LEGAL RIGHTS - RIGHT TO A FAIR AND PUBLIC HEARING

III. JURISPRUDENCE, CONTINUED

ICCPR

- *Äärelä and Näkkäläjärui v. Finland* (779/1997) ICCPR, A/57/40 vol. II (24 October 2001) 117 (CCPR/C/73/D/779/1997) at paras. 2.1-2.5, 4.11, 7.2-7.4, 8.1, 8.2, Individual Opinion by Prafullachandra N. Bhagwati (concurring), 129 and Individual Opinion by Abdelfattah Amor, Nisuke Ando, Christine Chanet, Eckart Klein, Ivan Shearer and Max Yalden (partly dissenting), 130.

...

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

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

2.3 On appeal by the Forestry Service to the Rovaniemi Court of Appeal, the Forestry Board

sought the then exceptional measure of oral hearings. The Court granted this motion, while rejecting the author's motion that the appellate court itself conduct an on-site inspection. The expert witness, having in the meanwhile examined the forest, repeated his first instance testimony for the Forestry Service. Another expert witness for the Forestry Service testified that the authors' herding co-operative would not suffer greatly in the reduction of herding land through the logging in question, however the Court was not informed that the witness already had proposed to the authorities that the authors' herd should be reduced by 500 owing to serious overgrazing.

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

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

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4.11 As to the imposition of costs, the State party points out that under its law there is an obligation for the losing party to pay, when sought, the reasonable legal costs of the successful party. 15/ The law does not alter this situation when the parties are a private individual and public authority, or when the case involves human rights issues. These

principles are the same in many other States, including Austria, Germany, Norway and Sweden, and are justified as a means of avoiding unnecessary legal proceedings and delays. The State party argues this mechanism, along with free legal aid for lawyers' expenses, ensures equality in the courts between plaintiffs and defendants. The State party notes however that, from 1 June 1999, an amendment to the law will permit a court *ex officio* to reduce a costs order that would otherwise be manifestly unreasonable or inequitable with regard to the facts resulting in the proceedings, the position of the parties and the significance of the matter.

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

7.3 As to the authors' claims under article 14 that the procedure applied by the Court of Appeal was unfair in that an oral hearing was granted and an on-site inspection was denied, the Committee considers that, as a general rule, the procedural practice applied by domestic courts is a matter for the courts to determine in the interests of justice. The onus is on the authors to show that a particular practice has given rise to unfairness in the particular proceedings. In the present case, an oral hearing was granted as the Court found it necessary to determine the reliability and weight to be accorded to oral testimony. The authors have not shown that this decision was manifestly arbitrary or otherwise amounted to a denial of justice. As to the decision not to pursue an on-site inspection, the Committee considers that the authors have failed to show that the Court of Appeal's decision to rely on the District Court's inspection of the area and the records of those proceedings injected unfairness into the hearing or demonstrably altered the outcome of the case. Accordingly, the Committee is unable to find a violation of article 14 in the procedure applied by the Court of Appeal in these respects.

7.4 As to the author's contention that the Court of Appeal violated the authors' right to a fair trial contained in article 14, paragraph 1, by failing to afford the authors an opportunity to

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

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

8.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the authors are entitled to an effective remedy. In terms of the award of costs against the authors, the Committee considers that as the costs award violated article 14, paragraph 1, of the Covenant and, moreover, followed proceedings themselves in violation of article 14, paragraph 1, the State party is under an obligation to restitute to the authors that proportion of the costs award already recovered, and to refrain from seeking execution of any further portion of the award. As to the violation of article 14, paragraph 1, arising from the process applied by the Court of Appeal in handling the brief submitted late by the Forestry Service (para. 7.4), the Committee considers that, as the decision of the Court of Appeal was tainted by a substantive violation of fair trial provisions, the State party is under an obligation to reconsider the authors' claims. The State party is also under an obligation to ensure that similar violations do not occur in the future.

Notes

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

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

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

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

5/ Communication 671/1995.

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

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

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

...

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

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Individual Opinion by Prafullachandra N. Bhagwati (concurring)

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

So far as the alleged violation of article 14, paragraph 1, in conjunction with article 2, by the imposition of substantial costs is concerned, the majority members have taken the view that such imposition, on the facts and circumstances of the case, constitutes a violation of those articles. While some of the members have expressed a dissenting view, I agree with the majority view but I would reason in a slightly different way.

It is clear that under the law as it then stood, the Court had no discretion in the matter of award of costs. The Court was under a statutory obligation to award costs to the winning party. The Court could not tailor the award of costs - even refuse to award costs - against the losing party taking into account the nature of the litigation, the public interest involved, and the financial condition of the party. Such a legal provision had a chilling effect on the exercise of the right of access to justice by none too wealthy litigants, and particularly those

pursuing an *actio popularis*. The imposition of substantial costs under such a rigid and blind-folded legal provision in the circumstances of the present case, where two members of the Sami tribe were pursuing public interest litigation to safeguard their cultural rights against what they felt to be a serious violation, would, in my opinion, be a clear violation of article 14, paragraph 1, in conjunction with article 2. It is a matter of satisfaction that such a situation would not arise in the future, because we are told that the law in regard to the imposition of costs has since been amended. Now the Court has a discretion whether to award costs at all to the winning party, and, if so, what the amount of such costs should be depending upon various circumstances such as those I have mentioned above.

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

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

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

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

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

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- *Boodlal Sooklal v. Trinidad and Tobago* (928/2000), ICCPR, A/57/40 vol. II (25 October 2001) 264 (CCPR/C/73/D/928/2000) at paras. 2.1-2.3, 4.8-4.10, 5 and 6.

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2.1 In May 1989, the author was arrested and charged with the offences of sexual intercourse and serious indecency with minors. Following a preliminary inquiry in June 1992, he was released on bail on 27 July 1992. The author was held in custody from the time of his arrest to his release on bail, over three years after his arrest.

2.2 In February 1997, the author was tried in the High Court, where he pleaded not guilty. He was represented by a legal aid lawyer. He was convicted and sentenced to 12 strokes with the birch, as well as 50 years of concurrent sentences, equivalent to a sentence of 20 years after remission.

2.3 The author lodged an appeal, which came up for hearing at the Court of Appeal on 19 November 1997. He did not receive any advice from his legal aid lawyer regarding this appeal, and did not meet with his lawyer prior to the hearing. During the proceedings, the author's lawyer, told the court that she could not find any grounds for pursuing the appeal. Consequently, leave to appeal was refused and the sentence was re-affirmed.

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4.8 As to counsel's contention that the State party has violated article 14, paragraph 3 (c), as the author's trial was not held within a reasonable time after he was charged, the Committee notes that the author waited for a period of seven years and nine months from the time of his arrest to the date of his trial. The State party has provided no justification for this delay. In the circumstances, the Committee considers that this is an excessive period of time and, therefore, that the State party has violated article 14, paragraph 3 (c), of the Covenant.

4.9 The Committee notes counsel's contention that, because of the delay of seven years and nine months from the date of the author's arrest to his trial, the witnesses could not have been expected to testify accurately to events alleged to have taken place nine years previously, and that the fairness of the trial was seriously prejudiced. As it appears from the file that issues related to the credibility and assessment of the evidence were addressed by the High Court, the Committee takes the view that the effect of the delay on the credibility of the witnesses testimonies does not give rise to a finding of a violation of the Covenant that would be separate from the conclusion reached above under article 14, paragraph 3 (c).

4.10 With regard to an alleged violation of article 14, paragraph 3 (d), the Committee notes that the State appointed defence counsel conceded that there were no grounds for appeal. The Committee, however, recalls its prior jurisprudence 7/ and is of the view that the requirements of fair trial and of representation require that the author be informed that his counsel does not intend to put arguments to the Court and that he have an opportunity to seek

alternative representation, in order that his concerns may be ventilated at appeal level. In the present case, it does not appear that the Appeal Court took any steps to ensure that this right was respected. In these circumstances, the Committee finds that the author's right under article 14, paragraph 3 (d), has been violated.

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5. The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by Trinidad and Tobago of articles 9, paragraph 3, 14, paragraph 3 (c) and (d), and article 7 of the Covenant.

6. Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy entailing compensation and the opportunity to lodge a new appeal, or should this no longer be possible, to due consideration of granting him early release. The State party is under an obligation to ensure that similar violations do not occur in the future. If the corporal punishment imposed on the author has not been executed, the State party is under an obligation not to execute the sentence.

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Notes

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7/ In the following cases, the Committee decided that the withdrawal of an appeal without consultation, would amount to a violation of article 14, paragraph 3 (d) of the Covenant: *Collins v. Jamaica* (356/89), *Steadman v. Jamaica* (528/93), *Smith and Stewart v. Jamaica* (668/95), *Morrison and Graham v. Jamaica* (461/91), *Morrison v. Jamaica* (663/95), *McLeod v. Jamaica* (734/97), *Jones v. Jamaica* (585/94).

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- *Des Fours v. Czech Republic* (747/1997), ICCPR, A/57/40 vol. II (30 October 2001) 88 (CCPR/C/73/D/747/1997) at paras. 2.1, 2.3, 2.4, 2.6, 2.7 and 8.2.

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2.1 Dr. Des Fours Walderode was born a citizen of the Austrian-Hungarian empire on 4 May 1904 in Vienna, of French and German descent. His family had been established in Bohemia since the seventeenth century. At the end of the First World War in 1918, he was a resident of Bohemia, a kingdom in the former empire, and became a citizen of the newly created Czechoslovak State. In 1939, because of his German mother tongue, he automatically became a German citizen by virtue of Hitler's decree of 16 March 1939, establishing the Protectorate of Bohemia and Moravia. On 5 March 1941, the author's father died and he inherited the Hruby Rohozec estate.

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2.3 On 15 April 1992, Law 243/1992 came into force. The law provides for restitution of agricultural and forest property confiscated under Decree 12/1945. To be eligible for

restitution, a claimant had to have Czech citizenship under Decree 33/1945 (or under Law 245/1948, 194/1949 or 34/1953), permanent residence in the Czech Republic, having been loyal to the Czechoslovak Republic during the period of German occupation, and to have Czech citizenship at the time of submitting a claim for restitution. The author filed a claim for restitution of the Hruby Rohozec estate within the prescribed time limit and on 24 November 1992 concluded a restitution contract with the then owners, which was approved by the Land Office on 10 March 1993 (PU-R 806/93). The appeal by the town of Turnov was rejected by the Central Land Office by decision 1391/93-50 of 30 July 1993. Consequently, on 29 September 1993 the author took possession of his lands.

2.4 The author alleges State interference with the judiciary and consistent pressure on administrative authorities and cites in substantiation from a letter dated 29 April 1993 by the then Czech Prime Minister Vaclav Klaus, addressed to party authorities in Semily and to the relevant Ministries, enclosing a legal opinion according to which the restitution of property confiscated before 25 February 1948 was "legal", but nevertheless "unacceptable". The author states that this political statement was subsequently used in court proceedings. The author further states that, because of increasing political pressure at the end of 1993 the Ministry of Interior reopened the issue of his citizenship. Furthermore, the former owners of the land were persuaded to withdraw their consent to the restitution to which they had previously agreed.

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2.6 On 7 August 1995, a "citizens' initiative" petitioned revision of the Semily Land Office's decision of 10 March 1993. On 17 October 1995, the Central Land Office examined the legality of the decision and rejected the request for revision. Nevertheless, on 2 November 1995 the author was informed by the Central Land Office that it would, after all, begin to revise the decision. On 23 November 1995, the Minister of Agriculture annulled the Semily Land Office decision of 10 March 1993, purportedly because of doubts as to whether the author fulfilled the requirement of permanent residence, and referred the matter back. On 22 January 1996, the author applied to the High Court in Prague against the Minister's decision.

2.7 On 9 February 1996, Law 243/1992 was amended. The condition of permanent residence was removed (following the judgement of the Constitutional Court of 12 December 1995, holding the residence requirement to be unconstitutional), but a new condition was added, of uninterrupted Czechoslovak/Czech citizenship from the end of the war until 1 January 1990. The author claims that this law specifically targeted him and submits evidence of the use of the term "Lex Walderode" by the Czech media and public authorities. On 3 March 1996 the Semily Land Office applied the amended Law to his case to invalidate the restitution agreement of 24 November 1992, since Dr. Des Fours did not fulfil the new eligibility requirement of continuous citizenship. On 4 April 1996, the author lodged an appeal with the Prague City Court against the Land Office's decision.

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8.2 The Committee has noted the author's claims that the State party has violated article 14, paragraph 1, of the Covenant because of alleged interference by the executive and legislative branches of government in the judicial process, in particular through the letter of the Prime Minister dated 29 April 1993, and because of the adoption of retroactive legislation aimed at depriving the author of rights already acquired by virtue of prior Czech legislation and decisions of the Semily Land Office. With regard to the adoption of retroactive legislation, the Committee observes that, whereas an allegation of arbitrariness and a consequent violation of article 26 is made in this respect, it is not clear how the enactment of law 30/1996 raises an issue under article 14, paragraph 1. As to the Prime Minister's letter, the Committee notes that it was part of the administrative file in respect of the author's property which was produced in Court, and that there is no indication whether and how this letter was actually used in the court proceedings. In the absence of any further information, the Committee takes the view that the mere existence of the letter in the case file is not sufficient to sustain a finding of a violation of article 14, paragraph 1, of the Covenant.

- *Simpson v. Jamaica* (695/1996), ICCPR, A/57/40 vol. II (31 October 2001) 67 (CCPR/C/73/D/695/1996) at paras. 2.1-2.5, 3.8, 6.2, 6.3, 7.3, 8 and 9.

...
2.1 On 15 August 1991, the author was arrested on suspicion of murder...

2.2 The author was provided with a lawyer by the Court Registrar as he did not have the means to hire one privately. He did not meet his lawyer before the preliminary hearing and his representation at the preliminary hearing was poor. The author's lawyer was not present for the hearing of two of the four prosecution witnesses as he claimed that he had to leave to be present in another court.

2.3 At trial the author was represented by three lawyers. The author only met one of the lawyers on one occasion for 15 minutes before the beginning of the trial. The lawyers did not sufficiently challenge the evidence against the author. In particular, the description given by one of the prosecution witnesses of the attacker, did not correspond with his physical characteristics, and this was not sufficiently pointed out by the author's lawyer. Consultations between the author and his lawyers during the trial were irregular.

2.4 At the beginning of the trial, the author was charged with two counts of non-capital murder. However, on the fifth day of the trial, the Judge allowed the amendment of the charges to capital murder. The author was re-arraigned, although, apparently by error, the charges put to the author were again charges of non-capital murder. Despite this, the judge appears to have assumed that he was hearing a capital murder trial. The author states that as a result of the amendment, he became nervous and consequently did not give a clear

statement from the dock.

2.5 On 6 November 1992, the author was convicted of two offences of capital murder and sentenced to death by the Home Circuit Court in Kingston.1/

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3.8 It is...claimed that, prior to the preliminary hearing, the author had inadequate time and facilities to prepare his defence and communicate with his attorney, in violation of article 14, paragraph 3 (b), and an inadequate opportunity to examine or procure witnesses, in violation of article 14, paragraph 3 (e). In this context, counsel claims that the fact that the author did not meet with his lawyer prior to the preliminary hearing violates paragraph 3 (b), and his lawyer's failure to be present for the examination of two of the witnesses violates paragraph 3 (e). Counsel claims that as there was insufficient preparation for his preliminary hearing, this culminated in poor quality representation at the trial hearing 4/. Counsel also claims a violation of article 14, paragraph 3 (b) because of the lack of consultation he had with his lawyer prior to the hearing itself. He claims that the author was only allowed 15 minutes with his lawyer when the prison warden asked her to leave. In addition, counsel claims a violation of article 14, paragraph 3 (e) because of counsel's behaviour during the trial as described in paragraph 2.3 above.

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6.2 With regard to counsel's claim that there was insufficient time to prepare the author's defence, since his lawyers came to see him only once before the trial, the Committee noted that it would have been for the author's representatives or the author himself to request an adjournment at the beginning of the trial, if they felt that they did not have enough time to prepare the defence. It appears from the trial transcript that no adjournment was sought at the beginning of the trial, and that on a further occasion, an adjournment was granted by the judge to the defence counsel to study new evidence. The Committee considered therefore that this claim was inadmissible under article 2 of the Optional Protocol, as being unsubstantiated. (para. 3.8)

6.3 With respect to the complaint that the author's representative did not properly cross examine the witnesses against him, the Committee recalled its jurisprudence that a State party cannot be held responsible for the conduct of a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.7/ The Committee were of the view that, in this instant case, there was no reason to believe that counsel at trial was not using her professional judgement in the interests of her client, and this part of the communication was thus considered inadmissible under article 2 of the Optional Protocol. (para. 3.8)

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7.3 With respect to counsel's allegation that the author's lawyer was absent for the hearing of two of the four witnesses during the preliminary hearing, the Committee decided in its admissibility decision that this allegation may raise issues under article 14, paragraph 1 and

paragraph 3 (d). The Committee recalls its prior jurisprudence that it is axiomatic that legal assistance be available at all stages of criminal proceedings, particularly in capital cases 9/. It also recalls its decision in communication No. 775/1997 (*Brown v. Jamaica*), adopted on 23 March 1999, in which it decided that a magistrate should not proceed with the deposition of witnesses during a preliminary hearing without allowing the author an opportunity to ensure the presence of his lawyer. In the present case, the Committee notes that it is not disputed that the author's lawyer was absent during the hearing of two of the witnesses nor does it appear that the magistrate adjourned the proceedings until her return. Accordingly, the Committee finds that the facts before it disclose a violation of article 14, paragraph 3 (d), of the Covenant. (para. 3.8)

8. The Human Rights Committee...is of the view that the facts as found by the Committee reveal a violation by Jamaica of articles 10, and 14, paragraph 3 (d) of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an appropriate remedy, including adequate compensation, an improvement in the present conditions of detention and due consideration of early release.

Notes

1/ At the trial, the case rested on the eyewitness evidence of three witnesses. They alleged that they saw Simpson coming to George S. Cockett's grocery, where Cecil Cockett (George S. Cockett's father) and his brother Donovan were working at 7.30 p.m. on 8 August 1991. They testified that Simpson drew a gun and fired several shots, outside the shop and in the shop through the window, at Donovan, Cecil and Simon Cockett, which led to the death of Donovan and Cecil Cockett. One of the witnesses testified that a week before the incident, Simpson and Donovan Cockett had an argument in the course of which Simpson threatened to kill the whole family. The author made an unsworn statement in which he denied being present and stated that the accusations against him were being made falsely because one of the witnesses believed that Simpson had informed on him in relation to drug dealing, which had resulted in a police raid a few weeks before the incident.

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4/ No further elaboration is provided by counsel or the author in relation to this issue.

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7/ See *inter alia*, the Committee's decision in communication No. 536/1993, *Perera v. Australia*, declared inadmissible on 28 March 1995.

...

9/ See *inter alia*, the Committee's Views in respect of communication No. 730/1996 *Clarence Marshall v. Jamaica*, adopted on 3 November 1998, communication No. 459/991, *Osbourne Wright and Eric Harvey v. Jamaica*, adopted on 27 October 1995, and communication No. 223/1987, *Frank Robinson v. Jamaica*, adopted on 30 March 1989.

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- *Gutiérrez Vivanco v. Peru* (678/1996), ICCPR, A/57/40 vol. II (26 March 2002) 46 (CCPR/C/74/D/678/1996) at paras. 2.2, 2.3, 2.5, 2.6, 7.1, 9 and Individual Opinion by Mr. Ivan Shearer, 54.

...
2.2 On 27 August 1992, the author was arrested at the home of Luisa Mercedes Machaco Rojas, his fiancée. While he was in her house, the police arrived with his fiancée, and both were arrested and taken in a police van to the offices of the National Directorate against Terrorism (DINCOTE)...

2.3 During this period of police custody the author was not represented by a defence lawyer. However, since he had been hospitalized, he was not asked to make any statement. He was accused by the police, on the basis of statements by other persons charged with him, of having taken part in subversive attacks against the Bata shoe shop and a restaurant.
...
2.5 The oral proceedings were held at private hearings in a room at Miguel Castro Castro Maximum Security Prison, 2/ Lima, between 7 April and 17 June 1994, without the presence of witnesses or experts. The court was composed of secret judges who conducted the proceedings behind special windows which prevented them from being identified and with loudspeakers which distorted their voices. In addition, the judges were not necessarily specialists in criminal matters, but could be chosen from among all High Court and Labour Court judges. During this stage of the proceedings, the author was assisted by a lawyer, who was engaged by his mother on the day when the hearings began; this lawyer was in fact representing another defendant in the same proceedings. At the hearings, the senior government prosecutor, when making his oral charges, stated that he did not find the author criminally liable, but even so he was bringing charges against him pursuant to the law.3/

2.6 On 17 June 1994, the Special Terrorism Division of the Lima High Court sentenced the author to 20 years' imprisonment; this sentence was subsequently confirmed by the Supreme Court of Justice on 28 February 1995. The Special Terrorism Division's sentence stated that the author's criminal responsibility had been proved in the interview with Lázaro Gago, one of the co-defendants, who stated that he not only knew the author and his fiancée, but had also made his home available for them to leave the goods taken during the subversive attacks on the Bata shoe shop. In addition, the sentence stated that the author's congenital illness could not serve as a legal basis for exempting him from all responsibility for the offence since several of the defendants had said that he was a member of Shining Path.
...
7.1 The author maintains that there has been a violation of article 14 (1) because the trial at

which he was convicted of a terrorist offence was not conducted with due guarantees: the proceedings took the form of private hearings in a court composed of faceless judges; he could not summon as witnesses the police officers who arrested and interrogated him or question other witnesses during the oral stage of the proceedings, because the law does not allow this; his right to have a lawyer of his choice was restricted; and the government prosecutor was obliged by law to bring charges against the prisoner. The Committee takes note of the State party's declaration that the trial was conducted with minimum guarantees, since these are contained in the pre-established procedures and the author was tried in accordance with these procedures. Nevertheless, the Committee recalls its decision in the *Polay Campos v. Peru* case 6/ regarding trials held by faceless courts, and trials in prisons to which the public are not admitted, at which the defendants do not know who are the judges trying them and where it is impossible for the defendants to prepare their defence and question witnesses. In the system of trials with "faceless judges" neither the independence nor the impartiality of the judges is guaranteed, which contravenes the provisions of article 14 (1) of the Covenant.

...

9. Under article 2 (3) (a) of the Covenant, the State party has the obligation to provide an effective remedy, including compensation, to Mr. José Luis Gutiérrez Vivanco. In addition, the State party has the obligation to ensure that similar violations do not occur in the future.

Notes

...

2/ Article 16 of the above-mentioned Decree provides that the trial shall be held in the prison establishment concerned so that the judges, members of the Public Prosecutor's Office and judicial officials may not be identified visually or orally by the defendants or defence lawyers.

3/ Under article 13 (d) of the Decree, senior government prosecutors have an obligation to bring charges, and consequently cannot express an opinion on the innocence of the defendants, even if there is no evidence against them.

...

6/ Communication No. 577/1994, Views of 6 November 1997.

...

Individual Opinion by Mr. Ivan Shearer

I have joined the Views of the Committee in this case. However, I think it desirable to make clear that the Committee has not condemned the practice of “faceless justice” in itself, and in all circumstances. The practice of masking, or otherwise concealing, the identity of judges in special cases, practised in some countries by reason of serious threats to their security caused by terrorism or other forms of organized crime, may become a necessity for the

protection of judges and of the administration of justice. When States parties to the Covenant are faced with this extraordinary situation they should take the steps set out in article 4 of the Covenant to derogate from their obligations, in particular those arising from article 14, but only to the extent strictly required by the exigencies of the situation. These statements of derogation should be communicated to the Secretary-General of the United Nations in the manner provided in that article. In formulating any necessary statements the States parties should have regard to General Comment No. 29 (States of Emergency) adopted by the Committee on 24 July 2001. In the present case the State party presented no observations on the claims of the author based on any situation of emergency. Nor had the State party made any declarations of derogation under article 4 of the Covenant. Hence those possible aspects of the case did not arise for determination.

- *Rogerson v. Australia* (802/1998), ICCPR, A/57/40 vol. II (3 April 2002) 150 (CCPR/C/74/802/1998) at paras. 2.1-2.5, 3.2, 5.3, 7.4, 7.6, 7.10, 9.2, 9.3, 10 and 11.

...

2.1 The author was a barrister and solicitor of the Northern Territory Supreme Court and director of Lofta Pty. Ltd., a law firm, operating under the name of Loftus and Cameron. In July 1991, one Mr. Tchia, director of Tchia Nominees PTY Ltd. and Kykym PTY Ltd., instructed the author to assist him with certain aspects of development of land in Darwin. On 19 August 1992, Mr. Tchia cancelled the retainer and engaged other solicitors to do the same work. The author tried to resurrect the Loftus and Cameron retainer. On 24 August 1992, the author lodged a caveat on the land and threatened legal action for breach of contract. Over some weeks, the author had been attempting to meet with Mr. Tchia to discuss their relationship. The author, finally, succeeded to set up a meeting for 1 September 1992 at 5.00 p.m. On the same day at 11.34 a.m., the Northern Territory Supreme Court had heard an ex-parte application by Mr. Tchia and, finally, granted an injunction to restrain the author from contacting or seeking to contact Mr. Tchia or any of the two companies, except through particular solicitors named in the order.

2.2 On 1 September at 4.50 p.m., Mr. Tchia's solicitors tried to serve the author, *inter alia*, the injunction and other documents relating to the originating motion. The author did not read the documents and immediately sent them back to the solicitors. The author knew that the documents pertained to a dispute between himself and Mr. Tchia, whom he was due to meet. The author decided not to read the documents but await Mr. Tchia's arrival; Mr. Tchia did not keep the appointment. Later the same day, the author met with one Mr. Riley, a business associate of Loftus and Cameron, and set out a settlement proposal to convey to Mr. Tchia. On 2 September at 10.30 a.m., Mr. Tchia's solicitors attempted again to serve the author the injunction at his office. However, the main door into the reception area was locked upon order of the author to prevent service by Mr. Tchia's solicitors. A woman at the front

door stated that the author was not available and that she could not allow entry into the office. At about the same time, Mr. Riley met with Mr. Tchia; the latter rejected the author's settlement proposal and mentioned the injunction. On 2 September at 11.13 a.m., Mr. Tchia's solicitors tried to send the documents to the author by facsimile transmission. During the transmission the facsimile stopped transmitting and connection was lost.

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.

2.4 On 12 October 1992, the Law Society of the Northern Territory cancelled the author's practising certificate for an indefinite period.

2.5 On 6 May 1997, while the communication was already pending with the Committee, the Law Society of the Northern Territory commenced procedures to remove the author's name from the Roll of Legal Practitioners. The Supreme Court held hearings in the case on 4 December 1998 and 16 August 1999, and decided to strike the author off the Roll of Legal Practitioners. On 24 November 2000, the High Court of Australia refused the author's application for Special Leave to Appeal.

...

3.2 With regard to the procedure at the Northern Territory Supreme Court hearing on contempt of court, the author contends that he was brought before the judge with less than one-hour notice, unrepresented. The author claims that the judge adopted an inquisitorial approach and assumed the role of prosecutor. The author claims that the judge violated articles 2, paragraph 2; 14, paragraphs 1 and 3 (a), (b), (g); 15, paragraph 1; 17; and 26 of the Covenant by his different actions during the trial. The author argues that the judge allowed the proceedings to continue, notwithstanding that they were in respect of an ex-parte injunction, the sealed copy of which did not contain the required warning of imprisonment for failing to comply; that the author did not have proper notice of the terms of the order; that the author had not been served with a copy of the order; that in respect of the alleged contempt, it had never been particularized in a summons; that the author's attendance at court had been effected by means of a misleading fax. The author submits further that, during the trial, the judge waived the requirement for affidavit evidence so that the author had no advance warning of what his accusers were to say against him; the judge refused to allow adjournments, to enable the author's case to be properly prepared and, later in the

proceedings, allow his counsel to take notice of what evidence had been given the previous day; the judge proceeded at an unseemly speed to hear the matter and produce a rapid decision convicting the author without hearing argument on the penalty and costs, which is an impossibility in law, as the proceedings should have been regarded as merely a form of execution in a civil action; and the judge made gratuitous and unfounded remarks on his fitness to practise law. Finally, the author claims that the Supreme Court failed to give effect to the decision of the Court of Appeals to reconsider the fine.

...

5.3 With regard to the procedure before the Supreme Court regarding his being struck off the Roll of Legal Practitioners, the author claims that he did not receive a fair hearing by an impartial tribunal under article 14, paragraph 1, of the Covenant. The author argues that the Chief Justice of the Court was partial, because he decided earlier on the appeal of the author against the contempt conviction. Furthermore, the author lists examples of the behaviour of the judge during the trial that should indicate that he was biased. The author claims further that he was denied proper opportunity of being present in person and present his case; that his counsel was incompetent and deceiving the court; that the evidence relied on was inadmissible; that the proceedings were defective; and that domestic law was applied incorrectly. With regard to the procedure before the High Court of Australia regarding his being struck off the Roll of Legal Practitioners, the author claims that his right to appeal was violated as the wrongful decision was not removed, thus entailing a violation of article 14, paragraph 1, and article 2, paragraphs 2 and 3 (a), (b), of the Covenant. The author submits further that the High Court lacked impartiality and discriminated against him by virtue of his status as a former legal practitioner. As the appeal, therefore, failed to cure the violations of the first instance procedure, the violations continue.

...

7.4 The Committee notes the author's allegations that the Northern Territory Supreme Court and the High Court of Australia lacked impartiality, as provided for in article 14, paragraph 1, when deciding on his conviction of contempt and, later, when deciding on his removal from the Role of Legal Practitioners. "Impartiality" of the court implies that judges must not harbour preconceptions about the matter before them, and they must not act in ways that promote the interests of one of the parties.2/ In the present case, the author has failed to substantiate, for the purposes of admissibility, that the judges were biased, when hearing his case. This part of the communication is accordingly inadmissible under article 2 of the Optional Protocol.

...

7.6 The Committee notes the argument of the author that the Law Society of the Northern Territory violated his right to a fair trial as provided for in article 14, paragraph 1, of the Covenant when, in its procedures to cancel the practising license, it relied only on the previous finding of the Northern Territory Supreme Court, instead of carrying out its own investigation that would have revealed the author's alleged illness. The Committee recalls its previous jurisprudence that the regulation of the activities of professional bodies and the

scrutiny of such relations by the courts may raise issues in particular under article 14 of the Covenant.4/ However, the binding effect of court decisions on the Law Society's considerations of the cancellation of a practising certificate is primarily a matter of application of domestic law that the Committee cannot review unless it is manifest that it was arbitrary or amounted to a denial of justice. Therefore, the Committee finds that the author has failed to substantiate this claim, for purposes of admissibility, and this claim is accordingly inadmissible under article 2 of the Optional Protocol.

...

7.10 As to the author's allegations with regard to the procedure before the Northern Territory Supreme Court and the High Court of Australia on contempt of court and, later, on his strike-off the Roll of Legal Practitioners, the Committee notes that the author's claims with regard to the content and serving of the injunction order, the judge's conduct of procedures and their procedural decisions refer to the application of domestic law. (See paragraphs 3.2 and 5.3) The Committee refers to its established jurisprudence that interpretation of domestic legislation is essentially a matter for the courts and authorities of the State party.7/ 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 the communication is inadmissible under article 3 of the Optional Protocol in this regard.

...

9.2 With respect to the alleged violations of article 14, paragraphs 3 (a), (b) and (g) by the Northern Territory Supreme Court in the procedure on contempt of court, the Committee observes that this provision applies only to criminal proceedings. The Committee notes that the State party submitted that the proceedings that are subject to the present communication relate to criminal contempt and accepted that they fall within the purview of article 14, paragraph 3, of the Covenant. However, the Committee notes that the author's claims in this regard had been subject to review by the Northern Territory Court of Appeal and the High Court of Australia and that the author does not raise the same claims with regard to the appellate procedures. The Committee recalls that it is possible for appellate instances to correct any irregularities of proceedings before lower court instances.8/ Therefore, the Committee is unable to conclude on the basis of the information before it that article 14, paragraphs 3 (a), (b) and (g) has been violated.

9.3 The Committee notes the author's claim that the procedure at the Northern Territory Court of Appeals on contempt of court violated his right to a fair hearing provided for in article 14, paragraph 3 (c), of the Covenant, because it delivered its decision with delay. The Committee notes that the Court heard the appeal of the author from 22 to 24 March 1993. The Committee notes further that the two puisne judges delivered their draft decisions on 28 April and 27 July 1993, respectively; on 17 March 1995, the Court dismissed the author's case. The State party has not explained what happened in the author's case between these dates, notwithstanding the existence of a case management system. The Committee finds that

in the circumstances of the present case a delay of almost two years to deliver the final decision violates the right of the author to be tried without undue delay as provided for in article 14, paragraph 3 (c), of the Covenant.

...

10. The Human Rights Committee...is of the view that the facts before it disclose violations of article 14, paragraph 3 (c), of the Covenant.

11. The Committee considers that its finding of a violation of the rights of the author under article 14, paragraph 3 (c), of the Covenant constitutes sufficient remedy.

_____

Notes

...

2/ *Karttunen v. Finland*, Case No. 387/1989, Views of 23 October 1992, para. 7.2.

...

4/ See *J. L. v. Australia*, Case No. 491/1992, decision of 28 July 1992, para. 4.3.

...

7/ See, *inter alia*, *Maroufidou v. Sweden*, Case No. 58/1979, Views adopted on 9 April 1981, para. 10.1.

8/ *Karttunen v. Finland*, Case No. 387/1989, Views of 23 October 1992, para. 7.3.

_____

- *Ricketts v. Jamaica* (667/1995), ICCPR, A/57/40 vol. II (4 April 2002) 29 (CCPR/C/74/D/667/1995) at paras. 2.3 and 7.2.

...

2.3 On 31 October 1983 the author was convicted of murder and sentenced to death by the Lucea Circuit Court. Although the verdict of the jury had to be unanimous, the author claims that four of the 12 jurors disagreed with the foreman and that the foreman falsely told the Court that the jury was unanimous. On 1 November 1983 four affidavits were presented, which state that they disagreed with the verdict.

...

7.2 With regard to the author's claim that he is a victim of a violation of articles 14 (1) and (2) of the Covenant, because he was convicted and sentenced by a non-unanimous jury, the Committee notes that after the trial four members of the Lucea Circuit Court jury submitted affidavits stating that they had not agreed to the verdict, though they conceded that they had not given oral expression to their differing view when the jury foreman announced that the verdict was accepted by all jurors. The Committee observes that the question presented by the jurors' affidavits was raised on appeal before the Judicial Committee of the Privy Council, which dismissed the petition. The Committee further notes that the alleged lack of

unanimity was not raised before the trial judge nor before the Court of Appeal. In these circumstances, the Committee cannot conclude that article 14 , paragraphs 1 and 2 of the Covenant has been violated.

For dissenting opinion in this context, see Ricketts v. Jamaica (667/1995), ICCPR, A/57/40 vol. II (4 April 2002) 29 (CCPR/C/74/D/667/1995) at Individual Opinion by Ms. Cecilia Mendina Quiroga and Mr. Martin Scheinin, 34 and Individual Opinion by Mr. Hipólito Solari Yrigoyen, 35.

- *Gedumbe v. Democratic Republic of the Congo* (641/1995), ICCPR, A/57/40 vol. II (9 July 2002) (CCPR/C/75/D/641/1995) at paras. 2.1-2.5, 5.2, 5.3, 6.1 and 6.2.

...

2.1 In 1985 the author was appointed director of a Zairian consular school in Bujumbura, Burundi. In 1988 he was suspended from his duties by Mboloko Ikolo, the then Zairian ambassador to Burundi. This suspension allegedly was attributable to a complaint addressed by the author and by other staff members of the school1/ to several administrative authorities of Zaire, including the President and the Minister of Foreign Affairs, concerning the embezzlement by Mr. Ikolo of the salaries for the personnel of the consular school. More particularly, the ambassador allegedly embezzled the author's salary in order to force him to yield his wife.

2.2 In March 1988 a fact-finding commission was sent from Zaire to Bujumbura, which, purportedly, made an overwhelming report against the ambassador and confirmed all the allegations made against him. In August 1988 the Minister of Foreign Affairs of Zaire enjoined Mr. Ikolo to pay all the salary arrears to the author, who, in the meantime, had been transferred as director of the Zairian consular school to Kigali, Rwanda. The ambassador, who allegedly refused to obey this order, was suspended from his duties and recalled to Zaire on 20 June 1989.

2.3 In September 1989 the Ministry of Primary and Secondary Education issued an order to reinstate the author in his post in Bujumbura. Accordingly, the author moved back to Burundi in order to fill his post. Subsequently, Mr. Ikolo, who despite his suspension remained in Bujumbura until 20 December 1989, informed the authorities in Zaire that the author was a member of a network of political opponents of the Zairian Government, and that he therefore had requested the authorities of Burundi to expel him. For this reason, the author maintains, Mr. Ikolo and his successor at the embassy, Vizi Topi, refused to reinstate him in his post, even after confirmation by the Minister of Primary and Secondary Education, or to pay his salary arrears.

2.4 The author appealed to the Public Prosecutor of the County Court (*Tribunal de Grande*

Instance) of Uvira, who passed on the file to the Public Prosecutor of the Court of Appeal (*Cour d'Appel*) of Bukavu on 25 July 1990. Both offices described the facts as being an abuse of rights and called into question the former ambassador's conduct. On 14 September 1990 the case was further transmitted for advice to the Office of the Public Prosecutor in Kinshasa, where the case was registered in February 1991. Since then, despite numerous reminders sent by the author, no further action has been taken. Consequently, the author appealed to the Minister of Justice and to the Chairman of the National Assembly. The latter interceded with the Minister of Foreign Affairs and the Minister of Education, who, allegedly, intervened on the author's behalf with Mr. Vizi Topi, all to no avail.

2.5 On 7 October 1990 the author served a summons on Mr. Ikolo for adultery, slanderous denunciation and prejudicial charges, abuse of power and embezzlement of private monies. By a letter dated 24 October 1990, the President of the Kinshasa Court of Appeal (*Cour d'Appel*) informed the author that Mr. Ikolo, as an ambassador, benefited from functional immunity and could only be brought to trial upon summons of the Public Prosecutor. All the author's requests to the latter to start legal proceedings against Mr. Ikolo have to date remained unanswered. According to the author, this is due to the fact that a special authorization of the President is required to start legal proceedings against members of the security police and that, therefore, the Public Prosecutor could not take the risk of serving a summons on Mr. Ikolo, who is also a senior official in the National Intelligence and Protection Service. Accordingly, the author's case cannot be the subject of a judicial determination. Therefore, it is submitted, all available and effective domestic remedies have been exhausted.

...

5.2 With regard to the alleged violation of article 25 (c) of the Covenant, the Committee notes that the author has made specific allegations relating, on the one hand, to his suspension in complete disregard of legal procedure and, in particular, in violation of the Zairian regulations governing State employees, and, on the other hand, to the failure to reinstate him in his post, in contravention of decisions by the Ministry of Primary and Secondary Education. In this connection the Committee notes also that the non-payment of the author's salary arrears, notwithstanding the instructions by the Minister for Foreign Affairs, is the direct consequence of the failure to implement the above-mentioned decisions by the authorities. In the absence of a response by the State party, the Committee finds that the facts in the case show that the decisions by the authorities in the author's favour have not been acted upon and cannot be regarded as an effective remedy for violation of article 25 (c) read in conjunction with article 2 of the Covenant.

5.3 To the extent that the Committee has found that there was no effective legal procedure allowing the author to invoke his rights before a tribunal (article 25 (c) in conjunction with article 2), no separate issue arises concerning the conformity of proceedings before such a tribunal with article 14 of the Covenant. With regard to article 26, the Committee sustains

the author's reasoning by finding a violation of article 25 (c).

...

6.1 The Human Rights Committee...is of the view that the facts before it disclose violations by the Democratic Republic of the Congo of articles 25 (c) in conjunction with article 2 of the Covenant.

6.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee is of the view that the author is entitled to an appropriate remedy, namely: (a) effective reinstatement to public service and to his post, with all the consequences that that implies, or, if necessary, to a similar post;2/ (b) compensation comprising a sum equivalent to the payment of the arrears of salary and remuneration that he would have received from the time at which he was not reinstated to his post, beginning in September 1989.3/

Notes

1/ This complaint was also signed by Odia Amisi; communication No. 497/1992 (*Odia Amisi v. Zaire*), declared inadmissible on 27 July 1994.

2/ Communication No. 630/1995 *Abdoulaye Mazou v. Cameroon*.

3/ Communications No. 422/1990, 423/1990 and 424/1990, *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*.

- *Chira Vargas v. Peru* (906/2000) ICCPR, A/57/40 vol. II (22 July 2002) 228 (CCPR/C/75/D/906/2000) at paras. 2.3, 2.4, 2.6-2.8 and 7.3.

...

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

2.4 The same day, an order was issued for the author's arrest, without a judicial order and without his being apprehended in *flagrante delicto*. The author was taken to Lima, where he was forced to attend a press conference. The author claims that no charges were ever brought against him, in either the ordinary or the military courts, for criminal negligence or liability in the course of his duties, or for any other criminal offence arising from the death of Mr.

Pérez Arévalo, and that he was neither tried nor sentenced.

...

2.6 According to the author, the minutes of the National Police Board of Inquiry dated 16 October 1991, which was based on the disciplinary reports dated 8 and 16 October 1991 and the reports prepared by the Office of the National Police Headquarters Legal Adviser, contained a number of irregularities, such as erasures of time and date, which constituted violations of the rules of procedure of the Board of Inquiry. In addition, the author was not notified in advance of the Board of Inquiry hearing.2/ He was under arrest at the time and found it difficult to prepare a defence: he was allowed only two minutes to present his case and had no time to submit any evidence in his own defence.

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

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

...

7.3 With regard to the alleged violations of article 14, paragraphs 1 and 2, of the Covenant, the author alleges a violation of his right to the presumption of innocence and his right to a defence inasmuch as he was relieved of his duties without having been brought before a competent court. The Committee recalls that article 14, paragraph 1, guarantees everyone the right, in the determination of his rights and obligations, to a hearing by an impartial tribunal or court, including the right of access to a civil court. In that regard, the Committee notes that both the Trujillo Third Special Civil Court and the Trujillo First Civil Division found that the author had been unlawfully dismissed and reinstated him in his post. Consequently, the Committee considers that, in this case, there was no violation of due process within the meaning of article 14, paragraph 1, of the Covenant. The Committee also considers that the domestic courts recognized the author's innocence and that consequently there was no violation of the right contained in article 14, paragraph 2, of the Covenant and, for the same reason, there was no violation of article 17 of the Covenant.

Notes

1/ According to the decision, the author had committed serious breaches of discipline and police regulations through his improper handling of a drug trafficking case, which resulted in the death of the suspect, Áureo Pérez Arévalo.

2/ The author does not mention the date of the hearing in the communication.

- *Rodríguez Orejuela v. Colombia* (848/1999) ICCPR, A/57/40 vol. II (23 July 2002) 172 (CCPR/C/75/D/848/1999) at paras. 2.1-2.3, 3.1, 3.2, 7.2-7.4 and 8.

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

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

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

against him. In particular, he claims a violation of article 14, paragraph 1, of the Covenant because neither the Bogotá Prosecution Commission, which conducted the investigation and brought the charges against the author, nor the Bogotá Regional Court, which handed down the judgement against the author, nor the National Court existed at the time the offences were committed, i.e. on 13 May 1990. The author maintains that the Prosecution Commission began the investigation in 1993 and brought charges against him before the Bogotá Regional Court for an offence allegedly committed on 13 May 1990. He states that the court is therefore an unlawful ad hoc body or special commission.

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

...

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

7.3 The author maintains that the proceedings against him were conducted only in writing, excluding any hearing, either oral or public. The Committee notes that the State party has not refuted these allegations but has merely indicated that the decisions were made public. The Committee observes that in order to guarantee the rights of the defence enshrined in article 14, paragraph 3, of the Covenant, in particular those contained in subparagraphs (d) and (e), all criminal proceedings must provide the person charged with the criminal offence the right

to an oral hearing, at which he or she may appear in person or be represented by counsel and may bring evidence and examine the witnesses. Taking into account the fact that the author did not have such a hearing during the proceedings that culminated in his conviction and sentencing, the Committee finds that there was a violation of the right of the author to a fair trial in accordance with article 14 of the Covenant.

7.4 In view of its conclusion that the right of the author to a fair trial in accordance with article 14 of the Covenant was violated for the reasons set out in paragraph 7.3, the Committee is of the opinion that it is not necessary to consider other arguments relating to violations of his right to a fair trial.

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 14, of the Covenant.

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Notes

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

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- *Pezoldova v. The Czech Republic* (757/1997), ICCPR, A/58/40 vol. II (25 October 2002) 25 (CCPR/C/76/D/757/1997) at paras. 2.1-2.7, 7.1-7.3, 11.2-11.6, 12.1, 12.2 and Individual Opinion by Justice Prafullachandra Natwarlal Bhagwati (concurring), 39.

...

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

2.2 After the Second World War, the family properties were placed under National Administration by the Czechoslovak Government in 1945. Pursuant to the Decrees issued

by the Czechoslovak President Edward Benes, No. 12 of 21 June 1945 and No. 108 of 25 October 1945, houses and agricultural property of persons of German and Hungarian ethnic origin were confiscated...

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

2.4 According to the author, the transfer of the property was not automatic upon the coming into force of Law No. 143/1947, but subject to the intabulation (writing into the register) in the public register of the transfer of the relevant rights of ownership. In this context, the author states that National Administration (see paragraph 2.2) remained in force until June 1948, and that intabulation of the properties by land offices and Courts shows that, at the time, Law No. 143/1947 was not considered as having immediately transferred title.

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

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

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2.7 On 9 March 1995 the author's application before the Constitutional Court concerning the City Court's decision of 27 June 1994 was rejected. The Court upheld the City Court's decision that ownership had been transferred to the State automatically by operation of Law No. 143/1947 and refused to consider whether Law No. 143/1947 was unconstitutional and void. The author did not appeal the City Court's decision of 28 February 1995 to the Constitutional Court, as it would have been futile in light of the outcome of the first appeal.
...
7.1 By submission of 23 March 2002, the author refers to the Committee's Views in case No. 774/1997 (*Brok v. The Czech Republic*), and, with respect to the issue of equal access, within the limits of the admissibility granted for issues under articles 2 and 26 of the Covenant, alleges that the Ministry of Agriculture and various State archives, until the year 2001, consistently denied to the author and to all land authorities access to the complete file on the confiscation procedures against her grandfather Dr. Adolph Schwarzenberg and his appeals lodged in due course...In particular, it is stated that as late as 2001 author's counsel was denied the inspection of the Schwarzenberg file by the director for legal affairs in the Ministry, Dr. Jindrich Urfus, and only when the author had found other relevant documents in another archive, was counsel informed by the Ministry, on 11 May 2001, that the file indeed existed and he was allowed to inspect it. Moreover, it is stated that on 5 October 1993 the head of the State archive in Krumlov, Dr. Anna Kubikova, had denied the author the use of the archive in the presence of her assistant Ing. Zaloha, dismissing her with the words "All Czech citizens are entitled to use this archive but you are not entitled to do so." The author complains that such denials of access illustrate the inequality of treatment to which she has been subjected by the Czech authorities since 1992.

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

7.3 On 29 November 2001, the Regional Court of Ceske Budejovice (15 Co 633/2001-115) as court of appeal confirmed that the Schwarzenberg estate was indeed confiscated pursuant to Section 1, par. 1, lit (a) of Decree No. 12/45, thus underlining the inapplicability of Law 143/47. However, the Court granted no redress to the author, because according to the author, there was no remedy available for anybody deemed to be of German or Hungarian stock.
...
11.2 The question before the Committee is whether the author was excluded from access to an effective remedy in a discriminatory manner. According to article 26 of the Covenant, all persons are equal before the law and every person has the right to equal protection of the law.

11.3 The Committee notes the statement of the author that the essence of her complaint is

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

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

11.5 In this context, the Committee also notes that by decision of 29 November 2001, the Regional Court of Ceske Budejovice recognized that the taking of Dr. Adolph Schwarzenberg's property had been effected pursuant to Benes' Decree 12/1945. The Committee further notes that on 30 January 1948 the confiscation of the Schwarzenberg agricultural lands under Benes' Decrees Nos. 12 and 108/1945 was revoked, apparently in order to give way for the application of Law 143/1947. The point in time when the revocation became effective seems not to have been clarified, because the courts proceeded from the premise that Law No. 143 was the only applicable legal basis.

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

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

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

as the equal protection of the law.

...

Individual Opinion by Prafullachandra Natwarlal Bhagwati (concurring)

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

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

Notes

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2/ The law reads:

"1 (1) The ownership of the property of the so-called primogeniture branch of the Schwarzenberg family in Hluboká nad Vlatavou - as far as it is situated in the Czechoslovak

Republic - is transferred by law to the county of Bohemia ...

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

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

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

4/ Concerning the "Stekl" property.

5/ Concerning properties in Krumlov and Klatovy.

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

For dissenting opinion in this context, see Pezoldova v. The Czech Republic (757/1997), ICCPR, A/58/40 vol. II (25 October 2002) 25 (CCPR/C/76/D/757/1997) at Individual Opinion by Mr. Nisuke Ando, 38.

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- *Ruiz Agudo v. Spain* (864/1999), ICCPR, A/58/40 vol. II (31 October 2002) 134 (CCPR/C/76/D/864/1999) at paras. 2.1-2.5, 3.3 and 9.2-9.4.

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

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

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

2.4 The author submitted an appeal against the sentence, on the grounds that there had been a serious error in the assessment of the evidence and that he had been convicted for acts that had in fact been committed by another person. He also complained that uncertified evidence (in the form of a computerized version of his accounts) had been used against him.

2.5 A ruling was issued on his appeal by the Third Division of the Court of Murcia in a judgement on 7 May 1996. According to counsel, this ruling contains arguments that are incompatible with the right to presumption of innocence, which implies that the burden of proof must always rest with the accusing party, when it states that:

> "(...) it has been found that the accused, Mr. Alfonso Ruiz Agudo, channelled the defrauded sums through his own account and others to which he had access, even though the finding was based on computer data produced by the employees of the said Caja de Ahorros, a procedure that the defence experts themselves considered to

be normal, while there is no doubt that it would have been preferable to have the originals of the accounting transactions concerned. On the other hand, data or facts to challenge the reliability of the computer files should have been produced."

...

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

...

9.2 The Committee has taken note of the arguments presented by the parties concerning the evaluation of the documented incriminating evidence. The Committee refers to its jurisprudence and reiterates that, while article 14 guarantees the right to a fair trial, it is not for the Committee but for the domestic courts to consider the facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly biased, arbitrary or amounted to a denial of justice. 3/ In the present case, the documents before the Committee do not demonstrate that the trial suffered from any such defect. The Committee also takes note of the State party's observations where it is argued that the author never maintained before the domestic courts that the evidence of the computerized records was unlawful, and notes that, according to the judgement handed down by the Criminal Court, several forms of evidence were taken into consideration with a view to establishing the facts. Consequently, the Committee concludes that there was no violation of article 14, paragraph 1, of the Covenant.

9.3 With regard to the absence of a verbatim record of the trial, the Committee finds that the author has not demonstrated in what way he was caused harm by the absence of such a document. Consequently, the Committee considers that there was no violation either of article 14, paragraph 1, or of the right of appeal provided for in article 14, paragraph 5.

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

Notes

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3/ See, for example, communications No. 634/1995, *Desmond Amore v. Jamaica*, and No. 679/1996, *Mohamed Refaat Darwish v. Austria*.

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- *Hussain v. Mauritius* (980/2001), ICCPR, A/58/40 vol. II (18 March 2003) 516 (CCPR/C/77/D/980/2001) at paras. 2.1, 2.3, 2.4 and 6.3.

...

2.1 On 7 July 1995, the author was arrested at Sir Seewoosagur Ramgoolam international airport in Mauritius and charged with "importation and trafficking" in heroin. Before 15 October 1996, the author was brought twice before the District Court of Mehbourgh.1/

...

2.3 In September 1996, the author personally contacted a lawyer, Mr. Oozeerally, who agreed to start working on the case as soon as he received the copies of the author's statement as well as of other evidence related to the case. Mr. Oozeerally was later appointed as legal aid counsel. The author claims that his counsel received the documents only five days before the trial.

2.4 The author was advised by his counsel to plead not guilty but after one day of proceedings, the author decided to plead guilty because he was "shocked to see the court proceedings and the way the trial was going on". On 17 October 1996, the author was sentenced to life imprisonment. He immediately indicated to the judge that he wanted to appeal.

...

6.3 Concerning the author's claim that his counsel has not received sufficient time to prepare his defence because the case file was transmitted to him only five days prior to the first hearing, which may raise issue under article 14, paragraph 3 (b) and (d), of the Covenant, the Committee notes from the information brought by both parties that counsel had the opportunity to cross-examine the witness as well as to ask for the adjournment of the trial, which he did not do. In this respect, the Committee refers to its jurisprudence that a State party cannot be held responsible for the conduct of a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.4/ In the instant case, there is no reason for the Committee to believe that the author's counsel was not using other than his best judgement. Moreover, the Committee notes that the author eventually decided to plead guilty against the advice of his counsel. The Committee finds therefore that the author has not sufficiently substantiated his claim under article 14, paragraph 3 (b) and (d) of the Covenant. This part of the communication should therefore be declared inadmissible under article 2 of the Optional Protocol.

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Notes

1/ The author does not give any indication whether anything relevant for the case was raised

at the District court level.

...

4/ See *inter alia*, the Committee's decision in Communication No. 536/1993, *Perera v. Australia*, declared inadmissible on 28 March 1995.

- *Evans v. Trinidad and Tobago* (908/2000), ICCPR, A/58/40 vol. II (21 March 2003) 216 (CCPR/C/77/D/908/2000) at paras. 2.1, 3.6, 6.5 and 6.6.

...

2.1 On 17 March 1986, the author was arrested for murder alleged to have been committed on 28 February 1986 and was subsequently charged with murder. Following a Preliminary Enquiry conducted before a Magistrate's Court, the trial took place before the High Court of Justice of San Fernando between 22 June 1988 and 4 July 1988, and the author was convicted of murder and sentenced to death. On 4 January 1994, the death sentence was commuted to life imprisonment for the rest of his "natural life".

...

3.6 ...[T]he author claims a violation of article 14, read together with article 2, paragraph 3 of the Covenant because a subsequent constitutional challenge to the High Court in relation to the length of the term imposed was not open to him as legal aid is not provided for such motions and the costs involved are beyond the means of the author. He states that an originating motion pursuant to article 14(1) of the Constitution, could have been lodged on the basis that his life imprisonment for the rest of his "natural life" is arbitrary and cruel. However, because of the lack of legal aid for Constitutional Motions, the author claims that he is effectively barred from exercising his constitutional right to seek redress for the violation of his rights. He cites the Human Rights Committee's decision in *Currie v. Jamaica*4/ for the proposition that remedies in the Constitutional Court should be available and effective and in the context of a review of irregularities in a criminal trial legal assistance should be provided to those who have not the means to take such an action. He also cites jurisprudence from the European Court of Human Rights5/ for the proposition that effective right of access to a court may require the provision of legal aid for indigent applicants.

...

6.5 As to the author's claim that he was denied access to the courts by not being allowed to make representations when his death sentence was commuted to life imprisonment for his "natural life", the Committee recalls its jurisprudence in *Kennedy v. Trinidad and Tobago*11/, in which it decided that State parties retain discretion for spelling out the modalities of the exercise of the right to seek commutation of the sentence of death (art. 6, para. 4) and that this right is not governed by the procedural guarantees of article 14. The Committee finds therefore that the author has not shown that his inability to make representations on the commutation of his sentence is such as to violate any of his rights

protected under the Covenant.

6.6 As to the claim that he was denied access to the courts in not being provided with legal aid to make a constitutional challenge on the issue of the length of the sentence imposed upon commutation, the Committee recalls its prior jurisprudence12/ that the Covenant does not contain an express obligation as such for any State party to provide legal aid to individuals in *all* cases but only in the determination of a criminal charge where the interest of justice so require. The Committee is therefore of the view that the State party is not expressly required to provide legal aid outside the context of a criminal trial. As the author's claim relates to the commutation of his sentence rather than the fairness of the trial itself, the Committee cannot find that there has been a violation of article 14, paragraph 1, of the Covenant, in this respect.

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4/ Communication No. 377/1989, Views adopted on 29 March 1994, where the Committee found that "where a convicted person seeking constitutional review of the irregularities in a criminal trial has not sufficient means to meet the costs of legal assistance in order to pursue his constitutional remedy and where the interests of justice so require, legal assistance should be provided by the State. In the present case the absence of legal aid has denied to the author the opportunity to test the irregularities of his criminal trial in the Constitutional Court and a fair hearing, and is thus a violation of article 14, paragraph 1, *juncto* article 2, paragraph 3."

5/ *Golder v. UK* [1975] 1 EHRR 524, and *Airey v. Ireland* [1979] 2 EHRR 305.

...

11/ [*Kennedy v. Trinidad and Tobago*, Case No. 845/1998, Views adopted on 26 March 2002].

12/ *Kennedy v. Trinidad and Tobago*, [Case No. 845/1998, Views adopted on 26 March 2002].

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- *Bondarenko v. Belarus* (886/1999), ICCPR, A/58/40 vol. II (3 April 2003) 161 (CCPR/C/77/D/886/1999) at paras. 2.1-2.3 and 9.3.

...

2.1 Mr. Bondarenko was accused of murder and several other crimes, found guilty as charged and sentenced by the Minsk Regional Court on 22 June 1998 to death by firing

squad. The decision was confirmed by the Supreme Court on 21 August 1998...

2.2 ...With regard to the homicide of Mrs. Martinenko, the author considers that there was irrefutable evidence that Mr. Bondarenko was not guilty. Mr. Voskoboynikov allegedly had confessed, on 24 August 1998, that he lied during the investigation and in court, falsely accusing Bondarenko. He had earlier refused to reveal the whereabouts of the murder weapon - his knife, with which he had committed both murders - but now pointed out where it was hidden so that the case could be reopened and a further inquiry initiated.

2.3 The author states that the President of the Supreme Court refused even to add the knife to the case file, holding it did not constitute sufficient evidence in support of the claim that Mr. Bondarenko had not been involved in the murders. Thus the Court is said to have refused to place on file evidence in defence of the author's son which would mitigate his guilt and prove that he had not been actively involved in the murders.

...

9.3 The Committee has noted the author's allegations that the courts did not have clear, convincing and unambiguous evidence, proving her son's guilt of the murders, and that the President of the Supreme Court ignored the testimony of her son's co-defendant given after the trial and refused to include evidence which could have mitigated her son's guilt. In the author's opinion, this shows conclusively that the court had a preordained attitude as far as her son's guilt was concerned, and displays the lack of independence and impartiality of the courts, in violation of articles 6 and 14 of the Covenant. These allegations therefore challenge the evaluation of facts and evidence by the State party's courts. The Committee recalls that it is generally for the courts of States parties to the Covenant to review facts and evidence in a particular case, unless it can be shown that the evaluation of evidence was clearly arbitrary or amounted to a denial of justice, or that the court otherwise violated its obligation of independence and impartiality. The information before the Committee does not provide substantiation for a claim that the decisions of the Minsk Regional Court and the Supreme Court suffered from such defects, even for purposes of admissibility. This part of the communication is accordingly inadmissible pursuant to article 2 of the Optional Protocol.

...

See also:

- *Lyashkevich v. Belarus* (887/1999), ICCPR, A/58/40 vol. II (3 April 2003) 169 (CCPR/C/77/D/887/1999) at paras. 2.1-2.3 and 8.3.

- *Weiss v. Austria* (1086/2002), ICCPR, A/58/40 vol. II (3 April 2003) 375 (CCPR/C/77/D/1086/2002) at paras. 2.1-2.3, 2.8, 2.11-2.14, 2.16, 9.2, 9.3, 9.6 and 10.1.

...

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2.1 In a trial beginning on 1 November 1998 in the District Court of Florida, the author was tried on numerous charges of fraud, racketeering and money laundering. He was represented throughout the trial by counsel of his choice. On 29 October 1999, as jury deliberations were about to begin, the author fled the courtroom and escaped. On 1 November 1999, the author was found guilty on all charges. Following submissions from the prosecution, and the author's counsel in opposition, as to whether sentencing should proceed in his absence, the Court ultimately sentenced him *in absentia* on 18 February 2000 to 845 years' imprisonment (with possibility to reduce it, in the event of good behaviour, to 711 years (sic)) and pecuniary penalties in excess of US$ 248 million.

2.2 The author's counsel lodged a notice of appeal within the ten-day time limit stipulated by law. On 10 April 2000, the United States Court of Appeals for the Eleventh Circuit rejected the motion of the author's counsel to defer dismissal of the appeal, and dismissed it on the basis of the "fugitive disentitlement" doctrine. Under this doctrine, a court of appeal may reject an appeal lodged by a fugitive on the sole grounds that the appellant is a fugitive. With that decision, the criminal proceedings against the author were concluded in the United States.1/

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

...

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

...

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

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

prison and of the Ministries of Justice and the Interior, to the jurisdiction of United States military authorities at Vienna airport, and returned to the United States.

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

2.14 On 13 June 2002, the Administrative Court decided, given that the author had been removed in violation of the Court's stay on execution, that the proceedings had been deprived of any object and suspended them. The Court observed that the purpose of its order to stay extradition was to preserve the rights of the author pending the main proceedings, and that as a result no action could be taken to the author's detriment on the basis of the Minister's challenged decision. As a consequence, the author's surrender had no sufficient legal basis.
...
2.16 On 12 December 2002, the Constitutional Court decided in the author's favour, holding that the Upper Regional Court should examine all admissibility issues concerning the author's human rights, including issues of a right to an appeal. Thereafter, the Minister's formal decision to extradite should consider any other issues of human dignity that might arise. The Court also found that the author's inability, under the State party's extradition law, further to challenge a decision of the Upper Regional Court finding his extradition admissible was contrary to rule of law principles and unconstitutional.
...
9.2 As to the author's claim that the pronouncement *in absentia* of his conviction and sentence resulted in a violation of article 14 of the Covenant, the Committee notes that in the present case, the author and his legal representatives were present throughout the trial, as arguments and evidence were advanced, and that thus the author self-evidently had notice that judgment, and in the event of a conviction, sentence would be passed. In such circumstances, the Committee, referring to its jurisprudence,25/ considers that no question of a violation of the Covenant by the State party can arise on the basis of the pronouncement of the author's conviction and sentence in another State.

9.3 As to the author's claim that by operation of the “fugitive disentitlement” doctrine he was denied a full appeal, the Committee notes that, on the information before it, it appears that the author - by virtue of being extradited on fewer than all the charges for which he was initially sentenced - will, according to the rule of specialty, be re-sentenced. According to information supplied to the State party, such a re-sentencing would entitle the author fully

to appeal his conviction and sentence. The Committee thus need not consider whether the "fugitive disentitlement" doctrine is compatible with article 14, paragraph 5, or whether extradition to a jurisdiction where an appeal had been so denied gives rise to an issue under the Covenant in respect of the State party.

...

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

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

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Notes

1/ The author relies for this proposition on a decision of another United States District Court in *United States v Bakhtiar* 964 F Supp 112. That case held that, when a person was extradited on fewer charges than s/he had been convicted of, the original conviction and sentence remained intact, but an application for *habeas corpus* would lie against the executive once sentence had been served in respect of the extraditable offences...

...

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

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

...

25/ See, for example, *Maleki v. Italy* [Case No. 699/1996, Views adopted on 15 July 1999].

- *Reece v. Jamaica* (796/1998), ICCPR, A/58/40 vol. II (14 July 2003) 61 CCPR/C/78/D/796/1998 at paras. 2.1, 2.5, 7.2, 7.3 and 7.7.

...

2.1 The author was arrested on 13 January 1983, and charged with two counts of murder with respect to events that occurred on 11 January 1983. At the preliminary hearing, he was assigned a legal aid trial lawyer. At trial before the Clarendon Circuit Court, from 20 to 27 September 1983, the author pleaded not guilty to both counts but admitted to having been at the scene of the murders when they took place. He was convicted by jury on both counts and sentenced to death.

...

2.5 In April or May 1995 the author's sentence of death was commuted to life imprisonment by the Governor-General.3/ The commutation was accompanied by a determination that seven years from the date of commutation had to elapse before the length of any non-parole period could be considered. He was not informed of the decision to commute his sentence until after the event and never received any formal documentation in relation to the decision. The author had no opportunity to make any representation in relation to the decision to commute his sentence or to the decision concerning the non-parole period. He remains imprisoned at St.Catherine's District Prison.

...

7.2 As to the claim of a violation of article 14, paragraph 3 (b) and (e), in that the author had inadequate time and facilities to prepare his trial defence at trial and that counsel conducted his defence poorly, the Committee reiterates its jurisprudence that in such a situation, it would have been incumbent on the author or his counsel to request an adjournment at the beginning of the trial, if it was felt that they had not had sufficient opportunity to properly prepare a defence. The trial transcript does not disclose any such application.9/ As to the issues raised by the author's objections to counsel's conduct of the trial, the Committee recalls that a State party cannot be held responsible for the conduct of a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.10/ The Committee is of the view that, in the

present case, there is no indication that counsel's conduct of the trial was manifestly incompatible with his professional responsibilities. Accordingly, the Committee does not find a violation of the Covenant in respect of these issues.

7.3 On the alleged violation of article 14, paragraph 1, in that the trial judge's directions on the evidence to the jury were inadequate, the Committee refers to its previous jurisprudence that it is not for the Committee to review specific instructions to the jury by the trial judge unless it could be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. In the present case, the Committee observes that the evidence in the case as well as the judge's directions to the jury were extensively examined upon appeal, and it does not discern clear arbitrariness or a denial of justice thereby.11/ The Committee thus does not find a violation of the Covenant in this respect.

...

7.7 As to the author's claims of a violation of articles 9, paragraph 1, and 14, paragraphs 1 and 3, subparagraphs (a), (b) and (d), arising from the commutation of his sentence and the setting of a seven-year period before parole issues might arise, the Committee refers to its previous jurisprudence that the commutation process is not one attracting the guarantees of article 14.12/ Nor does the Committee share the view that a substitution of the death penalty with life imprisonment, with a prospect of parole in the future, is a "re-sentencing" tainted with arbitrariness. It follows from this conclusion that the author continued to be legitimately detained pursuant to the original sentence, as modified by the decision of commutation, and that no issue of detention contrary to article 9 arises. Accordingly, the Committee does not find a violation of the Covenant with respect to these matters.

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Notes

...

3/ The sentence of death penalty was commuted to life imprisonment pursuant to the judgement of the Privy Council in *Pratt and Morgan v. Jamaica*. It is unclear on exactly what date the decision of commutation as taken by the Governor-General....

9/ See, for example, *Simpson v. Jamaica* Case No. 695/1996, Views adopted on 31 October 2001.

10/ *Ibid*.

11/ *Henry and Douglas v. Jamaica* Case No. 571/1994, Views adopted on 25 July 1996.

12/ *Kennedy v. Trinidad and Tobago* Case No. 845/1998, Views adopted on 26 March 2002.

...

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- *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, 7.3, 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.

...

7.3 Regarding the author's claims under article 14, the Committee takes note of the fact that Mr. Gómez Casafranca was, after first acquitted in 1988, ordered for retrial by a "faceless" Chamber of the Supreme Court. This alone raises issues under article 14, paragraphs 1 and 2. Taking into account that Mr. Gómez Casafranca was convicted after retrial in 1998, the Committee takes the view that whatever measures were taken by the Special Criminal Counter-Terrorism Chamber to guarantee Mr. Gómez Casafranca's presumption of innocence, the delay of some 12 years after the original events and 10 years after the first trial resulted in a violation of the author's right, under article 14, paragraph 3(c), to be tried without undue delay. In the circumstances of the case, the Committee concludes that there was a violation of article 14 of the right to a fair trial taken as a whole.

...

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.

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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.

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- *Adrien Mundyo Buyso, Thomas Osthudi Wongodi, René Sibu Matubuka et al. v. Democratic Republic of the Congo* (933/2000), ICCPR, A/58/40 vol. II (31 July 2003) 224 (CCPR/C/78/D/933/2000) at paras. 2.1-2.3, 5.2, 6.1 and 6.2.

...

2.1 Under Presidential Decree No. 144 of 6 November 1998, 315 judges and public prosecutors, including the above-mentioned authors, were dismissed on the following grounds:

> "The President of the Republic;
>
> Having regard to Constitutional Decree-Law No. 003 of 27 May 1997 on the organization and exercise of power in the Democratic Republic of Congo, as subsequently amended and completed;
>
> Having regard to articles 37, 41 and 42 of Ordinance-Law No. 88-056 of 29 September 1988 on the status of judges;
>
> Given that the reports by the various commissions which were set up by the Ministry of Justice and covered the whole country show that the above-mentioned judges are immoral, corrupt, deserters or recognized to be incompetent, contrary to their obligations as judges and to the honour and dignity of their functions;
>
> Considering that the conduct in question has discredited the judiciary, tarnished the image of the system of justice and hampered its functioning;
>
> Having regard to urgency, necessity and appropriateness;
>
> On the proposals of the Minister of Justice;
>
> Hereby decrees:

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Article 1:

The following individuals are dismissed from their functions as judges...".

2.2 Contesting the legality of these dismissals, the authors filed an appeal, following notification and within the three-month period established by law, with the President of the Republic to obtain the withdrawal of the above-mentioned decree. Having received no response, in accordance with Ordinance No. 82/017 of 31 March 1982 on procedure before the Supreme Court of Justice, the 68 judges all referred their applications to the Supreme Court during the period from April to December 1999. According to the information provided by the authors, it appears, first of all, that the Attorney-General of the Republic, who was required to give his views within one month, deliberately failed to transmit the report1/ by the Public Prosecutor's Office until 19 September 2000 in order to block the appeal. Moreover the Supreme Court, by a ruling of 26 September 2001, decided that Presidential Decree No. 144 was an act of Government inasmuch as it came within the context of government policy aimed at raising moral standards in the judiciary and improving the functioning of one of the three powers of the State. The Supreme Court consequently decided that the actions taken by the President of the Republic, as the political authority, to execute national policy escaped the control of the administrative court and thus declared inadmissible the applications by the authors.

2.3 On 27 and 29 January 1999, the authors, who formed an organization called the "Group of the 315 illegally dismissed judges", known as the "G.315", submitted their application to the Minister for Human Rights, without results.

...

5.2 The Committee notes that the authors have made specific and detailed allegations relating to their dismissal, which was not in conformity with the established legal procedures and safeguards. The Committee notes in this regard that the Minister of Justice, in his statement of June 1999...and the Attorney-General of the Republic, in the report by the Public Prosecutor's Office of 19 September 2000 (see note 1), recognize that the established procedures and safeguards for dismissal were not respected. Furthermore, the Committee considers that the circumstances referred to in Presidential Decree No. 144 could not be accepted by it in this specific case as grounds justifying the fact that the dismissal measures were in conformity with the law and, in particular, with article 4 of the Covenant. The Presidential Decree merely refers to specific circumstances without, however, specifying the nature and extent of derogations from the rights provided for in domestic legislation and in the Covenant and without demonstrating that these derogations are strictly required and how long they are to last. Moreover, the Committee notes that the Democratic Republic of the Congo failed to inform the international community that it had availed itself of the right of derogation, as stipulated in article 4, paragraph 3, of the Covenant. In accordance with its jurisprudence,6/ the Committee recalls, moreover, that the principle of access to public

service on general terms of equality implies that the State has a duty to ensure that it does not discriminate against anyone. This principle is all the more applicable to persons employed in the public service and to those who have been dismissed. With regard to article 14, paragraph 1, of the Covenant, the Committee notes the absence of any reply from the State party and also notes, on the one hand, that the authors did not benefit from the guarantees to which they were entitled in their capacity as judges and by virtue of which they should have been brought before the Supreme Council of the Judiciary in accordance with the law, and on the other hand, that the President of the Supreme Court had publicly, before the case had been heard, supported the dismissals that had taken place...thus damaging the equitable hearing of the case. Consequently, the Committee considers that those dismissals constitute an attack on the independence of the judiciary protected by article 14, paragraph 1, of the Covenant. The dismissal of the authors was ordered on grounds that cannot be accepted by the Committee as a justification of the failure to respect the established procedures and guarantees that all citizens must be able to enjoy on general terms of equality. In the absence of a reply from the State party, and inasmuch as the Supreme Court, by its ruling of 26 September 2001, has deprived the authors of all remedies by declaring their appeals inadmissible on the grounds that Presidential Decree No. 144 constituted an act of Government, the Committee considers that, in this specific case, the facts show that there has been a violation of article 25, paragraph (c), read in conjunction with article 14, paragraph 1, on the independence of the judiciary, and of article 2, paragraph 1, of the Covenant.

...

6.1 The Human Rights Committee...is of the view that the State party has committed a violation of article 25 (c), article 14, paragraph 1, article 9 and article 2, paragraph 1, of the Covenant.

6.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee is of the view that the authors are entitled to an appropriate remedy, which should include, *inter alia*: (a) in the absence of a properly established disciplinary procedure against the authors, reinstatement in the public service and in their posts, with all the consequences that that implies, or, if necessary, in similar posts;7/ and (b) compensation calculated on the basis of an amount equivalent to the salary they would have received during the period of non-reinstatement.8/ The State party is also under an obligation to ensure that similar violations do not occur in future and, in particular, that a dismissal measure can be taken only in accordance with the provisions of the Covenant.

Notes

1/ The authors transmitted a copy of the report by the Public Prosecutor's Office. In the report, the Office of the Attorney-General of the Republic requests the Supreme Court of Justice to declare, first and foremost, that Presidential Decree No. 144 is an act of Government that is outside its jurisdiction; and, secondly, that this decree is justified because

of exceptional circumstances. On the basis of accusations made by both the population and foreigners living in the Democratic Republic of the Congo against allegedly incompetent, irresponsible, immoral and corrupt judges, as well as of the missions carried out by judges in this regard, the Attorney-General of the Republic maintains that the Head of State issued Presidential Decree No. 144 in response to a crisis situation characterized by war, partial territorial occupation and the need to intervene as a matter of urgency in order to combat impunity. He stressed that it was materially impossible for the authorities to follow the ordinary disciplinary procedure and that the urgency of the situation, the collapse of the judiciary and action to combat impunity were incompatible with any decision to suspend the punishment of the judges concerned.

...

6/ Communication No. 422/1990 *Adimayo M. Aduayom T. Diasso and Yawo S. Dobou v. Togo;* general comment No. 25 on article 25 (fiftieth session - 1996).

7/ Communications No. 630/1995 *Abdoulaye Mazou v. Cameroon*; No. 641/1995 *Gedumbe v. Democratic Republic of the Congo*; and No. 906/2000 *Felix Enrique Chira Vargas-Machuca v. Peru*.

8/ Communications Nos. 422/1990, 423/1990 and 424/1990 *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*; No. 641/1995 *Gedumbe v. Democratic Republic of the Congo*; and No. 906/2000 *Felix Enrique Chira Vargas-Machuca v. Peru*.

- *Kolanowski v. Poland* (837/1998), ICCPR, A/58/40 vol. II (6 August 2003) 419 (CCPR/C/78/D/837/1998) at paras. 2.1, 2.2, 2.4 and 6.4.

...

2.1 The author has been employed in the Polish police (formerly the Civic Militia) since 1973. In 1975, he completed the School for Non-commissioned Officers of the Police in Pila. He obtained a doctoral degree in "Sciences of Physical Culture" in 1991.

2.2 On 7 January 1991, the author requested the Chief Commander of the Police to appoint him to the rank of officer in the police. His request was denied on 22 February 1991, since he lacked the required "officer" training to be appointed to that rank. The author appealed this decision before the Minister of Internal Affairs, arguing that article 50, paragraph 1, of the Police Act (PA) only required professional training rather than officer's training for policemen with a higher education degree.

...

2.4 By letter of 26 August 1991 to the General Commander of the Police in Warsaw, the author appealed the rejection of his appointment. On 28 August 1991, he sent a similar

complaint to the Under-Secretary of State in the Ministry of Internal Affairs. In his response, dated 16 September 1991, the General Commander of the Police once again informed the author that he did not have the required officer's training. On 29 June 1994, the Minister of Internal Affairs refused to institute proceedings with respect to the rejection of the author's appointment to the aspirant rank, which was not considered an administrative decision within the meaning of article 104 of the Code of Administrative Procedure (CAP).

...

6.4 As to the author's claims under article 14, paragraph 1, the Committee notes that they relate to the author's efforts to contest a negative decision on his request to be promoted to a higher rank. The author was neither dismissed nor did he apply for any specific vacant post of a higher rank. In these circumstances the Committee considers that the author's case must be distinguished from the case of *Casanovas v. France* (Communication 441/1990). Reiterating its view that the concept of "suit at law" under article 14, paragraph 1, is based on the nature of the right in question rather than on the status of one of the parties, the Committee considers that the procedures initiated by the author to contest a negative decision on his own request to be promoted within the Polish police did not constitute the determination of rights and obligations in a suit at law, within the meaning of article 14, paragraph 1, of the Covenant. Consequently, this part of the communication is incompatible with that provision and inadmissible under article 3 of the Optional Protocol.

- *Aliev v. Ukraine* (781/1997), ICCPR, A/58/40 vol. II (7 August 2003) 52 (CCPR/C/78/D/781/1997) at paras. 2.1, 7.3 and 7.4.

...

2.1 On 8 June 1996, in the town of Makeevka, Ukraine, having consumed a large quantity of alcohol, the author, Mr. Kroutovertsev and Mr. Kot had an altercation in an apartment. The altercation degenerated into a fight. A fourth person, Mr. Goncharenko, witnessed the incident. According to the author, Mr. Kot and Mr. Kroutovertsev beat him severely. Mr. Kroutovertsev also struck him with an empty bottle. While defending himself, the author seriously wounded Mr. Kot and Mr. Kroutovertsev with a knife, whereupon he fled.

...

7.3 ...[T]he author alleges that, subsequently, on 17 July 1997, the Supreme Court heard his case in his absence and in the absence of his counsel. The Committee notes that the State party has not challenged this allegation and has not provided any reason for this absence. The Committee finds that the decision of 17 July 1997 does not mention that the author or his counsel was present, but mentions the presence of a procurator. Moreover it is uncontested that the author had no legal representation in the early stages of the investigations. Bearing in mind the facts before it, and in the absence of any relevant observation by the State party, the Committee considers that due weight must be given to the author's allegations. The Committee recalls its jurisprudence that legal representation must

be available at all stages of criminal proceedings, particularly in cases in which the accused incurs capital punishment.2/ Consequently, the Committee is of the view that the facts before it disclose a violation of article 14, paragraph 1, as well as a separate violation of article 14, paragraph 3 (d), of the Covenant.

7.4 The Committee is of the view3/ that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant if no further appeal against the death sentence is possible. In the author's case, the final sentence of death was passed without having met the requirements for a fair trial as set out in article 14 of the Covenant and thus in breach of article 6. However, this breach was remedied by the commutation of the death sentence by the Donetsk regional court's decision of 26 June 2000.

Notes

...

2/ See for example *Robinson v. Jamaica*, communication No. 223/1987 and *Brown v. Jamaica*, communication No. 775/1997.

3/ See *Levy v. Jamaica*, [communication No. 719/1996]; *Marshall v. Jamaica*, [communication No. 730/1996].

- *Kazantzis v. Cyprus* (972/2001), ICCPR, A/58/40 vol. II (7 August 2003) 499 (CCPR/C/78/D/972/2001) at paras. 2.1-2.4 and 6.5.

...

2.1 On 23 June 1997, the Supreme Council of Judicature invited applications from qualified advocates for two vacancies of the post of District Judge and one vacancy of the post of Judge of the Industrial Disputes Tribunal. The author applied for both posts on 30 July 1997. He was interviewed by the Supreme Council of Judicature for both posts on 9 September and 11 September 1997, respectively.

2.2 On 18 September 1997, the Supreme Council of Judicature decided that a candidate other than the author was most suitable for the post of Judge of the Industrial Disputes Tribunal. The Council also ascertained that there were four additional vacancies for the post of District Judge, in addition to the two vacancies in relation to which applications had already been invited. It decided not to fill two vacancies at the time, but rather to invite also applications for the four additional vacancies. It was decided that, concerning the four additional vacancies, candidates who had already submitted applications for the two vacant posts would be considered for all six vacancies. On 15 and 18 October 1997, all candidates,

including the author, were interviewed.

2.3 On 21 October 1997, the Council evaluated the candidates, taking into account the reports on the abilities of each, by the President of the District Court in which the candidate was practicing as a lawyer, and decided to appoint the six candidates considered the most suitable for the post of District Judge. The author was not among those selected for appointment. Notice of the appointments decided by the Council was published in the Official Gazette of the Republic on 14 November 1997. The author was not personally notified of his non-appointment, nor the reasons therefor.

2.4 The author did not contest this issue before the local courts, as previous jurisprudence of the Supreme Court had held that no Cypriot court had jurisdiction over the decisions of the Supreme Council of Judicature. In *Kourris v. Supreme Council of Judicature*,1/ the Supreme Court held, by a majority of three judges to two, that "...it follows that the Court has no jurisdiction to entertain a recourse against any act, decision or omission of the said Council (of Judicature) because the functions of such Council *are very closely connected with the exercise of judicial power.*" (Emphasis original)

...

6.5 As to the author's claim under article 14, paragraph 1, the Committee observes that, in contrast to the situation in *Casanovas v. France*6/ and *Chira Vargas v. Peru*7/ concerning removal from public employment, the issue in dispute concerns the denial by a body exercising a non-judicial task of an application for employment in the judiciary. The Committee recalls that the concept of "suit at law" under article 14, paragraph 1, is based on the nature of the right in question rather than the status of one of the parties.8/ It considers that the procedure of appointing judges, albeit subject to the right in article 25(c) to access to public service on general terms of equality as well as the right in article 2, paragraph 3, to an effective remedy, does not additionally come within the purview of a determination of rights and obligations in a suit at law, within the meaning of article 14, paragraph 1, of the Covenant. This part of the communication is therefore inadmissible *ratione materiae*, under Article 3 of the Optional Protocol.

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Notes

1/ (1972) 3 CLR 390.

...

6/ Case No. 441/1990, Views adopted on 19 July 1994.

7/ Case No. 906/2000, Views adopted on 22 July 2002.

8/ *Y. L. v Canada* Case No. 112/81, Decision adopted on 8 April 1986, at paragraph 9.2; and *Casanovas v. France* [Case No. 441/1990], at paragraph 5.2.

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- *Perera v. Sri Lanka* (1091/2002), ICCPR, A/58/40 vol. II (7 August 2003) 593 (CCPR/C/78/D/1091/2002) at paras. 2.1-2.6, 5.2 and 6.3.

...

2.1 While acting as a Deputy Chief Manager of the People's Bank (a State bank of Sri Lanka), the author was "interdicted" by the bank alleging that he had misled the Regional Office of the Bank in approving the provision of facilities to a customer. According to the author, the bank itself did not incur any loss in this transaction, and the allegations were based on conjecture and bias, in order to cover up certain malpractices of two superior officers who were directly involved in providing facilities to the customer.

2.2 After an internal inquiry, the author was dismissed from service on 2 March 1987, without any opportunity to call witnesses in his favour. In 1988, the author failed to obtain relief from the Labour Tribunal and therefore appealed to the High Court.

2.3 On 13 February 1998, the High Court held that the author had been improperly dismissed, and ordered Rs. 474,941.60 1/ compensation and costs, in lieu of re-instatement, as at that point the author had passed the 55-year retirement age. The author appealed to the Supreme Court, on the basis that the relief granted in the High Court was inadequate, in particular as it did not take into account salary increases that he would have received had he not been dismissed. The author's employer cross-appealed to the same Court against the High Court's finding of improper dismissal.

2.4 On 22 March 2000, the Chief Justice of the Supreme Court, sitting with two other justices of the court, examined the various briefs and allegedly commented that it was not worth reading such a heavy brief on a matter that was "a minor one". The Chief Justice allegedly went on to state that some injustice had been done to the author and suggested "some compensation". The author's counsel objected and argued that the quantum of damages fixed in the judgement of the High Court was inadequate, and pleaded that the case be argued and heard. That notwithstanding, the Chief Justice advised the counsel for the parties to reach an agreed settlement and postponed consideration of the case.

2.5 On 9 May 2000, when the matter came up for the second time before the Supreme Court, the Chief Justice did not allow the author's counsel to argue the case although it was fixed for argument, and threatened to dismiss the case if no settlement was reached by a further date, which was fixed for 12 September 2000. He allegedly stated that the case should come only before him.

2.6 On 12 September 2000, the employer's counsel agreed to pay SL Rs 469,941.60 (about US$ 4,690) as compensation to the author. On that basis, the Supreme Court on the same day dismissed both appeals without costs, allegedly over objections from the author's counsel that the author's entitlements to pension rights should be recorded. Since that point, the author contends that his employer has allegedly improperly denied him pension entitlements.

...

5.2 In this connection, the author states that the arbitrary and partisan handling of certain judicial matters has become the subject of investigation by various international bodies, such as the International Bar Association (IBA), which sent a mission to Sri Lanka "to identify the circumstances surrounding the calling of a referendum on the constitution, assess the constitutional position of such action and the implication for the rule of law, in the light of recent cases seeking to disbar the Chief Justice from practicing as a Lawyer (…)".2/ The author also refers to an impeachment motion against the Chief Justice submitted to the Speaker of Parliament on 6 June 2001, regarding other cases where the Chief Justice had allegedly abused his position. The author claims that it is abundantly clear that the attitude of the Chief Justice created a situation where litigants, lawyers and even judges, who all were under the authority of the Chief Justice, were compelled to acquiesce. In such a situation, he contends that he found himself helpless as a litigant and without any means of redress.

...

6.3 As to the author's claim under article 14, paragraph 1, of the Covenant, the Committee notes that the Supreme Court's decision of 12 September 2000 was delivered by three justices of the Court. The allegations of improper conduct in the administration of justice in certain other cases made against the Chief Justice in the parliamentary notice of resolution do not, in the Committee's view, substantiate the author's claim that the encouragement by the Chief Justice to both parties' counsel to reach an amicable settlement on the quantum of damages exceeded the bounds of a superior court's proper management of its judicial resources in violation of article 14, paragraph 1. The Committee notes, in this context, that counsel did not explicitly contest the Court's oral framing of the disposition of the case, and that, in substance, the High Court's findings in the author's favour were almost entirely upheld at the appellate level. Accordingly, the Committee considers this claim unsubstantiated, for the purposes of admissibility, and consequently to be inadmissible under article 2 of the Optional Protocol.

Notes

1/ The compensation comprised SL Rs 469,941.60, being the author's last monthly salary multiplied by the months that had passed until judgement, and SL Rs 5,000 as costs.

2/ Report of The International Bar Association 2001, *Sri Lanka: Failing to protect the Rule of Law and the Independence of the Judiciary*. http://www.hg.org/cgi-

bin/redir.cgi?url=http://www.ibanet.org.

- *Romanov v. Ukraine* (842/1998), ICCPR, A/59/40 vol. II (30 October 2003) 407 (CCPR/C/79/D/842/1998) at paras. 3.1 and 6.4.

...

3.1 The author contends that he was wrongly convicted of attempted murder, because he did not know that the clopheline given to the victim was life threatening, and did not know what he was doing at the time he struck the victim over the head. He disputes the Courts' findings of evidence, particularly the reliance on his accomplice's testimony, and states that he was not afforded a fair trial. He contends that the Court did not presume him innocent until proven guilty. He also claims that his arguments about the relevant evidence, and what really occurred in Maksimenko's apartment, were not considered by the Supreme Court of Ukraine, and that his right to have his conviction reviewed by a higher tribunal according to law was therefore violated. He claims that, given the circumstances, the State party violated articles 2, 7, 9 and 14 of the Covenant. He does not however link specific and concrete actions of the State party to the particular alleged violations of the Covenant.

...

6.4 In respect of the author's claims under article 14, paragraphs (1) and (2), the Committee considers that the subject matter of the allegations relates in substance to the evaluation of facts and evidence in the course of proceedings in the Ukrainian courts. The Committee recalls its jurisprudence and reiterates that it is generally not for itself, but for the courts of States parties, to review or to evaluate facts and evidence, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence was manifestly arbitrary or amounted to a denial of justice2/. The material before the Committee does not indicate that the conduct of the judicial proceedings in the author's case suffered from such deficiencies. Accordingly, the Committee considers the author's claims under article 14, paragraphs (1) and (2) to be inadmissible under article 3 of the Optional Protocol.

Notes

...

2/ See for example communication No. 790/1997, *Cheban v. Russian Federation*, Views adopted on 24 July 1997.

...

- *Martinez Muñoz v. Spain* (1006/2001), ICCPR, A/59/40 vol. II (30 October 2003) 198 (CCPR/C/79/D/1006/2001) at paras. 2.1, 2.2, 2.4-2.6 and 6.3-6.5.

LEGAL RIGHTS - RIGHT TO A FAIR AND PUBLIC HEARING

...
2.1 On 21 September 1990, the author, together with six other persons, took part in writing *pintadas* ("graffiti") in favour of the right to refuse to perform military service, on the outer facade of the bullring in the town of Yecla. For this reason, they were intercepted by two local policemen. The author alleges that, when one of the policemen attempted to arrest him, a struggle ensued and he accidentally struck the policeman in one eye, causing a contusion.

2.2 The author was held in custody on 21 September 1990 and released on 22 September 1990. The hearing took place on 14 June 1995. The author was accused by the prosecutor of two misdemeanours and an offence and, on 16 June 1995, Criminal Court No. 3 of Murcia sentenced him for the offence of attacking a law enforcement officer to a penalty of six months' and one day's imprisonment and compensation in the amount of 70,000 pesetas in favour of the injured policeman.
...
2.4 The author filed an application for *amparo* and requested the Constitutional Court to allow him to dispense with the *procurador* and to represent himself. That request was denied on 15 January 1996. The author then requested the court to appoint a *procurador*. When that person had been appointed in accordance with article 27 of the Free Legal Assistance Act, the Constitutional Court required the freely chosen lawyer to waive his fees. In the light of this requirement, the author filed an application for reconsideration, which was rejected on 22 March 1996.

2.5 When the freely chosen lawyer refused to waive his fees, on 13 December 1995 the author requested the court to appoint counsel. The lawyer assigned to him requested the Constitutional Court to excuse her from filing an application for *amparo*, since she believed that that remedy was unnecessary because there had been no violation of fundamental human rights.

2.6 The author said that he wished to dismiss the court-appointed counsel. On 1 July 1996, the Constitutional Court informed him that it could not accede to his request but transmitted the pleas of fact to the General Council of Spanish Lawyers which, on 9 September 1996, concluded that the application for *amparo* that the author's court-appointed counsel had not filed was partly sustainable, since it could be admissible only with respect to the complaint of undue delay in the proceedings.
...
6.3 The author claims a violation of article 14 (1) of the Covenant, arguing that, during the proceedings, privileges were granted to the prosecution, which was allowed to propose measures after the summary procedure had begun. In this regard, the Committee notes that the author does not substantiate his complaint by indicating what these measures were and how they damaged his case. He also does not substantiate his complaint that Murcia

Criminal Court No. 3 granted complete freedom of interrogation to the prosecutor, without disallowing questions formulated in a manner similar to that which the author's counsel was not permitted to use. Consequently, this part of the complaint is admissible under article 2 of the Optional Protocol.

6.4 The author also claims a violation of article 14, paragraph 1, of the Covenant, arguing that, since he was not allowed to dispense with a *procurador* and to represent himself before the Constitutional Court, he was placed in a situation of inequality with respect to persons with a law degree; such inequality was not justified. In this regard, the Committee recalls its constant jurisprudence1/ that the requirement for representation by a *procurador* reflects the need for a person with knowledge of the law to be responsible for handling an application to that court. The Committee therefore considers that the author's allegations have not been properly substantiated for the purposes of admissibility. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 The author claims that his right to a defence, guaranteed in article 14, paragraph 3 (b), was violated, since the court did not authorize the form - which it called "tendentious" - in which his lawyer wished to question him, nor did it permit the re-enactment of the incident by one of the witnesses, which, according to the author, was crucial to his defence. The Committee notes that the dismissal of that complaint was argued both by the court of first instance and by the National High Court in its decision on the appeal. In this regard, the Committee recalls its constant jurisprudence that the interpretation of domestic law in a specific case is essentially a matter for the courts and authorities of the State party concerned. It is therefore not for the Committee to evaluate facts and evidence, unless the domestic decisions are manifestly arbitrary or amount to a denial of justice. In the present case, the author has not substantiated any claim in this regard. Consequently, this part of the communication is declared inadmissible under article 2 of the Optional Protocol.
...

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Notes

1/ Communication No. 865/1999, *Alejandro Marín Gómez v. Spain,* Views adopted on 22 October 2001, para. 8.4; communication No. 866/1999, *Marina Torregrosa Lafuente et al. v. Spain,* Views adopted on 16 July 2001, para. 6.3; and communication No. 1005/2001, *Concepción Sánchez González v. Spain,* Views adopted on 22 March 2002, para. 4.3.

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LEGAL RIGHTS - RIGHT TO A FAIR AND PUBLIC HEARING

- *Kurbanova v. Tajikistan* (1096/2002), ICCPR, A/59/40 vol. II (6 November 2003) 354 (CCPR/C/79/D/1096/2002) at paras. 2.1-2.4, 3.3, 3.4, 7.3, 7.6, 7.7, 8 and 9.

...

2.1 According to the author, Mr. Kurbanov went to the police on 5 May 2001 to testify as a witness. He was detained for seven days in the building of the Criminal Investigation Department of the Ministry of the Interior, where according to the author he was tortured. Only on 12 May 2001, a formal criminal charge of fraud was made against him, an arrest warrant was issued for him, and he was transferred to an investigation detention centre. He was forced to sign a declaration that he renounced the assistance of a lawyer.

2.2 On 9 June 2001, a criminal investigation was opened in relation to the triple murder of Firuz and Fayz Ashurov and D. Ortikov, which had occurred in Dushanbe on 29 April 2001. In addition to the initial fraud charge, the author's son was, on 30 July 2001, charged with the murders and with illegal possession of firearms2/. The author claims that her son was tortured before he accepted to write down his confession under duress; during her visits, she noted scars on her son's neck and head, and as well as broken ribs. She adds that one of the torturers - investigation officer Rakhimov - was charged in August 2001 with having received bribes and with abuse of power in 13 other cases also related to the use of torture; he was later sentenced to 5 years and 6 months of imprisonment.

2.3 The investigation was concluded on 4 August 2001, and the case was sent to court. On 2 November 2001, the Military Chamber of the Supreme Court sentenced the author's son to death (with confiscation of his property). On 18 December 2001 the judgement was confirmed by the Supreme Court, following extraordinary appeal proceedings.

2.4 The judgment of 2 November 2001 by the Military Chamber of the Supreme Court was submitted to the Committee by the author in Tajik; an unofficial English translation was provided subsequently. The judgement includes neither an account of the prosecution's case nor a transcript of the actual trial. It begins with a description of the facts as established by the court, then moves to the testimonies of the three accused persons and some witnesses, and finally addresses the issues of the conviction and sentencing. It does not transpire from this judgement how the Military Chamber of the Supreme Court was constituted, e.g. whether one or more of its judges were military officers. However, it transpires that Mr. Kurbanov was tried together with one Mr. Ismoil and Mr. Nazmudinov, who was a major in the service of the Ministry of National Security...

...

3.3 The author contends that article 14, paragraph 1, of the Covenant was violated, as the court proceedings were partial. She alleges that the court proceedings were unfair from the beginning, as the families of the victims exercised pressure on the judges. All requests of the defence were rejected.

LEGAL RIGHTS - RIGHT TO A FAIR AND PUBLIC HEARING

3.4 The author claims that when her son was charged with murder, she requested, due to her financial situation, a lawyer be assigned to him *ex officio*, but she was informed that the law provided no such possibility.

...

7.3. ...[T]he documents submitted by the State party show that Mr. Kurbanov was, after being detained since 5 May 2001 on other grounds, informed on 11 June 2001 that he was suspected of the killings of 29 April 2001 but charged with these crimes only on 30 July 2001. During his detention from 5 May 2001 onwards, he was, except for the last week starting on 23 July 2001, without the assistance of a lawyer. The Committee takes the view that the delay in presenting the charges to the detained author and in securing him legal assistance affected the possibilities of Mr. Kurbanov to defend himself, in a manner that constitutes a violation of article 14, paragraph 3 (a), of the Covenant.

...

7.7 The Committee recalls5/ that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant. In the current case, the sentence of death was passed in violation of the right to a fair trial as set out in article 14 of the Covenant, and thus also in breach of article 6.

...

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of the rights of Mr. Kurbanov under article 7, article 9, paragraphs 2 and 3, article 10, article 14, paragraph 1 and paragraph 3 (a) and (g), and of article 6 of the Covenant.

9. Under article 2, paragraph 3 (a), of the Covenant, the author's son is entitled to an effective remedy entailing compensation and a new trial before an ordinary court and with all the guarantees of article 14, or, should this not be possible, release. The State party is under an obligation to take measures to prevent similar violations in the future.

Notes

...

2/ It transpires from documents later submitted by the State party that the author's son was on 11 June 2001 initially informed that he was suspected of the murders.

...

5/ See *Conroy Levy v. Jamaica*, communication No. 719/1996, and *Clarence Marshall v. Jamaica*, communication No. 730/1996.

- *Ahani v. Canada* (1051/2002), ICCPR, A/59/40 vol. II (29 March 2004) 260 at paras. 2.1-2.10, 10.5-10.10, 11 and 12.

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...
2.1 On 14 October 1991, the author arrived in Canada from Iran and claimed protection under the Convention on the Status of Refugees and its Protocol, based on his political opinion and membership in a particular social group. He contended, on various occasions, (i) that he had been beaten by members of the Islamic Revolutionary Committee in Iran for being intoxicated, (ii) that his return to Iran would endanger his life due to his knowledge of Iranian covert operations and personnel, knowledge which he had acquired as a forced conscript in the foreign assassins branch of the Iranian Foreign Ministry, (iii) that he had been jailed for four years as a result of refusing to carry out a drug raid which was in fact a raid on the home of an Iranian dissident, with women and children, in Pakistan, and (iv) that he had been released after pretending to repent. On 1 April 1992, the Immigration and Refugee Board determined that the author was a Convention refugee based on his political opinion and membership in a particular social group.

2.2 On 17 June 1993, the Solicitor-General of Canada and the Minister of Employment and Immigration, having considered security intelligence reports stating that the author was trained to be an assassin by the Iranian Ministry of Intelligence and Security ("MIS"), both certified, under section 40 (1) of the *Immigration Act* ("the Act"), that they were of the opinion that the author was inadmissible to Canada under section 19 (1) of the Act as there were reasonable grounds to believe that he would engage in terrorism, that he was a member of an organization that would engage in terrorism and that he had engaged in terrorism. On the same date, the certificate was filed with the Federal Court, while the author was served with a copy of the certificate and, pursuant to section 40 (1) (2) (b) of the Act, he was taken into mandatory detention, where he remained until his deportation nine years later.

2.3 On 22 June 1993, in accordance with the statutory procedure set out in section 40(1) of the Act for a determination of whether the Ministers' certificate was "reasonable on the basis of the information available", the Federal Court (Denault J) examined the security intelligence reports in camera and heard other evidence presented by the Solicitor-General and the Minister, in the absence of the plaintiff. The Court then provided the author with a summary of the information, required by statute to allow the affected person to be "reasonably" informed of the circumstances giving rise to the certification while being appropriately redacted for national security concerns, and offered the author an opportunity to respond.

2.4 Rather than exercising his right to be heard under this procedure, the author then challenged the constitutionality of the certification procedure and his detention subsequent to it in a separate action before the Federal Court. On 12 September 1995, the Federal Court (McGillis J) rejected his challenge, holding that the procedure struck a reasonable balance between competing interests of the State and the individual, and that the detention upon the Ministers' certification pending the Court's decision on its reasonableness was not arbitrary.

The author's further appeals against that decision were dismissed by the Federal Court of Appeal and the Supreme Court on 4 July 1996 and 3 July 1997, respectively.

2.5 Following the affirmation of the constitutionality of section 40 (1) procedure, the Federal Court (Denault J) proceeded with the original reasonableness hearing, and, following extensive hearings, concluded on 17 April 1998 that the certificate was reasonable. The evidence included information gathered by foreign intelligence agencies which was divulged to the Court in camera in the author's absence on national security grounds. The Court also heard the author testify on his own behalf in opposition to the reasonableness of the certificate. The Court found that there were grounds to believe that the author was a member of the MIS, which "sponsors or undertakes directly a wide range of terrorist activities including the assassination of political dissidents worldwide". The Federal Court's decision on this matter was not subject to appeal or review.

2.6 Thereafter, in April 1998, an immigration adjudicator determined that the author was inadmissible to Canada, and ordered the author's deportation. On 22 April 1998, the author was informed that the Minister of Citizenship and Immigration would assess the risk the author posed to the security of Canada, as well as the possible risk that he would face if returned to Iran. The Minister was to consider these matters in deciding under section 53 (1) (b) of the Act1/ (which implements article 33 of the Convention on the Status of Refugees) whether the prohibition on removing a Convention refugee to the country of origin could be lifted in the author's case. The author was accordingly given an opportunity to make submissions to the Minister on these issues.

2.7 On 12 August 1998, the Minister, following representations by the author that he faced a clear risk of torture in Iran, determined, without reasons and on the basis of a memorandum attaching the author's submissions, other relevant documents and a legal analysis by officials, that he (a) constituted a danger to the security of Canada, and (b) could be removed directly to Iran. The author applied for judicial review of the Minister's opinion. Pending the hearing of the application, the author applied for release from detention pursuant to section 40(1)(8) of the Act, as 120 days has passed from the issue of the deportation order against him2/. On 15 March 1999, the Federal Court (Denault J), finding reasonable grounds to believe that his release would be injurious to the safety of persons in Canada, particularly Iranian dissidents, denied the application for release. The Federal Court of Appeal upheld this decision.

2.8 On 23 June 1999, the Federal Court (McGillis J) rejected the author's application for judicial review of the Minister's decision, finding there was ample evidence to support the Minister's decision that the author constituted a danger to Canada and that the decision to deport him was reasonable. The Court also dismissed procedural constitutional challenges, including to the process of the provision of the Minister's danger opinion. On 18 January

2000, the Court of Appeal rejected the author's appeal. It found that "the Minister could rightly conclude that the [author] would not be exposed to a serious risk of harm, let alone torture" if he were deported to Iran. It agreed that there were reasonable grounds to support the allegation that the author was in fact a trained assassin with the Iranian secret service, and that there was no basis upon which to set aside the Minister's opinion that he was a danger to Canada.

2.9 On 11 January 2001, the Supreme Court unanimously rejected the author's appeal, finding that there was "ample support" for the Minister to decide that the author was a danger to the security of Canada. It further found the Minister's decision that he only faced a "minimal risk of harm", rather than a substantial risk of torture, in the event of return to Iran to be reasonable and "unassailable". On the constitutionality of deportation of persons at risk of harm under section 53 (1) (b) of the Act, the Court referred to its reasoning in a companion case of *Suresh v. Canada (Minister of Citizenship and Immigration)*3/ decided the same day, where it held that "barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice". As *Suresh* had established a *prima facie* risk of torture, he was entitled to enhanced procedural protections, including provision of all information and advice the Minister intended to rely on, receipt of an opportunity to address the evidence in writing and to be given written reasons by the Minister. In the author's case, however, the Court considered that he had not cleared the evidentiary threshold required to make a *prima facie* case and access these protections. The Court was of the view that the author, in the form of the letter advising him of the Minister's intention to consider his danger to Canada as well as the possible risks to him in the event of expulsion, "was fully informed of the Minister's case against him and given a full opportunity to respond". The process followed, according to the Court, was therefore consistent with principles of fundamental justice and not prejudicial to the author even though it had not followed the *Suresh* requirements.

2.10 The same day, the Committee indicated its request pursuant to rule 86 of its rules of procedure for interim measures of protection, however the State party's authorities proceeded with arrangements to effect removal. On 15 January 2002, the Ontario Superior Court (Dambrot J) rejected the author's argument that the principles of fundamental justice, protected by the *Charter*, prevented his removal prior to the Committee's consideration of the case. On 8 May 2002, the Court of Appeal for Ontario upheld the decision, holding that the request for interim measures was not binding upon the State party. On 16 May 2002, the Supreme Court, by a majority, dismissed the author's application for leave to appeal (without giving reasons). On 10 June 2002, the author was deported to Iran.

...

10.5 As to the claims under articles 6, 7, 13 and 14, with respect to the process and the fact of the author's expulsion, the Committee observes, at the initial stage of the process, that at the Federal Court's "reasonableness" hearing on the security certification the author was

provided by the Court with a summary redacted for security concerns reasonably informing him of the claims made against him. The Committee notes that the Federal Court was conscious of the "heavy burden" upon it to assure through this process the author's ability appropriately to be aware of and respond to the case made against him, and the author was able to, and did, present his own case and cross-examine witnesses. In the circumstances of national security involved, the Committee is not persuaded that this process was unfair to the author. Nor, recalling its limited role in the assessment of facts and evidence, does the Committee discern on the record any elements of bad faith, abuse of power or other arbitrariness which would vitiate the Federal Court's assessment of the reasonableness of the certificate asserting the author's involvement in a terrorist organization. The Committee also observes that the Covenant does not, as of right, provide for a right of appeal beyond criminal cases to all determinations made by a court. Accordingly, the Committee need not determine whether the initial arrest and certification proceedings in question fell within the scope of articles 13 (as a decision pursuant to which an alien lawfully present is expelled) or 14 (as a determination of rights and obligations in a suit at law), as in any event the author has not made out a violation of the requirements of those articles in the manner the Federal Court's "reasonableness" hearing was conducted.

10.6 Concerning the author's claims under the same articles with respect to the subsequent decision of the Minister of Citizenship and Immigration that he could be deported, the Committee notes that the Supreme Court held, in the companion case of *Suresh*, that the process of the Minister's determination in that case of whether the affected individual was at risk of substantial harm and should be expelled on national security grounds was faulty for unfairness, as he had not been provided with the full materials on which the Minister based his or her decision and an opportunity to comment in writing thereon and further as the Minister's decision was not reasoned. The Committee further observes that where one of the highest values protected by the Covenant, namely the right to be free from torture, is at stake, the closest scrutiny should be applied to the fairness of the procedure applied to determine whether an individual is at a substantial risk of torture. The Committee emphasizes that this risk was highlighted in this case by the Committee's request for interim measures of protection.

10.7 In the Committee's view, the failure of the State party to provide him, in these circumstances, with the procedural protections deemed necessary in the case of *Suresh*, on the basis that the present author had not made out a *prima facie* risk of harm fails to meet the requisite standard of fairness. The Committee observes in this regard that such a denial of these protections on the basis claimed is circuitous in that the author may have been able to make out the necessary level of risk if in fact he had been allowed to submit reasons on the risk of torture faced by him in the event of removal, being able to base himself on the material of the case presented by the administrative authorities against him in order to contest a decision that included the reasons for the Minister's decision that he could be removed.

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The Committee emphasizes that, as with the right to life, the right to be free from torture requires not only that the State party not only refrain from torture but take steps of due diligence to avoid a threat to an individual of torture from third parties.

10.8 The Committee observes further that article 13 is in principle applicable to the Minister's decision on risk of harm, being a decision leading to expulsion. Given that the domestic procedure allowed the author to provide (limited) reasons against his expulsion and to receive a degree of review of his case, it would be inappropriate for the Committee to accept that, in the proceedings before it, "compelling reasons of national security" existed to exempt the State party from its obligation under that article to provide the procedural protections in question. In the Committee's view, the failure of the State party to provide him with the procedural protections afforded to the plaintiff in *Suresh* on the basis that he had not made out a risk of harm did not satisfy the obligation in article 13 to allow the author to submit reasons against his removal in the light of the administrative authorities' case against him and to have such complete submissions reviewed by a competent authority, entailing a possibility to comment on the material presented to that authority. The Committee thus finds a violation of article 13 of the Covenant, in conjunction with article 7.

10.9 The Committee notes that as article 13 speaks directly to the situation in the present case and incorporates notions of due process also reflected in article 14 of the Covenant, it would be inappropriate in terms of the scheme of the Covenant to apply the broader and general provisions of article 14 directly.

10.10 As a result of its finding that the process leading to the author's expulsion was deficient, the Committee thus does not need to decide the extent of the risk of torture prior to his deportation or whether the author suffered torture or other ill-treatment subsequent to his return. The Committee does however refer, in conclusion, to the Supreme Court's holding in *Suresh* that deportation of an individual where a substantial risk of torture <u>had</u> been found to exist was not necessarily precluded in all circumstances. While it has neither been determined by the State party's domestic courts or by the Committee that a substantial risk of torture <u>did</u> exist in the author's case, the Committee expresses no further view on this issue other than to note that the prohibition on torture, including as expressed in article 7 of the Covenant, is an absolute one that is not subject to countervailing considerations.

11. The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by Canada of article 9, paragraph 4, and article 13, in conjunction with article 7, of the Covenant. The Committee reiterates its conclusion that the State party breached its obligations under the Optional Protocol by deporting the author before the Committee's determination of his claim.

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12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. In the light of the circumstances of the case, the State party, having failed to determine appropriately whether a substantial risk of torture existed such as to foreclose the author's deportation, is under an obligation (a) to make reparation to the author if it comes to light that torture was in fact suffered subsequent to deportation, and (b) to take such steps as may be appropriate to ensure that the author is not, in the future, subjected to torture as a result of the events of his presence in, and removal from, the State party. The State party is also under an obligation to avoid similar violations in the future, including by taking appropriate steps to ensure that the Committee's requests for interim measures of protection will be respected.

Notes

...

1/. Section 53 (1) (b) reads, in relevant part: "…[N]o person who is determined…to be a Convention refugee…shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless

> …
> (b) the person is a member of an inadmissible class described in paragraph 19 (1) (e), (f), (g), (j), (k) or (l) and the Minister is of the opinion that the person constitutes a danger to the security of Canada".

2/. Section 40 (1) provides, in material part:

> "(8) Where a person is detained under subsection (7) and is not removed from Canada within 120 days of after the making of a removal order relating to that person, the person may apply to the [Federal Court].
>
> (9) On [such] an application, the [Federal Court] may, subject to such terms and conditions as the [Federal Court] deems appropriate, order that the person be released from detention if the [Federal Court] is satisfied that:
>
> > (a) The person will not be removed from Canada within a reasonable time; and
> > (b) The person's release would not be injurious to national security or the safety of persons."

3/. [2002] 1 SCR.

For dissenting opinion in this context, see Ahani v. Canada (1051/2002), ICCPR, A/59/40 vol. II (29

March 2004) 260 at Individual Opinion of Mr. Nisuke Ando, 280, and Individual Opinion of Sir Nigel Rodley, Mr. Roman Wieruszewski and Mr. Ivan Shearer, 282.

- *Wilson v. Australia* (1239/2004), A/59/40 vol. II (1 April 2004) 571 at paras. 2.1 and 4.4.

...

2.1 The author claims that he has been involved in a number of different legal proceedings in the State of New South Wales which have been conducted unfairly, and which have denied him the right to a trial by jury.

...

4.4 As to the author's claims under articles 2, 9, 14, 17 and 26 of the Covenant, the Committee considers that they either fall outside the scope of those provisions or have not been substantiated, for purposes of admissibility. The Committee observes, in particular, that the Covenant does not confer the right to trial by jury in either civil or criminal proceedings, rather the touchstone is that all judicial proceedings, with or without a jury, comport with the guarantees of fair trial 3/ Consequently, the author's claims are inadmissible under articles 2 and 3 of the Optional Protocol.

...

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Notes

...

3/ See, for example, *Kavanagh v. Ireland* (No. 1), case No. 818/1998, Views adopted on 4 April 2001.

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- *Dugin v. Russian Federation* (815/1998), ICCPR, A/59/40 vol. II (5 July 2004) 34 at paras. 2.1, 2.2, 3.1, 3.2, 9.3, 10 and 11.

...

2.1 On the evening of 21 October 1994, the author and his friend Yuri Egurnov were standing near a bus stop when two adolescents carrying beer bottles passed by. The author and his friend, both of whom were drunk, verbally provoked Aleksei Naumkin and Dimitrii Chikin in order to start a fight. When Naumkin tried to defend himself with a piece of glass and injured the author's hand, the author and his accomplice hit him on the head and, when he fell down, they kicked him in the head and on his body. Naumkin died half an hour later.

2.2 On 30 June 1995, Dugin and Egurnov were found guilty by the Orlov *oblastnoi* (regional) court of premeditated murder with aggravating circumstances. The judgement was based on the testimony of the author, his accomplice, several eyewitnesses and the victim,

Chikin, several forensic reports and the crime scene report. Dugin and Egurnov were each sentenced to 12 years' imprisonment in a correctional labour colony.

...

3.1 The author's counsel states that the surviving victim, Chikin, was not present during the proceedings in the Orlov court, even though the court took into account the statement he had made during the investigation. According to counsel, Chikin gave contradictory testimony in his statements, but as Chikin did not appear in court, Dugin could not cross-examine him on these matters, and was thus deprived of his rights under article 14, paragraph 3 (e), of the Covenant.

3.2 Counsel further claims that the presumption of innocence under article 14, paragraph 2, of the Covenant was not respected in the author's case. He bases this statement on the forensic expert's reports and conclusions of 22 and 26 October, 9 November, 20 December 1994 and 7 February 1995, which were, in his opinion, vague and not objective. He states, without further explanation, that he had posed questions to which the court had had no answer. He therefore requested the court to have the forensic expert appear to provide clarification and comments, and to allow him to lead additional evidence. The court denied his request.

...

9.3 The author claims that his rights under article 14 were violated because he did not have the opportunity to cross-examine Chikin on his evidence, summon the expert and call additional witnesses. While efforts to locate Chikin proved to be ineffective for reasons not explained by the State party, very considerable weight was given to his statement, although the author was unable to cross-examine this witness. Furthermore, the Orlov Court did not give any reasons as to why it refused the author's request to summon the expert and call additional witnesses. These factors, taken together, lead the Committee to the conclusion that the courts did not respect the requirement of equality between prosecution and defence in producing evidence and that this amounted to a denial of justice. Consequently, the Committee concludes that the author's rights under article 14 have been violated.

...

10. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 14 of the Covenant.

11. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee considers that the author is entitled to an appropriate remedy, including compensation and his immediate release.

LEGAL RIGHTS - RIGHT TO A FAIR AND PUBLIC HEARING

- *Smartt v. Guyana* (867/1999), ICCPR, A/59/40 vol. II (6 July 2004) 41 at paras. 5.3, 5.5, 6.3, 6.4, 7 and 8.

...

5.3 As to the allegation that the conviction of the author's son was based on insufficient evidence, the Committee notes that this claim relates to the evaluation of facts and evidence by the trial judge and the jury. The Committee recalls that it is generally for the appellate courts of States parties to the Covenant and not for the Committee to evaluate the facts and evidence in a particular case, unless it could be ascertained that the evaluation of evidence and the instructions to the jury were clearly arbitrary or otherwise amounted to a denial of justice.5/ The Committee notes that the fact that a criminal conviction may be based on circumstantial evidence, as maintained by the author in the present case, does not of itself warrant a finding that the evaluation of facts and evidence, or the trial as such, was manifestly tainted by arbitrariness or amounted to a denial of justice. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol, as the author has failed to substantiate her claim for purposes of admissibility in this respect.

...

5.5 With respect to the author's claim that the trial against her son was otherwise unfair, the Committee notes that the trial documents submitted by the author reveal that her son was not represented by counsel during the committal hearings. It also notes with concern that, despite three reminders addressed to it, the State party has failed to comment on the communication, including on its admissibility. In the absence of any such comments, the Committee considers that the author has sufficiently substantiated, for purposes of admissibility, that the trial against her son was unfair, and declares the communication admissible, insofar as it may raise issues under articles 6 and 14, paragraph 3 (d), of the Covenant.

...

6.3 The Committee recalls its jurisprudence that legal representation must be available at all stages of criminal proceedings, particularly in cases involving capital punishment.6/ The pre-trial hearings, having taken place before the Georgetown Magisterial Court between 16 November 1993 and 6 May 1994, that is after the author's son had been charged with murder on 31 October 1993, formed part of the criminal proceedings. Furthermore, the fact that most witnesses of the prosecution were examined at this stage of the proceedings for the first time, and were subject to cross-examination by the author's son, shows that the interests of justice would have required securing legal representation to the author's son through legal aid or otherwise. In the absence of any submission by the State party on the substance of the matter under consideration, the Committee finds that the facts before it disclose a violation of article 14, paragraph 3 (d), of the Covenant.

6.4 The Committee recalls that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation

of article 6 of the Covenant. 7/ In the present case, the sentence of death was passed without meeting the requirements of a fair trial set out in article 14 of the Covenant, and thus also in breach of article 6.

7. The Human Rights Committee...is of the view that the facts before it reveal a violation of articles 6 and 14, paragraph 3 (d), of the Covenant.

8. In accordance with article 2, paragraph 3, of the Covenant, the author's son is entitled to an effective remedy, including the commutation of his death sentence. The State party is also under an obligation to take measures to prevent similar violations in the future.

Notes

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5/ See e.g. communication No. 329/1988, *D. S. v. Jamaica*, Decision on admissibility adopted on 26 March 1990, at para. 5.2.

6/ See e.g. communication No. 1096/2002, *Kurbanova v. Tajikistan*, Views adopted on 6 November 2003, at para. 6.5; communication No. 781/1997, *Aliev v. Ukraine*, Views adopted on 7 August 2003, at para. 7.3; communication No. 775/1997, *Brown v. Jamaica*, Views adopted on 23 March 1999, at para. 6.6.

7/ See *ibid*., at paras. 7.7, 7.4 and 6.15, respectively.

- *Nazarov v. Uzbekistan* (911/2000), ICCPR, A/59/40 vol. II (6 July 2004) 91 at paras. 6.3, 7 and 8.

...

6.3 The author...alleges that the State party violated article 14, and points to a number of circumstances which he claims, as a matter of evidence, point clearly to the author's innocence. The Committee recalls its jurisprudence and notes that it is generally not for itself, but for the courts of States parties, to review or to evaluate facts and evidence, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence was manifestly arbitrary or amounted to a denial of justice. However in the current case the author claims that the State party violated article 14 of the Covenant, in that the Court denied the author's request for the appointment of an expert to determine the geographical origin of the hemp, which may have constituted crucial evidence for the trial. In this respect, the Committee has noted that in the court decision submitted before it, the court when denying this request gave no justification. In the absence of any explanation from the State party, the Committee considers that this denial did not respect the requirement of equality between the

prosecution and defence in producing evidence, and amounted to a denial of justice. The Committee therefore decides that the facts before it reveal a violation of article 14 of the Covenant.

7. The Human Rights Committee...is of the view that the facts before it reveal a violation of articles 6 and 14, paragraph 3 (d), of the Covenant.

8. In accordance with article 2, paragraph 3, of the Covenant, the author's son is entitled to an effective remedy, including the commutation of his death sentence. The State party is also under an obligation to take measures to prevent similar violations in the future.

- *Van Marcke v. Belgium* (904/2000), ICCPR, A/59/40 vol. II (7 July 2004) 65 at paras. 2.1-2.3, 8.2 and 8.3.

...
2.1 In July 1988, a former employee filed a complaint against the author, who was the managing director of *N.V. Interprovinciale stoombootdiensten Flandria*, a shipping company, for fiscal fraud and evasion of income tax. As a result, the Public Prosecutor ordered a preliminary inquiry. Later, on 22 June 1989, the Public Prosecutor ordered the collection of information from the Tax Control Office. The information collected from the Tax Control Office was reflected in police protocol No. 17.375 of 17 November 1989. In the protocol, mention was made of a conversation with a tax officer, who had inquired into the taxes paid by the company in 1987 and 1988, and whose report was annexed to the protocol. According to the author, this was done in violation of article 350 of the Income Tax Code in force at the time, which provided that tax officials could only be heard as witnesses in criminal matters and which prohibited their active participation in a criminal inquiry. On 26 February 1990, the same tax officer reported to the Public Prosecutor breaches of the Tax Code committed by officers in the company.

2.2 On 18 June 1990, after completing the preliminary inquiry, the Public Prosecutor laid charges of forgery and fraud against the author and several co-accused. On 19 June 1990, the author was arrested and questioned by the police. According to the author, the Prosecution was waiting for the outcome of the investigation by the Tax Control Office into the tax payments of the company. The Tax Control Office's report was sent to the Judge in charge of the case on 1 April 1992. The case against the author was then referred for trial at the Court of First Instance in Antwerp.

2.3 By judgement of 30 June 1995, the author was convicted of forgery and fraud. On 28 June 1996, the Court of Appeal confirmed the judgement of first instance and sentenced him to a suspended sentence of two years' imprisonment and a fine of 500,000 BEF.

LEGAL RIGHTS - RIGHT TO A FAIR AND PUBLIC HEARING

...
8.2 With regard to the author's allegation that the tax inspector participated actively in the preliminary inquiry and that his reports were used in the criminal case against him, in violation of article 14, paragraph 1 of the Covenant, the Committee notes that the courts rejected the author's claim in this respect and found on the facts that there was no active participation of any tax officials in the criminal case. As established by the Committee's jurisprudence, the Committee is generally not in a position to review the evaluation of facts by the domestic courts. The information before the Committee and the arguments advanced by the author do not show that the Courts' evaluation of the facts was manifestly arbitrary or amounted to a denial of justice. The author has further argued that the appearance of bias in itself constitutes a violation of article 14, paragraph 1, of the Covenant, even if the tax inspector did not participate actively in the criminal case against him. While acknowledging that in certain circumstances the appearance of bias may be such as to violate the right to a fair hearing by an independent and impartial tribunal, the Committee finds that in the present case the facts do not amount to a violation of article 14, paragraph 1 of the Covenant.

8.3 With regard to the author's claim that his right to equal access to information was violated by the courts' refusal to add the fiscal file to the criminal file, the Committee notes that the Court and the author had access to all documents used in the criminal case against him, and that the fiscal file did not constitute the basis of the prosecutor's case before the courts. The fact that information supplied by the fiscal authorities alerted the prosecutor to lines of inquiry for independent investigations did not require that the fiscal file be made part of the prosecution's case. The Committee observes that the right to a fair hearing contained in article 14, paragraph 1, does not in itself require that the prosecution bring before the court all information it reviewed in preparation of a criminal case, unless the failure to make the information available to the courts and the accused would amount to a denial of justice, such as by withholding exonerating evidence. The Committee notes that the author has made no claim that anything contained in the fiscal file would have been exculpatory. In the circumstances of the instant case, the Committee finds that the information before it does not show that the refusal of the courts to join the fiscal file to the criminal case hampered the author's right to defence or otherwise amounted to a violation of his right to fair hearing.

- *Saidov v. Tajikistan* (964/2001), ICCPR, A/59/40 vol. II (8 July 2004) 164 at paras. 6.7, 6.9, 7 and 8.

...
6.7 The Committee has noted the author's claim that her husband's right to a fair trial was violated, *inter alia* by the fact that the judge conducted the trial in a biased manner and refused even to consider the revocation of the confessions made by Mr. Saidov during the investigation. No explanation was provided by the State party for the reasons of that

situation. Therefore, on the basis of the strength of the material before it, the Committee concludes that the facts as submitted before it reveal a violation of Mr. Saidov's rights under article 14, paragraph 1, of the Covenant.

...

6.9 The Committee recalls 9/ that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant. In the current case, the sentence of death was passed, and subsequently carried out, in violation of the right to a fair trial as set out in article 14 of the Covenant, and therefore also in violation of article 6 of the Covenant.

7. The Human Rights Committee...is of the view that the facts before it disclose a violation of Mr. Saidov's rights under articles 6, 7, 10, paragraph 1, and 14, paragraphs 1, 2, 3 (b), (d), and (g), and 5, of the Covenant.

8. Under article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy, including compensation. The State party is under an obligation to take measures to prevent similar violations in the future.

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Notes

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9/ See *Conroy Levy v. Jamaica*, communication No. 719/1996, and *Clarence Marshall v. Jamaica*, communication No. 730/1996, *Kurbanov v. Tajikistan*, communication No. 1096/2002.

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- *Perterer v. Austria* (1015/2001), ICCPR, A/59/40 vol. II (8 July 2004) 231 at paras. 2.1, 2.2, 2.4, 2.7, 2.8, 9.2, 10.2-10.7, 11 and 12.

...

2.1 In 1980, the author was employed by the municipality of Saalfelden in the province of Salzburg. In 1981, he was appointed head of the administrative office of the municipality. On 31 January 1996, the mayor of Saalfelden filed a disciplinary complaint against the author with the Disciplinary Commission for Employees of Municipalities of the Province of Salzburg alleging, *inter alia*, that the author had failed to attend hearings on building projects, that he had used office resources for private purposes, that he had been absent during office hours, and other professional shortcomings. Moreover, the mayor claimed that the author had lost his reputation and the confidence of the public because of his private conduct.

2.2 On 29 February 1996, the trial senate of the Disciplinary Commission initiated

proceedings against the author, and on 28 May 1996, suspended him from office, reducing his salary by one third. On 4 June 1996, the author challenged the chairman of the senate, Mr. Guntram Maier, pursuant to section 124, paragraph 3, 2/ of the Federal Civil Servants Service Act. During a hearing held in June 1996, the chairman himself dismissed the challenge, arguing that the Salzburg Civil Servants of Municipalities Act,3/ as well as the Federal Civil Servants Act (Federal Act), permitted a challenge only with respect to members, but not the chairperson of the senate.

...

2.4 On 4 July 1996, the trial senate of the Disciplinary Commission dismissed the author. By decision of 25 September 1996, the Disciplinary Appeals Commission for Employees of Municipalities (*Disziplinaroberkommission für Gemeindebedienstete*), on the author's appeal, referred the case back to the Disciplinary Commission, on the basis that the participation of the chairman constituted a violation of the author's right to a fair trial, since the right to challenge a member of the senate also extended to its chairperson.

...

2.7 After the Appeals Commission had referred the matter back to the Disciplinary Commission, the trial senate, by procedural decision of 13 July 1999, initiated a third set of proceedings, again suspending the author from office. The author subsequently challenged the senate chairman, Michael Cecon, and two other members appointed by the Provincial Government for lack of impartiality, since they had participated in the second set of proceedings and had voted for his dismissal. By procedural decision of 3 August 1999, the chairman of the senate was replaced by the substitute chairman, Guntram Maier, who had chaired the trial senate in the first set of proceedings, and who had refused to desist when challenged by the author, and against whom the author had brought criminal charges. The author then reiterated his challenge, specifically challenging Mr. Maier, as being *prima facie* biased because of his previous role. On 16 August 1999, the chairman informed the author that Mr. Cecon would resume chairmanship.

2.8 The author subsequently filed complaints against the procedural decisions of 13 July and 3 August 1999 with the Constitutional Court, alleging breaches of his right to a trial before a tribunal established by law because of the composition of the trial senate, at the same time requesting the Court to review the constitutionality of the Salzburg Civil Servants of Municipalities Act (Salzburg Act), insofar as it provided for the participation of members delegated by the interested municipality. On 28 September 1999, the complaints were rejected by the Constitutional Court and, on 21 June 2000, by the Administrative Court, after the matter had been referred to it.

...

9.2 With regard to the State party's objection *ratione materiae*, the Committee recalls that the concept of a "suit at law" under article 14, paragraph 1, is based on the nature of the right in question rather than on the status of one of the parties 15/. The imposition of disciplinary measures taken against civil servants does not of itself necessarily constitute a determination

of one's rights and obligations in a suit at law, nor does it, except in cases of sanctions that, regardless of their qualification in domestic law, are penal in nature, amount to a determination of a criminal charge within the meaning of the second sentence of article 14, paragraph 1. In the present case, the State party has conceded that the trial senate of the Disciplinary Commission was a tribunal within the meaning of article 14, paragraph 1, of the Covenant. While the decision on a disciplinary dismissal does not need to be determined by a court or tribunal, the Committee considers that whenever, as in the present case, a judicial body is entrusted with the task of deciding on the imposition of disciplinary measures, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee. Consequently, the Committee declares the communication admissible *ratione materiae* insofar as the author claims to be a victim of violations of his rights under article 14, paragraph 1, of the Covenant.

...

10.2 With regard to the author's claim that several members of the trial senate in the third set of proceedings were biased against him, either because of their previous participation in the proceedings, the fact that they had already been challenged by the author, or because of their continued employment with the municipality of Saalfelden, the Committee recalls that "impartiality" within the meaning of article 14, paragraph 1, implies that judges must not harbour preconceptions about the matter put before them, and that a trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair and impartial 18/. The Committee notes that the fact that Mr. Cecon resumed chairmanship of the trial senate after having been challenged by the author during the same set of proceedings, pursuant to section 124, paragraph 3, of the Federal Civil Servants Act, raises doubts about the impartial character of the third trial senate. These doubts are corroborated by the fact that Mr. Maier was appointed substitute chairman and temporarily even chaired the senate, despite the fact that the author had previously brought criminal charges against him.

10.3 The Committee observes that, if the domestic law of a State party provides for a right of a party to challenge, without stating reasons, members of the body competent to adjudicate disciplinary charges against him or her, this procedural guarantee may not be rendered meaningless by the reappointment of a chairperson who, during the same stage of proceedings, had already relinquished chairmanship, based on the exercise by the party concerned of its right to challenge senate members.

10.4 The Committee also notes that, in its decision of 6 March 2000, the Appeals Commission failed to address the question of whether the decision of the Disciplinary Commission of 23 September 1999 had been influenced by the above procedural flaw, and to that extent merely endorsed the findings of the Disciplinary Commission 19/. Moreover, while the Administrative Court examined this question, it only did so summarily 20/. In the

light of the above, the Committee considers that the third trial senate of the Disciplinary Commission did not possess the impartial character required by article 14, paragraph 1, of the Covenant and that the appellate instances failed to correct this procedural irregularity. It concludes that the author's right under article 14, paragraph 1, to an impartial tribunal has been violated.

10.5 With respect to the rejection by the Disciplinary Commission of the author's requests to call witnesses and to admit further evidence in his defence, the Committee recalls that, in principle, it is beyond its competence to determine whether domestic tribunals properly evaluate the relevance of newly requested evidence 21/. In the Committee's view, the trial senate's decision that the author's evidentiary requests were futile because of the sufficient written evidence does not amount to a denial of justice, in violation of article 14, paragraph 1.

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

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

11. The Human Rights Committee...is of the view that the facts before it reveal a violation

of article 14, paragraph 1, of the Covenant.

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

Notes

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2/ Section 124, paragraph 3, of the Federal Civil Servants Act provides: "With the order instituting proceedings (Verhandlungsbeschluß), the accused shall be notified of the composition of the senate, including replacement members. The accused may challenge, without stating reasons, a member of the senate within one week after the order has been served. Upon request of the accused, up to three civil servants may be present during the hearing. The hearing shall otherwise be held in camera."

3/ Section 12 of the Salzburg Civil Servants of Municipalities Act reads, in pertinent parts: "(1) A Disciplinary Commission for Employees of Municipalities is established at the Office of the Provincial Government to conduct first instance disciplinary trials. (2) The Disciplinary Commission is composed of a chairperson, deputy chairpersons, and the necessary number of members. (3) The Provincial Government shall appoint for a period of three years the chairperson and the deputy chairpersons, who have to be chosen from among the civil servants with legal training employed by the Office of the Provincial Government or the Regional Administrative Authorities and the members - with the exception of those members delegated by the municipalities pursuant to paragraph 5 - who have to be chosen from among the civil servants employed by the municipalities governed by the present Act. (4) The Disciplinary Commission tries and decides cases in senates composed of a chairperson and four members. The chairperson and two members chosen from among the civil servants employed by municipalities are appointed by the Provincial Government. (5) Two further members of the senates are delegated by the municipality which is a party to the proceedings. If the municipality fails to delegate two members or replacement members […] within a period of three days after a written request, the chairperson shall select civil servants of the Provincial Government as additional members. […]"

...

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

...

18/ See communication No. 387/1989, *Arvo O. Karttunen v. Finland*, Views adopted on 23 October 1992, at para. 7.2.

19/ See page 3 of the decision of 6 March 2000 of the Appeals Commission, No.

11-12294/94-2000.

20/ See pages 7 *et seq*. of the decision of 29 November 2000 of the Administrative Court, No. Zl. 2000/09/0079-6.

21/ Cf. communication No. 174/1984, *J.K. v. Canada*, decision on admissibility adopted on 26 October 1984, at para. 7.2.

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

- *Everett v. Spain* (961/2000), A/59/40 vol. II (9 July 2004) 436 at paras. 2.1-2.3 and 6.4.

...
2.1 The author arrived in Spain from the United Kingdom in 1983 and settled in Marbella with his wife. On 5 July 2000, he was arrested by the police pursuant to an extradition request from the United Kingdom based on a robbery alleged to have taken place in London in 1983, and on his alleged involvement in narcotics trafficking.

2.2 The author applied for provisional release. On 8 July 2000, Magistrates' Court No. 6 ruled that he should remain in provisional detention. The author appealed to the same court, arguing that he was a sick man and 70 years of age, and that he could not flee from justice because he had no identity documents. The court rejected his appeal in a judgement dated 20 July 2000. The author appealed to the First Criminal Division of the High Court, but his application was rejected on 10 October 2000. He also submitted an application for *amparo* to the Constitutional Court, but this was rejected on 16 November 2000.

2.3 The author's extradition was granted in a decision of the First Criminal Division dated 20 February 2001. The author submitted an appeal for reconsideration, which was rejected on 18 May 2001. The author again applied to the Constitutional Court for *amparo*, but his appeal was denied on 22 June 2001.
...
6.4 Recalling its earlier case law the Committee considers that although the Covenant does not require that extradition procedures be judicial in nature, extradition as such does not fall outside the protection of the Covenant. On the contrary, several provisions, including articles 6, 7, 9 and 13, are necessarily applicable in relation to extradition. Particularly, in cases where, as in the current one, the judiciary is involved in deciding about extradition, it must respect the principles of impartiality, fairness and equality, as enshrined in article 14, paragraph 1, and also reflected in article 13 of the Covenant. Nevertheless, the Committee considers that even when decided by a court the consideration of an extradition request does

not amount to the determination of a criminal charge in the meaning of article 14. Consequently, those of the author's claims that relate to specific provisions in paragraphs 2 and 3 of article 14, are incompatible *ratione materiae* with the provisions in question and hence inadmissible pursuant to article 3 of the Optional Protocol...
...

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

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

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

6.3 In accordance with its consistent practice the Committee takes the view that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected, constitutes a violation of article 6 of the Covenant. In the circumstances of the current case the State party has violated the rights of Bharatraj and

Lallman Mulai under article 6 of the Covenant.

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

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

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Notes

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

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- *Nallaratnam v. Sri Lanka* (1033/2001), ICCPR, A/59/40 vol. II (21 July 2004) 246 at paras. 7.2 and 7.4-7.6.

...

7.2 As to the claim of a violation of article 14, paragraph 3 (f), due to the absence of an external interpreter during the author's alleged confession, the Committee notes that this provision provides for the right to an interpreter during the court hearing only, a right which was granted to the author 15/. However, as clearly appears from the court proceedings, the confession took place in the sole presence of the two investigating officers - the Assistant Superintendent of Police and the Police Constable; the latter typed the statement and provided interpretation between Tamil and Sinhalese. The Committee concludes that the author was denied a fair trial in accordance with article 14, paragraph 1, of the Covenant by solely relying on a confession obtained in such circumstances.

...

7.4 On the claim of a violation of the author's rights under article 14, paragraph 3 (g), in that he was forced to sign a confession and subsequently had to assume the burden of proof that it was extracted under duress and was not voluntary, the Committee must consider the principles underlying the right protected in this provision. It refers to its previous jurisprudence that the wording, in article 14, paragraph 3 (g), that no one shall "be compelled to testify against himself or confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological coercion from the investigating authorities on the accused with a view to obtaining a confession of guilt.17/ The Committee considers that it is implicit in this principle that the prosecution prove that the confession was made without

duress. It further notes that pursuant to section 24 of the Sri Lankan Evidence Ordinance, confessions extracted by "inducement, threat or promise" are inadmissible and that in the instant case both the High Court and the Court of Appeal considered evidence that the author had been assaulted several days prior to the alleged confession. However, the Committee also notes that the burden of proving whether the confession was voluntary was on the accused. This is undisputed by the State party since it is so provided in section 16 of the PTA [Prevention of Terrorism Act]. Even if, as argued by the State party, the threshold of proof is "placed very low" and "a mere possibility of involuntariness" would suffice to sway the court in favour of the accused, it remains that the burden was on the author. The Committee notes in this respect that the willingness of the courts at all stages to dismiss the complaints of torture and ill-treatment on the basis of the inconclusiveness of the medical certificate (especially one obtained over a year after the interrogation and ensuing confession) suggests that this threshold was not complied with. Further, insofar as the courts were prepared to infer that the author's allegations lacked credibility by virtue of his failing to complain of ill-treatment before its Magistrate, the Committee finds that inference to be manifestly unsustainable in the light of his expected return to police detention. Nor did this treatment of the complaint by its courts satisfactorily discharge the State party's obligation to investigate effectively complaints of violations of article 7. The Committee concludes that by placing the burden of proof that his confession was made under duress on the author, the State party violated article 14, paragraphs 2, and 3 (g), read together with article 2, paragraph 3, and 7 of the Covenant.

7.5 The Human Rights Committee...is of the view that the facts before it disclose violations of articles 14, paragraphs 1, 2, 3, (c), and 14, paragraph (g), read together with articles 2, paragraph 3, and 7 of the Covenant.

7.6 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 and appropriate remedy, including release or retrial and compensation. The State party is under an obligation to avoid similar violations in the future and should ensure that the impugned sections of the PTA are made compatible with the provisions of the Covenant.

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15/ *B.d.B. v. Netherlands*, case No. 273/1988, decision of 30 March 1989, and *Yves Cadoret v. France*, case No. 221/1987, decision of 11 April 1991 and *Herve Le Bihan v. France*, case No. 323/1988, decision of 9 November 1989.

...

17/ *Berry v. Jamaica*, case No. 330/1988, Views adopted on 4 July 1994.

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- *Deisl v. Austria* (1060/2002), ICCPR, A/59/40 vol. II (27 July 2004) 283 at paras. 11.1-11.6.

...

11.1 The Committee recalls, at the outset, that the concept of a "suit at law" in article 14, paragraph 1, of the Covenant is based on the nature of the right and obligations in question rather than on the status of the parties 24/. It notes that the proceedings concerning the authors' request for an exemption from the zoning regulations, as well as the orders to demolish their buildings, relate to the determination of their rights and obligations in a suit at law, in particular their right to freedom from unlawful interference with their privacy and home, their rights and interests relating to their property, and their obligation to comply with the demolition orders. It follows that article 14, paragraph 1, is applicable to these proceedings.

11.2 The Committee further recalls that the right to a fair hearing under article 14, paragraph 1, entails a number of requirements, including the condition that the procedure before the national tribunals must be conducted expeditiously 25/. The issue before the Committee is therefore whether the delays complained of violated this requirement, to the extent that they occurred or continued after the entry into force of the Optional Protocol for the State party.

11.3 As to the alleged delay in examining the authors' appeal of 18 February 1987, the Committee notes that the authors themselves requested a postponement of the decision until November 1987. Although it thereafter took the Provincial Government another two years to set aside the impugned decision, of which 20 months coincide with the period of time following the entry into force of the Optional Protocol for the State party, the Committee considers that the authors have not demonstrated that this delay was so unreasonable, as to amount to a violation of article 14, paragraph 1, taking into account that: (a) the delay had no detrimental effect on their legal position; (b) the authors chose not to avail themselves of available remedies to accelerate the proceedings; and (c) the outcome of the appellate proceedings was beneficial to them.

11.4 Regarding the alleged delays in the proceedings before the Constitutional Court (16 November 1993 to 29 November 1994 and 15 January 1996 to 29 September 1998), the Committee observes that, while the first set of these proceedings were conducted expeditiously, the second may have exceeded the ordinary length of proceedings resulting in a complaint's dismissal and referral to another court. However, in the Committee's view, the second delay is not so long as to constitute, in proceedings before a constitutional court in a property-related matter, a violation of the concept of fairness enshrined in article 14, paragraph 1, of the Covenant.

11.5 As to the alleged delays in the proceedings before the Administrative Court (29 November 1994 to 12 October 1995 and 29 September 1998 to 3 November 1999), the

Committee has noted the State party's uncontested argument that the authors could have filed their complaints simultaneously with the Constitutional and Administrative Courts, to avoid a loss of time. In the light of the complexity of the matter complained of, as well as the Court's detailed legal reasoning in its decisions of 12 October 1995 and 3 November 1999, the Committee does not consider that the delays complained of amount to a violation of article 14, paragraph 1, of the Covenant.

11.6 The Committee notes that the length of the proceedings as a whole, counted from the date of entry into force of the Optional Protocol for Austria (10 March 1988) to the date of the Administrative Court's final decision (3 November 1999), totalled 11 years and 8 months. In assessing the reasonableness of this delay, the Committee bases itself on the following considerations: (a) the length of each individual stage of the proceedings; 26/ (b) the fact that the suspensive effect of the proceedings *vis-à-vis* the demolition orders was beneficial, rather than detrimental, to the authors' legal position; (c) the fact that the authors did not avail themselves of possibilities to accelerate administrative proceedings or to file complaints simultaneously; (d) the considerable complexity of the matter; and (e) the fact that, during this time, the Provincial Government twice, and the Administrative Court once, set aside negative decisions on appeal by the authors. The Committee considers that these factors outweigh any detrimental effects which the legal uncertainty during the protracted proceedings may have caused to the authors. It concludes, having regard to all the circumstances of the case, that their right to have their case determined without undue delay has not been violated.

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24/ See communication No. 207/1986, *Yves Morael v. France*, Views adopted on 28 July 1989, at para. 9.3.

25/ See communication No. 441/1990, *Robert Casanovas v. France*, at para. 7.3; communication No. 238/1987, *Floresmilo Bolaños v. Ecuador*, at para. 8.4; communication No. 207/1986, *Yves Morael v. France*, at para. 9.3.

26/ See above paras. 11.4-11.6.

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- *Khomidov v. Tajikistan* (1117/2002), ICCPR, A/59/40 vol. II (29 July 2004) 363 at paras. 2.8, 2.9, 6.5, 7 and 8.

...

2.8 The Supreme Court judge, S.K., allegedly acted in an accusatory manner. Mr.

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Khomidov's lawyer's requests were denied, particularly when he asked to call supplementary witnesses, and when he requested that a medical expert examine him to clarify whether he had sustained injuries as a result of the torture he was subjected to. The only witness of the crime was the 5-year old daughter of the neighbours, and she was the only one who identified Mr. Khomidov as the culprit. According to the author, the child's testimony was the consequence of the police "preparation" she was subjected to. As to the episode related to the hijacking of a car, the author alleges that the eyewitnesses could not recognize her son during an identification parade and in court.

2.9 On 12 September 2001, the Supreme Court found Mr. Khomidov guilty of all the charges against him and sentenced him to death. According to the author, the death penalty was imposed on her son because the judge was afraid of eventual persecution against her by the victims' family. On 13 November 2001, on appeal, the Criminal College of the Supreme Court upheld the decision. On 3 October 2002, the President of Tajikistan refused to grant her son a pardon.

...

6.5 The Committee has noted the author's claim that the trial of Mr. Khomidov was unfair, as the court did not fulfil its obligation of impartiality and independence (see paragraphs 2.8 and 2.9 above). It has noted also the author's contention that her son's lawyer requested the court to call witnesses on his behalf, and to have Mr. Khomidov examined by a doctor to evaluate his injuries sustained as a result of the torture to which he was subjected to make him confess guilt. The judge denied his request without providing any reason. In the absence of any pertinent State party information on this claim, the Committee concludes that the facts before it disclose a violation of article 14, paragraphs 1, and 3 (e) and (g), of the Covenant.

...

7. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 7; 9, paragraphs 1 and 2; 14, paragraphs 1, and 3 (b), (e) and (g), read together with article 6, of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Khomidov with an effective remedy, entailing commutation of his sentence to death, a compensation, and a new trial with all the guarantees of article 14, or, should this not be possible, release. The State party is under an obligation to take measures to prevent similar violations in the future.

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- *Ganga v. Guyana* (912/2000), ICCPR, A/60/40 vol. II (1 November 2004) 40 at paras. 2.1, 2.2, 5.1-5.3 and 7.

...

2.1 Mr. Deolall was arrested on 26 October and charged with murder on 3 November 1993. On 22 November 1995, he was convicted of murder and sentenced to death in the Georgetown Criminal Assizes Court. He appealed to the High Court and subsequently to the Court of Appeal. The grounds of appeal to the Court of Appeal were that (a) the trial judge had erred in not putting the accused's defence adequately to the jury, and (b) that the trial judge had erroneously admitted inadmissible evidence, i.e. an alleged involuntary confession. The Court of Appeal dismissed his appeal and the Chief Justice confirmed the death sentence on 30 January 1997. With this it is submitted that all domestic remedies are exhausted. The author notes that Mr. Deolall has been on death row since November 1995, and that his sentence should have been commuted.

2.2 According to the author, Mr. Deolall was convicted on the basis of a single piece of evidence, namely the confession, which he is alleged to have signed after being subjected to ill-treatment during the interrogation by police officers. Although the police record shows that Mr. Deolall had no marks of violence on his body, at the trial it was disclosed that he had such marks when he had been examined individually by three doctors. It appears from the trial transcript, submitted by the author, that Mr. Deolall was examined on 30 October 1993 and 8 November 1993. Dr. Persaud saw him on 30 October 1993, and in a medical report stated that the "examination revealed a small bruise on the lower level of the left alliae fosse region (lower region of the left side of the abdomen)". Dr. Maynard saw him on the same day and had a similar finding. Dr. Joshua Deen day saw him on 8 November 1993, and stated in his medical report that Mr. Deolall had "scratch marks on his back" and that in his view they were received between 27 October 1993 and 31 October 1993, i.e. prior to making the alleged statement.

...

5.1 The author claims that Mr. Deolall was ill-treated during interrogations by police officers and forced to sign a confession statement, a claim that raises issues under article 14, paragraphs 1 and 3 (g) and article 6, of the Covenant. The Committee refers to its previous jurisprudence that the wording, in article 14, paragraph 3 (g), that no one shall "be compelled to testify against himself or confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological coercion from the investigating authorities on the accused with a view to obtaining a confession of guilt, and that it is implicit in this principle that the prosecution prove that the confession was made without duress 3/. In the current case, the Committee notes that the testimony of 3 doctors at the trial, that Mr. Deolall displayed injuries, as outlined in paragraph 2.2 above, as well as Mr. Deolall's own statement, would *prima facie* support the allegation that such ill-treatment indeed occurred during the police interrogations, prior to his signing of the confession statement. In its

instructions to the jurors, the court clearly stated that if the jurors found that Mr. Deolall was beaten by the police prior to giving his confession, even though it was a slight beating, they could not attach any weight to that statement and would need to acquit the defendant. However, the Court did not instruct the jurors that they would need to be convinced that the prosecution had managed to prove that the confession was voluntary.

5.2 The Committee maintains its position that it is generally not in the position to evaluate facts and evidence presented before a domestic court. In the current case, however, the Committee takes the view that the instructions to the jury raise an issue under article 14 of the Covenant, as the defendant had managed to present *prima facie* evidence of being mistreated, and the Court did not alert the jury that that the prosecution must prove that the confession was made without duress. This error constituted a violation of Mr. Deolall's right to a fair trial as required by the Covenant, as well as his right not to be compelled to testify against himself or confess guilt, which violations were not remedied upon appeal. Therefore, the Committee concludes that the State party has violated article 14, paragraphs 1, and 3 (g), of the Covenant in respect of Mr. Deolall.

5.3 The Committee recalls its jurisprudence that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant 4/. In the present case, since the final sentence of death was passed without having observed the requirement for a fair trial set out in article 14, it must be concluded that the right protected by article 6 of the Covenant has also been violated.

...

7. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Deolall with an effective remedy, including release or commutation.

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3/ *Berry v. Jamaica*, case No. 330 1988, Views adopted on 4 July 1994 and *Nallaratnam Singarasa v. Sri Lanka*, case No. 1033/2001, Views adopted on 21 July 2004.

4/ *Taylor v. Jamaica*, communication No. 05/1996, *Levy v. Jamaica*, 719/1996.

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

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

2.2 The authors state that their lands were expropriated by the Government at a price considerably below the current price in comparison with voluntary purchases and other expropriations in the region.
...
3. The authors argue that their rights under articles 2, paragraph 1, 3, and 26 of the Covenant have been violated because they did not receive equal treatment in relation to the compensation paid for expropriated land property. They also claim to be victims of a violation of article 14, paragraph 1, of the Covenant, because of the failure of the Supreme Court to disclose the names of the judges participating in the decision on their application.
...
8.2 In respect to the authors' claim that they are the victims of a violation of article 14, paragraph 1 of the Covenant, the Committee notes the State party's explanation, which has not been contested by the authors, that the authors could at any time have requested the names of the judges participating in the decision from the Registry of the Supreme Court. The Committee therefore considers that the facts before it do not reveal any violation of article 14, paragraph 1 of the Covenant.

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

- *Czernin v. Czech Republic* (823/1998), ICCPR, A/60/40 vol II (29 March 2005) 1 at paras. 2.1-2.7, 7.2-7.5, 8, 9 and Individual Opinion of Ms. Ruth Wedgwood (concurring) at 10.

...
2.1 After the German occupation of the border area of Czechoslovakia in 1939, and the establishment of the "protectorate", Eugen and Josefa Czernin, the now deceased parents of the author, were automatically given German citizenship, under a German decree of 20 April 1939. After the Second World War, their property was confiscated on the ground that they were German nationals, under the Benes decrees Nos. 12/1945 and 108/1945. Furthermore, Benes decree No. 33/1945 of 2 August 1945 deprived them of their Czechoslovak citizenship, on the same ground. However, this decree allowed persons who satisfied certain

requirements of faithfulness to the Czechoslovak Republic2/ to apply for retention of Czechoslovak citizenship.

2.2 On 13 November 1945, Eugen and Josefa Czernin applied for retention of Czechoslovak citizenship, in accordance with Presidential Decree No. 33/1945, and within the stipulated time frame. A "Committee of Inquiry" in the District National Committee of Jindřichův Hradec, which examined their application, found that Eugen Czernin had proven his "anti-Nazi attitude". The Committee then forwarded the application to the Ministry of the Interior for a final decision. In December 1945, after being released from prison where he was subjected to forced labour and interrogated by the Soviet secret services NKVD and GPÚ, he moved to Austria with his wife. The Ministry did not decide on their applications, nor did it reply to a letter sent by Eugen Czernin on 19 March 1946, urging the authorities to rule on his application. A note in each of their files from 1947 states that the application was to be regarded as irrelevant as the applicants had voluntarily left for Austria, and their files were closed.

2.3 After the regime change in Czechoslovakia in late 1989, the author, only son and heir of Eugen and Josefa Czernin, lodged a claim for restitution of their property under Act No. 87/1991 and Act No. 243/1992. According to him, the principal precondition for the restitution of his property is the Czechoslovak citizenship of his parents after the war.

2.4 On 19 January and 9 May 1995 respectively, the author applied for the resumption of proceedings relating to his father's and his mother's application for retention of Czechoslovak citizenship. In the case of Eugen Czernin, a reply dated 27 January 1995 from the Jindřichův Hradec District Office informed the author that the proceedings could not be resumed because the case had been definitely settled by Act 34/1953, conferring Czechoslovak citizenship on German nationals who had lost their Czechoslovak citizenship under Decree 33/1945 but who were domiciled in the Czechoslovak Republic.3/ In a letter dated 13 February 1995, the author insisted that a determination on his application for resumption of proceedings be made. In a communication dated 22 February 1995, he was notified that it was not possible to proceed with the citizenship case of a deceased person and that the case was regarded as closed. On 3 March 1995, the author applied to the Ministry of Interior for a decision to be taken on his case. After the Ministry informed him that his letter had not arrived, he sent the same application again on 13 October 1995. On 24 and 31 January 1996, the author again wrote to the Minister of Interior. Meanwhile, in a meeting between the second author and the Minister of Interior, the latter indicated that there were not only legal but also political and personal reasons for not deciding on the case, and that "in any other case but [his], such an application for determination of nationality would have been decided favourably within two days". The Minister also promised that he would convene an ad hoc committee composed of independent lawyers, which would consult with the author's lawyers, but this committee never met.

2.5 On 22 February 1996, the Minister of Interior wrote to the author stating that "the decision on [his] application was not favourable to [him]". On 8 March 1996, the author appealed the Minister's letter to the Ministry of Interior. In a reply from the Ministry dated 24 April 1996, the author was informed that the Minister's letter was not a decision within the meaning of section 47 of Act No. 71/1967 on administrative proceedings and that it was not possible to appeal against a non-existent decision. On the same day, the author appealed the letter of the Minister to the Supreme Court which on 16 July 1996 ruled that the letter was not a decision by an administrative body, that the absence of such a decision was an insurmountable procedural obstacle, and that domestic administrative law did not give the courts any power to intervene against any failure to act by an official body.

2.6 After yet another unsuccessful appeal to the Ministry of Interior, the author filed a complaint for denial of justice in the Constitutional Court which, by judgement of 25 September 1997, ordered the Ministry of Interior to cease its continuing inaction which violated the complainant's rights. Further to this decision, the author withdrew his communication before the Human Rights Committee.

2.7 According to the author, the Jindřichův Hradec District Office (District Office), by decision of 6 March 1998, reinterpreted the essence of the author's application and, arbitrarily characterized it as an application for confirmation of citizenship. The District Office denied the application on the ground that Eugen Czernin had not retained Czech citizenship after being deprived of it, in accordance with the Citizenship Act of 1993, which stipulates that a decision in favour of the plaintiff requires, as a prerequisite, the favourable conclusion of a citizenship procedure. The District Office did not process the author's initial application for resumption of proceedings on retention of citizenship. Further to this decision, the author resubmitted and updated his communication to the Committee in March 1998.

....

7.2 The main issue before the Committee is whether the administrative authorities (the District Office in Jindřichův Hradec and the Ministry of Interior) acted in a way that violated the authors' right, under article 14, paragraph 1, to a fair hearing by a competent, independent and impartial tribunal, in conjunction with the right to effective remedy as provided under article 2, paragraph 3.

7.3 The Committee notes the statement of the authors that the District Office and Ministry of Interior, in their decisions of 6 March and 17 June 1998, arbitrarily reinterpreted his application on resumption of proceedings on retention of citizenship and applied the State party's current citizenship laws rather than Decree No. 33/1945, on which the initial application had been based. The Committee further notes that the latter decision was quashed by the Prague High Court and yet referred back for a rehearing. In its second assessment of the case, the Ministry of Interior applied Decree No. 33/1945, and denied the

application.

7.4 The Committee recalls its jurisprudence that the interpretation and application of domestic law is essentially a matter for the courts and authorities of the State party concerned. However, in the pursuit of a claim under domestic law, the individual must have access to effective remedies, which implies that the administrative authorities must act in conformity with the binding decisions of national courts, as admitted by the State party itself. The Committee notes that the decision of the Ministry of Interior of 31 May 2002, as well as its confirmation by the Minister on 1 January 2003, were both quashed by the Prague Town Court on 5 May 2004. According to the authors, the Town Court ruled that the authorities had taken these decisions without the required reasoning and arbitrarily, and that they had ignored substantive evidence provided by the applicants, including the author's father, Eugen Czernin. The Committee notes that the State party has not contested this part of the authors' account.

7.5 The Committee further notes that since the authors' application for resumption of proceedings in 1995, they have repeatedly been confronted with the frustration arising from the administrative authorities' refusal to implement the relevant decisions of the courts. The Committee considers that the inaction of the administrative authorities and the excessive delays in implementing the relevant courts' decisions are in violation of article 14, paragraph 1, in conjunction with article 2, paragraph 3, which provides for the right to an effective remedy.

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 14, paragraph 1, of the Covenant. With regard to the above finding, the Committee considers that it not necessary to examine the claim under article 26 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 the requirement that its administrative authorities act in conformity with the decisions of the courts.

Notes

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2/ Decree 33/1945, paragraph 2 (1) stipulates that persons "who can prove that they remained true to the Republic of Czechoslovakia, never committed any acts against the Czech and Slovak peoples and were actively involved in the struggle for its liberation or suffered under the National Socialist or Fascist terror shall retain Czechoslovak citizenship."

3/ Act 34/1953 of 24 April 1953 "Whereby certain persons acquire Czech citizenship rights", paragraph 1 (1) stipulates that "Persons of German nationality, who lost Czechoslovak citizenship rights under Decree 33/1945 and have on the day on which this law

comes into effect domicile in the territory of the Czechoslovak Republic shall become Czech citizens, unless they have already acquired Czech citizenship rights".

Individual Opinion of Ms. Ruth Wedgwood

In the first case of this series, *Simunek v. The Czech Republic*, No. 516/1992, the Committee invoked the norm of "equal protection of the law" as recognized under article 26 of the Covenant. The Committee held that a state cannot impose arbitrary conditions for the restitution of confiscated property. In particular, the Committee held that restoration of private property must be available even to persons who no longer enjoy national citizenship and are no longer permanent residents - at least when the state party, under its prior communist regime, was "responsible for the departure" of the claimants. See Views of the Committee, No. 516/1992, paragraph 11.6.

The Committee has followed these views in subsequent cases, including *Adam v. The Czech Republic,* No. 586/1994; *Blazek et al. v. The Czech Republic*, No. 857/1999; and *Des Fours Walderode v. The Czech Republic*, No. 747/1997.

Committee member Nisuke Ando, writing individually in *Adam v. The Czech Republic*, No. 586/1994, properly pointed out that traditionally, private international law has permitted states to restrict the ownership of immovable properties to citizens. But a totalitarian regime that forces its political opponents to flee, presents special circumstances. And there is no showing that the Czech Republic has, in regard to new purchasers of real property, required either citizenship or permanent residence.

It is against this background that the Committee is brought to consider the case of *Czernin v. The Czech Republic*, No. 823/1998. Here, the Committee has challenged the state party not on the grounds of denial of equal treatment, but on a question of process - finding that the administrative authorities of the state party had "refuse[d] to carry out the relevant decisions of the courts" of the state party concerning property restoration.

The author's father, accompanied by his wife, left for Austria in December 1945, after interrogation in prison by the Soviet secret services NKVD and GPU. In 1989, after the fall of the communist regime in former Czechoslovakia, the author, as sole heir, sought restitution of his father's property, and in 1995, sought to renew his parents' applications for restoration of Czech citizenship. Since that time, the Czech Constitutional Court, the Prague High Court, and the Prague Town Court have, respectively, chastised the Czech Interior Ministry for failure to act upon the author's application, erroneous reliance on a 1993 citizenship law, and the absence of "necessary argumentation" concerning his father's asserted anti-Nazi posture (required for retention of Czech citizenship, under the post-war

decree No. 33/1945 of Czech president Eduard Benes, in the case of ethnic Germans).

In one sense, this case is simpler than the previous cases, since the issue is process, rather than the limits of permissible substantive grounds. Nonetheless, one should note that the courts of the Czech Republic have, ultimately, sought to provide an effective remedy to the authors, in the consideration of their claims. Many democracies have seen administrative agencies that are reluctant to reach certain results, and the question is whether there is a remedy within the system for a subordinate agency's failure to impartially handle a claim. One could not adopt any *per se* rule that three rounds of appellate litigation amounts to proof that an applicant has been deprived of a right to a fair hearing by a competent, independent and impartial tribunal, especially since here the appellate courts have acted to restrain the administrative agency in question on its various grounds of denial of the author's claims. The Committee has not held that administrative proceedings fall within the full compass of article 14.

Equally, this case does not touch upon the post-war circumstances of the mandatory transfer of the Sudeten German population, a policy undertaken after the National Socialists' catastrophic misuse of the idea of German self-determination. Though population transfers, even as part of a peace settlement, would not be easily accepted under modern human rights law, the wreckage of post-war Europe brought a different conclusion. Nor has the author challenged, and the Committee does not question, the authority of the 1945 presidential decree, which required that ethnic Germans from the Sudetenland who wished to remain in Czechoslovakia, had to demonstrate their wartime opposition to Germany's fascist regime. A new democracy, with an emerging economy, may also face some practical difficulties in unravelling the violations of private ownership of property that lasted for 50 years. In all of these respects, the State party is bound to act with fidelity to the Covenant, yet the Committee must also act with a sense of its limits.

- *Khalilov v. Tajikistan* (973/2001), ICCPR, A/60/40 vol. II (30 March 2005) 74 at paras. 7.4-7.6, 8 and 9.

...
7.4 The Committee has noted the author's claim, under article 14, paragraph 2, that her son's right to be presumed innocent was violated by investigators. She contends that her son was forced to admit guilt on at least two occasions during the investigation on national television. In the absence of any information from the State party, due weight must be given to these allegations. The Committee recalls its general comment No. 13 and its jurisprudence 6/ that it is "a duty for all public authorities to refrain from prejudging the outcome of a trial". In the present case, it concludes that the investigating authorities failed to comply with their obligations under article 14, paragraph 2.

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7.5 The author claimed that her son's right to have his death sentence reviewed by a higher tribunal according to law was violated. From the documents before the Committee, it transpires that on 8 November 2000, the author's son was sentenced to death at first instance by the Supreme Court. The judgement mentions that it is final and not subject to any further cassation appeal. The Committee recalls that even if a system of appeal may not be automatic, the right to appeal under article 14, paragraph 5, imposes on the State party a duty substantially to review, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case7/. In the absence of any pertinent explanation from the State party, the Committee considers that the absence of a possibility to appeal to a higher judicial instance judgements of the Supreme Court handed down at first instance, falls short of the requirements of article 14, paragraph 5, and, consequently, that there has been a violation of this provision 8/.

7.6 With regard to the author's claim under article 6, paragraph 1, of the Covenant, the Committee recalls that that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant 9/. In the current case, the sentence of death of the author's son was passed, and subsequently carried out, in violation of the right to a fair trial as set out in article 14 of the Covenant, and therefore also in violation of article 6 of the Covenant.

...

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of Mr. Khalilov's rights under articles 6, paragraph 1; 7; 10, paragraph 1; and 14, paragraphs 2, 3 (g) and 5, of the Covenant, and a violation of article 7 in the author's own respect.

9. Under article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including information on the location where her son is buried, and compensation for the anguish suffered. The State party is also under an obligation to prevent similar violations in the future.

Notes

...

6/ See, for example *Gridin v. The Russian Federation*, communication No. 770/1997, Views adopted on 20 July 2000.

7/ See *Domukovsky and al. v. Georgia*, communications No. 623-627/1995, Views adopted on 6 April 1998, and *Saidova v. Tajikistan*, communication No. 964/2001, Views adopted on 8 July 2004.

8/ See for example *Aliev v. Ukraine*, communication No. 781/1997, Views adopted on 7 August 2003, *Robinson v. Jamaica*, communication No. 223/1987, Views adopted on 30

March 1989, *Brown v. Jamaica*, communication No. 775/1997, Views adopted on 23 March 1999.

9/ See *Conroy Levy v. Jamaica*, communication No. 719/1996, Views adopted on 3 November 1998, *Clarence Marshall v. Jamaica*, communication No. 730/1996, Views adopted on 3 November 1998, *Kurbanov v. Tajikistan*, communication No. 1096/2002, Views adopted on 6 November 2003, and *Saidova v. Tajikistan*, communication No. 964/2001, Views adopted on 8 July 2004.

- *Rouse v. The Philippines* (1089/2002), ICCPR, A/60/40 vol. II (25 July 2005) 123 at paras. 2.1, 2.4-2.20, 6.3, 7.2, 8 and 9.

...

2.1 During a visit to the Philippines, the author was arrested, on 4 October 1995, for alleged sexual relations with a male minor and for a violation of the Child Abuse Law, which criminalizes sexual acts between an adult and a person under the age of 18. Although the police proposed bribes in return for dismissing the case, the author, claiming that he was innocent, chose to face trial.

...

2.4 The author was arrested without a warrant; he and Godfrey were taken to the police station, where Godfrey Domingo (hereafter referred to as the alleged victim) signed a sworn statement, witnessed by his parents, and filed a complaint against the author. He claimed that he was 15 years old and that the author had prompted him into sexual acts. In subsequent interviews, the alleged victim told the same story to Assistant City Prosecutor Aurelio, to one Dr. Caday, and two social workers.

2.5 Dr. Caday, who examined and interviewed the alleged victim after the incident, concluded in a medical certificate that the victim claimed to have been sodomized, but that the examination neither confirmed nor contradicted this statement.

2.6 On 11 October 1995, the alleged victim, assisted by his parents, signed an affidavit of desistance, confirming the version of the facts as related by the author, and admitted that he had been part of a set-up organized by police officers Augustin and Dancel. It transpires from the judgement of the Court of Appeal, that in this document, the alleged victim also stated that he was 18 years old when the author was arrested.

2.7 On 19 October, the author was charged with child abuse, under article III, section 5, paragraph b, of Republic Act 7610, otherwise known as "Special Protection of Children against Child Abuse, Exploitation and Discrimination Act". On 23 October, on arraignment,

the author pleaded not guilty; that same day, he filed a petition for bail. On 10 November, the Regional Trial Court of Laoag City, Branch II (hereafter referred to as the Trial Court) ruled that "the petition for bail had been overtaken by the fact that the prosecution was about to terminate the presentation of its evidence".

2.8 Despite a subpoena order against the alleged victim and his parents, they did not appear in hearings on 31 October and 10 November 1995.

2.9 On 7 December 1995, the author filed a demurrer to the evidence, mainly based on the fact that the prosecution rested its case on the statements made to others by the alleged victim, who was the only eyewitness of the events and who, despite a subpoena order, was not present for cross-examination. The demurrer also pointed out the inconsistencies in the testimonies of the other witnesses and the illegality of the arrest, and invoked the principle of presumption of innocence. The Court was asked to dismiss the case for insufficiency of evidence.

2.10 On 22 January 1996, before the author had submitted his defence statement, the Trial Court issued a pretrial order dismissing the demurrer to evidence for lack of merit, and found that "the evidence for the prosecution [was] sufficient to prove the guilt of the accused beyond reasonable doubt of the crime charged against him." The prosecution had presented the following circumstantial evidence: 1. A 21-year-old witness had reported that he and the author had engaged in sexual activities the day before the arrest, and the Court found that, despite his age, "his physical appearance shows that he looks like a minor". The Trial Court based its order on such assessment of evidence, although it had not even been offered as evidence by the prosecution, and the author had no opportunity to defend himself against the charge. 2. The police had found the author and the alleged victim naked in the hotel room when entering it. 3. The alleged victim had told the same story consistently to two social workers, the medical officer who examined him, and the Assistant City Prosecutor. The Court considered that these accounts by the alleged victim, although made out of court, were not simple hearsay.

2.11 On 2 February, the author filed a motion for reconsideration, claiming that, in the absence of testimony of the alleged victim, the testimonies of the other prosecution witnesses constituted hearsay, and that there was no proof of the minor age of the victim.

2.12 On 11 March, the Trial Court dismissed the motion for reconsideration for lack of merit.

2.13 On 26 March, the author filed a petition for *certiorari* to the Court of Appeal, seeking to annul the order of the Trial Court, dismissing the demurrer to evidence of 22 January 1996, as well as the order of the same court of 11 March 1996, which denied the motion for

reconsideration. The author based his petition on the deprivation of his right to confront or cross-examine witnesses against him and the alleged illegality of his arrest and of the search of his room, conducted without a warrant.

2.14 The author provides copies of the comments of the Solicitor General to the Appeal Brief, and his own reply to the Solicitor General's comments. In his comments, the Solicitor General argues that there was no need to prove the fact of actual sodomy of the alleged victim, as a different section of Act 7610, section 10 (b), article VI, penalizes "any person who shall keep or have in his company a minor, 12 years or under or who is 10 years or more his junior in any public or private place, hotel (…)". The Solicitor General argued that "the mere fact that the petitioner was found keeping in his company Domingo (…) who is younger than him by 24 years (…) raises the presumption that there was, at least, the commission of other acts of child abuse". The author recalls that he was charged for a violation of article III, section 5, paragraph b, of Act 7610, and not section 10 (b), article VI.

2.15 On 24 September 1996, the Court of Appeal dismissed the petition for *certiorari*, "which clearly suffered from procedural infirmity", as the author had not presented his contradicting evidence, and because the pretrial testimonies of the alleged victim were properly characterized as circumstantial evidence. The Court found that the evidence presented by the prosecution "may yet suffice to establish the lesser offence defined and penalized under section 10 (b) of the statute". The Court also found that the alleged illegality of the author's arrest only affected the admission into evidence of the pictures taken in the hotel room at the time of the arrest.

2.16 On 29 October 1996, the author filed a motion for reconsideration against the Court of Appeal's decision. He submits a copy of the comments of the Solicitor General, and his own reply to these comments.

2.17 On 12 February 1997, the Court of Appeal dismissed the author's motion for reconsideration.

2.18 On 20 March 1997, the author filed a Petition for Review in the Supreme Court, which dismissed it on 23 July 1997, for "failure by the petitioner to sufficiently show that the respondent court had committed any reversible error in rendering the questioned judgement".

2.19 On 12 January 1998, the Trial Court found that "the admission of Godfrey Domingo on what transpired between him and the accused which he repeatedly related to the different public officers immediately after the incident (…) cannot be overcome by the affidavit of desistance executed by Godfrey Domingo assisted by his parents", because the alleged victim was not in court to confirm the contents of the document. The Court ruled that the affidavit of desistance should be considered as hearsay, and had no probative value. It found the

author guilty beyond reasonable doubt of the crime charged against him. He was sentenced to serve a penalty of 10 years, 2 months and 21 days, as a minimum, to 17 years, 4 months and 1 day maximum, of imprisonment.

2.20 The author appealed to the Court of Appeal which upheld the conviction on 18 August 1999. The Court of Appeal based its decision on the following grounds. On the issue of the age of the alleged victim, the Court of Appeal considered that "the trial court did not commit any error in not giving probative value to [the] affidavit of desistance because the well-known rule is that retractions are generally unreliable and are looked upon with considerable disfavour by the courts". On the issue that the alleged victim did not appear in court for cross-examination, the Court of Appeal considered that this case constituted an exception to the general rule of non admissibility of hearsay evidence, because the alleged victim's statements took place immediately after the alleged facts, and were therefore natural and spontaneous. On the contradicting versions of the facts and testimonies of witnesses of the prosecution and the defence, the Court ruled that the issue of credibility of witnesses was an issue under the competence of the trial court. As a result, the decision of the Trial Court was affirmed.

...

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

...

7.2 The Committee recalls its jurisprudence that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice. In the present case, the Committee notes that the judge convicted the author *inter alia* on evidence that the accounts made by the alleged victim, although made out of court, were not simple hearsay. In addition, the judge did not admit the affidavit of desistance of the alleged victim as evidence while she admitted his first statement, although both were equally confirmed by witnesses who did not have a personal knowledge of the facts. Finally, the author had to overcome doubtful evidence, and even evidence that was not presented in court (the youthful looks of the 21-year-old witness, as well as the minor age of the alleged victim). In the

circumstances, the Committee finds that the court's choice of admissible evidence, in particular in the absence of any evidence confirmed by the alleged victim, as well as its evaluation thereof, were clearly arbitrary, in violation of article 14, paragraph 1 of the Covenant.

...

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 14, paragraphs 1 and 3 (c) and (e); 9, paragraph 1; and 7 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 adequate compensation, *inter alia* for the time of his detention and imprisonment.

- *Karatsis v. Cyprus* (1182/2003), ICCPR, A/60/40 vol. II (25 July 2005) 378 at paras. 2.1-2.6, 3.1 and 6.3-6.5.

...

2.1 On 11 January 1994, the author was appointed to the post of Family Court judge, a position that he continues to hold until today. In June 2000, he applied for a vacant post of District Court judge offering better promotion opportunities, a higher salary scale and higher pension benefits. On 12 July 2000, the Supreme Council of Judicature ("the Supreme Council"), a panel responsible for the appointment and promotion of judges under the Administration of Justice Law (1964), whose 13 members also sit as Supreme Court of Cyprus, selected the author for a temporary post as District Court judge for a period of one year from 1 October 2000, subject to the condition that he would resign from his post of Family Court judge before taking up his function at the District Court. At the end of that period, the Supreme Council would decide about his appointment as permanent judge and civil servant.

2.2 On 14 July 2000, acting on instructions from the Supreme Court, the Chief Registrar communicated with the author. After the author had accepted the conditions of appointment, including his prior resignation from the post of Family Court judge, the Chief registrar sent him an offer of appointment to the post of District Court judge (with the starting salary of the scale for District Court judges) and advertised the author's post of Family Court judge. By letter of 19 July 2000, the author accepted the written offer of appointment, which did not contain a proviso on his resignation from the post as Family Court judge.

2.3 On 26 September 2000, the Chief Registrar sent the author the following letter together with the document of his appointment to the temporary post of District Court judge:

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> "Further to the letter offering appointment dated 13 July 2000 and its acceptance by you by your letter dated 19 July 2000, I forward to you the relevant document of your appointment to the post of temporary district judge.
>
> 1. It is noted that, as you have been informed, a prerequisite to your appointment is your resignation from the post of judge of the Family Court before the assumption of your duties.
>
> 2. Provided the above [is] observed, you will take the judicial oath and will give the affirmation to the Republic for the post of temporary district judge next Monday, 2 October 2000, at 8.00 a.m. at the Supreme Court."

2.4 On 2 October 2000, the author objected to the condition of prior resignation from his post as Family Court judge, which he believed to have been dropped, as it had not been included in the written offer of appointment. He argued that such resignation would result in a reduction of his annual salary by CYP£ 10,000.00, loss of benefit of his more than six years of service in the Family Court, including loss of his pension benefits, and uncertainty of tenure as it was not sure whether he would be permanently appointed at the end of the one-year period. He would only accept the "new condition" of prior resignation in the event of permanent appointment to the post of District Court judge on a scale which corresponds to the salary of a Family Court judge with more than six years' service and if any acquired rights were preserved.

2.5 On the same day, the Chief Registrar informed the author that his appointment had been revoked, as he did not accept the conditions of such appointment. On 4 December 2000, the author filed a complaint with the Supreme Court, challenging the Supreme Council's notification of 26 September 2000 on the basis that it purported unilaterally to change the terms of his employment contract. The author also challenged the Council's decision of 2 October 2000 revoking his appointment. The case was first referred to a single judge of the Court but later assigned to the full Supreme Court by the Chief Registrar. On 23 January 2001, the author, by reference to article 153 (9) 2/ of the Constitution of Cyprus, applied for his case to be heard by a different bench, arguing that the 13 judges of the Supreme Court were the very authors of the impugned decisions, which they had taken in their capacity as members of the Supreme Council.

2.6 By judgement of 15 March 2001, the Supreme Court dismissed the case for want of jurisdiction without addressing the issue of impartiality 3/. It held that the appointment of judges is an exercise of the judicial rather than the executive or administrative power, thus falling within the exclusive competence of the Supreme Council and outside the Supreme Court's jurisdiction under article 146 of the Constitution of Cyprus 4/.

...

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3.1 The author claims that the fact that the Supreme Court's decision not to hear his case was taken by the same judges who, in their capacity as members of the Supreme Council, had revoked his temporary appointment as District Court judge deprived him of his rights to a fair and public hearing before an impartial tribunal and to an effective remedy, in violation of article 14, paragraph 1, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

...

6.3 As to the author's claim under article 14, paragraph 1, the Committee observes that, in contrast to *Casanovas v. France* and *Chira Vargas v. Peru*, the present case concerns the revocation of an appointment to another post within the judiciary rather than the dismissal from public service. The Committee recalls that the concept of "suit at law" under article 14, paragraph 1, is based on the nature of the rights in question rather than the status of one of the parties 12/. It also recalls that that the procedure of appointing judges, albeit subject to the right in article 25 (c) to access to public service on general terms of equality, as well as the right in article2, paragraph 3, to an effective remedy, does not as such come within the purview of a determination of rights and obligations in a suit at law within the meaning of article 14, paragraph 1.

6.4 The issue before the Committee is therefore whether the proceedings initiated by the author to challenge the revocation of his appointment to the post of District Court judge constituted a determination of his rights and obligations in a suit at law. The Committee recalls that the author chose not to resign from his post as Family Court judge to prevent a substantial reduction in his annual salary, exclusion of his years of service at the Family Court from the calculation of his pension benefits, as well as uncertainty of tenure. It notes that the author entirely preserved these acquired rights and considers that his claim concerning the loss of career prospects and possible increases in salary and pension benefits caused by the revocation of his appointment is merely hypothetical. Similarly, he has failed to substantiate any violation of his right under article 25 (c) to equal access to public service...The author has therefore not substantiated that the proceedings initiated by him constituted a determination of his rights and obligations in a suit at law within the meaning of article 14, paragraph 1.

6.5 While the revocation of appointments within the judiciary must not necessarily be determined by a court or tribunal, the Committee recalls that whenever a judicial body is entrusted under national law with the task of deciding on such matters, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee 14/. However, the author has not rebutted the State party's argument that the Supreme Court's judgement in *Kourris v. The Supreme Council of Judicature* was a binding precedent to the effect that the Supreme Council's exercise of powers is not subject to judicial review and falls outside the Supreme Court's jurisdiction under article 146 of the

Constitution. Accordingly, the Committee considers that the Supreme Court did not violate the guarantees of article 14, paragraph 1, when it declared itself incompetent to deal with the author's case, given that Cypriot law explicitly excluded the Court's jurisdiction to adjudicate the matter. The initiation of proceedings before a judicial body that manifestly lacks jurisdiction to deal with a matter cannot trigger the guarantees of article 14, paragraph 1. The Committee concludes that this part of the communication is therefore inadmissible *ratione materiae* under article 3 of the Optional Protocol.

Notes

...

2/ Article 153 (9) of the Constitution of Cyprus reads: "In the case of temporary absence or incapacity of the President of the High Court or of one of the Greek judges or of the Turkish judge thereof, the President of the Supreme Constitutional Court or the Greek judge of the Turkish judge thereof, respectively, shall act in his place during such temporary absence of incapacity. Provided that it is impracticable or inconvenient for the Greek or the Turkish judge of the Supreme Constitutional Court to act, the senior in office Greek or Turkish judge in the judicial service of the Republic shall so act respectively."

3/ The Court recalled that "[i]t is up to the court, which is legally competent under the law, to decide whether the subject matter of an application comes under its jurisdiction. This matter takes precedence over any other. Once it is considered that the court has jurisdiction to deal with the subject matter of an application, then the question of excluding judges who will exercise the court's jurisdiction is examined." Supreme Court of Cyprus, case No. 1547/2000, *Savvas Karatsis v. The Republic*, Judgement of 15 March 2001.

4/ The Supreme Court referred to its previous judgement in *Antonios Kourris v. The Supreme Council of Judicature* (1972) 3 CLR, 390.

...

12/ Communication No. 112/1981, *Y.L. v. Canada*, decision on admissibility adopted on 8 April 1986, at para. 9.2; communication No. 441/1990, *Casanovas v. France*, at para. 5.2.

...

14/ Cf. communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, at para. 9.2.

- *van den Hemel v. Netherlands* (1185/2003), ICCPR, A/60/40 vol. II (25 July 2005) 386 at paras. 2.1, 2.2, 2.5, 6.3, 6.5 and 7.

...

2.1 The author is an orthodontist living in the Netherlands. On 12 October 1989, he was

involved in a car accident in which road signs used by road construction companies were damaged. The author himself suffered "material and non-material" damage and a 20 per cent loss of earning capacity.

2.2 The damage was covered by several insurance companies, including Royal Nederlands Verzekeing Maatschappij NV (Royal), which partially compensated the damage. The insurance company VVAA Schadeverzekeing-smattschappij (VVAA), with whom the author had third party insurance at the time of the accident, partially compensated the damage to Royal. The question of guilt regarding the cause of the car accident and the damaged road signs led to a dispute between the author and the insurance company Royal.
...
2.5 On 26 September 1997, the author appealed the judgement to the Supreme Court. Two of the judges who considered this appeal, judges Herrman and Mijnssen, were at the time of the author's appeal, employed and remunerated by the Supervisory Board of the Insurance Sector (Raad van Toezicht Verzekeringen), which is financed by the League of Insurers (Verbond van Verzekeraars) of which Royal is a member. The Board is a disciplinary body that determines disputes between insurance companies and the insured.
...
6.3 The Committee has noted the author's claim that the hearing of his case violated article 14 of the Covenant because: (a) two of the judges who rendered judgement in the Court of Appeal also sit as substitute judges on the Utrecht Regional Court; (b) the Supreme Court judges who considered his case were biased because of their possible links to Royal (the insurance company that filed a claim against the author), because of their positions on the Supervisory Board of the Dutch Association of Insurers; and (c) the judges who pronounced on his case "could" have been shareholders of Royal.
...
6.5 Inasmuch as the second claim is concerned (bias because of the Supreme Court judges' position on the National Insurers Association Supervisory Board), the Committee observes that the author challenged the two Supreme Court judges in question and requested that they recuse themselves. While expressing some doubts about the propriety of a system that allows judges to sit on a supervisory board established by a business association, the Committee notes that the Supreme Court heard the author's recusal challenge in a different composition, proceeded to a full hearing of the positions and the evidence advanced by the author and the judges in question, and in the end dismissed the challenge and subsequently, on 24 December 1999, also the substance of the appeal. The Committee recalls that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice 8/. Nothing in the material before the Committee suggests that the proceedings before the Supreme Court that resulted in the dismissal of the author's challenge on 19 November 1999 and of the substance of his appeal a month later suffered from such defects. Accordingly, this claim is inadmissible under article 2 of the Optional Protocol.

The same applies with even more force to the author's claim, under article 14, that one of the Supreme Court judges who considered the author's challenge of the two Supreme Court judges had been a former colleague of one of these judges in the University of Amsterdam.
...
7. The Human Rights Committee therefore decides:

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

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Notes

...

8/ See *Errol Simms v. Jamaica*, communication No. 541/1993, declared inadmissible 3 April 1995.

_____

- *Fijalkovska v. Poland* (1061/2002), ICCPR, A/60/40 vol. II (26 July 2005) 103 at paras. 2.1-2.6, 4.4, 4.5, 8.2-8.5, 9 and 10.

...

2.1 The author has been suffering from schizophrenic paranoia since 1986. On 12 February 1998, she was committed to the Provincial Psychiatric Therapeutic Centre (hereinafter the "psychiatric institution") in Torun. She was committed under article 29 of the Law on Psychiatric Health Protection, by order of the Torun District Court of 5 February 1998.

2.2 On 29 April 1998, the author was permitted to leave the psychiatric institution, but continued her treatment as an outpatient; treatment was completed on 22 July 1998.

2.3 On 1 June 1998, the author went to the court registry to examine her case file and requested copies of the transcript of the court hearing and decision of 5 February 1998. She received a copy of the decision on 18 June 1998 at the psychiatric institution. On 24 June 1998, she lodged an appeal against the Torun District Court's decision of 5 February 1998. On 26 June 1998, the Regional Court dismissed her appeal as she had missed the statutory deadline.1/

2.4 On 1 July 1998, the author applied to the Regional Court to establish a new time limit for lodging her appeal. On 16 September 1998, the Regional Court refused her request. On 19 October 1998, the Torun Provincial Court similarly rejected the author's appeal against the decision of the Regional Court. The decision contained instructions on how to appeal to the Supreme Court.

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2.5 On 24 November 1998 and following a decision of the Provincial Court of 20 October 1998, the author was assigned a legal aid lawyer to prepare her appeal to the Supreme Court. On 21 April 1999, the Supreme Court rejected the author's appeal.

2.6 On 1 September 1999, the Supreme Court rejected, for lack of competence, the author's request to review the constitutionality of the provisions of the Law on Psychiatric Health Protection.

...

4.4 On 17 December 1997, and in order to corroborate the evidence submitted by the author's sister, the Torun District Court ordered that the author be independently examined. On 22 December 1997, the court-appointed medical expert informed the court that the author had not appeared when summoned for the examination. On the same day, the court ordered the author to appear for an examination on 30 December 1997. The author again ignored the summons. The court scheduled another psychiatric examination for 12 January 1998; on that day, the author was escorted to the examination by the police.

4.5 The expert who conducted the examination concluded that the author needed treatment in a psychiatric institution. On 5 February 1998 and on the basis of this evidence, the Torun District Court ordered the author's committal. The author failed to appear in court. Thus, the State party argued that there were serious grounds for subjecting the author to compulsory treatment and the decision was taken in accordance with the relevant provisions of Polish law. It concluded that the author has not submitted any reliable arguments in support of her submission concerning allegedly cruel, inhuman or degrading treatment.

...

8.2 As to whether the State party violated article 9 of the Covenant by committing the author to a psychiatric institution, the Committee notes its prior jurisprudence that treatment in a psychiatric institution against the will of the patient constitutes a form of deprivation of liberty that falls under the terms of article 9 of the Covenant. 5/ As to whether the committal was lawful, the Committee notes that it was carried out in accordance with the relevant articles of the Mental Health Protection Act and was, thus, lawfully carried out.

8.3 Concerning the possible arbitrary nature of the author's committal, the Committee finds it difficult to reconcile the State party's view that although the author was recognized, in accordance with the Act, to suffer from deteriorating mental health and inability to provide for her basic needs, she was at the same time considered to be legally capable of acting on her own behalf. As to the State party's argument that "mental illness cannot be equated to a lack of legal capacity", the Committee considers that confinement of an individual to a psychiatric institution amounts to an acknowledgement of that individual's diminished capacity, legal and otherwise. The Committee considers that the State party has a particular obligation to protect vulnerable persons within its jurisdiction, including the mentally impaired. It considers that as the author suffered from diminished capacity that might have

affected her ability to take part effectively in the proceedings herself, the court should have been in a position to ensure that she was assisted or represented in a way sufficient to safeguard her rights throughout the proceedings. The Committee considers that the author's sister was not in a position to provide such assistance or representation, as she had herself requested the committal order in the first place. The Committee acknowledges that circumstances may arise in which an individual's mental health is so impaired that so as to avoid harm to the individual or others, the issuance of a committal order, without assistance or representation sufficient to safeguard her rights, may be unavoidable. In the present case, no such special circumstances have been advanced. For these reasons, the Committee finds that the author's committal was arbitrary under article 9, paragraph 1, of the Covenant.

8.4 The Committee further notes that although a committal order may be appealed to a court, thereby allowing the individual to challenge the order, in this case, the author, who had not even been served with a copy of the order, nor been assisted or represented by anyone during the hearing who could have informed her of such a possibility, had to wait until after her release before becoming aware of the possibility of, and actually pursuing, such an appeal. Her appeal was ultimately dismissed as having been filed outside the statutory deadline. In the Committee's view, the author's right to challenge her detention was rendered ineffective by the State party's failure to serve the committal order on her prior to the deadline to lodge an appeal. Therefore, in the circumstances of the case, the Committee, finds a violation of article 9, paragraph 4, of the Covenant.

8.5 In light of a finding of a violation of article 9, the Committee need not consider whether there was also a violation of article 14 of the Covenant.

9. The Human Rights Committee...is of the view that the State party has violated article 9, paragraphs 1 and 4, of the International Covenant on Civil and Political Rights.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an adequate remedy, including compensation, and to make such legislative changes as are necessary to avoid similar violations in the future. The State party is under an obligation to avoid similar violations in the future.

Notes

1/ According to the decision, dated 26 June 1998, of the Regional Court, the statutory deadline was 26 February 1998.

...

5/ Communication No. 754/1997, *A. v. New Zealand*, Views adopted on 15 July 1999.

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CAT

- *P. E. v. France* (193/2001), CAT, A/58/44 (21 November 2002) 135 (CAT/C/29/D/193/2001) at paras. 2.1-2.4, 2.6-2.9, 2.13 and 6.2-6.7.

...

2.1 In November 1996, 2/ the complainant was arrested in the Landes region in the company of her partner, Juan Luis Agirre Lete, during a French customs check, and placed in pre-trial detention in Paris. Following her arrest, she was sentenced to 30 months' imprisonment on 23 February 1999 on charges of participating in a conspiracy as an alleged member of the Basque separatist organization, Euskadi Ta Askatasuna (ETA). 3/

2.2 As soon as she was arrested, the Spanish authorities made a first request for her extradition, but the request was later withdrawn on grounds of mistaken identity. A second request for extradition was lodged by the Spanish authorities a year later, alleging cooperation with an armed group, on the basis of evidence that was claimed to be questionable but was given a favourable reception by the French authorities.

2.3 A third request for extradition 4/ was lodged by Spain on the basis of a statement made by a certain Mikel Azurmendi Penagarikano, who was arrested in Seville on 21 March 1998 by the Spanish Civil Guard and who is alleged to have suffered a variety of treatments in breach of the Convention while being held. The complainant adds that Mr. Azurmendi's partner was arrested at the same time as he was and also suffered treatment in breach of the Convention.

2.4 While in custody, Mikel Azurmendi is reported to have made two statements under duress to the Civil Guard on 23 and 24 March 1998. In these statements, which are said to contain many contradictions and implausibilities, the complainant was implicated, with some 30 others, as a member of ETA's "Madrid Commando", and accused of carrying out, together with others, surveillance and checks on the route taken in Madrid by a van belonging to the general staff of the Spanish air force, with the aim of carrying out an act of violence, and of participating, together with others, in the preparation of an explosive device placed on board a vehicle that was used by other members of the commando in an attempted act of violence on 25 January 1994. The complainant nevertheless maintains that she had long since left Madrid at the time of the events.

...

2.6 At the end of his period in custody, on 25 March 1998, Mr. Azurmendi appeared before examining magistrate No. 6 of the National High Court in Madrid. He lodged a complaint relating to the torture to which he had been subjected during his time in custody and retracted his earlier statements. This complaint is still being investigated.

2.7 While in Madrid prison, Mr. Azurmendi was also examined by the prison medical services, and a court-ordered medical report was delivered on 18 October 1998. These medical reports and the testimony of a number of detainees arrested on the same day as Mr. Azurmendi corroborate his allegations of torture and ill-treatment.

2.8 After the complainant had been implicated in the statements made by Mr. Azurmendi on 23 and 24 March 1998, the Spanish procurator's office stipulated that proceedings against the complainant would be subject to the evidence. As the results were negative, Mr. Ismael Moreno Chamaro, central examining magistrate No. 2 attached to the National High Court in Madrid, issued an order on 29 October 1998 that the complainant should be imprisoned and committed for trial. On that basis, the judge issued a request for the extradition of the complainant on 22 December 1998. By means of a note verbale dated 10 March 1999, the Spanish Government, through its embassy, requested the French authorities to extradite the complainant. On 15 June 1999, she was placed in detention pending extradition in Fresnes prison. The request for extradition was heard in public session on 24 May 2000 by the first indictment division of the Paris Court of Appeal which, on 21 June 2000, ruled partially 5/ in favour of extradition in respect of the acts described by Spain as 19 attempted terrorist murders.

2.9 The complainant emphasizes that the request for extradition did not contain a copy of the statement that Mr. Azurmendi made on 25 March 1998 to the examining magistrate of the National High Court. In that regard, the complainant's counsel argued before the indictment division of the Paris Court of Appeal that it was unacceptable that, since the charges carried very severe prison terms, the requesting State had not mentioned the statement in which Mr. Azurmendi retracted everything that he had said and also stated that he did not know the complainant.

...

2.13 On 29 September 2000, the French Government issued a decree granting extradition of the complainant to the Spanish authorities. On 3 January 2001, the complainant appealed against the decree to the Council of State...The Council of State rejected this appeal by a decision dated 7 November 2001. The complainant was handed over to the Spanish authorities on the same day.

...

6.2 The Committee notes the complainant's allegations concerning the circumstances in which Mr. Azurmendi's statements were made, the evidence that she adduced in support of the allegations and the arguments put forward by the parties concerning the obligations of States parties under article 15 of the Convention.

6.3 The Committee considers in this regard that the generality of the provisions of article 15 derive from the absolute nature of the prohibition of torture and imply, consequently, an obligation for each State party to ascertain whether or not statements constituting part of the

evidence of a procedure for which it is competent have been made as a result of torture. The Committee finds that the statements at issue constitute part of the evidence of the procedure for the extradition of the complainant, and for which the State party is competent. In this regard, in the light of the allegations that the statements at issue, which constituted, at least in part, the basis for the additional extradition request, were obtained as a result of torture, the State party had the obligation to ascertain the veracity of such allegations.

6.4 The Committee notes that the French authorities, both judicial and administrative, examined the complainant's allegations and found that they had not been sufficiently substantiated. The Committee also notes that Mr. Azurmendi's complaint concerning the treatment to which he was allegedly subjected during custody is still being considered by the Spanish judicial authorities, which are expected to rule, at the end of the judicial proceedings, on whether Mr. Azurmendi's confession was obtained in an unlawful manner. The Committee considers that only this judicial ruling should be taken into consideration, and not the simple retraction by Mr. Azurmendi of a confession which he had previously signed in the presence of counsel.

6.5 The Committee reiterates in this regard that it is for the courts of the States parties to the Convention, and not the Committee, to evaluate facts and evidence in a particular case. It is for the appellate courts of States parties to the Convention to examine the conduct of the trial, unless it can be ascertained that the manner in which the evidence was evaluated was clearly arbitrary or amounted to a denial of justice, or that the trial judge had clearly violated his obligation of impartiality.

6.6 The Committee, bearing in mind that it is for the author to demonstrate that her allegations are well founded, considers that, on the basis of the facts before it, it cannot conclude that it has been established that the statements at issue were obtained as a result of torture.

6.7 Accordingly, the Committee is of the opinion that the facts before it do not enable it to establish that there has been a violation of article 15 of the Convention.

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Notes

...

2/ The complainant does not specify the exact date of her arrest.

3/ In this regard, the complainant stresses that her relations with her partner have always remained strictly at the personal level.

4/ This is the request referred to by the State party as an "additional request" - see paragraphs 4.4 ff.

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5/ The State party explains in its observations (see paragraphs 4.1 ff.) why the ruling is partially in favour of extradition.

- *Agiza v. Sweden* (233/2003), CAT, A/60/44 (20 May 2005) 197 at paras. 1.1, 2.2-2.6, 13.1-13.8 and 14.

1.1 The complainant is Ahmed Hussein Mustafa Kamil Agiza, an Egyptian national born on 8 November 1962, detained in Egypt at the time of submission of the complaint. He claims that his removal by Sweden to Egypt on 18 December 2001 violated article 3 of the Convention...

...

2.2 In 1991, the complainant left Egypt for Saudi Arabia for security reasons, and thereafter went to Pakistan, where his wife and children joined him. After the Egyptian Embassy in Pakistan refused to renew their passports, the family left in July 1995 for the Syrian Arab Republic under assumed Sudanese identities, in order to continue on to Europe. This plan failed, and the family moved to the Islamic Republic of Iran, where the complainant was granted a university scholarship.

2.3 In 1998, the complainant was tried *in absentia* in Egypt for terrorist activity directed against the State before a "Superior Court Martial", along with over 100 other accused. He was found guilty of belonging to the terrorist group "Al Gihad", and was sentenced, without possibility of appeal, to 25 years' imprisonment. In 2000, concerned that improving relations between Egypt and Iran would result in his being returned to Egypt, the complainant and his family bought air tickets, using Saudi Arabian identities, to Canada, and claimed asylum during a transit stop in Stockholm on 23 September 2000.

2.4 In his asylum application, the complainant claimed that he had been sentenced to "penal servitude for life" *in absentia* on charges of terrorism linked to Islamic fundamentalism, b/ and that, if returned, he would be executed, as others accused in the same proceedings allegedly had been. His wife contended that, if returned, she would be detained for many years, as the complainant's wife. On 23 May 2001, the Migration Board sought the opinion of the Swedish Security Police on the case. On 14 September 2001, the Migration Board held a "major inquiry" with the complainant, with a further inquiry following on 3 October 2001. During of the same month, the Security Police questioned the complainant. On 30 October 2001, the Security Police advised the Migration Board that the complainant held a leading position in an organization guilty of terrorist acts and was responsible for the activities of the organization. The Migration Board thereupon forwarded the complainant's case, on 12 November 2001, to the Government for a strength of the decision under chapter 7, section 11 (2) (2), of the Aliens Act. In the Board's view, on the basis of the information

before it, the complainant could be considered entitled to claim refugee status; however, the Security Police's assessment, which the Board saw no reason to question, pointed in a different direction. The balancing of the complainant's possible need for protection against the Security Police's assessment thus had to be made by the Government. On 13 November 2001, the Aliens Appeals Board, whose view the Government had sought, shared the Migration Board's assessment of the merits and also considered that the Government should decide the matter. In a statement, the complainant denied belonging to the organization referred to in the Security Police's statement, arguing that one of the designated organizations was not a political organization but an Arabic-language publication. He also claimed that he had criticized Osama Bin Laden and the Taliban in a letter to a newspaper.

2.5 On 18 December 2001, the Government rejected the asylum applications of the complainant and of his wife. The reasons for these decisions are omitted from the text of the present decision at the State party's request and with the agreement of the Committee. Accordingly, it was ordered that the complainant be deported immediately and his wife as soon as possible. On 18 December 2001, the complainant was deported, while his wife went into hiding to avoid police custody.

2.6 On 23 January 2002, the Swedish Ambassador to Egypt met the complainant at Mazraat Tora prison outside Cairo. c/ The same day, the complainant's parents visited him for the first time. They allege that they when they met him in the warden's office, he was supported by an officer and was near breakdown, hardly able to shake his mother's hand, pale and in shock. His face, particularly the eyes, and his feet were swollen, with his cheeks and bloodied nose seemingly thicker than usual. The complainant allegedly said to his mother that he had been treated brutally upon arrest by the Swedish authorities. During the eight-hour flight to Egypt, in Egyptian custody, he allegedly was bound by his hands and feet. Upon arrival, he was allegedly subjected to "advanced interrogation methods" at the hand of Egyptian State security officers, who told him that the guarantees provided by the Government of Egypt concerning him were useless. The complainant told his mother that a special electric device with electrodes was connected to his body, and that that he received electric shocks if he did not respond properly to orders.

...

13.1 The Committee has considered the merits of the complaint, in the light of all information presented to it by the parties, pursuant to article 22, paragraph 4, of the Convention. The Committee acknowledges that measures taken to fight terrorism, including denial of safe haven, deriving from binding Security Council resolutions are both legitimate and important. Their execution, however, must be carried out with full respect to the applicable rules of international law, including the provisions of the Convention, as affirmed repeatedly by the Security Council. s/

Substantive assessment under article 3

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13.2 The issue before the Committee is whether removal of the complainant to Egypt violated the State party's obligation under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected by the Egyptian authorities to torture. The Committee observes that this issue must be decided in the light of the information that was known, or ought to have been known, to the State party's authorities *at the time* of the removal. Subsequent events are relevant to the assessment of the State party's knowledge, actual or constructive, at the time of removal.

13.3 The Committee must evaluate whether there were substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon return to Egypt. The Committee recalls that the aim of the determination is to establish whether the individual concerned was personally at risk of being subjected to torture in the country to which he was returned...

13.4 The Committee considers at the outset that it was known, or should have been known, to the State party's authorities at the time of the complainant's removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons.t/ The State party was also aware that its own security intelligence services regarded the complainant as implicated in terrorist activities and a threat to its national security, and for these reasons its ordinary tribunals referred the case to the Government for a decision at the highest executive level, from which no appeal was possible. The State party was also aware of the interest in the complainant by the intelligence services of two other States: according to the facts submitted by the State party to the Committee, the first foreign State offered through its intelligence service an aircraft to transport the complainant to the second State, Egypt, where, to the State party's knowledge, he had been sentenced *in absentia* and was wanted for alleged involvement in terrorist activities. In the Committee's view, the natural conclusion from these combined elements, that is, that the complainant was at a real risk of torture in Egypt in the event of expulsion, was confirmed when, immediately preceding expulsion, the complainant was subjected on the State party's territory to treatment in breach of, at least, article 16 of the Convention by foreign agents but with the acquiescence of the State party's police. It follows that the State party's expulsion of the complainant was in breach of article 3 of the Convention. The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.

13.5 In light of this assessment, the Committee considers it appropriate to observe that its decision in the current case reflects a number of facts which were not available to it when it considered the largely analogous complaint of *Hanan Attia*,u/ where, in particular, it expressed itself satisfied with the assurances provided. The Committee's decision in that

case, given that the complainant had not been expelled, took into account the evidence made available to it up to the time the decision in that case was adopted. The Committee observes that it did not have before it the actual report of mistreatment provided by the current complainant to the Ambassador at his first visit and not provided to the Committee by the State party (see paragraph 14.10); the mistreatment of the complainant by foreign intelligence agents on the territory of the State party and acquiesced in by the State party's police; the involvement of a foreign intelligence service in offering and procuring the means of expulsion; the progressively wider discovery of information as to the scope of measures undertaken by numerous States to expose individuals suspected of involvement in terrorism to risks of torture abroad; the breach by Egypt of the element of the assurances relating to guarantee of a fair trial, which addresses the question of the weight that can be attached to the assurances as a whole; and the unwillingness of the Egyptian authorities to conduct an independent investigation despite appeals from the State party's authorities at the highest levels. The Committee observes, in addition, that the calculus of risk in the case of the wife of the complainant, whose expulsion would have taken place some years after that of the complainant, raised issues differing from the present case.

Procedural assessment under article 3

13.6 The Committee observes that the right to an effective remedy for a breach of the Convention underpins the entire Convention, for otherwise the protections afforded by the Convention would be rendered largely illusory. In some cases, the Convention itself sets out a remedy for particular breaches of the Convention,v/ while in other cases the Committee has interpreted a substantive provision to contain within it a remedy for its breach.w/ In the Committee's view, in order consistently to reinforce the protection of the norm in question and the understanding of the Convention, the prohibition on *refoulement* contained in article 3 should be interpreted as encompassing a remedy for its breach, even though it may not contain on its face such a right to remedy for a breach thereof.

13.7 The Committee observes that in the case of an allegation of torture or cruel, inhuman or degrading treatment having occurred, the right to remedy requires, after the event, an effective, independent and impartial investigation of such allegations. The nature of *refoulement* is such, however, that an allegation of breach of that article relates to a future expulsion or removal; accordingly, the right to an effective remedy contained in article 3 requires, in this context, an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise. The Committee's previous jurisprudence has been consistent with this view of the requirements of article 3, having found an inability to contest an expulsion decision before an independent authority, in that case the courts, to be relevant to a finding of a violation of article 3.x/

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13.8 The Committee observes that, in the normal course of events, the State party provides, through the operation of the Migration Board and the Aliens Appeals Board, for review of a decision to expel satisfying the requirements of article 3 of an effective, independent and impartial review of a decision to expel. In the present case, however, owing to the presence of national security concerns, these tribunals relinquished the complainant's case to the Government, which took the first and at once final decision to expel him. The Committee emphasizes that there was no possibility for review of any kind of this decision. The Committee recalls that the Convention's protections are absolute, even in the context of national security concerns, and that such considerations emphasize the importance of appropriate review mechanisms. While national security concerns might justify some adjustments to be made to the particular process of review, the mechanism chosen must continue to satisfy the requirements of article 3 of effective, independent and impartial review. In the present case, therefore, on the strength of the information before it, the Committee concludes that the absence of any avenue of judicial or independent administrative review of the Government's decision to expel the complainant constitutes a failure to meet the procedural obligation to provide for effective, independent and impartial review required by article 3 of the Convention.

...

14. The Committee against Torture...decides that the facts before it constitute breaches by the State party of articles 3 and 22 of the Convention.

Notes

...

b/ Counsel explains the deviation from the actual sentence on the basis that a 25-year sentence amounted to the same, as few could be expected to survive that length of time in prison.

c/ Counsel states that the following information concerning the complainant's whereabouts and well-being originates from Swedish diplomatic sources, the complainant's parents, a Swedish radio reporter and the complainant's Egyptian attorney.

...

s/ Security Council resolution 1566 (2004), third and sixth paragraphs; resolution 1456 (2003), para. 6, and resolution 1373 (2001), para. 3 (f).

t/ See, among other sources, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 44* (A/51/44), paras. 180-222 and *ibid*., Fifty-eighth Session, Supplement No. 44 (A/58/44, paras. 37-44).

u/ Communication No. 199/2002, [decision adopted on 17 November 2003].

v/ See articles 12-14 in relation to an allegation of torture.

w/ See *Dzemajl v. Yugoslavia*, communication No. 161/2000, decision adopted on 21 November 2002, para. 9.6: "The positive obligations that flow from the first sentence of article 16 of the Convention include an obligation to grant redress and compensate the victims of an act in breach of that provision. The Committee is therefore of the view that the State party has failed to observe its obligations under article 16 of the Convention by failing to enable the complainants to obtain redress and to provide them with fair and adequate compensation."

x/ *Arkauz Arana v. France*, communication No. 63/1997, decision adopted on 9 November 1999, paras. 11.5 and 12.

For dissenting opinion in this context, see *Agiza v. Sweden* (233/2003), CAT, A/60/44 (20 May 2005) 197 at Individual Opinion of Mr. Alexander Yakovlev (partly dissenting), 232.