed, was that the element of the crime under section 233 B of the *Customs* Act that the narcotics had been imported illegally, could not be established due to the fact that although the import had been based on a ministerial agreement between the authorities of the State party exempting import of narcotics by the police from customs scrutiny, its illegality had not technically been removed and the evidence in question was hence inadmissible.

7.7 While the Committee considers that changes in rules of procedure and evidence after an alleged criminal act has been committed, may under certain circumstances be relevant for determining the applicability of article 15, especially if such changes affect the nature of an offence, it notes that no such circumstances were presented in the author's case. As to his case, the Committee observes that the amending legislation did not remove the past illegality of the police's conduct in importing the narcotics. Rather, the law directed that the courts ignore, for the evidentiary purposes of determining admissibility of evidence, the illegality of the police conduct. Thus, the conduct of the police was illegal, at the time of importation, and remained so ever since, a fact unchanged by the absence of any prosecution against the officers engaging in the unlawful conduct. In the Committee's view, nevertheless, all of the elements of the crime in question existed at the time the offence took place and each of these elements were proven by admissible evidence by the rules applicable at the time of the author's conviction. It follows that the author was convicted according to clearly applicable law, and that there is thus no violation of the principle of *nullum crimen sine lege* protected by article 15, paragraph 1.

8. The Human Rights Committee...is of the view that the facts before it do not disclose a violation of article 15, paragraph 1, of the Covenant.

Notes

1/ Section 233 B (1) (c) of the Customs Act provides:

> "Any person who:
>
> (c) without reasonable excuse (proof whereof shall lie upon him) has in his possession any prohibited imports to which this section applies which have been

imported into Australia in contravention of this Act:…
shall be guilty of an offence".

2/ (1995) 184 CLR 19 (High Court of Australia).

3/ The full text of section 15X of the Act provides, in material part:

"In determining, for the purposes of a prosecution for an offence against section 233 B of the Customs Act 1901 or an associated offence, whether evidence that narcotic goods were imported into Australia in contravention of the Customs Act 1901 should be admitted, the fact that a law enforcement officer committed an offence in importing the narcotic goods, or in aiding, abetting, counselling, procuring, or being in any way knowingly concerned in their importation, is to be disregarded, if:
(a) the law enforcement officer, when committing the offence, was acting in the course of duty for the purposes of a [duly exempted] controlled operation…"

For dissenting opinions in this context generally, see:

- *Chadee et al. v. Trinidad and Tobago* (813/1998), ICCPR, A/53/40 vol. II (29 July 1998) 242 (CCPR/C/63/D/813/1998) at Individual Opinion by Mr. Martin Scheinin (dissenting), 254 at paras. 8 and 9.
- *Rameka et al. v. New Zealand* (1090/2002), ICCPR, A/59/40 vol. II (6 November 2003) 330 (CCPR/C/79/D/1090/2002) at Individual Opinion by Mr. Rajsoomer Lallah, 349.