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III. JURISPRUDENCE

ICCPR

- *Massera v. Uruguay* (R.1/5), ICCPR, A/34/40 (15 August 1979) 124 at paras 9(e)(i) and 10(i).

...
9. ...(e) ...

> (i) Luis María Bazzano Ambrosini was arrested on 3 April 1975 on the charge of complicity in "assistance to subversive association"...After being detained for one year he was granted conditional release, but this judicial decision was not respected and the prisoner was taken to an unidentified place, where he was confined and held incommunicado until 7 February 1977. On that date he was tried on the charge of "subversive association" and remained imprisoned in conditions seriously detrimental to his health. His lawyer twice attempted to obtain his provisional release, but without success.

10. The Human Rights Committee...is of the view that these facts...disclose violations of the International Covenant on Civil and Political Rights, in particular:

> (i) with respect to Luis María Bazzano Ambrosini,
>
> > ...
> > of Article 9 (1), because he was kept in custody in spite of a judicial order of release;
> > ...
> > of Article 9 (4), because he was denied any effective remedy to challenge his arrest and detention...

- *Valcada v. Uruguay* (R.2/9), ICCPR, A/35/40 (26 October 1979) 107 at paras. 10 and 12.

...
10. The Human Rights Committee ... decides to base its views on the following facts which have either been essentially confirmed by the State party or are unrepudiated or uncontested except for denials of a general character offering no particular information or explanations: Edgardo Dante Santullo Valcada was arrested on 8 or 9 September 1976. He was brought before a military judge on 25 October 1976 and again on 5 or 6 November 1976 when he was released. During his detention he did not have access to legal counsel. He had no possibility to apply for *habeas corpus*. Nor was there any decision against him which could be the

subject of an appeal.

...

12. The Human Rights Committee...is of the view that these facts, having arisen after 23 March 1976, disclose violations of the International Covenant on Civil and Political Rights, in particular:

> -of article 9 (4) because, *habeas corpus* being inapplicable in his case, Santullo Valcada vas denied an effective remedy to challenge his arrest and detention...

- *Perdomo v. Uruguay* (R.2/8), ICCPR, A/35/40 (3 April 1980) 111 at paras. 14(i), 14(ii) and 16.

...

14. The Committee therefore decides to base its views on the following considerations:

> (i) Alcides Lanza Perdomo was arrested for investigation on 2 February 1976 and detained under the prompt security measures as stated by the Government. He was kept incommunicado for many months. It is not in dispute that he was kept in detention for nearly eight months without charges, and later for another 13 months, on the charge of "subversive associations" apparently on no other basis than his political views and connexions. Then, after nearly 21 months in detention, he was sentenced for that offence by a military judge to three years severe imprisonment, less the period already spent in detention. Throughout his period of detention and during his trial he had no effective access to legal assistance. Although he had served his sentence on 2 February 1979, he was not released until 1 July 1979...
>
> (ii) Beatriz Weismann de Lanza was arrested for investigation on 17 February 1976 and detained under the prompt security measures, as stated by the Government. She was kept *incommunicado* for many months. It is not in dispute that she was kept in detention for more than seven months without charges, and later, according to the information provided by the Government, she was kept in detention for over 18 months (28 September 1976 to April 1978) on the charge of "assisting a subversive association", apparently on similar grounds to those in the case of her husband. She was tried and sentenced in April 1978 by a military judge, at which time her offence was deemed to be purged by the period spent in custody pending trial. She was, however, kept in detention until 11 February 1979. Throughout her period of detention and during her trial she had no effective access to legal

assistance...

16. The Human Rights Committee...is of the view that the facts set out above (para. 14), in so far as they continued or occurred after 23 March 1976...disclose...violations of the International Covenant on Civil and Political Rights, in particular:

> with respect to both Alcides Lanza Perdomo and Beatriz Weismann de Lanza;
> ...
> of article 9 (4) because they were unable effectively to challenge their arrest and detention;
> ...
> of article 9 (1) because they were not released, in the case of Alcides Lanza Perdomo, for five months and, in the case of Beatriz Weismann de Lanza, for 10 months, after their sentences of imprisonment had been fully served.

- *Carballal v. Uruguay* (R.8/33), ICCPR, A/36/40 (27 March 1981) 125 at paras. 9, 11 and 13.

...
9. The Human Rights Committee...hereby decides to base its views on the following facts which have been essentially confirmed by the State party, are unrefuted or are uncontested, except for denials of a general character offering no particular information or explanation. Leopoldo Buffo Carballal was arrested on 4 January 1976 and held incommunicado for more than five months, much of the time tied and blindfolded, in several places of detention. Recourse to *habeas corpus* was not available to him. He was brought before a military Judge on 5 May 1976 and again on 28 June or 28 July 1976, when an order was issued for his release. He was, however, kept in detention until 26 January 1977.
...
11. The Human Rights Committee has considered whether acts and treatment which *prima facie* are not in conformity with the Covenant could, for any reasons be justified under the Covenant in the circumstances. The Government has referred to provisions of Uruguayan law, including the "prompt security measures". The Covenant (art. 4) allows national measures derogating from some of its provisions only in strictly defined circumstances, and the Government has not made any submission of fact or law to justify derogation. Moreover, some of the facts referred to above raise issues under provisions from which the Covenant does not allow any derogation under any circumstances.
...
13. The Human Rights Committee...is of the view that these facts, in so far as they have occurred on or after 23 March 1976 (the date on which the Covenant entered into force in respect of Uruguay) or continued or had effects which themselves constitute a violation after

that date, disclose violations of the Covenant, in particular:

> ...
> of article 9 (1), because he was not released until approximately six or seven months after an order for his release was issued by the military court;
> ...
> of article 9 (4), because recourse to *habeas corpus* was not available to him...

- *De Bouton v. Uruguay* (R.9/37), ICCPR, A/36/40 (27 March 1981) 143 at paras 10, 12 and 13.

...
10. The Committee decides to base its views on the following facts which have either been essentially confirmed by the State party or are uncontested except for denials of a general character offering no particular information or explanation: Esther Soriano de Bouton was arrested on 12 February 1976, allegedly without any warrant. Although her arrest took place before the coming into force of the International Covenant on Civil and Political Rights and of the Optional Protocol thereto on 23 March 1976 in respect of Uruguay, her detention without trial continued after 23 March 1976. Following her arrest, Esther Soriano de Bouton was detained for eight months *incommunicado*, before she was taken before a military court which, within one month, decided that she was innocent and ordered her release. Her release was effected one month later on 25 January 1977.
...
12. The Human Rights Committee has considered whether acts and treatment, which are *prima facie* not in conformity with the Covenant, could for any reasons be justified under the Covenant in the circumstances. The Government, in its submission, has referred to the provisions of Uruguayan laws such as the prompt security measures. However, the Covenant (art. 4) does not allow national measures derogating from any of its provisions except in strictly defined circumstances and the Government has not made any submissions of fact or law to justify such derogation. Moreover, some of the facts referred to above raise issues under provisions from which the Covenant does not allow any derogation under any circumstances.

13. The Human Rights Committee...is of the view of that the facts...disclose violations of the Covenants in particular:

> ...
> Of article 9 (1), because she was not released until one month after an order for her release was issued by the military court;
> ...
> Of article 9 (4), because recourse to *habeas corpus* was not available to her.

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See also:

- *Ramírez v. Uruguay* (R.1/4), ICCPR, A/35/40 (23 July 1980) 121 at paras. 15 and 18.

- *Burgos v. Uruguay* (R.12/52), ICCPR, A/36/40 (29 July 1981) 176 at paras. 10.2, 11.6, 11.7, 12.1 and 13.

...

10.2 Sergio Rubén López Burgos was living in Argentina as a political refugee until his disappearance on 13 July 1976; he subsequently reappeared in Montevideo, Uruguay, not later than 23 October 1976, the date of his purported arrest by Uruguayan authorities and was detained under prompt security measures. On 4 November 1976 pre-trial proceedings commenced when the second military examining magistrate charged him with the offence of "subversive association", but the actual trial began in April 1978 before a military court of first instance, which sentenced him on 8 March 1979 to seven years' imprisonment; upon appeal the court of second instance reduced the sentence to four years six months. López Burgos was treated for a broken jaw in a military hospital from 5 February to 7 May 1977.

...

11.6 The Committee has considered whether acts and treatment, which are *prima facie* not in conformity with the Covenant, could for any reasons be justified under the Covenant in the circumstances of the case. The Government of Uruguay has referred to provisions, in Uruguayan law, of prompt security measures. However, the Covenant (article 4) does not allow national measures derogating from any of its provisions except in strictly defined circumstances, and the Government has not made any submissions of fact or law in relation thereto. Moreover, some of the facts referred to above raise issues under provisions from which the Covenant does not allow any derogation under any circumstances.

11.7 The Human Rights Committee notes that if the sentence of López Burgos ran from the purported date of arrest on 23 October 1976, it was due to be completed on 23 April 1981, on which date he should consequently have been released.

...

12.1 The Human Rights Committee further observes that although the arrest and initial detention and mistreatment of López Burgos allegedly took place on foreign territory, the Committee is not barred either by virtue of article 1 of the Optional Protocol ("...individuals subject to its jurisdiction...") or by virtue of article 2 (1) of the Covenant ("...individual within its territory and subject to its jurisdiction...") from considering these allegations, together with the claim of subsequent abduction into Uruguayan territory, inasmuch as these acts were perpetrated by Uruguayan agents acting on foreign soil.

...

13. The Human Rights Committee...is of the view that the communication discloses

violations of the Covenant, in particular:

> of article 7 because of the treatment (including torture) suffered by López Burgos at the hands of Uruguayan military officers in the period from July to October 1976 both in Argentina and Uruguay;
>
> of article 9 (1) because the act of abduction into Uruguayan territory constituted an arbitrary arrest and detention...

- *Casariego v. Uruguay* (R.13/56), ICCPR, A/36/40 (29 July 1981) 185 at paras. 9 and 11.

...
9. On 12 November 1978 Lilian Celiberti de Casariego was arrested in Porto Alegre (Brazil) together with her two children and with Universindo Rodriguez Diaz. The arrest was carried out by Uruguayan agents with the connivance of two Brazilian police officials. From 12 to 19 November 1978, Mrs. Celiberti was detained in her apartment in Porto Alegre and then driven to the Uruguayan border. She was forcibly abducted into Uruguayan territory and kept in detention. On 25 November 1978 the Fuerzas Conjuntas of Uruguay publicly confirmed the arrest of Mrs. Celiberti, her two children and Mr. Universindo Rodriguez Diaz, alleging that they had tried to cross the Brazilian Uruguayan border secretly with subversive material. Until 16 March 1979, Mrs. Celiberti was held incommunicado. On 23 March 1979, she was charged with "subversive association", "violation of the Constitution by conspiracy and preparatory acts thereto", and with other violations of the Military Penal Code in conjunction with the ordinary Penal Code. She was ordered to be tried by a Military Court. She was ordered to be kept in "preventive custody" and assigned an ex officio defense lawyer.
...
11. The Human Rights Committee...is of the view that the facts as found by the Committee, disclose violations of the International Covenant on Civil and Political Rights, in particular:

> of article 9(1), because the act of abduction into Uruguayan territory consitiuted an arbitrary arrest and detention...

- *Massiotti v. Uruguay* (R.6/25), ICCPR, A/37/40 (26 July 1982) 187 at paras. 11-13.

...
11. Carmen Amendold Massiotti was arrested in Montevideo on 8 March 1975, kept incommunicado until 12 September that year and subjected to severe torture. On 17 April 1975 she was brought before a military judge. On 12 September she was again brought

before a military judge and tried for "assistance to illegal association" and "contempt for the armed forces"...Despite having served her sentence on 9 November 1977, she was kept in detention until 11 or 12 December 1977 when the choice was offered to her of either remaining in detention or leaving the country. She opted for the latter and obtained political asylum in the Netherlands.

With respect to Graciela Baritussio:

12. Graciela Baritussio was arrested in Uruguay on 3 September 1972, tried by a military judge on 5 February 1973 for 'complicity in a subversive association' and brought in April 1973 to the Punta Rieles prison where she served her two years prison sentence. On 15 August 1974 she was brought to the same military court as before in order to sign the documents for her provisional release. The decision granting her provisional release became enforceable and final in 1975. Graciela Baritussio, however, remained in detention. On 6 October 1977 she was transferred to another military establishment in the interior of the country which was being used as a prison for women detained under the security measures. On 8 August 1978 the governor of the establishment informed her that she was going to be released. Her release took place on 12 August 1978. Once the document for Graciela Baritussio's provisional release had been signed and after the decision became final and enforceable in 1975, her defence lawyer had made numerous representations to the military judges responsible for her case. He was informed that, if the prison authorities did not comply with the court's release order, the judges could do no more.

13. The Human Rights Committee...is of the view that the facts as found by the Committee, in so far as they continued or occurred after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay) disclose the following violations of the International Covenant on Civil and Political Rights,

In the case of Carmen Amendola Massiotti

...

of article 9 (1), because she continued to be detained after having served her prison sentence on 9 November, 1977;

In the case of Graciela Baritussio

of article 9(1), because she was subjected to arbitrary detention under the "prompt security measures" until 12 August 1978 after having signed on 15 August 1974 the document for her provisional release;

of article 9 (4) in conjunction with article 2 (3), because there

> was no competent court to which she could have appealed during her arbitrary detention.

- *Schweizer v. Uruguay* (66/1980) (R.16/66), ICCPR, A/38/40 (12 October 1982) 117 at paras. 16.2, 18.1 and 19.

...
16.2 In May 1974, a judge ordered David Campora's provisional release; his request to leave the country was approved in November 1974. At the same time, however, an order of detention under the rules of "Prompt Security Measures" was issued against him so that be was kept imprisoned without any charges. There were no remedies available to him to challenge his prolonged detention...
...
18.1 On the basis of the facts of the present case, the Human Rights Committee does not feel that it is in a position to pronounce itself on the general compatibility of the regime of "prompt security measures" under Uruguayan law with the Covenant. According to article 9 (1) of the Covenant, no one shall be subjected to arbitrary arrest or detention. Although administrative detention may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner, the Committee emphasizes that the guarantees enshrined in the following paragraphs of article 9 fully apply in such instances. In this respect, it appears that the modalities under which "prompt security measures" are ordered, maintained and enforced do not comply with the requirements of article 9.
...
19. The Human Rights Committee...is of the view that the facts as found by the Committee...disclose the following violations of the International Covenant on Civil and Political Rights:

> of article 9 (3) and (4) because during the time spent in detention under the regime of "prompt security measures", David Alberto Campora Schweizer was not brought before a judge and could not take proceedings to challenge his arrest and detention)...

- *Luyeye v. Zaire* (90/1981) (R.22/90), ICCPR, A/38/40 (21 July 1983) 197 at paras 7.1, 7.2 and 8.

...
7.1 The Human Rights Committee, having examined the present communication in the light of all the information made available to it as provided in article 5, paragraph 1, of the

Optional Protocol, hereby decides to base its views on the following facts, which, in the absence of any observations by the State party, are uncontradicted by it.

7.2 Luyeye Magana ex-Philibert was arrested on 24 March 1977 when three agents of the *Centre Nationale de Documentation* furnished with a search warrant, came to his house to carry out a search for no apparent reason. They seized documents written by the alleged victim, cinematographic films and magnetic tapes. Following the search, though without any warrant of arrest or summons, they requested him to accompany them to the *Centre Nationale de Documentation* to provide further information. Once there, he was Introduced to Citizen Kisangani, one of the directors who, without any further proceedings, simply ordered him to be kept in detention. While in detention, he was kept in a cell, locked in from morning to night, sleeping on the grounds he was deprived of all contact with his family and he was refused all medical attention. On 6 April 1977, without his knowledge or that of his family, the *Centre Nationale de Documentation* sent three agents to the village of his birth, Kintambu in Lower Zaire, to search his country house where they removed his Scout's Certificate. His detention continued until 9 January 1978 when he was released following an amnesty pronounced by the President of the Republic, without ever having been interrogated or given any document relating to the detention, though a decree of 22 April 1961 (*l'arrete ministeriel* No. 05/22) provided that the agents of the *Surete Nationale* can detain people for inquiry for five days only, after which they must be served with an internment order. During his detention he appealed without result to the Administrateur General and, by letter, to the Head of State. No other remedy was available to him. It is further alleged that during his detention, five members of his immediate family died and were buried without his having been able to be present at the funeral. His children were expelled from school because of the lack of finance while he was detained.

...

8. The Human Rights Committee...is of the view that the facts as found by the Committee, in so far as they continued or occurred after 1 February 1977 (the date on which the Covenant and the Optional Protocol entered into force for Zaire), disclose violations of the International Covenant on Civil and Political Rights, particularly:

> of article 9 (1), because Luyeye Magana ex-Philibert has been subjected to arbitrary arrest and detentions;
>
> ...
>
> of article 9 (3) and (4), because he was not brought promptly before a Judge and no court decided within a reasonable time on the lawfulness of his detention...

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- *Jaona v. Madagascar* (132/1982) (R.28/32), ICCPR, A/40/40 (1 April 1985) 179 at paras. 12.1, 12.2 and 14.

...
12.1 The Human Rights Committee, having examined the present communication in the light of all the information made available to it by the parties as provided in article 5, paragraph 1, of the Optional Protocol, hereby decides to base its views on the following facts, which appear uncontested, except for denials of a general character offering no particular information or explanations.

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

> of article 9, paragraph 1, because Monja Jaona was arrested in December 1982 and detained until August 1983 on account of his political opinions...
>
> of article 9, paragraph 2, because he was not informed of the reasons for his arrest or of any charges against him...

- *Conteris v. Uruguay* (139/1983), ICCPR, A/40/40 (17 July 1985) 196 at paras. 9.2 and 10.

...
9.2 Hiber Conteris was arrested without a warrant by the Security Police on 2 December 1976, at the Carrasco airport and taken to the intelligence service headquarters in the city. He was later transferred to different military establishments, including the establishment known as "*El Infierno*" and the Sixth Calvary Headquarters. From 2 December 1976 to 4 March 1977, he was held *incommunicado*, and his relatives were not informed of his place of detention...The remedy of *habeas corpus* was not available to Hiber Conteris. He was

never brought before a judge and was kept uninformed of the charges against him for over two years...

...

10. The Human Rights Committee is of the view that the facts as found by the Committee disclose violations of the Covenant, in particular:

> of article 9, paragraph 1, because the manner in which he was arrested and detained, without a warrant, constitutes an arbitrary arrest and detention, irrespective of the charges which were subsequently laid against him;
>
> ...
>
> of article 9, paragraph 2, because he was not informed of the charges against him for over two years;
>
> ...
>
> of article 9, paragraph 4, because he had no opportunity to challenge his detention...

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

...

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

8.2 The authors are eight former Zairian parliamentarians and one Zairian businessman. In December 1980, they were subjected to measures of arrest, banishment or house arrest on account of the publication of an "open letter" to Zairian President Mobutu. The eight parliamentarians were also stripped of their membership of parliament and forbidden to hold public office for a period of five years. Although they were covered by an amnesty decree of 17 January 1981, they were not released from detention or internal exile until 4 December 1981. They were subsequently brought to trial before the State Security Court on 28 June 1982 on charges of plotting to overthrow the regime and planning the creation of a political party, and of secreting documents concerning the establishment of said party...

...

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

> article 9, paragraph 1, because the authors were subjected to arbitrary arrest and detention and were not released until 4 December 1981, despite an amnesty decreed on 17 January 1981...

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

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

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

> article 9, paragraph 1, because Andre Alphonse Mpaka-Nsusu was arbitrarily arrested on 1 July 1979, and detained without trial until 31 January 1981...

- *Portorreal v. Dominican Republic* (188/1984), ICCPR, A/43/40 (5 November 1987) 207 at paras. 9.2 and 11.

...
9.2 Mr. Ramón B. Martínez Portorreal is a national of the Dominican Republic, a lawyer and Executive Secretary of the *Comité Dominicano de los Derechos Humanos*. On 14 June 1984 at 6 a.m., he was arrested at his home, according to the author, because of his activities as a leader of a human rights association, and taken to a cell at the secret service police headquarters, from where he was transferred to another cell measuring 20 by 5 metres, where approximately 125 persons accused of common crimes were being held, and where, owing to lack of space, some detainees had to sit on excrement. He received no food or water until the following day. On 16 June 1984, after 50 hours of detention, he was released. At no time during his detention was he informed of the reasons for his arrest.
...
11. The Human Rights Committee...is of the view that these facts disclose violations of the Covenant, with respect to:

> ...
> Article 9, paragraph 1, because he was arbitrarily arrested; and
>
> Article 9, paragraph 2, because he was not informed of the reasons for his

arrest.

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

...
6.3 ...With regard to the author's allegation that his right to life under article 6 of the Covenant and that his right to liberty under article 9 have been violated, the Committee finds that he has not substantiated either allegation...With regard to article 9, the Committee points out that this article prohibits unlawful arrest and detention, whereas the author was lawfully arrested in connection with his unauthorized entry into Canada, and the decision to detain him was not made arbitrarily, especially in view of his insistence not to leave the territory of Canada.
...
7. The Human Rights Committee therefore decides:

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

- *Bolaños v. Ecuador* (238/1987), ICCPR, A/44/40 (26 July 1989) 246 at paras. 8.3 and 9.

...
8.3 With respect to the prohibition of arbitrary arrest or detention contained in article 9 of the Covenant, the Committee observes that although the State party has indicated that the author was suspected of involvement in the murder of Ivan Egas it has not explained why it was deemed necessary to keep him under detention for five years prior to his indictment in December 1987. In this connection the Committee notes that article 9, paragraph 3, of the Covenant provides that anyone arrested on a criminal charge "shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial...". The Committee further observes that article 9, paragraph 5, of the Covenant provides that "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation".
...
9. The Human Rights Committee...is of the view that the facts of this case disclose violations of article 9, paragraphs 1 and 3, because Mr. Floresmilo Bolaños was deprived of liberty contrary to the laws of Ecuador and not tried within a reasonable time...

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- *Arévalo v. Colombia* (181/1984), ICCPR, A/45/40 vol. II (3 November 1989) 31 at paras. 10 and 11.

  ...
  10. The Human Rights Committee has considered the present communication in the light of all the written information made available to it by the parties...In adopting its views, the Committee stresses that it is not making any finding on the guilt or innocence of the Colombian officials who are currently under investigation for possible involvement in the disappearance of the Sanjuán brothers. The Committee limits itself to expressing its views on the question whether any of the Covenant rights of the Sanjuán brothers have been violated by the State party, in particular, articles 6 and 9...

  11. The Human Rights Committee notes that the parents of the Sanjuán brothers received indications that their sons had been arrested by agents of the "F2". The Committee further notes that in none of the investigations ordered by the Government has it been suggested that the disappearance of the Sanjuán brothers was caused by persons other than Government officials. In all these circumstances, therefore, the Committee...finds that the right to life enshrined in article 6 of the Covenant and the right to liberty and security of the person laid down in article 9 of the Covenant have not been effectively protected by the State of Colombia.

For dissenting opinion in this context, see Arévalo v. Colombia (181/1984), ICCPR, A/45/40 vol. II (3 November 1989) 31 at Individual Opinion by Mr. Nisuke Ando (dissenting in part), 37.

- *Torres v. Finland* (291/1988), ICCPR, A/45/40 vol. II (2 April 1990) 96 (CCPR/C/38/D/291/1988) at paras. 6, 7.1 and 7.2.

  ...
  6. The Committee notes the author's allegation that Finland is in violation of article 7 of the Covenant for extraditing him to a country where there were reasons to believe that he might be subjected to torture. The Committee finds, however, that the author has not sufficiently substantiated his fears that he would be subject to torture in Spain.

  7.1 Three separate questions arise with respect to article 9, paragraph 4, of the Covenant: (a) whether the fact that the author was precluded, under the Aliens Act, from challenging his detention for the periods of 8 to 15 October, 1987, 3 to 10 December 1987 and 5 to 10 January, 1988 before a court when he was being detained under orders of the police, constitutes a breach of this provision; (b) whether at once he was by law entitled to challenge his detention under the Aliens Act, (c) whether the application of the Extradition Act to the

author entails any violation of this provision.

7.2 With respect to the first question, the Committee was taken note of the State party's contention that the author could have appealed the detention orders of 7 October, 3 December 1987 and 5 January 1988 pursuant to section 32 of the Aliens Act to the Ministry of the Interior. In the Committee's opinion, this possibility, while providing for some measure of protection and review if the legality of detention, does not satisfy the requirements of article 9, paragraph 4, which envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence in such control. The Committee further notes that while the author was detained under order of the police, he could not have the lawfulness of his detention reviewed by a court. Review by a court of law was possible only when, after seven days, the detention was confirmed by order of the Minister. As no challenge could have been made until the second week of detention, the author's detention from 8 to 15 October 1987 and from 5 to 20 January 1988 violated the requirement of article 9 paragraph 4, of the Covenant that a detained person be able " to take proceedings before a court in order that that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful" (emphasis added).

- *Delgado Páez v. Colombia* (195/1985), ICCPR, A/45/40 vol. II (12 July 1990) 43 at paras. 5.4-5.6.

...
5.4 Although the author has not specifically invoked article 9 of the Covenant, the Committee notes that his submission of 14 September 1987, which was transmitted to the State party prior to the adoption of the Committee's decision on admissibility, raised important questions under this article. The Committee recalls that upon declaring the communication admissible, it requested the State party to address these issues. The State party has not done so.

5.5 The first sentence of article 9 does not stand as a separate paragraph. Its location as a part of paragraph one could lead to the view that the right to security arises only in the context of arrest and detention. The *travaux préparatoires* indicate that the discussions of the first sentence did indeed focus on matters dealt with in the other provisions of article 9. The Universal Declaration of Human Rights, in article 3, refers to the right to life, the right to liberty and the right to security of the person. These elements have been dealt with in separate clauses of the Covenant. Although in the Covenant, the only reference to the right of security of the person is to be found in article 9, there is no evidence that at was intended to narrow the concept of the right to security only to situations of formal deprivations of liberty. At the same time States parties have undertaken to guarantee the rights enshrined in

the Covenant. It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because that he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them. An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant.

5.6 There remains the question of the application of this finding to the facts in the case under consideration. There appears to have been an objective need for Mr. Delgado to be provided by the State with protective measures to guarantee his security, given the threats made against him, including the attack on his person, and the murder of a close colleague. It is arguable that, in seeking to secure this protection, Mr. Delgado failed to address the competent authorities, making his complaints to the military authorities in Leticia, the teachers' union, the Ministry of Education and the President of Colombia, rather that to the general prosecutor or the judiciary. It is unclear to the Committee whether these matters were reported to the police. It does not know either with certainty whether any measures were taken by the Government. However, the Committee cannot but note that the author claims that there was no response to his request to have these threats investigated and to receive protection, and that the State party has not informed the Committee otherwise. Indeed, the State party has failed to comply with the request by the Committee to provide it with information on any of the issues relevant to article 9 of the Covenant. Whereas the Committee is reluctant to make a finding of a violation in the absence of compelling evidence as to the facts, it is for the State party to inform the Committee if alleged facts are incorrect, or if they would not, in any event, indicate a violation of the Covenant. The Committee has, in its past jurisprudence, made it clear that circumstances may cause it to assume facts in the author's favour if the State Party fails to reply or to address them. The pertinent factors in this case are that Mr. Delgado had been engaged in a protracted confrontation with the authorities over his teaching and his employment. Criminal charges, later determined unfounded, had been brought against him and he had been suspended, with salary frozen...Further, he was known to have instituted a variety of complaints against the ecclesiastical and scholastical authorities in Leticia...Coupled with these factors were threats to his life. If the State party neither denies the threats nor co-operates with the Committee to explain whether the relevant authorities were aware of them, and, if so, what was done about them, the Committee must necessarily treat as correct allegations that the threats were known and that nothing was done. Accordingly, while fully understanding the situation in Colombia, the Committee finds that the State party has not taken, or has been unable to take, appropriate measures to ensure Mr. Delgado's right to security of his person under article 9, paragraph 1.

LIBERTY AND SECURITY OF THE PERSON

- *van Alphen v. The Netherlands* (305/1988), ICCPR, A/45/40 vol. II (23 July 1990) 108 at paras. 5.6, 5.8 and 6.

  ...
  5.6 The principal issue before the Committee is whether the author's detention from 5 December 1983 to 9 February 1984 was arbitrary. It is uncontested that the Netherlands judicial authorities, in determinating repeatedly whether to prolong the author's detention, observed the rules governing pre-trial detention laid down in the Code of Criminal Procedure. It remains to be determined whether other factors may render an otherwise lawful detention arbitrary, and whether the author enjoys an absolute right to invoke his professional obligation to secrecy regardless of the circumstances of a criminal investigation.
  ...
  5.8 The drafting history of article 9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime. The State party has not shown that these factors were present in the instant case. It has, in fact, stated that the reason for the duration of the author's detention "was that the applicant continued to invoke his obligation to maintain confidentiality despite the fact that the interested party had released him from his obligations in this respect", and that "the importance of the criminal investigation necessitated detaining the applicant for reasons of accessibility". Notwithstanding the waiver of the author's professional duty of confidentiality, he was not obliged to provide such co-operation. The Committee therefore finds that the facts as submitted disclose a violation of article 9, paragraph 1, of the Covenant.
  ...
  6. The Human Rights Committee...is of the view that the facts of the communication disclose a violation of article 9, paragraph 1, of the Covenant.

For dissenting opinion in this context, see van Alphen v. The Netherlands (305/1988), ICCPR, A/45/40 vol. II (23 July 1990) 108 at Individual Opinion by Mr. Nisuke Ando, 116.

- *Kelly v. Jamaica* (253/1987), ICCPR, A/46/40 (8 April 1991) 241 (CCPR/C/41/D/253/1987) at paras. 5.6, 6 and Individual Opinion by Mr. Bertil Wennergren, 252.

  ...
  5.6 In respect of the allegations pertaining to article 9, paragraphs 3 and 4, the State party has not contested that the author was detained for five weeks before he was brought before a judge or judicial officer entitled to decide on the lawfulness of his detention. The delay of

over one month violates the requirement, in article 9, paragraph 3, that anyone arrested in a criminal charge shall be brought "promptly" before a judge or other officer authorized by law to exercise judicial power. The Committee considers it to be an aggravating circumstance that, throughout this period, the author was denied access to legal representation and any contact with his family. As a result, his right under article 9, paragraph 4, was also violated, since he was not in due time afforded the opportunity to obtain, on his own initiative, a decision by the court on the lawfulness of his detention.

...

6. The Human Rights Committee...is of the view that the facts...disclose violations of articles...9, paragraphs 2 to 4...of the Covenant.

Individual Opinion by Mr. Bertil Wennergren

I concur in the views expressed in the Committee's decision. However, in my opinion, the arguments in paragraph 5.6 should be expanded.

Anyone deprived of his liberty by arrest or detention shall, according to article 9, paragraph 4, of the Covenant, be entitled to take proceedings before a court. In addition, article 9, paragraph 3, ensures that anyone arrested or detained on criminal charges shall be brought before a judge or other officer authorized by law to exercise judicial power. A similar right is contained in article 5 of the European Convention on Human Rights, which is applicable to the "lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so."

The author was arrested and taken into custody on 20 August, 1981; he was detained *incommunicado*. On 15 September 1981 he was charged with murder; only one week later he was brought before a judge.

While article 9, paragraph 1, of the Covenant covers all forms of deprivation of liberty by arrest or detention, the scope of application of paragraph 3 is limited to arrests and detentions "on a criminal charge". It would appear that the State party interprets this provision in the sense that the obligation of the authorities to bring the detainee before a judge or judicial officer does not arise until a formal criminal charge has been served to him. It is, however, abundantly clear from the *travaux préparatoires* that the formula "on a criminal charge" was meant to cover as broad a scope of application as the corresponding provision in the European Convention. All types of arrest and detention in the course of crime prevention are therefore covered by the provision, whether it is preventive detention, detention pending investigation or detention pending trial...

It should be noted that the words "shall be brought promptly" reflect the original form of *habeus corpus*...and order the authorities to bring a detainee before a judge or judicial officer as soon as possible, independently of the latter's express wishes in this respect. The word "promptly" does not permit a delay of more than two to three days. As the author was not brought before a judge until about 5 weeks had passed since his detention, the violation of article 9, paragraph 3 of the Covenant is flagrant. The fact that the author was held *incommunicado* until he was formally charged deprived him of his right, under article 9, paragraph 4, to file an application if his own for judicial review if his detention by a court. Accordingly, this provision was also violated.

- *Jijón v. Ecuador* (277/1988), ICCPR, A/47/40 (26 March 1992) 261 at paras. 5.3 and 6.

...
5.3 In respect of the authors' claim of a violation of article 9, paragraph 1, the Committee lacks sufficient evidence to the effect that Mr. Terán's arrest was arbitrary and not based on grounds established by law. On the other hand, the Committee notes that Mr. Terán was kept in detention on the basis of a second indictment, subsequently quashed, from 9 March 1987 until 18 March 1988. In the circumstances, the Committee finds that this continuation of his detention for one year following the release order of 9 March 1987 constituted illegal detention within the meaning of article 9, paragraph 1 of the Covenant. Moreover, Mr. Terán has claimed and the State party has not denied that he was kept incommunicado for five days without being brought before a judge and without having access to counsel. The Committee considers that this entails a violation of article 9, paragraph 3.
...
6. The Human Rights Committee...is of the view that the facts before it disclose violations of articles...9, paragraphs 1 and 3...of the Covenant.

- *Wolf v. Panama* (289/1988), ICCPR, A/47/40 (26 March 1992) 277 at paras. 6.2 and 7.

...
6.2 While the author has not specifically invoked article 9 of the Covenant, the Committee considers that some of his claims raise issues under this provision. Although he has claimed that he should have been granted a "grace period" of 48 hours to settle his debts before he could be arrested, the Committee lacks sufficient information to the effect that his arrest and detention were arbitrary and not based on grounds established by law. On the other had, the author has claimed and the State party has not denied that he was never brought before a judge after his arrest, and that he never spoke with any lawyer, whether counsel of his own choice or public defender, during his detention. In the circumstances, the Committee concludes that article 9, paragraph 3, was violated because the author was not brought

promptly before a judge or other judicial officer authorized by law to exercise judicial power.
...
7. The Human Rights Committee...is of the view that the facts before it disclose violations of articles 9, paragraph 3...

- *Campbell v. Jamaica* (248/1987), ICCPR, A/49/40 vol. II (30 March 1992) 240 at para. 6.3.

...
6.3 In respect of the allegations pertaining to article 9, paragraphs 1 to 3, the State party has not contested that the author was detained for three months before he was formally charged with murder, and that throughout the period from 12 December 1984 to 12 March 1985 he had no access to legal representation. The Committee does not consider that the author's arrest was arbitrary within the meaning of article 9, paragraph 1, as he was apprehended on suspicion of having committed a specified criminal offence. However, the Committee finds that the author was not "promptly" informed of the charges against him: one of the most important reasons for the requirement of "prompt" information on a criminal charge is to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority. A delay from 12 December 1984 to 26 January 1985 does not meet the requirements of article 9, paragraph 2.

- *Bwalya v. Zambia* (314/1988), ICCPR, A/48/40 vol. II (14 July 1993) 52 (CCPR/C/48/D/314/1988) at paras. 6.3, 6.4 and 7.

...
6.3 The Committee has noted that when the communication was placed before it for consideration, Mr. Bwalya had been detained for a total of 31 months, a claim that has not been contested by the State party. It notes that the author was held solely on charges of belonging to a political party considered illegal under the country's (then) one-party constitution and that on the basis of the information before the Committee, Mr. Bwalya was not brought promptly before a judge or other officer authorized by law to exercise judicial power to determine the lawfulness of his detention.

This, in the Committee's opinion, constitutes a violation of the author's right under article 9, paragraph 3, of the Covenant.

6.4 With regard to the right to security of person, the Committee notes that Mr. Bwalya, after being released from detention, has been subjected to continued harassment and intimidation. The State party has not contested these allegations. The first sentence of article 9, paragraph 1, guarantees to everyone the right to liberty and security of person. The Committee has

already had the opportunity to explain that this right may be invoked not only in the context of arrest and detention, and that an interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render ineffective the guarantees of the Covenant. 1/ In the circumstances of the case, the Committee concludes that the State party has violated Mr. Bwalya's right to security of person under article 9, paragraph 1.

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

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Notes

1/ Views on communication No. 195/1985 (*Delgado Páez v. Colombia*), adopted on 12 July 1990, paragraphs 5.5 and 5.6.

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- *Bahamonde v. Equatorial Guinea* (468/1991), ICCPR, A/49/40 vol. II (20 October 1993) 183 (CCPR/C/49/D/468/1991) at paras. 2.1, 9.1 and 9.2.

...

2.1 On 4 March 1986, the author's passport was confiscated at the airport of Malabo; on 26 March 1986, the same thing occurred at the airport of Libreville, Gabon, allegedly upon orders of President Obiang of Equatorial Guinea. From 26 May to 17 June 1987, the author was detained by order of the Governor of Bioko. Some of his lands were confiscated in October 1987. The author complained to the authorities and directly to President Obiang, to no avail. A little later, some 22.2 tons of cacao from his plantations were confiscated by order of the Prime Minister, and his objections and recourse of 28 February 1988 were simply ignored. Part of his agricultural crops allegedly were destroyed by the military in 1990-1991. Once again, his requests for compensation were not acted upon.

...

9.1 With respect to the author's allegation that he was arbitrarily arrested and detained between 26 May and 17 June 1986, the Committee notes that the State party has not contested this claim and merely indicated that the author could have availed himself of judicial remedies. In the circumstances, the Committee considers that the author has substantiated his claim and concludes that he was subjected to arbitrary arrest and detention, in violation of article 9, paragraph 1. It further concludes that as the author was not brought promptly before a judge or other officer authorized by law to exercise judicial power, the State party has failed to comply with its obligations under article 9, paragraph 3.

9.2 With regard to the author's claim that he was subjected to harassment, intimidation and

threats by prominent politicians and their respective services on a number of occasions, the Committee observes that the State party has dismissed the claim in general terms, without addressing the author's well substantiated allegations against several members of the government of President Obiang Nguema. The first sentence of article 9, paragraph 1, guarantees to everyone the right to liberty and security of person. The Committee has already had the opportunity to explain that this right may be invoked not only in the context of arrest and detention, and that an interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render ineffective the guarantees of the Covenant. a/ In the circumstances of the case, the Committee concludes that the State party has failed to ensure Mr. Oló Bahamonde's right to security of person, in violation of article 9, paragraph 1.

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Notes

a/ Official Records of the General Assembly, Forty Fifth Session, Supplement No. 40 (A/45/40), annex IX.D, Communication No. 195/1985 (*Delgado Páez v. Colombia*), Views adopted on 12 July 1990, paragraphs 5.5 and 5.6; and *ibid*., Fortieth Session, Supplement No. 40 (A/48/40), annex XII.I, Communication No. 314/1988 (*Bwalya v. Zambia*), Views adopted on 14 July 1993, para. 6.4.

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- *Kanana v. Zaire* (366/1989), ICCPR, A/49/40 vol. II (2 November 1993) 65 (CCPR/C/49/D/366/1989) at paras. 5.2 and 6.

...

5.2 The Committee notes that the author claims to have been detained at the headquarters of the *Agence Nationale de Documentation* between the early afternoon of 1 May 1989 and the early morning hours of the following day. He claims that he was not informed of the reasons for his apprehension and detention; this has not been contested. Furthermore, it is uncontested that no warrant was served on him and that he was brought to AND headquarters under false pretexts. These uncontested claims are considered by the Committee to have been substantiated by Mr. Kanana and justify the conclusion that his detention on 1 and 2 May 1989 was arbitrary and contrary to article 9, paragraph 1. The Committee also expresses grave concern about the circumstances of Mr. Kanana's apprehension and the apparent lack of judicial accountability of the Zairian Defence Forces.

6. The Human Rights Committee...is of the view that the facts before it disclose violations of articles...9, paragraph 1...of the Covenant.

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- *Megreisi v. Libyan Arab Jamahiriya* (440/1990), ICCPR, A/49/40 vol. II (23 March 1994) 128 (CCPR/C/50/D/440/1990) at para. 5.3.

  ...
  5.3 The Committee...bases its assessment on the undisputed facts that Mr. Mohammed El-Megreisi was arrested in January 1989, that no charges were or have been brought against him, and that he has not been released to date. In the opinion of the Committee, therefore, he has been subjected to arbitrary arrest and detention, and continues to be arbitrarily detained, contrary to article 9 of the Covenant.

- *Mika Miha v. Equatorial Guinea* (414/1990), ICCPR, A/49/40 vol. II (8 July 1994) 96 (CCPR/C/51/D/414/1990) at para. 6.5.

  ...
  6.5 As to the author's allegation that he was arbitrarily arrested and detained between 16 August 1988 and 1 March 1990, the Committee notes that the State party has not contested this claim. It further notes that the author was not given any explanations for the reasons of his arrest and detention, except that the President of the Republic had ordered both, that he was not brought promptly before a judge or other officer authorized by law to exercise judicial power, and that he was unable to seek the judicial determination, without delay, of the lawfulness of his detention. On the basis of the information before it, the Committee finds a violation of article 9, paragraphs 1, 2 and 4. On the same basis, the Committee concludes, however, that there has been no violation of article 9, paragraph 5, as it does not appear that the author has in fact claimed compensation for unlawful arrest or detention. Nor is the Committee able to make a finding in respect of article 9, paragraph 3, as it remains unclear whether the author was in fact detained on specific criminal charges within the meaning of this provision.

- *Mojica v. Dominican Republic* (449/1991), ICCPR, A/49/40 vol. II (15 July 1994) 142 (CCPR/C/51/D/449/1991) at paras. 5.3 and 5.4.

  ...
  5.3 The author has alleged a violation of article 9, paragraph 1, of the Covenant. Although there is no evidence that Rafael Mojica was actually arrested or detained on or after 5 May 1990, the Committee recalls that under the terms of the decision on admissibility, the State party was requested to clarify these issues; it has not done so. The Committee further notes the allegation that Rafael Mojica had received death threats from some military officers of the *Dirección de Bienes Nacionales* in the weeks prior to his disappearance; this information,

again, has not been refuted by the State party.

5.4 The first sentence of article 9, paragraph 1, guarantees to everyone the right to liberty and security of person. In its prior jurisprudence, the Committee has held that this right may be invoked not only in the context of arrest and detention, and that an interpretation which would allow States parties to tolerate, condone or ignore threats made by persons in authority to the personal liberty and security of non-detained individuals within the State party's jurisdiction would render ineffective the guarantees of the Covenant. a/ In the circumstances of the case, the Committee concludes that the State party has failed to ensure Rafael Mojica's right to liberty and security of the person, in violation of article 9, paragraph 1, of the Covenant.

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Notes

a/ Official Records of the General Assembly, Forty Fifth Session, Supplement No. 40 (A/45/40), annex IX.D, Communication No. 195/1985 (*Delgado Páez v. Colombia*), Views adopted on 12 July 1990, paragraphs 5.5 and 5.6; and *ibid*., Fortieth Session, Supplement No. 40 (A/48/40), annex XII.I, Communication No. 314/1988 (*Bwalya v. Zambia*), Views adopted on 14 July 1993, para. 6.4; and annex IX.BB below, Communication No. 468/1991 (*Oló Bahamonde v. Equatorial Guinea*), Views adopted on 20 October 1993, paragraph 9.2.

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- *Zelaya v. Nicaragua* (328/1988), ICCPR, A/49/40 vol. II (21 July 1994) 12 (CCPR/C/51/D/328/1988) at para. 10.3.

...

10.3 With regard to the author's allegations that he was subjected to arbitrary detention, the Committee notes that the State party has not disputed the author's description of the reasons for his detention, i.e. his political opinions contrary to those of the Sandinista Government. The Committee has also taken note of the many annexes to the author's submissions, including the relevant report from the *Nicaraguan Departamento de Seguridad del Estado* and the evaluation of the case by Amnesty International. In the light of all the information before it, the Committee finds that the author's arrest and detention violated article 9, paragraph 1, of the Covenant.

- *Mukong v. Cameroon* (458/1991), ICCPR, A/49/40 vol. II (21 July 1994) 171 (CCPR/C/51/D/458/1991) at para. 9.8.

...

9.8 The Committee notes that the State party has dismissed the author's claim under article 9 by indicating that he was arrested and detained in application of the rules of criminal procedure, and that the police detention and preliminary enquiries by the examining magistrate were compatible with article 9. It remains however to be determined whether other factors may render an otherwise lawful arrest and lawful detention "arbitrary" within the meaning of article 9. The drafting history of article 9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. As the Committee has observed on a previous occasion, this means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. e/ Remand in custody must further be necessary in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime. In the present case, the State party has not shown that any of these factors was present. It has merely contended that the author's arrest and detention were clearly justified by reference to article 19, paragraph 3, i.e. permissible restrictions on the author's freedom of expression...[T]he Committee finds that the author's detention in 1988-1989 and 1990 was neither reasonable nor necessary in the circumstances of the case, and thus in violation of article 9, paragraph 1, of the Covenant.

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Notes

...

e/ [See Official Records of the General Assembly], Forty-fifth Session, Supplemant No. 40 (A/45/40), annex IX.M, Communication No. 305/1988 (*Hugo van Alphen v. The Netherlands*), Views adopted on 23 July 1990, paragraph 5.8.

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- *Koné v. Senegal* (386/1989), ICCPR, A/50/40 vol. II (21 October 1994) 1 (CCPR/C/52/D/386/1989) at paras. 8.3 and 8.7.

...

8.3 As to the claims of violations of article 9, the Committee notes that, in respect of the author's detention from 1982 to 1986 and in the spring of 1988, the State party has provided detailed information about the charges against the author, their legal qualification, the procedural requirements under the Senegalese Code of Criminal Procedure, and the legal remedies available to the author to challenge his detention. The records reveal that these charges were not based, as claimed by the author, on his political activities or upon his expressing opinions hostile to the Senegalese government. In the circumstances, it cannot be concluded that the author's arrest and detention were arbitrary or not based "on such grounds and in accordance with such procedure as are established by law". However, there are issues concerning the length of the author's detention, which are considered below...

...

8.7 A delay of four years and four months during which the author was kept in custody (considerably more taking into account that the author's guilt or innocence had not yet been determined at the time of his provisional release on 9 May 1986) cannot be deemed compatible with article 9, paragraph 3, in the absence of special circumstances justifying such delay, such as that there were, or had been, impediments to the investigations attributable to the accused or to his representative. No such circumstances are discernible in the present case. Accordingly, the author's detention was incompatible with article 9, paragraph 3. This conclusion is supported by the fact that the charges against the author in 1982 and in 1988 were identical, whereas the duration of the judicial process on each occasion differed considerably.

- *Thompson v. Panama* (438/1990), ICCPR, A/50/40 vol. II (21 October 1994) 143 (CCPR/C/52/D/438/1990) at paras. 2.2 and 5.2.

...

2.2 When, on 31 January 1990, President George Bush declared the end of hostilities with Panama, most prisoners of war were released. Mr. Thompson, however, was transferred to the Modelo Prison in Panama, where he continued to be held. He was indicted on charges of having committed certain offences against the (territorial) integrity and the internal order of the Republic of Panama.

...

5.2 As to the claims under articles 9, paragraphs 1 and 2, the Committee begins by noting that the author links the alleged arbitrariness of Mr. Thompson's arrest and detention to his presumed innocence. Nothing in the file, however, indicates that Mr. Thompson was not held on specific charges(see paragraph 2.2 above), pending the determination of his innocence or guilt by a court of law, and that he was not properly indicted. But, in any event, the Committee notes that Mr. Thompson's counsel, while initially appealing the sentence of 4 June 1993 against his client, later withdrew the appeal, where these issues could have been dealt with. For the purpose of article 5, paragraph 2(b), of the Optional Protocol, an applicant must make use of all judicial or administrative avenues that offer him a reasonable prospect of success. This Mr. Thompson's counsel has failed to do, and available domestic remedies accordingly have not been exhausted in the case.

See also:

- *Patiño v. Panama* (437/1990), ICCPR, A/50/40 vol. II (21 October 1994) 140 (CCPR/C/52/D/437/1990) at paras. 2.2 and 5.2.

LIBERTY AND SECURITY OF THE PERSON

- *Barroso v. Panama* (473/1991), ICCPR, A/50/40 vol. II (19 July 1995) 41 (CCPR/C/54/D/437/1991) at para. 8.2.

...
8.2 The Committee has noted the author's claim that her nephew was arrested and detained arbitrarily, and that he was denied bail primarily out of "political motives". However, the material before the Committee does not reveal that Mr. del Cid was not detained on specific criminal charges; accordingly, his detention cannot be qualified as "arbitrary" within the meaning of article 9, paragraph 1. There is further no indication that Mr. del Cid was denied bail without a proper weighing, by the judicial authorities, of the possibility of releasing him on bail; accordingly, there is no basis for a finding of a violation of article 9, paragraph 3. Similar considerations apply to the alleged violation of article 9, paragraph 4: the Superior Tribunal did in fact review the lawfulness of Mr. del Cid's detention.

- *Bautista v. Colombia* (563/1993), ICCPR, A/51/40 vol. II (27 October 1995) 132 (CCPR/C/55/D/563/1993) at paras. 6.6, 6.8 and 8.5.

...
6.6 The salient points of the decision of the National Delegate for Human Rights (entitled "*Resolución 13 de Julio 5 de 1995 mediante la cual se falla el proceso disciplinario 008-147452*"), after recalling the facts and the procedure from 3 March 1994 to the spring of 1995, are the following:

> ...
> -The Delegate characterizes the phenomenon of forced disappearance in general as a violation of the most basic human rights enshrined in international human rights instruments, such as the right to life and the right to liberty and personal physical integrity, considered to be part of *jus cogens* and/or of customary international law.
>
> -On the basis of the evidence placed before it, the Delegate considers the abduction and subsequent detention of Nydia Bautista as illegal ("*la captura de Nydia E. Bautista fue abiertamente ilegal por cuanto no existía orden de captura en su contra y no fue sorprendida en flagrancia cometiendo delito alguno*").
>
> -The disappearance must be attributed to State agents, who failed to inform about the victim's apprehension and her whereabouts, in spite of investigations of the military authorities to locate Ms. Bautista: "The victim's abduction was not brought to the attention of any authority and is not certified in any register" ("*... sobre su retención no se informó a ninguna autoridad*

y tampoco apareció registrada in ningún libro").

...

-The Delegate concludes that by virtue of his failure to prevent Nydia Bautista's disappearance and assassination, Mr. Velandia Hurtado violated her rights under articles 2, 5, 11, 12, 16, 28, 29 and 30 of the Colombian Constitution, under articles 3, 4, 6, 7 and 17 of the American Convention on Human Rights and articles 6, 9, 14 and 16 of the International Covenant on Civil and Political Rights. By his action, Mr. Velandia Hurtado further violated his duties as a military official and contravened article 65, Section B) lit. a) and article 65, Section F) lit. a) of the Rules of Military Discipline of the Armed Forces (*Reglamento Disciplinario para las Fuerzas Armadas*).

-Similar conclusions are reached for the responsibility of Sgt. Ortega Araque. In particular, the Delegate rejects Mr. Ortega's defence that he was only carrying out the orders of a superior, since obedience "cannot be blind" ("*la obediencia no puede ser ciega*").

...

6.8 The principal points made in the Judgment of the Administrative Tribunal of Cundinamarca of 22 June 1995 may be summarized as follows:

...

-The Tribunal considers it established that Nydia Bautista was abducted on 30 August 1987, and that she was tortured and assassinated thereafter. It concludes that the evidence before it firmly establishes the responsibility of the armed forces in the events leading to the victim's death. Reference is made in this context to the procedure pending before the National Delegate for Human Rights.

...

-The Tribunal concludes that the State party's authorities involved in the victim's illegal disappearance and death are fully responsible. As a result, it awards the equivalent of 1000 grams in gold to both parents, the husband and the son of Nydia Bautista, and the equivalent of 500 grams in gold to her sister. The Ministry of Defence is further directed to pay a total of 1,575,888.20 pesos plus interest and inflation-adjustment to Nydia Bautista's son for the moral prejudice suffered.

...

8.5 The author has alleged a violation of article 9. Both decisions referred to above conclude that Nydia Bautista's abduction and subsequent detention were "illegal" (see paragraphs 6.6 and 6.8 above), as no warrant for her arrest had been issued and no formal charges against her were known to exist. There has, accordingly, been a violation of article 9, paragraph 1.

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- *Celis Laureano v. Peru* (540/1993), ICCPR, A/51/40 vol. II (25 March 1996) 108 (CCPR/C/56/D/540/1993) at para. 8.6.

...

8.6 The author has alleged a violation of article 9, paragraph 1, of the Covenant. The evidence before the Committee reveals that Ms. Laureano was violently removed from her home by armed State agents on 13 August 1992; it is uncontested that these men did not act on the basis of an arrest warrant or on orders of a judge or judicial officer. Furthermore, the State party has ignored the Committee's requests for information about the results of the author's petition for *habeas corpus*, filed on behalf of Ana R. Celis Laureano. The Committee finally recalls that Ms. Laureano had been provisionally released into the custody of her grandfather by decision of 5 August 1992 of a judge on the Civil Court of Huacho, i.e., merely eight days before her disappearance. It concludes that, in the circumstances, there has been a violation of article 9, paragraph 1, *juncto* article 2, paragraph 1.

- *Tshishimbi v. Zaire* (542/1993), ICCPR, A/51/40 vol. II (25 March 1996) 116 (CCPR/C/56/D/542/1993) at paras. 2.4, 5.3 and 5.4.

...

2.4 ...Mr. Tshishimbi was abducted during the night of 28 March 1993; Belgian press reports of 6 April 1993 mention that he had been arrested ("*aurait été arrêté*"). The exact circumstances of his abduction...remain unknown. After his abduction, his family, relatives and colleagues remained without news from him. It was believed - as noted in Belgian newspaper reports of 21 April 1993 - that he is/was detained at the headquarters of the National Intelligence Service, where ill-treatment of detainees is said to be common.

...

5.3 The author has alleged a violation of article 9 of the Covenant. While there is no evidence that Mr. Tshishimbi was actually arrested or detained during the night of 28 March 1993, the Committee recalls that the State party was requested, in the decision on admissibility, to clarify this issue; it has not done so.

5.4 The first sentence of article 9, paragraph 1, guarantees to everyone the right to liberty and security of person. In its prior jurisprudence, the Committee has held that this right may be invoked not only in the context of arrest and detention, and that an interpretation which would allow States parties to tolerate, condone or ignore threats made by persons in authority to the personal liberty and security of non-detained individuals within the State party's jurisdiction would render ineffective the guarantees of the Covenant. a/ In the circumstances of this case, the Committee concludes that the State party has failed to ensure Mr. Tshishimbi's right to liberty and security of person, in violation of article 9, paragraph 1, of the Covenant.

Notes

a/ See for example, Official Records if the General Assembly, Forty-ninth Session, Supplement No. 40 (A/49/40), vol.II, annex IX. W, Communication No. 449/1991 (*Mójica v. Dominican Republic*), Views adopted on 15 July 1994, para. 5.4; and axxex IX.BB, Communication No. 468/1991 (*Oló Bahamonde v. Equatorial Guinea*), Views adopted 20 October 1993, para. 9.2

- *Aduayom, Diasso and Dobou v. Togo* (422-424/1990), ICCPR, A/51/40 vol. II (12 July 1996) 17 (CCPR/C/51/D/422/1990) at para. 7.3.

...

7.3 The authors contend that they have not been compensated for the time they were arbitrarily arrested, contrary to article 9, paragraph 5. The procedures they initiated before the Administrative Chamber of the Court of Appeal have not, on the basis of the information available to the Committee, resulted in any judgment or decision, be it favourable or unfavourable to the authors. In the circumstances, the Committee sees no reason to go back on its admissibility decision, in which it had held that recourse to the Administrative Chamber of the Court of Appeal did not constitute an available and effective remedy. As to whether it is precluded *ratione temporis* from considering the authors' claim under article 9, paragraph 1, the Committee wishes to note that its jurisprudence has been not to entertain claims under the Optional Protocol based on events which occurred after entry into force of the Covenant but before entry into force of the Optional Protocol for the State party. Some of the members feel that the jurisprudence of the Committee on this issue may be questionable and may have to be reconsidered in an appropriate (future) case. In the instant case, however, the Committee does not find any elements which would allow it to make a finding under the Optional Protocol on the lawfulness of the authors' arrest, since the arrests of the authors took place in September and December 1985, respectively, and they were released in April and July 1986, respectively, prior to the entry into force of the Optional Protocol for Togo on 30 June 1988. Accordingly, the Committee is precluded *ratione temporis* from examining the claim under article 9, paragraph 5.

For dissenting opinion in this context, see Aduayom, Diasso and Dobou v. Togo (422-424/1990), ICCPR, A/51/40 vol. II (12 July 1996) 17 (CCPR/C/51/D/422/1990) at para. 7.3 at Individual Opinion by Fausto Pocar (dissenting in part), 23.

LIBERTY AND SECURITY OF THE PERSON

- *Hill v. Spain* (526/1993), ICCPR, A/52/40 vol. II (2 April 1997) 5 (CCPR/C/59/D/426/1993) at para. 12.2.

...
12.2 With regard to the authors' allegations of violations of article 9 of the Covenant, the Committee considers that the authors' arrest was not illegal or arbitrary. Article 9, paragraph 2, of the Covenant requires that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. The authors specifically allege that seven and eight hours, respectively, elapsed before they were informed of the reason for their arrest, and complain that they did not understand the charges because of the lack of a competent interpreter. The documents submitted by the State party show that police formalities were suspended from 6 a.m. until 9 a.m., when the interpreter arrived, so that the accused could be duly informed in the presence of legal counsel. Furthermore, from the documents sent by the State it appears that the interpreter was not an *ad hoc* interpreter but an official interpreter appointed according to rules that should ensure her competence. In these circumstances, the Committee finds that the facts before it do not reveal a violation of article 9, paragraph 2, of the Covenant.

- *A. v. Australia* (560/1993), ICCPR, A/52/40 vol. II (3 April 1997) 125 (CCPR/C/59/D/560/1993) at paras. 9.1-9.6 and Individual Opinion by Prafullachandra N. Bhagwati, 145.

...
9.1 The Human Rights Committee has examined the present communication in the light of all the information placed before it by the parties, as it is required to do under article 5, paragraph 1, of the Optional Protocol to the Covenant. Three questions are to be determined on their merits:

> (a) whether the prolonged detention of the author, pending determination of his entitlement to refugee status, was "arbitrary" within the meaning of article 9, paragraph 1;
>
> (b) whether the alleged impossibility to challenge the lawfulness of the author's detention and his alleged lack of access to legal advice was in violation of article 9, paragraph 4...

...
9.2 On the first question, the Committee recalls that the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent

flight or interference with evidence: the element of proportionality becomes relevant in this context. The State party however, seeks to justify the author's detention by the fact that he entered Australia unlawfully and by the perceived incentive for the applicant to abscond if left in liberty. The question for the Committee is whether these grounds are sufficient to justify indefinite and prolonged detention.

9.3 The Committee agrees that there is no basis for the author's claim that it is *per se* arbitrary to detain individuals requesting asylum. Nor can it find any support for the contention that there is a rule of customary international law which would render all such detention arbitrary.

9.4 The Committee observes however, that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal. In the instant case, the State party has not advanced any grounds particular to the author's case, which would justify his continued detention for a period of four years, during which he was shifted around between different detention centres. The Committee therefore concludes that the author's detention for a period of over four years was arbitrary within the meaning of article 9, paragraph 1.

9.5 The Committee observes that the author could, in principle, have applied to the court for review of the grounds of his detention before the enactment of the Migration Amendment Act of 5 May 1992; after that date, the domestic courts retained that power with a view to ordering the release of a person if they found the detention to be unlawful under Australian law. In effect, however, the courts' control and power to order the release of an individual was limited to an assessment of whether this individual was a "designated person" within the meaning of the Migration Amendment Act. If the criteria for such determination were met, the courts had no power to review the continued detention of an individual and to order his/her release. In the Committee's opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release "if the detention is not lawful', article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant. This conclusion is supported

by article 9, paragraph 5, which obviously governs the granting of compensation for detention that is "unlawful" either under the terms of domestic law or within the meaning of the Covenant. As the State party's submissions in the instant case show that court review available to A was, in fact, limited to a formal assessment of the self-evident fact that he was indeed a "designated person" within the meaning of the Migration Amendment Act, the Committee concludes that the author's right, under article 9, paragraph 4, to have his detention reviewed by a court, was violated.

9.6 As regards the author's claim that article 9, paragraph 4, encompasses a right to legal assistance in order to have access to the courts, the Committee notes from the material before it that the author was entitled to legal assistance from the day he requested asylum and would have had access to it, had he requested it. Indeed, the author was informed on 9 December 1989, in the attachment to the form he signed on that day, of his right to legal assistance. This form was read in its entirety to him in Kampuchean, his own language, by a certified interpreter. That the author did not avail himself of this possibility at that point in time cannot be held against the State party. Subsequently (as of 13 September 1990), the author sought legal advice and received legal assistance whenever requesting it. That A. was moved repeatedly between detention centres and was obliged to change his legal representatives cannot detract from the fact that he retained access to legal advisers; that this access was inconvenient, notably because of the remote location of Port Hedland, does not, in the Committee's opinion, raise an issue under article 9, paragraph 4.

...

Individual Opinion by Prafullachandra N. Bhagwati

I am in agreement with the opinion rendered by the Committee save and except that in regard to paragraph 9.5, I would prefer the following formulation:

> "9.5 The Committee observes that the author could, in principle, have applied to the court for review of the grounds of his detention before the enactment of the Migration Amendment Act on 5 May 1992; after that date, the domestic courts retained the power of judicial review of detention with a view to ordering the release of a person if they found the detention to be unlawful. But with regard to a particular category of persons falling within the meaning of the expression 'designated person', in the Migration Amendment Act, the power of the courts to review the lawfulness of detention and order release of the detention was found unlawful, was taken away by Section 54R of the Migration Amendment Act. If the detained person was a 'designated person' the courts had no power to review the continued detention of such person and order his/her release. The only judicial review available in such a case was limited to a determination of the fact whether the detained person was a 'designated person' and if he was, the

> court could not proceed further to review the lawfulness of his detention and order his/her release. The author in the present case, being admittedly a 'designated person', was barred by Section 54R of the Migration Amendment Act from challenging the lawfulness of his continued detention and seeking his release by the courts."

But it was argued on behalf of the State that all that article 9, paragraph 4, of the Covenant requires is that the person detained must have the right and opportunity to take proceedings before a court for review of lawfulness of his/her detention and lawfulness must be limited merely to compliance of the detention with domestic law. The only inquiry which the detained person should be entitled to ask the court to make under article 9, paragraph 4, is whether the detention is in accordance with domestic law, whatever the domestic law may be. But this would be placing too narrow an interpretation on the language of article 9, paragraph 4, which embodies a human right. It would not be right to adopt an interpretation which will attenuate a human right. It must be interpreted broadly and expansively. The interpretation contended for by the State will make it possible for the State to pass a domestic law virtually negating the right under article 9, paragraph 4, and making non-sense of it. The State could, in that event, pass a domestic law validating a particular category of detentions and a detained person falling within that category would be effectively deprived of his/her right under article 9, paragraph 4. I would therefore place a broad interpretation on the word "lawful" which would carry out the object and purpose of the Covenant and in my view, article 9, paragraph 4, requires that the court be empowered to order release "if the detention is not lawful", that is, the detention is arbitrary or incompatible with the requirement of article 9, paragraph 1, or with other provisions of the Covenant. It is no doubt true that the drafters of the Covenant have used the word "arbitrary" along with "unlawful" in article 17 while the word "arbitrary" is absent in article 9, paragraph 4. But it is elementary that detention which is arbitrary is unlawful or in other words, unjustified by law. Moreover the word "lawfulness" which calls for interpretation in article 9, paragraph 4, occurs in the Covenant and must therefore be interpreted in the context of the provisions of the Covenant and having regard to the object and purpose of the Covenant. This conclusion is furthermore supported by article 9, paragraph 5, which governs the granting of compensation for detention "unlawful" either under the terms of the domestic law or within the meaning of the Covenant or as being arbitrary. Since the author in the present case was totally barred by Section 54R of the Migration Amendment Act from challenging the "lawfulness" of his detention and seeking his release, his right under article 9, paragraph 4, was violated.

LIBERTY AND SECURITY OF THE PERSON

- *McLawrence v. Jamaica* (702/1996), ICCPR, A/52/40 vol. II (18 July 1997) 225 (CCPR/C/60/D/702/1996) at para. 5.5.

...
5.5 As to the claim that article 9, paragraph 1, was breached because the author's arrest warrant did not feature the three principal sources of evidence later relied upon by the prosecution, the Committee recalls that the principle of legality is violated if an individual is arrested or detained on grounds which are not clearly established in domestic legislation. There is no indication, in the instant case, that Mr. McLawrence was arrested on grounds not established by law. He has argued, however, that he was not promptly informed of the reasons for his arrest, in violation of article 9, paragraph 2. The State party has refuted this claim in general terms, in that the author must show that he did not know the reasons for his arrest; it is, however, not sufficient for the State party simply to reject the author's allegations as unsubstantiated or untrue. In the absence of any State party information to the effect that the author was promptly informed of the reasons for his arrest, the Committee must rely on Mr. McLawrence's statement that he was only apprised of the charges for his arrest when he was first taken to the preliminary hearing, which was almost three weeks after the arrest. This delay is incompatible with article 9, paragraph 2.

- *Arhuacos v. Colombia* (612/1995), ICCPR, A/52/40 vol. II (29 July 1997) 173 (CCPR/C/60/D/612/1995) at paras. 7.2, 7.3, 8.6 and 8.7.

...
7.2 Counsel states that the criminal proceedings are in contrast with the clear and forceful action taken by the Human Rights Division of the Attorney-General's Office. In Decision No. 006 of 27 April 1992, the Human Rights Division considered the following facts to have been substantiated:

> That the indigenous leaders of the Arhuaco community, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres, were detained on 28 November 1990 by Colombian army units near Curumani, Department of César.
> ...

7.3 In the above-mentioned decision of 1992, the Human Rights Division considered, in the following terms, that the two officers' participation in the events had been established:

> "Luis Fernando Duque Izquierdo and Pedro Antonio Fernández Ocampo took part in both the physical and psychological torture inflicted on José Vicente and Amado Villafañe Chaparro, members of the Arhuaco indigenous community, and on a civilian, Manuel de la Rosa Pertuz Pertuz, and also the

abduction and subsequent killing of Angel María Torres, Luis Napoleón Torres and Antonio Hugues Chaparro" (sheet 30).

On the basis of the evidence gathered by the Human Rights Division, counsel rejects the Colombian Government's argument justifying the delays and standstill in the investigations.

...

8.6 Counsel has alleged a violation of article 9 in respect of the three murdered indigenous leaders. The above-mentioned decision of the Human Rights Division concluded that the indigenous leaders' abduction and subsequent detention were illegal (see paras. 7.2 and 7.3 above), as no warrant for their arrest had been issued and no formal charges had been brought against them. The Committee concludes that the authors' detention was both unlawful and arbitrary, violating article 9 of the Covenant.

8.7 Counsel has claimed a violation of article 14 of the Covenant in connection with the interrogation of the Villafañe brothers by members of the armed forces and by a civilian with military authorization without the presence of a lawyer and with total disregard for the rules of due process. As no charges were brought against the Villafañe brothers, the Committee considers it appropriate to speak of arbitrary detention rather than unfair trial or unfair proceedings within the meaning of article 14. The Committee accordingly concludes that José Vicente and Amado Villafañe were arbitrarily detained, in violation of article 9 of the Covenant.

- *G. T. v. Australia* (706/1996), ICCPR, A/53/40 vol. II (4 November 1997) 184 (CCPR/C/61/D/706/1996) at paras. 8.4 and 8.7.

...

8.4 In cases like the present case, a real risk is to be deducted from the intent of the country to which the person concerned is to be deported, as well as from the pattern of conduct shown by the country in similar cases. The Australian Government is deporting T. from its territory because he has no entitlement to remain in Australia; Malaysia has not requested T.'s return. Although the Committee considers that the "assurances" given by the Malaysian Government do not as such preclude the possibility of T.'s prosecution for exporting or possessing drugs, nothing in the information before the Committee points to any intention on the part of Malaysian authorities to prosecute T. The State party itself has made investigations into the possibility of the imposition of the death sentence for T. and has been informed that in similar cases no prosecution has occurred. In the circumstances, it cannot be concluded that it is a foreseeable and necessary consequence of T.'s deportation that he will be tried, convicted and sentenced to death.

...

8.7 With regard to the possible preventative detention of T. under the Dangerous Drugs

(Special Preventative Measures) Act 1985, the Committee notes that it is likely that T. will be detained for questioning upon his return to Malaysia. According to the State party, however, preventative detention is not automatic and is not likely to occur in the instant case, taking into account T.'s limited knowledge of the trafficking in which he was involved. The author has not challenged this information, and only relies on the existence of the law in claiming that there is a risk that her husband may be subject to preventative detention. In the circumstances, the Committee cannot conclude that T.'s deportation to Malaysia would amount to a violation by Australia of his rights under article 9 of the Covenant.

- *Domukhousky, Tsiklauri, Gelbakhiani and Dokvadze v. Georgia* (623,624,626 and 627/1995), ICCPR, A/53/40 vol. II (6 April 1998) 95 (CCPR/C/62/D/623/1995) at para. 18.2.

...
18.2 With regard to the claim made by Mr. Domukovsky and Mr. Gelbakhiani that they were illegally arrested when residing in Azerbaijan, the Committee notes that the State party has submitted that they were arrested following an agreement with the Azerbaijan authorities on cooperation in criminal matters. The State party has provided no specific information about the agreement, nor has it explained how the agreement was applied to the instant case. Counsel for Mr. Domukovsky, however, has produced a letter from the Azerbaijan Ministry of Internal Affairs to the effect that it was not aware of any request for their arrest. In the absence of a more specific explanation from the State party of the legal basis of their arrest in Azerbaijan, the Committee considers that due weight should be given to the authors' detailed allegations and finds that their arrest was unlawful in violation of article 9, paragraph 1, of the Covenant.

- *A. v. New Zealand* (754/1997), ICCPR, A/54/40 vol. II (15 July 1999) 245 at paras. 3.1, 3.2, 7.2-7.4, 8 and Individual Opinion by Fausto Pocar and Martin Scheinin (partly dissenting), 255.

...
3.1 The author claims that his original detention under the Mental Health Act was unlawful, and that judge Unwin, not being convinced that he was mentally disordered, acted arbitrarily and unlawfully in not discharging him.

3.2 He further contends that the yearly review hearings by a panel of psychiatrists were unfair, in that he had no access to the documents they based themselves on and could not call any witnesses on his behalf. In his opinion, the hearings were orchestrated to continue his unlawful detention.
...

7.2 The main issue before the Committee is whether the author's detention under the Mental Health Act from 1984 to 1993 constituted a violation of the Covenant, in particular of article 9. The Committee notes that the author's assessment under the Mental Health Act followed threatening and aggressive behaviour on the author's part, and that the committal order was issued according to law, based on an opinion of three psychiatrists. Further, a panel of psychiatrists continued to review the author's situation periodically. The Committee is therefore of the opinion that the deprivation of the author's liberty was neither unlawful nor arbitrary and thus not in violation of article 9, paragraph 1, of the Covenant.

7.3 The Committee further notes that the author's continued detention was regularly reviewed by the Courts and that the facts of the communication thus do not disclose a violation of article 9, paragraph 4, of the Covenant. In this context, the Committee has noted the author's argument that the decision by Unwin J not to dismiss him from compulsory status was arbitrary. The Committee observes, however, that this decision and the author's continued detention were reviewed by other courts, which confirmed Unwin J's findings and the necessity of continuation of compulsory status for the author. The Committee refers to its constant jurisprudence, that it is for the courts of States parties concerned to review the evaluation of the facts as well as the application of the law in a particular case, and not for the Committee, unless the Courts' decisions are manifestly arbitrary or amount to a denial of justice. On the basis of the material before it, the Committee finds that the Courts' reviews of the author's compulsory status under the Mental Health Act did not suffer from such defects.

7.4 As a consequence of the above findings, the author's claim under article 9, paragraph 5, is without merit.

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

Individual Opinion by Fausto Pocar and Martin Scheinin

We associate ourselves with the general points of departure taken by the Committee. Treatment in a psychiatric institution against the will of the patient is a form of deprivation of liberty that falls under the terms of article 9 of the Covenant. In an individual case there might well be a legitimate ground for such detention, and domestic law should prescribe both the criteria and procedures for assigning a person to compulsory psychiatric treatment. As a consequence, such treatment can be seen as a legitimate deprivation of liberty under the terms of article 9, paragraph 1.

The special nature of compulsory psychiatric treatment as a form of deprivation of liberty lies in the fact that the treatment is legitimate only as long as the medical criteria necessitating

it exist. In order to avoid compulsory psychiatric treatment from becoming arbitrary detention prohibited by article 9, paragraph 1, there must be a system of mandatory and periodic review of the medical-scientific grounds for continuing the detention.

In the present case we are satisfied that the law of New Zealand, as applied in the case, met with the requirements of article 9, paragraph 1. The author was subject to a system of periodic expert review by a board of psychiatrists. Although the periodicity of one year appears to be rather infrequent, the facts of the case do not support a conclusion that this in itself resulted in a violation of the Covenant.

- *Spakmo v. Norway* (631/1995), ICCPR, A/55/40 vol. II (5 November 1999) 22 at paras. 2.1-2.3, 6.2, 6.3 and 8.

...
2.1 The author was commissioned, in July 1984, by a landlord, one Finn Grimsgaard, to carry out repairs on a building, including the demolition and replacement of three balconies. Work commenced on 23 July 1984. Two tenants applied for an injunction from the Tenancy Disputes Court until such time as the owner guaranteed that the balconies would be restored to their original appearance; the injunction was granted on 25 July 1984. According to the author, he then contacted the judge of the Tenancy Disputes Court to ascertain how to proceed and was informed that the owner could either request an oral negotiation in court or that the municipal building authorities issue a ruling authorizing the demolition of the balconies. In the morning of Friday 27 July 1984, a municipal inspector, Per M. Berglie (since deceased), examined the building together with the author. The author states that the building inspector gave an oral order to continue with the demolition.

2.2 The author reinitiated the work later on 27 July 1984. After having received a complaint from one of the tenants in the building, the police arrived at the site for inspection at 10.30 p.m. The police was of the opinion that the work was disturbing the peace in the neighbourhood, and verbally ordered the author to stop his work. The author refused to do so and claimed that he was working legally. After repeatedly having been ordered to stop his activities, the superintendent on duty ordered the author's arrest. He was arrested around 11.00 p.m., and released one hour later.

2.3 The next day, the author continued with his demolition activities. Again, the police ordered him to stop, which the author refused. Around 2.25 pm he was arrested and brought to the police station from where he was released eight hours later. On Tuesday 31 July 1984, the building authorities issued a written demolition order for the balconies.
...
6.2 The question before the Committee is whether the author's arrest was in violation of

article 9 of the Covenant. The author has argued that there was no legal basis for his arrest and that the police was exceeding its competence when detaining him ... On the basis of the information before it, the Committee concludes that the author was arrested in accordance with Norwegian law and that his arrest was thus not unlawful.

6.3 The Committee recalls that for an arrest to be in compliance with article 9, paragraph 1, it must not only be lawful, but also reasonable and necessary in all the circumstances. 3/ ... The author's arrest of the next day was again a result of him refusing to follow the orders of the police. While accepting that the author's arrest by the police also on Saturday may have been reasonable and necessary, the Committee considers that the State party has failed to show why it was necessary to detain the author for eight hours in order to make him stop his activities. In the circumstances, the Committee finds that the author's detention for eight hours was unreasonable and constituted a violation of article 9, paragraph 1, of the Covenant.

...

8. ...[T]he State party is under the obligation to provide Mr. Spakmo with an effective remedy, including compensation. The State party is under an obligation to take measures to prevent similar violations in the future.

_____

Notes

...

3/ See the Committee's Views in respect to communication No. 305/1988 (*Van Alphen v. The Netherlands*), adopted on 23 July 1990.

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For dissenting opinion in this context, see Spakmo v. Norway (631/1995), ICCPR, A/55/40 vol. II (5 November 1999) 22 at Individual Opinion by A. Amor, N. Ando, Lord Colville, E. Klein, R. Wieruszewski and M. Yalden, 28.

- *Dias v. Angola* (711/1996), ICCPR, A/55/40 vol. II (20 March 2000) 111 at paras. 3, 8.3 and 10.

...

3. The author claims that Angola has violated the Covenant, since it failed to investigate the crimes committed, keeps those responsible for the crimes in high positions, and harasses the author and the witnesses so that they can't return to Angola, with as a consequence for the author that he has lost his property...

...

8.3 The Committee recalls its jurisprudence that article 9(1) of the Covenant protects the right to security of person also outside the context of formal deprivation of liberty. An interpretation of article 9 which would allow a State party to ignore threats to the personal

security of non-detained persons subject to its jurisdiction would render totally ineffective the guarantees of the Covenant. 1/ In the present case, the author has claimed that the authorities themselves have been the source of the threats. As a consequence of the threats against him, the author has been unable to enter Angola, and he has therefore been prevented from exercising his rights. If the State party neither denies the threats nor cooperates with the Committee to explain the matter, the Committee must give due weight to the author's allegations in this respect. Accordingly, the Committee concludes that the facts before it disclose a violation of the author's right of security of person under article 9, paragraph 1, of the Covenant.

...

10. ...[T]he State party is under the obligation to provide Mr. Dias with an effective remedy and to take adequate measures to protect his personal security from threats of any kind. The State party is under an obligation to take measures to prevent similar violations in the future.

_____

Notes

1/ See the Committee's Views in case No. 195/1985, *Delgado Paez v. Colombia*, paragraph 5.5, adopted on 12 July 1990, document CCPR/C/39/D/195/1985.

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- *Chongwe v. Zambia* (821/1998), ICCPR, A/56/40 vol. II (25 October 2000) 137 at paras. 2.1-2.3, 2.8, 2.13, 2.14, 5.3, 6 and 7.

...

2.1 The author, a Zambian advocate and chairman of a 13-party opposition alliance, states that in the afternoon of 23 August 1997, he and Dr. Kenneth Kaunda, for 27 years the President of Zambia, were shot and wounded by the police. The author states that the incident occurred in Kabwe, a town some 170 kilometres north of Lusaka, while the author and Dr. Kaunda were to attend a major political rally to launch a civil disobedience campaign. He annexes reports by Human Rights Watch and Inter-African Network for Human Rights and Development as part of his communication.

2.2 The author states that the police fired on the vehicle on which he was travelling, slightly wounding former President Kaunda and inflicting a life threatening wound on the author. The police force subsequently promised to undertake its own investigation. The Zambian Human Rights Commission was also said to be investigating the incident; but no results of any investigations have been produced.

2.3 He further refers to the Human Rights Watch Report for May 1998, Vol. 10, No 2 (A), titled "Zambia, no model for democracy") which includes 10 pages on the so-called "Kabwe

shooting", confirming the shooting incident that took place by quoting witness statements and medical reports.

...

2.8 According to the Human Rights Watch report, President Chiluba on 26 August 1997, denied that the Kabwe shooting was a state-sponsored assassination plot. He said that the Zambian police had instigated an investigation and that Nungu Sassasali, the commanding officer at Kabwe, was suspended. However, he rejected calls for an independent inquiry into the incident. The report refers to the ZNBC radio, stating that on 28 August, President Chiluba said the government would not apologise over the Kabwe shooting as it could not be held responsible for it.

...

2.13 Secondly, in its report, submitted by the author, on the investigation of the Kabwe-shooting, the Inter-African Network for Human Rights and Development concluded that the shooting incident took place, and that an international tribunal should investigate the assassination attempt on the former President Kenneth Kaunda. This report, which is based on evidence taken from persons directly concerned in the incident, shows that the car in which the author was travelling, had left the centre of Kabwe. Before it did so, there is evidence that the local police commander had given orders to his men to fire on the car without giving any details as to the objective of such shooting; this information was relayed on the police radio network. At a roundabout at the outskirts of Kabwe, a police vehicle whose registration number and driver have been identified attempted to block the path of the car. The car's driver evaded this attempt, and there is evidence that two policemen standing on the back of the police vehicle opened fire on the car.

2.14 The author claims that on 28 November 1997, while on board a British Airways plane in Harare, he was told by airport and airline personnel that there was a VIP plane on the runway sent by the Zambian Government to collect him. He decided not to go back to Zambia, and has since this incident been residing in Australia. He will not return to Zambia, as he fears for his life.

...

5.3 The Committee recalls its jurisprudence that article 9(1) of the Covenant protects the right to security of person also outside the context of formal deprivation of liberty.1/ The interpretation of article 9 does not allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction. In the present case, it appears that persons acting in an official capacity within the Zambian police forces shot at the author, wounded him, and barely missed killing him. The State party has refused to carry out independent investigations, and the investigations initiated by the Zambian police have still not been concluded and made public, more than three years after the incident. No criminal proceedings have been initiated and the author's claim for compensation appears to have been rejected. In the circumstances, the Committee concludes that the author's right to security of person, under article 9, paragraph 1 of the Covenant, has been violated.

LIBERTY AND SECURITY OF THE PERSON

6. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 6, paragraph 1, and 9, paragraph 1, of the Covenant.

7. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Chongwe with an effective remedy and to take adequate measures to protect his personal security and life from threats of any kind. The Committee urges the State party to carry out independent investigations of the shooting incident, and to expedite criminal proceedings against the persons responsible for the shooting. If the outcome of the criminal proceedings reveals that persons acting in an official capacity were responsible for the shooting and hurting of the author, the remedy should include damages to Mr Chongwe. The State party is under an obligation to ensure that similar violations do not occur in the future.

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Notes

1/ See the Committee's Views in case No 195/1985, Delgado Paez, paragraph 5.5, adopted on 12 July 1990, document CCPR/C/39/D/195/1985, and in case No 711/1996 Carlos Dias, paragraph 8.3, adopted on 20 March 2000, document CCPR/C/68/D/711/1996.

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- *Jiménez Vaca v. Colombia* (859/1999), ICCPR, A/57/40 vol. II (25 March 2002) 187 (CCPR/C/74/D/859/1999) at paras. 2.1-2.14, 7.1-7.3, 8 and 9.

...

2.1 Mr. Jiménez Vaca was a practising trial lawyer in the city of Medellín and in the region of Urabá, based for his work in the municipality of Turb...

2.2 From 1980 onwards, the author was a member of the various commissions set up by the Government to find a solution to the social and labour conflicts and the violence in the region, including the Tripartite Commission, the Special Commission for Urabá, the Commission on Permanent Guarantees in Urabá and the High-Level Commission. The author was also a member of the national and regional executive of the *Frente Popular* opposition political party until his exile in 1988.

2.3 In 1980, because of his professional activities on behalf of the unions, the author began to be summoned, harassed and temporarily detained by the Voltígeros military battalion. The arbitrary detention of workers became common practice, as did the presence of soldiers at union meetings, and prior authorization from the military commander was required for union activities.

2.4 On 15 December 1981, at a *Sintagro* meeting in Turbo municipality, a military patrol

detained the participants, including the author, questioned them and photographed them. Some of them were taken to the Voltígeros battalion quarters, where they were tortured in various ways. The author was released after three hours of detention on condition that he should report to the chief of military intelligence in five days' time. When he did so, the author was interrogated and urged to "collaborate" with the military authorities in order to "avoid problems in the future".

2.5 Between 1984 and 1985, the author advised *Sintagro* in the negotiation of over 150 collective agreements it signed with the banana companies. During the negotiations, soldiers, police officers and secret agents kept the author and his residence and office under constant surveillance. The author received death threats and was harassed with phone calls and written messages telling him to leave the area and asking where he would like to die, with a warning that the authors knew where his family lived.

2.6. As a result, the author submitted a criminal complaint regarding the death threats to the second circuit court in Turbo. The court notified the Antioquia administrative court on 22 October 1990 that the proceedings for extortion practised on the *Sindebras* board of directors, in which the author was registered as an aggrieved party, had been transmitted. The author claims that he never learned of the outcome of these proceedings. The author also claims to have no knowledge of the outcome of the investigations regarding the criminal complaint he had filed with the regional procurator's office in Turbo in mid-1984.

2.7 In September 1984, the author lodged a complaint for death threats with the regional office of the administrative security department in Turbo, but was never informed of the outcome of the investigation.

2.8 On 26 August 1985, pamphlets were delivered under the doors of a number of houses, asking "Are you a member of *Sintagro*? Doesn't it bother you to belong to a group of hired assassins and murderers of the people, drug bandits led by Argemiro Correa, Asdrúbal Jiménez and Fabio Villa?" A few days later, another pamphlet was circulated, in which the author was warned to avoid certain areas if he did not want to follow his colleagues to the cemetery. Some time afterwards one of the author's brothers disappeared and another was murdered.

2.9 In December 1985, the author, together with other Sintagro leaders, reported the Voltígeros battalion's intervention in labour conflicts to the Procurator-General and called for an investigation of the soldiers involved in the harassment and threats. The author was never informed of the outcome.

2.10 In October 1986, the author lodged a complaint with the *Foro por el Derecho a la Vida* (Forum for the Right to Life), with the assistance of several authorities, including the

Procurator-General and the National Director of Pre-Trial Proceedings.

2.11 At the beginning of 1987, as a result of the wave of violence against workers and the population, the Government set up a high-level commission, of which the author was a member alongside civil, military and security authorities. When the Commission met in February 1987, the author lodged complaints for the death threats and harassment to which he was being subjected. After he had worked with the Commission, the author was forced to leave Urabá and take refuge in Medellín for safety.

2.12 On 6 September 1987, the author again asked the authorities for protection as he was receiving death threats more frequently since becoming involved in the High-Level Commission. He then received a number of visits from unknown men, and this led him to close the Medellín office for good in November 1987 and move to Bogotá. He was subsequently urged to leave the country.

2.13 On 4 April 1988, as the author was travelling with Sonia Roldán in a taxi from the airport to Medellín, two men dressed in civilian clothes and riding a bicycle fired pistol shots at the taxi, hitting the author twice. The men fled after the attack thinking that the author was dead. After five days in hospital, the author was transferred for security reasons to another hospital. He stayed there until he was well enough to travel to the United Kingdom, where he requested asylum on 20 May 1988. He was granted refugee status on 4 January 1989. This assault left the author with, *inter alia*, permanent damage to his motor and gastrointestinal systems and impaired circulation in one leg.

2.14 On 9 February 1990, the author submitted, by proxy, a claim for damages to the administrative court on the grounds that the authorities had failed to protect his life and to ensure his right to practise as a lawyer, but this claim was dismissed on 8 July 1999.1/ Criminal Court No. 28 in Medellín officially undertook the criminal investigation into the attempt on the author's life, but the author knows nothing of the outcome.

...

7.1 The author claims that article 9, paragraph 1, of the Covenant has been violated, insofar as the State party was obligated, in view of the death threats that had been made against him, to take the necessary measures to ensure his personal safety and did not do so. The Committee recalls its jurisprudence3/ regarding article 9, paragraph 1, and reiterates that the Covenant also protects the right to security of persons not deprived of their liberty. An interpretation of article 9 which would allow a State party to ignore known threats to the lives of persons under its jurisdiction solely on the grounds that those persons are not imprisoned or detained would render the guarantees of the Covenant totally ineffective.

7.2 In the case in question, Mr. Jiménez Vaca had an objective need for the State to take steps to ensure his safety, given the threats made against him. The Committee takes note of

the State party's observations, set out in paragraph 5.1, but notes that the State party does not refer to the complaint which the author claims to have filed with the regional procurator's office in Turbo or before the regional office of the administrative security department of Turbo, nor does it offer any argument to show that the so-called "extortion" did not begin as a result of the complaint concerning death threats which the author filed with the Turbo second criminal circuit court. The Committee must also consider the fact that the State party does not deny the author's allegations that there was no reply to his request that the threats should be investigated and his protection guaranteed. The attempt on the author's life subsequent to the threats confirms that the State party did not take, or was unable to take, adequate measures to guarantee Mr. Asdrúbal Jiménez's right to security of person as provided for in article 9, paragraph 1.

7.3 With regard to the author's claim that article 6, paragraph 1, was violated insofar as the very fact that an attempt was made on his life is a violation of the right to life and the right not to be arbitrarily deprived of life, the Committee points out that article 6 of the Covenant implies an obligation on the part of the State party to protect the right to life of every person within its territory and under its jurisdiction. In the case in question, the State party has not denied the author's claims that the threats and harassment which led to an attempt on his life were carried out by agents of the State, nor has it investigated who was responsible. In the light of the circumstances of the case, the Committee considers that there has been a violation of article 6, paragraph 1, of the Covenant.

...

8. The Human Rights Committee...is of the view that the facts before it disclose violations of article 6, paragraph 1, article 9, paragraph 1, and article 12, paragraphs 1 and 4.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Luis Asdrúbal Jiménez Vaca with an effective remedy, including compensation, and to take appropriate measures to protect his security of person and his life so as to allow him to return to the country. The Committee urges the State party to carry out an independent inquiry into the attempt on his life and to expedite the criminal proceedings against those responsible for it. The State party is also under an obligation to try to prevent similar violations in the future.

Notes

1/ As is apparent from the decision of the Antioquia Administrative Court of 8 July 1999, in his claim the author alleges that his right to freedom and security was violated as a result of the threats to which he was subjected and because of which he himself requested protection, and on account of the attack he later suffered.

...

3/ Communication No. 195/1985, *William Eduardo Delgado Páez v. Colombia*, Views

adopted on 12 July 1990.

- *Jalloh v. The Netherlands* (794/1998), ICCPR, A/57/40 vol. II (26 March 2002) 144 (CCPR/C/74/D/794/1998) at paras. 2.1-2.4, 8.2, 8.3 and 9.

...

2.1 The author states that he is a national of the Ivory Coast and was born in 1979. He arrived in the Netherlands on or around 3 September 1995. The author had no identification documents in his possession on arrival, but on 15 October 1995 the immigration authorities recorded that he was 15 years of age. Earlier on 4 September 1995, he applied for asylum to the State Secretary for Justice. From this date until June 1996, the author was under the responsibility of the guardianship agency, which is appointed as the legal guardian of all unaccompanied minor asylum seekers and aliens. The author was received and accommodated at an open facility.1/

2.2 In August 1996, the author absconded from his reception facility and went into hiding out of fear of an immediate deportation.2/ His lawyer advised him to apply again for refugee status, in order to bring an end to his illegal status and to regain access to refugee accommodation. On 4 September 1996, the author made a second application for refugee status with the State Secretary for Justice. On 12 September 1996, following an interview with the Aliens Department, his detention was ordered for the following reasons: because he did not have a valid permit, because he did not possess a document proving his identity, because he did not have any financial means to live nor to return to his home country, and because of a serious suspicion that he would fail to cooperate with his removal.3/ On 17 September 1996, the author's second application for refugee status was dismissed.

2.3 On 24 September 1996, the author's request for a ruling that he was being unlawfully detained was rejected by the District Court of 's-Hertogenbosch, though the issue of his status as a minor was allegedly raised by counsel. From the judgement of the Court it appears that the author was brought before the representative of the Ivory Coast in Brussels to ascertain his identity, but with negative result. It also appears from the judgement that he was then presented to the Consulates of Sierra Leone and Mali, with equally negative results. On 8 November 1996, counsel filed a request to have the author's detention reviewed once more. On 2 December 1996, the same Court rejected the author's second request partly because a further identity investigation was being prepared to determine his nationality. However, on 9 January 1997, the State Secretary for Justice terminated the author's detention, as at that point there was no realistic prospect of expelling him. Notice was then served on the author that he must leave the Netherlands immediately.

2.4 On 5 February 1997, the author appealed against the refusal to grant him refugee status on the basis of his second application. The same Court, on 23 April 1997, decided to reopen proceedings to allow the author to undergo a medical examination. This examination took place in May 1997. On 4 June 1997, the report of a psychological examination and the results of X-ray tests to determine the author's age were made available to the Court. As a result, the Court declared the author's appeal well-founded and the State Secretary for Justice granted him a residence permit "admitted as an unaccompanied minor asylum-seeker" with effect from the date of his second asylum application.4/

...

8.2 With regard to the author's claim that his rights under article 9 have been violated, the Committee notes that his detention was lawful under Dutch law, section 26 of the Aliens Act. The Committee further notes that the author had his detention reviewed by the courts on two occasions, once twelve days after the beginning of his detention, and again two months later. On both occasions, the Court found that the author's continued detention was lawful, because he had evaded expulsion before, because there were doubts as to his identity, and because there were reasonable prospects for expulsion, as an identity investigation was still ongoing. The question remains therefore as to whether his detention was arbitrary. Recalling its previous jurisprudence6/ the Committee notes that "arbitrariness" must be interpreted more broadly than "against the law" to include elements of unreasonbleness. Considering the author's flight from the open facility at which he was accommodated from the time of his arrival for around 11 months, the Committee considers that it was not unreasonable to have detained the author for a limited time until the administrative procedure relating to his case was completed. Once a reasonable prospect of expelling him no longer existed his detention was terminated. In the circumstances, the Committee finds that the author's detention was not arbitrary and thus not in violation of article 9 of the Covenant.

8.3 The author has raised a further claim against his detention in so far as it violated the State party's obligation under article 24 of the Covenant to provide special measures of protection to him as a minor. In this connection, while the author's counsel alleges that the issue of "mental underdevelopment" was raised before the State party's authorities, he does not specify the authorities before which the issue was raised. Moreover, the judgement of the Court concerning the lawfulness of the author's detention does not reveal that the issue was actually raised in Court during the proceedings. The State party has argued that there were doubts about the author's age, that it was not certain that he was a minor until the Court's judgement following the medical examination of 4 June 1997, and that in any event article 26 of the Aliens Act does not preclude the detention of minors. The Committee notes that apart from a statement that the author was detained, he does not provide any information on the type of detention facility he was accommodated, or his particular conditions of detention. In this respect, the Committee notes the State party's explanation that the detention of minors is applied with great restraint. The Committee further notes that the detention of a minor is not per se a violation of article 24 of the Covenant. In the circumstances of this case, where

there were doubts as to the author's identity, where he had attempted to evade expulsion before, where there were reasonable prospects for expulsion, and where an identity investigation was still ongoing, the Committee concludes that the author has failed to substantiate his claim that his detention for three and a half months entailed a failure by the State party to grant him such measures of protection as are required by his status as a minor. The Committee therefore finds that the facts before it do not disclose a violation of article 24(1) of the Covenant.

...

9. The Human Rights Committee...is of the view that the facts before it do not reveal a breach of any articles of the Covenant.

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Notes

1/ On 15 October 1995, the immigration authorities recorded that the author was 15 years of age.

2/ It appears that the Aliens Department attempted to contact the author on 9 August 1996 but he had already fled.

3/ No further details on the type of detention facility or on the specific conditions of his detention have been provided.

4/ This information was provided by counsel after the initial submission to the Human Rights Committee.

...

6/ *Van Alpen v. The Netherlands*, Case no. 305/1988, Views adopted on 23 July 1990, *Suárez de Guerrero*, Case no. 45/1979, Views adopted on 31 March 1982.

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- *Jayawardena v. Sri Lanka* (916/2000), ICCPR, A/57/40 vol. II (22 July 2002) 234 (CCPR/C/75/D/916/2000) at paras. 2.1-2.9, 7.2 and 7.3.

...

2.1 The author is a medical doctor and a member of the United National Party ("UNP") in Sri Lanka. At the time of his initial communication, he was an opposition Member of Parliament but in December 2001 his party obtained a majority in Parliament and he was appointed Minister of Rehabilitation, Resettlement and Refugees. From 1998, Mrs. Chandrika Bandaranaike Kumaratunga, the President of Sri Lanka, made public accusations, during interviews with the media, that the author was involved with the Liberation Tigers of Tamil Elam ("LTTE") and such allegations were given wide publicity by the

"government-controlled" radio and television corporations. In addition, the same allegations appeared on the Daily News newspaper on 9 and 10 September 1998, and 5 January 2000, respectively.

2.2 On 3 January 2000, and during an interview broadcast over the state-owned television station, the President again accused the author of involvement with the LTTE. Two days later, a lawyer and leader of the All Ceylon Tamil Congress, who openly supported the LTTE, was assassinated by an unidentified gunman in Colombo. The author feared that he too would be murdered and that the President's accusations exposed him to many death threats by unidentified callers and to being followed by unidentified persons.

2.3 On 2 March 2000, the Secretary General of Parliament requested the Ministry of Defence to provide the author with the same security afforded to the Members of Parliament in the North-East of the country, as his work was concentrated in those provinces. He also stated that the author was in receipt of certain threats to his life and requested that he receive additional personal security. The Secretary General of Parliament confirmed in two letters to the author that he did not receive a response from the Ministry of Defence to his request. On 13 March 2000, the President accused the UNP of complicity with the LTTE in an interview published by the Far Eastern Economic Review.

2.4 On or around 15 March 2000, the author received two extra security guards, however they were not provided with "emergency communication sets" and the author was not provided with dark tinted glass in his vehicle. Such security devices are made available to all government Members of Parliament whose security is threatened, as well as providing them with more than 8 security guards.

2.5 In several faxes submitted by the author, he provides the following supplementary information. On 8 June 2001, a state-owned newspaper published an article in which it stated that the author's name had appeared in a magazine as an LTTE spy. After this incident, the author alleges to have received around 100 death threats over the telephone and was followed by several unidentified persons in unmarked vehicles. As a result of these calls, the author's family was in a state of "severe psychological shock." On 13 June 2001, the author made a complaint to the police and requested extra security, but this was not granted.

2.6 On 18 June 2001, the author made a statement to Parliament revealing the fact that his life and that of his family were in danger. He also requested the Speaker of the Parliament to refer his complaint to the "privileges committee."1/ Pursuant to his complaint to the Speaker a "select committee"2/ was set up to look into his complaint, however because of the "undemocratic prorogation to the parliament", this matter was not considered.3/

2.7 In addition, the author made a complaint to the police against a Deputy Minister of the

government who threatened to kill him. On 3 April 2001, the Attorney General instructed the "Director of Crimes of Police" to prosecute this Minister. However, on 21 June 2001, the Attorney General informed the Director of Crimes that he (the Attorney General) would have to re-examine this case again following representations made by the Deputy Minister's lawyer. The author believes that this is due to political pressure. On 19 June 2001, the author wrote to the Speaker of Parliament requesting him to advise the Secretary of the Ministry of Defence to provide him with additional security as previously requested by the Secretary General of Parliament.

2.8 On the following dates the President and the state-owned media made allegations about the author's involvement with the LTTE: 25 June 2001; 29 July 2001; 5 August 2001; 7 August 2001; and 12 August 2001. These allegations are said to have further endangered the author's life.

2.9 Furthermore, on 18 July 2001, the author alleges to have been followed by an unidentified gunman close to his constituency office. The author lodged a complaint with the police on the same day but no action was taken in this regard. On 31 August 2001, a live hand grenade was found at a junction near his residence.4/ During the parliamentary election campaign which ended on 5 December 2001, the author alleges that the President made similar remarks about the connection between the UNP and the LTTE.

...

7.2 In respect of the author's claim that the allegations made publicly by the President of Sri Lanka put his life at risk, the Committee notes that the State party has not contested the fact that these statements were in fact made. It does contest that the author was the recipient of death threats subsequent to the President's allegations but, on the basis of the detailed information provided by the author, the Committee is of the view that due weight must be given to the author's allegations that such threats were received after the statements and the author feared for his life. For these reasons, and because the statements in question were made by the Head of State acting under immunity enacted by the State party, the Committee takes the view that the State party is responsible for a violation of the author's right to security of person under article 9, paragraph 1, of the Covenant.

7.3 With regard to the author's claim that the State party violated his rights under the Covenant by failing to investigate the complaints made by the author to the police in respect of death threats he had received, the Committee notes the State party's contention that the author did not receive any death threats and that no complaints or reports of such threats were received. However, the State party has not provided any specific arguments or materials to refute the author's detailed account of at least two complaints made by him to the police. In the circumstances, the Committee concludes that the failure of the State party to investigate these threats to the life of the author violated his right to security of person under article 9, paragraph 1, of the Covenant.

Notes

1/ No further information is provided on this committee.

2/ No further information is provided on this committee.

3/ No further information has been provided by the author on this matter.

4/ According to a newspaper article, provided by the author on this matter, an investigation was carried out and the officer-in-charge stated that the incident had nothing to do with the author.

- *Borisenco v. Hungary* (852/1999), ICCPR, A/58/40 vol. II (14 October 2002) 119 (CCPR/C/76/D/852/1999) at paras. 2.1, 2.3, 3.1 and 7.2.

...
2.1 On 29 April 1996, the author and his friend, Mr. Kuspish arrived in Budapest... Because they were late for their train, they ran to the metro station. At this point, they were stopped by three policemen in civilian clothing. The police suspected them of pick-pocketing. They ill-treated the author and his friend by "tightening handcuffs and striking our heads against metal booths when we attempted to speak". They were interrogated for three hours at the police station.

2.2 On 30 April 1996, the author and his friend were charged with theft. Although the charge was not translated from Hungarian they were provided with an interpreter. Mr. Kuspish signed the investigation report but the author refused to do so without the presence of a lawyer and without including his version of the facts of the incident. The author and his friend lodged complaints against their arrest and interrogation. On 1 May 1996, in a written decision, the public prosecutor rejected these complaints, having reviewed the legality of the arrest and detention.

2.3 On 2 May 1996 the author and his friend were brought before the Pescht Central District Court for the purpose of deciding whether they should be remanded in custody. The court decided to detain them due to the risk of flight. During the police interrogation, the hearing on detention and the detention itself, the author and his friend were not allowed to contact their Embassy, families, lawyers or sports organization. On 7 May 1996, the police authorities completed the investigation and referred the case to the public prosecutor's office.
...

LIBERTY AND SECURITY OF THE PERSON

3.1 The author complains that his rights were violated as he was arrested and charged without any proof of being involved in criminal activity and was ill-treated by police on arrest. He claims that he did not understand what he was being charged with and that the charge itself was not translated. He also claims a violation of the Covenant, for having been detained for over two weeks without trial.

...

7.2 With respect to the claim that the State party violated article 9, paragraph 1, of the Covenant, the Committee recalls that, pursuant to this article, no one shall be subjected to arbitrary arrest or detention. The State party argues and the author has not contested that he was arrested on suspicion of having committed an offence. In these circumstances, the Committee cannot find a violation of article 9, paragraph 1 of the Covenant (see para.3.1).

- *Coronel et al. v . Colombia* (778/1997), ICCPR, A/58/40 vol. II (24 October 2002) 40 (CCPR/C/76/D/778/1997) at paras. 2.1-2.3, 9.3, 9.4, 9.7, 9.8 and 10.

...

2.1 Between 12 and 14 January 1993, troops of the "Motilones" Anti-Guerrilla Battalion (No. 17), attached to the Second Mobile Brigade of the Colombian National Army, conducted a military operation in the indigenous community of San José del Tarra (municipality of Hacari, department of Norte Santander) and launched a search operation in the region, making incursions into a number of neighbouring settlements and villages. During these operations, the soldiers raided several houses and arrested a number of people, including Ramón Villegas Téllez, Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Ramón Emilio Sánchez, Ramón Emilio Quintero Ropero and Luis Honorio Quintero Ropero. Both the raids and the arrests were carried out illegally, since the soldiers did not have the judicial warrants prescribed by Colombian law on criminal procedure to conduct searches or make arrests.

2.2 Ramón Villegas Téllez, Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Ramón Emilio Sánchez, Ramón Emilio Quintero Ropero, Luis Honorio Quintero Ropero and others were tortured by the soldiers, and some of them were forced to put on military uniforms and go on patrol with the members of the "Motilones" Anti-Guerrilla Batallion (No. 17). All of them were "disappeared" between 13 and 14 January 1993.

2.3 On 26 January 1993, Luis Ernesto Ascanio Ascanio, aged 16, disappeared while on his way home, abducted by soldiers who, a few days before, had raided the home of the Ascanio Ascanio family, ill-treating and harassing the family members, who included six minors and also a 22-year-old mentally deficient young man, whom they attempted to hang. The soldiers remained in the house until 31 January, holding its inhabitants hostage. Luis Ernesto Ascanio Ascanio was seen for the last time some 15 minutes away from the family home. On the

same day, members of the Ascanio family heard shouts and shots coming from outside the house. On 27 January, two of the brothers of Luis Ernesto Ascanio Ascanio succeeded in evading the military guards and fled to Ocaña, where they advised the local authorities and submitted a complaint to the Provincial Office of the Attorney-General. Once the military patrol had withdrawn, the search for Luis Ernesto Ascanio Ascanio began; the outcome was the discovery of a pocket knife belonging to him some 300 metres away from the house.

...

9.3 With regard to the authors' claim that there was a violation of article 6, paragraph 1, of the Covenant, the Committee notes that, according to the authors, the Special Investigations Unit of the Attorney-General's office established, in its final report of 29 June 1994, that State officials were responsible for the victims' detention and disappearance. Moreover, in its decision of 27 February 1998, which the Committee had before it, the Human Rights Division of the Attorney-General's Office acknowledged that State security forces had detained and killed the victims. Considering, furthermore, that the State party has not refuted these facts and that it has not taken the necessary measures against the persons responsible for the murder of the victims, the Committee concludes that the State did not respect or guarantee the right to life of Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Ramón Emilio Sánchez, Ramón Emilio Quintero Ropero, Luis Honorio Quintero Ropero, Ramón Villegas Téllez and Luis Ernesto Ascanio Ascanio, in violation of article 6, paragraph 1, of the Covenant.

9.4 With regard to the claim under article 9 of the Covenant, the Committee takes note of the authors' allegations that the detentions were illegal in the absence of any arrest warrants. Bearing in mind that the State party has not denied this fact, and since, in the Committee's opinion, the complaint is sufficiently substantiated by the documents mentioned in paragraph 9.3, the Committee concludes that there has been a violation of article 9 of the Covenant in respect of the seven victims.

...

9.7 With regard to the claim under article 17 of the Covenant, the Committee must determine whether the specific conditions in which the raid on the homes of the victims and their families took place constitute a violation of that article. The Committee takes note of the authors' allegations that both the raids and the detentions were carried out illegally, since the soldiers did not have search or arrest warrants. It also takes note of the corroborating testimony gathered from witnesses by the Attorney-General's Office showing that the procedures were carried out illegally in the private houses where the victims were staying. In addition, the Committee considers that the State party has not provided any explanation in this regard to justify the action described. Consequently, the Committee concludes that there has been a violation of article 17, paragraph 1, inasmuch as there was unlawful interference in the homes of the victims and their families or in the houses where the victims were present, including the home of the minor Luis Ernesto Ascanio Ascanio, even though he was not there at the time.

9.8 The Human Rights Committee...is of the view that the facts that have been set forth constitute violations of article 6, paragraph 1; article 7 in respect of Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Luis Ernesto Ascanio Ascanio and Luis Honorio Quintero Ropero; article 9; and article 17 of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party has an obligation to provide the victims' relatives with effective remedy, including compensation. The Committee urges the State party to conclude without delay the investigations into the violation of articles 6 and 7 and to speed up the criminal proceedings against the perpetrators in the ordinary criminal courts. The State party is also obliged to take steps to prevent similar violations from occurring in the future.

- *C. v. Australia* (900/1999), ICCPR, A/58/40 vol. II (28 October 2002) 188 (CCPR/C/76/D/900/1999) at paras. 2.1, 3.1-3.3, 7.4, 8.2-8.5, 9 and 10.

...

2.1 The author, who has close family ties in Australia 3/ but none in Iran, was lawfully in Australia from 2 February 1990 to 8 August 1990 and left thereafter. On 22 July 1992, the author returned to Australia with a Visitor's Visa but no return air ticket, and was detained, as a "non-citizen" without an entry permit, in immigration detention under (then) s.89 *Migration* Act 1958 pending removal ("the first detention").

...

3.1 The author contends that he has suffered a violation of his rights under article 7 in dual fashion. Firstly, he was detained in such a way and for such a prolonged period (from his arrival on 22 July 1992 until 10 August 1994) as to cause him mental illness, from which he did not earlier suffer. The medical evidence was unanimous in concluding that his severe psychiatric illness was brought about by his prolonged incarceration ... and this had been accepted by the AAT [Administrative Appeals Tribunal] and the courts. The author contends that he was initially imprisoned without any evidence of a risk of abscondment or other danger to the community. He could have been released into the community with commonly utilized bail conditions such as a bond or surety, or residential and/or reporting requirements. The author also alleges that his current detention is in breach of article 7.20/

3.2 Secondly, the author argues a violation of article 7 by Australia in that his proposed deportation to Iran would expose him to a real risk of a violation of his Covenant rights, at least of article 7 and possibly also article 9, by Iran. He refers in this connection to the Committee's jurisprudence that if a State party removes a person within its jurisdiction, and the necessary and foreseeable consequence is a violation of that person's rights under the Covenant in another jurisdiction, the State party itself may be in violation of the Covenant.21/ He considers that the Minister's delegate found that the author had a well-

founded fear of persecution in Iran because of his religion and because his psychological state may bring him to the notice of the authorities which could lead to the deprivation of his liberty under such conditions as to constitute persecution. Far from being overturned in subsequent proceedings, the AAT in fact affirmed this position. Moreover, the author argues that the pattern of conduct shown by Iran supports the conclusion that he will be exposed to a violation of his Covenant rights in the event of deportation.22/

3.3 The author further claims that his prolonged detention in Australia upon arrival breaches articles 9, paragraphs 1 and 4, of the Covenant, as he was detained upon arrival under the mandatory (non-discretionary) provisions of (then) s.89 Migration Act. Those provisions do not provide for any review of detention, either by judicial or administrative means. The author considers his case to fall within the principles laid down by the Committee in its Views in *A. v. Australia*,23/ in which the Committee held that detention, even of an illegal immigrant, which was neither reviewed periodically nor otherwise justified in the particular case violated article 9, paragraph 1, and that the absence of real judicial review including the possibility of release violated article 9, paragraph 4. The author emphasizes that, as in *A*'s case, there was no justification for his prolonged detention, and that the present legislation had the same effect of depriving him of the ability to make an effective judicial application for review of detention. For these violations of article 9, the author seeks adequate compensation for his detention under article 2, paragraph 3. The author also maintains that his current detention is in violation of article 9.24/

...

7.4 As to the claims relating to the first period of detention, the Committee notes that the legislation pursuant to which the author was detained provides for mandatory detention until either a permit is granted or a person is removed. As confirmed by the courts, there remained no discretion for release in the particular case. The Committee observes that the sole review capacity for the courts is to make the formal determination that the individual is in fact an "unlawful non-citizen" to which the section applies, which is uncontested in this case, rather than to make a substantive assessment of whether there are substantive grounds justifying detention in the circumstances of the case. Thus, by direct operation of statute, substantive judicial review which could provide a remedy is extinguished. This conclusion is not altered by the exceptional provision in s.11 of the Act providing for alternative restraint and custody (in the author's case his family's), while remaining formally in detention. Moreover, the Committee notes that the High Court has confirmed the constitutionality of mandatory regimes on the basis of the policy factors advanced by the State party.68/ It follows that the State party has failed to demonstrate that there were available domestic remedies that the author could have exhausted with respect to his claims concerning the initial period of detention, and these claims are admissible.

...

8.2 As to the claims relating to the first period of detention, in terms of article 9, paragraph 1, the Committee recalls its jurisprudence that, in order to avoid a characterization of

arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.69/ In the present case, the author's detention as a non-citizen without an entry permit continued, in mandatory terms, until he was removed or granted a permit. While the State party advances particular reasons to justify the individual detention...the Committee observes that the State party has failed to demonstrate that those reasons justify the author's continued detention in the light of the passage of time and intervening circumstances. In particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition. In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was, in the Committee's view, arbitrary and constituted a violation of article 9, paragraph 1.

8.3 As to the author's further claim of a violation of article 9, paragraph 4, related to this period of detention, the Committee refers to its discussion of admissibility above and observes that the court review available to the author was confined purely to a formal assessment of the question whether the person in question was a "non-citizen" without an entry permit. The Committee observes that there was no discretion for a court, as indeed held by the Full Court itself in its judgement of 15 June 1994, to review the author's detention in substantive terms for its continued justification. The Committee considers that an inability judicially to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4.

8.4 As to the author's allegations that his first period of detention amounted to a breach of article 7, the Committee notes that the psychiatric evidence emerging from examinations of the author over an extended period, which was accepted by the State party's courts and tribunals, was essentially unanimous that the author's psychiatric illness developed as a result of the protracted period of immigration detention. The Committee notes that the State party was aware, at least from August 1992 when he was prescribed tranquillisers, of psychiatric difficulties the author faced. Indeed, by August 1993, it was evident that there was a conflict between the author's continued detention and his sanity. Despite increasingly serious assessments of the author's conditions in February and June 1994 (and a suicide attempt), it was only in August 1994 that the Minister exercised his exceptional power to release him from immigration detention on medical grounds (while legally he remained in detention). As subsequent events showed, by that point the author's illness had reached such a level of severity that irreversible consequences were to follow. In the Committee's view, the continued detention of the author when the State party was aware of the author's mental condition and failed to take the steps necessary to ameliorate the author's mental deterioration constituted a violation of his rights under article 7 of the Covenant.

8.5 As to the author's arguments that his deportation would amount to a violation of article 7, the Committee attaches weight to the fact that the author was originally granted refugee status on the basis of a well-founded fear of persecution as an Assyrian Christian, coupled with the likely consequences of a return of his illness. In the Committee's view, the State party has not established that the current circumstances in the receiving State are such that the grant of refugee status no longer holds validity. The Committee further observes that the AAT, whose decision was upheld on appeal, accepted that it was unlikely that the only effective medication (Clozaril) and back-up treatment would be available in Iran, and found the author "blameless for his mental illness" which "was first triggered while in Australia". In circumstances where the State party has recognized a protection obligation towards the author, the Committee considers that deportation of the author to a country where it is unlikely that he would receive the treatment necessary for the illness caused, in whole or in part, because of the State party's violation of the author's rights would amount to a violation of article 7 of the Covenant.

9. The Human Rights Committee...is of the view that the facts before it disclose violations of articles 7 and 9, paragraphs 1 and 4, of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. As to the violations of articles 7 and 9 suffered by the author during the first period of detention, the State party should pay the author appropriate compensation. As to the proposed deportation of the author, the State party should refrain from deporting the author to Iran. The State party is under an obligation to avoid similar violations in the future.

Notes

...

3/ The author's mother, along with his brother and sister-in-law reside in Australia, while his father is deceased. Another brother resides in Canada.

...

20/ This is clarified by his subsequent (final) submissions of 21 September 2001. See paragraph 5.3 (with footnote 57), paragraph 6.3 and paragraphs 6.5 to 6.8.

21/ *ARJ v. Australia* (No. 692/1996) and *T. v. Australia* (No. 706/1996), coupled with general comment 20 on article 7.

22/ In this connection the author supplies reports, dated 14 December 1994, 1 August 1997, and 19 November 1999, by Dr. Colin Rubinstein, Senior Lecturer in Middle East Politics (Monash University) and member of Victorian Ethnic Affairs Commission, detailing "real and effective discrimination against Christians", "effective intimidation", "the fiercest campaign since 1979 against the small Christian minority", including killings of clerics and

arrests of apostates and a "gradual eradication of existing churches under legal pretences". The situation for minorities, including Christians, is "clearly degenerating" and "deteriorating rapidly". Accordingly, the author could expect a "high probability of vindictive retaliation" and "real persecution" in the event of his return.

23/ No. 560/1993.

24/ This is clarified by his subsequent (final) submissions of 21 September 2001. While the initial complaint appears confined to the initial period of detention, the State party's main submissions also address the second detention from the perspective of article 9 (see especially paragraphs 4.22-4.24 and 4.32-4.35).

...

68/ *Lim v. Australia* (1992) 176 CLR 1 (HCA).

69/ *A. v. Australia*, op. cit., at para. 9.4.

For dissenting opinions in this context, see C. v. Australia (900/1999), ICCPR, A/58/40 vol. II (28 October 2002) 188 (CCPR/C/76/D/900/1999) at Individual Opinion of Mr. Nigel Rodley, 213, and Individual Opinion of Mr. David Kretzmer, 214.

- *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 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.

LIBERTY AND SECURITY OF THE PERSON

...

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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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.

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

...

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- *Chambala v. Zambia* (856/1999), ICCPR, A/58/40 vol. II (15 July 2003) 130 (CCPR/C/78/D/856/1999) at paras. 2.1, 2.2, 7.2, 7.3, 8 and 9.

...

2.1 The author was arrested and detained without charge on 7 February 1987. He was served with a Police Detention Order2/ pursuant to Regulation 33(6) of the Preservation of Public Security Act on 12 February 1987. On 24 February 1987 the Police Detention Order was revoked, but on the same day he was served with a Presidential Detention Order pursuant to Regulation 33 (1) of the Preservation of Public Security Act. The grounds of the detention were served on the author on 5 March 1987; they state that he was being detained for (a) receiving and keeping an escaped prisoner, Henry Kalenga, at his house, (b) whom the author knew was detained for offences under the Preservation of Public Security Act, (c) that he assisted Mr. Kalenga in his attempt to flee to a country hostile to Zambia, and (d) that he never reported the presence of Mr. Kalenga to the Security Forces.

2.2 After detention for over one year without any production before a court or a judicial officer, the author applied for release. On 22 September 1988, the High Court of Zambia decided that there were no reasons to keep him in detention. Nevertheless, the author was

not released until December 1988, when the President revoked his detention. According to the author, the maximum prison sentence for the offence he was charged with was 6 months.

...

7.2 With regard to the author's allegation that he was subjected to arbitrary detention, the Committee has noted that the author was detained for a period of 22 months, dating from 7 February 1987, a claim that has not been contested by the State party. Moreover, the State party has not sought to justify this lengthy detention before the Committee. Therefore, the detention was, in the Committee's view, arbitrary and constituted a violation of article 9, paragraph 1, read together with article 2, paragraph 3.

7.3 The Committee further notes that the author's detention for the further two months following the High Court's determination that there were no grounds to hold him in detention was, in addition to being arbitrary in terms of article 9, paragraph 1, also contrary to Zambian domestic law, thus giving rise to a violation of the right to compensation under article 9, paragraph 5.

8. The Human Rights Committee...is of the view that the facts before it, disclose violations of article 9, paragraph 1, read together with article 2, paragraph 3, and of article 9, paragraph 5, 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. In view of the fact that the State party has committed itself to pay compensation, the Committee urges the State party to grant as soon as possible compensation to the author for the period that he was arbitrarily detained from 7 February 1987 to December 1988. The State party is under an obligation to ensure that similar violations do not occur in the future.

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Notes

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2/ The Police Detention Order dated 12 February 1987 states that the author should be detained for a period not exceeding 28 day spending a decision whether a Detention Order should be made against him.

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- *Sarma v. Sri Lanka* (950/2000), ICCPR, A/58/40 vol. II (16 July 2003) 248 (CCPR/C/78/D/950/2000) at paras. 2.1-2.6, 9.2-9.4 and 11.

...

2.1 The author alleges that, on 23 June 1990, at about 8.30 a.m., during a military operation, his son, himself and three others were removed by army members from their family residence

in Anpuvalipuram, in the presence of the author's wife and others. The group was then handed over to other members of the military, including one Corporal Sarath, at another location (Ananda Stores Compound Army Camp). The author's son was apparently suspected of being a member of the LTTE (Liberation Tigers of Tamil Eelam) and was beaten and tortured. He was thereafter taken into military custody at Kalaimagal School allegedly after transiting through a number of other locations. There, he was allegedly tortured, hooded and forced to identify other suspects.

2.2 In the meantime, the author and other persons arrested were also transferred to Kalaimagal School, where they were forced to parade before the author's hooded son. Later that day, at about 12.45 p.m., the author's son was taken to Plaintain Point Army Camp, while the author and others were released. The author informed the Police, the International Committee of the Red Cross (ICRC) and human rights groups of what had happened.

2.3 Arrangements were later made for relatives of missing persons to meet, by groups of 50, with Brigadier Pieris, to learn about the situation of the missing ones. During one of these meetings, in May 1991, the author's wife was told that her son was dead.

2.4 The author however claims that, on 9 October 1991 between 1:30 and 2 p.m., while he was working at "City Medicals Pharmacy", a yellow military van with license plate No. 35 Sri 1919 stopped in front of the pharmacy. An army officer entered and asked to make some photocopies. At this moment, the author saw his son in the van looking at him. As the author tried to talk to him, his son signalled with his head to prevent his father from approaching.

2.5 As the same army officer returned several times to the pharmacy, the author identified him as star class officer Amarasekara. In January 1993, as the "Presidential Mobile Service" was held in Trincomalee, the author met the then Prime Minister, Mr. D. B. Wijetunghe and complained about the disappearance of his son. The Prime Minister ordered the release of the author's son, wherever he was found. In March 1993, the military advised that the author's son had never been taken into custody.

2.6 In July 1995, the author gave evidence before the "Presidential Commission of Inquiry into Involuntary Removals and Disappearances in the Northern and Eastern Provinces" (The Presidential Commission of Inquiry), without any result. In July 1998, the author again wrote to the President, and was advised in February 1999 by the Army that no such person had been taken into military custody. On 30 March 1999, the author petitioned to the President, seeking a full inquiry and the release of his son.

...

9.2 With regard to the author's claim in respect of the disappearance of his son, the Committee notes that the State party has not denied that the author's son was abducted by an

officer of the Sri Lankan Army on 23 June 1990 and has remained unaccounted for since then. The Committee considers that, for purposes of establishing State responsibility, it is irrelevant in the present case that the officer to whom the disappearance is attributed acted *ultra vires* or that superior officers were unaware of the actions taken by that officer.13/. The Committee therefore concludes that, in the circumstances, the State party is responsible for the disappearance of the author's son.

9.3 The Committee notes the definition of enforced disappearance contained in article 7, paragraph 2 (i) of the Rome Statute of the International Criminal Court14/: *"Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time*. Any act of such disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to liberty and security of person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10). It also violates or constitutes a grave threat to the right to life (art. 6).15/

9.4 The facts of the present case clearly illustrate the applicability of article 9 of the Covenant concerning liberty and security of the person. The State party has itself acknowledged that the arrest of the author's son was illegal and a prohibited activity. Not only was there no legal basis for his arrest, there evidently was none for the continuing detention. Such a gross violation of article 9 can never be justified. Clearly, in the present case, in the Committee's opinion, the facts before it reveal a violation of article 9 in its entirety.

...

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author's son, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the violations suffered by the author's son, the author and his family. The Committee considers that the State party is also under an obligation to expedite the current criminal proceedings and ensure the prompt trial of all persons responsible for the abduction of the author's son under section 356 of the Sri Lankan Penal Code and to bring to justice any other person who has been implicated in the disappearance. The State party is also under an obligation to prevent similar violations in the future.

Notes

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13/ See article 7 of the Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session 2001 and article 2, paragraph 3 of the Covenant.

14/ Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by *procès-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

15/ See article 1, paragraph 2 of the Declaration on the Protection of All Persons from Enforced Disappearances, General Assembly Resolution 47/133, 47 UN GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992). Adopted by General Assembly resolution 47/133 of 18 December 1992.

- *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, 7.2, 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.

...

7.2 With respect to the allegations of a violation of the right of the victim to liberty and security of person and that her son was arrested without a warrant, the Committee regrets that the State party has failed to provide an explicit response to this claim, merely asserting in general terms that Mr. Gómez Casafranca was arrested in accordance with Peruvian law. The Committee notes the author's claim that her son was held for 22 days at the police station, whereas the law provides for a period of 15 days. The Committee considers that since the State party has not contested these claims due weight must be attached to them. Accordingly the Committee finds that there was a violation of article 9, paragraphs 1 and 3, of the Covenant.

...

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

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to release Mr. Gómez Casafranca and pay him appropriate compensation. The

State party is also under an obligation to ensure that similar violations do not occur in future.

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Notes

1/ Department of Counter-Terrorism.

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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, 2.4 and 5.3.

...

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

...

2.4 The authors also refer to various coercive measures used by the authorities to prevent them from pressing their claims. They mention two warrants for the arrest of Judges René Sibu Matubuka and Ntumba Katshinga2/. They explain that, following a meeting on the decree in question which was held between the G.315 and the Minister of Justice on 23 November 1998, the Minister withdrew the two warrants. The authors add that, further to their follow-up letter to the Minister of Justice concerning the lack of action taken following their meeting on the decree, Judges René Sibu Matubuka and Benoît Malu Malu were arrested and detained from 18 to 22 December 1998 in an illegal detention centre in the GLM (Groupe Litho Moboti) building belonging to the Task Force for Presidential Security. They were heard by persons who had neither been sworn in nor authorized by the Attorney-General of the Republic, as required by law.

...

5.3 Having regard to the complaint of a violation of article 9 of the Covenant, the Committee notes that Judges René Sibu Matubuka and Benoît Malu Malu were arbitrarily arrested and detained from 18 to 22 December 1998 in an illegal detention centre belonging to the Task Force for Presidential Security. In the absence of a reply from the State party, the Committee notes that there has been an arbitrary violation of the right to liberty of the person under article 9 of the Covenant.

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Notes

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2/ Dates of arrest warrants not specified.

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LIBERTY AND SECURITY OF THE PERSON

- *Baban et al. v. Australia* (1014/2001), ICCPR, A/58/40 vol. II (6 August 2003) 331 (CCPR/C/78/D/1014/2001) at paras. 1.1, 2.2, 2.3, 2.5, 2.6, 6.8, 7.2 and 9.

1.1 The author of the communication is Omar Sharif Baban, born on 3 May 1976 and an Iraqi national of Kurdish ethnicity. He brings the communication on his own behalf and that of his son Bawan Heman Baban, born on 3 November 1997 and also an Iraqi national of Kurdish ethnicity. The author and his son were detained, at the time of presentation of the communication, in Villawood Detention Centre, Sydney, Australia.1/ The author claims that they are victims of violations by Australia of articles 7, 9, paragraph 1, 10, paragraph 1, 19 and 24, paragraph 1, of the Covenant. The author is represented by counsel.

...

2.2 On 15 June 1999, the author and his son arrived in Australia without travel documentation and were detained in immigration detention under section 189(1) Migration Act 1958. On 28 June 1999, they applied for refugee status. On 7 July 1999, the author was interviewed by an officer of the Department of Immigration and Multicultural Affairs (DIMA).

2.3 On 13 July 1999, DIMA rejected the author's claim. On 6 September 1999, the Refugee Review Tribunal (RRT) dismissed the author's appeal against DIMA's decision. On 10 September 1999, DIMA advised the author that his case did not satisfy the requirements for an exercise of the Minister's discretion to allow a person to remain in Australia on humanitarian grounds. On 12 April 2000, Federal Court (Whitlam J) dismissed the author's application for judicial review of the RRT's decision.

...

2.5 On 21 September 2000, the Full Court of the Federal Court dismissed the authors' further appeal against the Federal Court's decision. The same day, the authors lodged an application for special leave to appeal in the High Court of Australia.

2.6 In June 2001, the author and his son escaped from Villawood Detention Centre. Their current precise whereabouts are unknown. On 16 July 2001, the Registry of the High Court of Australia listed the author's case for hearing on 12 October 2001. On 15 October 2001, the High Court adjourned the hearing of the author's appeal until the author and his son were located.

...

6.8 As to the claim under article 24, the Committee notes the State party's argument that in the absence of other family in Australia, the best interests of the author's infant son were best served by being located together with his father. The Committee considers, in the light of the State party's explanation of the efforts undertaken to provide children with appropriate educational, recreational and other programs, including outside the facility, that a claim of violation of his rights under article 24 has, in the circumstances, been insufficiently substantiated, for purposes of admissibility. Insofar as the claim under article 24 concerns

his subjection to the mandatory detention regime, the Committee considers this issue is most appropriately dealt with in the context of article 9, together with his father's admissible claim under that head.

...

7.2 As to the claims under article 9, the Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.14/ In the present case, the author's detention as a non-citizen without an entry permit continued, in mandatory terms, until he was removed or granted a permit. While the State party advances particular reasons to justify the individual detention...the Committee observes that the State party has failed to demonstrate that those reasons justified the author's continued detention in the light of the passage of time and intervening circumstances such as the hardship of prolonged detention for his son or the fact that during the period under review the State Party apparently did not remove Iraqis from Australia... In particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions. The Committee also notes that in the present case the author was unable to challenge his continued detention in court. Judicial review of detention would have been restricted to an assessment of whether the author was a non-citizen without valid entry documentation, and, by direct operation of the relevant legislation, the relevant courts would not have been able to consider arguments that the individual detention was unlawful in terms of the Covenant. Judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1.15/ In the present case, the author and his son were held in immigration detention for almost two years without individual justification and without any chance of substantive judicial review of the continued compatibility of their detention with the Covenant. Accordingly, the rights of both the author and his son under article 9, paragraphs 1 and 4, of the Covenant were violated.

...

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including compensation.

Notes

1/ See, however, paragraph 2.6.

...

14/ *A. v. Australia* [Case No. 560/1993, Views adopted on 3 April 1997] and *C. v. Australia* [Case No. 900/1999, Views adopted on 28 October 2002].

15/ *Ibid.*

For dissenting opinion in this context, see Baban et al. v. Australia (1014/2001), ICCPR, A/58/40 vol. II (6 August 2003) 331 (CCPR/C/78/D/1014/2001) at Individual Opinion by Ms. Ruth Wedgwood, 344.

- *Bakhtiyari v. Australia* (1069/2002), ICCPR, A/59/40 vol. II (29 October 2003) 301 (CCPR/C/79/D/1069/2002) at paras. 2.1, 2.2, 2.5, 2.6, 2.8-2.10, 2.13, 2.14, 8.4, 9.2-9.7, 10 and 11.

  ...
  2.1 In March 1998, Mr. Bakhtiyari left Afghanistan for Pakistan where he was subsequently joined by his wife, their five children, and Mrs. Bakhtiyari's brother. Rather than being smuggled to Germany as he had understood, Mr. Bakhtiyari was instead smuggled by an unidentified smuggler to Australia through Indonesia, losing contact with his wife, children and brother-in-law. He arrived unlawfully in Australia by boat on 22 October 1999. On arrival, he was detained in immigration detention at the Port Hedland immigration detention facility. On 29 May 2000, he lodged an application for a protection visa. On 3 August 2000, he was granted a protection visa on the basis of Afghan nationality and Hazara ethnicity.

  2.2 Apparently unknown to Mr. Bakhtiyari, Mrs. Bakhtiyari, her children and her brother were also subsequently brought to Australia by the same smuggler, arriving unlawfully by boat on 1 January 2001 and were taken into immigration detention at the Woomera immigration detention facility. On 21 February 2001, they applied for a protection visa, which was refused by a delegate of the Minister of Immigration and Multicultural and Indigenous Affairs ("the Minister") on 22 May 2001 on the ground that language analysis suggested that she was Pakistani rather than Afghan, as claimed by her, and she was unable to give adequate response to questions concerning Afghanistan. On 26 July 2001, the Refugee Review Tribunal ("RRT") dismissed their application for review of the refusal. The RRT accepted that Mrs. Bakhtiyari was Hazara, but was not satisfied that she was an Afghan national, finding her credibility "remarkably poor" and her testimony "implausible" and "contradictory".
  ...
  2.5 On 2 April 2002, the Minister declined to exercise his discretion in Mrs. Bakhtiyari's favour. On 8 April 2002, an application was made to the High Court of Australia in its original jurisdiction constitutionally to review the decisions of government officials. The application challenged (i) the RRT's decision on the ground that it should have been aware of Mr. Bakhtiyari's presence on a protection visa, and (ii) the Minister's decision under s. 417 of the *Migration* Act. The application sought to require the Minister to grant a visa to Mrs.

Bakhtiyari and her children based on the visa already granted to Mr. Bakhtiyari.

2.6 On 12 April 2002, as a consequence of receiving information that Mr. Bakhtiyari was not an Afghan farmer, as he had claimed, but rather a plumber and electrician from Quetta, Pakistan, the Department of Immigration and Multicultural and Indigenous Affairs ("the Department") issued him a notice of intention to consider cancellation of his visa and provided him with an opportunity to comment on the allegations. On 26 April 2002, Mrs. Bakhtiyari made a further request to the Minister under s.417 of the *Migration* Act, but was informed that such matters were generally not referred to the Minister while litigation was underway.

...

2.8 On 2 August 2002, an application was filed with the Family Court in Adelaide on behalf of Almadar and Montazer, seeking orders against the Minister under s.67ZC of the *Family Law* Act 1975 2/ for the release of the boys from detention and for them to be made available for examination by a psychologist.

2.9 On 30 August 2002, following Mr. Bakhtiyari's institution of legal proceedings to compel the Department to release to him details of his alleged visa fraud, the Department informed him of the additional information obtained in relation to his identity and nationality, including an application by him for Pakistani identification documentation in 1975, family registration documents of 1973 and 1982 listing his birthplace, citizenship and permanent residence as Pakistani. The letter also referred to pieces of investigative journalism published in major Australian newspapers, where journalists were unable to find any person in the Afghan area from where he claimed to be who knew him, or any further evidence that he had lived there. On 20 September 2002, Mr. Bakhtiyari replied to these issues.

2.10 ...On 5 December 2002, Mr. Bakhtiyari's protection visa was cancelled, and he was taken into custody at the Villawood immigration detention facility, Sydney. The same day he lodged an application for review of this decision with the RRT, as well as an application with the Department for bridging visa seeking his release pending determination of the RRT proceedings. On 9 December 2002, a Minister's delegate refused the request for a bridging visa. On 18 December 2002, the Migration Review Tribunal upheld the decision to refuse a bridging visa.

...

2.13 On 4 March 2003, the RRT affirmed the decision to cancel Mr. Bakhtiyari's protection visa. On 22 May 2003, the Federal Court (Selway J) dismissed the author's application for judicial review of the RRT's decision, finding its conclusion open to it on the evidence. He lodged an appeal from this decision to the Full Bench of the Federal Court.

2.14 On 19 June 2003, the Full Bench of the Family Court held, by a majority, that the Court

did have jurisdiction to make orders against the Minister, including release from detention, if that was in the best interests of the child. The case was accordingly remitted for hearing as a matter of urgency as to what orders would be appropriate in the particular circumstances of the children. On 8 July 2003, the Full Bench of the Family Court granted the Minister leave to appeal to the High Court, but rejected the Minister's application for a stay on the order for rehearing as a matter of urgency. On 5 August 2003, the Family Court (Strickland J) dismissed an application for interlocutory relief, that is, that the children be released in advance of the trial of the question of what final orders would be in their best interests. On 25 August 2003, the Full Bench of the Family Court allowed an appeal and ordered the release of all of the children forthwith, pending resolution of the final application. They were released the same day and have resided with carers in Adelaide since.

...

8.4 Referring to the arguments that Mrs. Bakhtiyari and her children, if removed to Afghanistan, would be in fear of being subjected to treatment contrary to article 7 of the Covenant, the Committee observes that as the authors have not been removed from Australia, the issue before the Committee is whether such removal if implemented at the present time would entail a real risk of treatment contrary to article 7 as a consequence. The Committee also observes that the State party's authorities, in the proceedings to date, have determined, as a matter of fact, that the authors are not from Afghanistan, and hence they do not stand in fear of being returned to that country by the State party. The authors on the other hand have failed to demonstrate that if returned to any other country, such as Pakistan, they would be liable to be sent to Afghanistan, where they would be in fear of treatment contrary to article 7. Much less have the authors substantiated that even if returned to Afghanistan, directly or indirectly, they would face, as a necessary and foreseeable consequence, treatment contrary to article 7. The Committee accordingly takes the view that the claim that, if the State party returns them at the present time, Mrs. Bakhtiyari and her children would have to face treatment contrary to article 7, has not been substantiated before the Committee, for purposes of admissibility, and is inadmissible under article 2 of the Optional Protocol.

...

9.2 As to the claims of arbitrary detention, contrary to article 9, paragraph 1, the Committee recalls its jurisprudence that, in order to avoid any characterization of arbitrariness, detention should not continue beyond the period for which a State party can provide appropriate justification.18/ In the present case, Mr. Bakhtiyari arrived by boat, without dependents, with his identity in doubt and claiming to be from a State suffering serious internal disorder. In light of these factors and the fact that he was granted a protection visa and released two months after he had filed an application (some seven months after his arrival), the Committee is unable to conclude that, while the length of his first detention may have been undesirable, it was also arbitrary and in breach of article 9, paragraph 1. In the light of this conclusion, the Committee need not examine the claim under article 9, paragraph 4, with respect to Mr. Bakhtiyari. The Committee observes that Mr. Bakhtiyari's second period of detention, which has continued from his arrest for purposes of deportation on 5 December 2002 until the

present may raise similar issues under article 9, but does not express a further view thereon in the absence of argument from either party.

9.3 Concerning Mrs. Bakhtiyari and her children, the Committee observes that Mrs. Bakhtiyari has been detained in immigration detention for two years and ten months, and continues to be detained, while the children remained in immigration detention for two years and eight months until their release on interim orders of the Family Court. Whatever justification there may have been for an initial detention for the purposes of ascertaining identity and other issues, the State party has not, in the Committee's view, demonstrated that their detention was justified for such an extended period. Taking into account in particular the composition of the Bakhtiyari family, the State party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies by, for example, imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances. As a result, the continuation of immigration detention for Mrs. Bakhtiyari and her children for length of time described above, without appropriate justification, was arbitrary and contrary to article 9, paragraph 1, of the Covenant.

9.4 As to the claim under article 9, paragraph 4, related to this period of detention, the Committee refers to its discussion of admissibility above and observes that the court review available to Mrs. Bakhtiyari would be confined purely to a formal assessment of whether she was a "non-citizen" without an entry permit. The Committee observes that there was no discretion for a domestic court to review the justification of her detention in substantive terms. The Committee considers that the inability judicially to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4.

9.5 As to the children, the Committee observes that until the decision of the Full Bench of the Family Court on 19 June 2003, which held that it had jurisdiction under child welfare legislation to order the release of children from immigration detention, the children were in the same position as their mother, and suffered a violation of their rights under article 9, paragraph 4, up to that moment on the same basis. The Committee considers that the ability for a court to order a child's release if considered in its best interests, which subsequently occurred (albeit on an interim basis), is sufficient review of the substantive justification of detention to satisfy the requirements of article 9, paragraph 4, of the Covenant. Accordingly, the violation of article 9, paragraph 4, with respect to the children came to an end with the Family Court's finding of jurisdiction to make such orders.

9.6 As to the claim under articles 17 and 23, paragraph 1, the Committee observes that to separate a spouse and children arriving in a State from a spouse validly resident in a State may give rise to issues under articles 17 and 23 of the Covenant. In the present case,

however, the State party contends that, at the time Mrs. Bakhtiyari made her application to the Minister under section 417 of the *Migration* Act, there was already information on Mr. Bakhtiyari's alleged visa fraud before it. As it remains unclear whether the attention of the State party's authorities was drawn to the existence of the relationship prior to that point, the Committee cannot regard it as arbitrary that the State party considered it inappropriate to unite the family at that stage. The Committee observes, however, that the State party intends at present to remove Mrs. Bakhtiyari and her children as soon as "reasonably practicable", while it has no current plans to do so in respect of Mr. Bakhtyari, who is currently pursuing domestic proceedings. Taking into account the specific circumstances of the case, namely the number and age of the children, including a newborn, the traumatic experiences of Mrs. Bakhtiyari and the children in long-term immigration detention in breach of article 9 of the Covenant, the difficulties that Mrs. Bakhtiyari and her children would face if returned to Pakistan without Mr. Bakhtiyari and the absence of arguments by the State party to justify removal in these circumstances, the Committee takes the view that removing Mrs. Bakhtiyari and her children without awaiting the final determination of Mr. Bakhtiyari's proceedings would constitute arbitrary interference in the family of the authors, in violation of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

9.7 Concerning the claim under article 24, the Committee considers that the principle that in all decisions affecting a child, its best interests shall be a primary consideration, forms an integral part of every child's right to such measures of protection as required by his or her status as a minor, on the part of his or her family, society and the State, as required by article 24, paragraph 1, of the Covenant. The Committee observes that in this case children have suffered demonstrable, documented and on-going adverse effects of detention suffered by the children, and in particular the two eldest sons, up until the point of release on 25 August 2003, in circumstances where that detention was arbitrary and in violation of article 9, paragraph 1, of the Covenant. As a result, the Committee considers that the measures taken by the State party had not, until the Full Bench of the Family Court determined it had welfare jurisdiction with respect to the children, been guided by the best interests of the children, and thus revealed a violation of article 24, paragraph 1, of the Covenant, that is, of the children's right to such measures of protection as required by their status as minors up that point in time.

10. The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by Australia of articles 9, paragraphs 1 and 4, and 24, paragraph 1, and, potentially, of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. As to the violation of article 9, paragraphs 1 and 4, continuing up to the present time with respect to Mrs. Bakhtiyari, the State party should release her and pay her appropriate compensation. So far as concerns the

violations of articles 9 and 24 suffered in the past by the children, which came to an end with their release on 25 August 2003, the State party is under an obligation to pay appropriate compensation to the children. The State party should also refrain from deporting Mrs. Bakhtiyari and her children while Mr. Bakhtiyari is pursuing domestic proccedings, as any such action on the part of the State party would result in violations of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

_____

Notes

...

2/ Section 67ZC provides:

"(1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.

(2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration."

...

18/ *A. v. Australia* [Case No. 506/1993, Views adopted on 4 March 1993] and *C. v. Australia* [Case No. 900/1999, Views adopted on 28 October 2002].

_____

For dissenting opinion in this context, see Bakhtiyari v. Australia (1069/2002), ICCPR, A/59/40 vol. II (29 October 2003) 301 (CCPR/C/79/D/1069/2002) at Individual Opinion by Sir Nigel Rodley, 319.

- *Wilson v. The Philippines* (868/1999), ICCPR, A/59/40 vol. II (30 October 2003) 48 (CCPR/C/79/D/868/1999) at paras. 2.1, 2.3, 7.5, 8 and 9.

...

2.1 On 16 September 1996, the author was forcibly arrested without warrant as a result of a complaint of rape filed by the biological father of the author's twelve year old step-daughter and transferred to a police station. He was not advised of his rights, and, not speaking the local language, was unaware as to the reasons for what was occurring. At the police station, he was held in a 4 by 4 foot cage with three others, and charged on the second day with attempted rape of his stepdaughter. He was then transferred to Valenzuela municipal jail, where the charge was changed to rape...

...

2.3 On 30 September 1998 the author was convicted of rape and sentenced to death, as well as to P50,000 indemnity, by the Regional Trial Court of Valenzuela...

...

7.5 As to the author's claims under article 9 the Committee notes that the State party has not contested the factual submissions of the author. Hence, due weight must be given to the information submitted by the author. The Committee concludes that the author was not informed, at the time of arrest, of the reasons for his arrest and was not promptly informed of the charges against him; that the author was arrested without a warrant and hence in violation of domestic law; and that after the arrest the author was not brought promptly before a judge. Consequently, there was a violation of article 9, paragraphs 1, 2 and 3, of the Covenant.

8. The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by the Philippines of article 7, article 9, paragraphs 1, 2 and 3, and article 10, paragraphs 1 and 2, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. In respect of the violations of article 9 the State party should compensate the author...All monetary compensation thus due to the author by the State party should be made available for payment to the author at the venue of his choice, be it within the State party's territory or abroad. The State party is also under an obligation to avoid similar violations in the future.

- *Rameka v. New Zealand* (1090/2002), ICCPR, A/59/40 vol. II (6 November 2003) 330 (CCPR/C/79/D/1090/2002) at paras. 2.1-2.8, 6.2, 7.2-7.4, 8 and 9.

...
Mr. Rameka's case

2.1 On 29 March 1996, Mr. Rameka was found guilty in the High Court at Napier of two charges of sexual violation by rape, one charge of aggravated burglary, one charge of assault with intent to commit rape, and indecent assault. Pre-sentence and psychiatric reports provided to the court referred *inter alia* to the author's previous sexual offences, his propensity to commit sexual offences, his lack of remorse and his use of violence, concluding that there was a 20 per cent likelihood of further commission of sexual offences.

2.2 In respect of the first charge of rape, he was sentenced to preventive detention (that is, indefinite detention until release by the Parole Board) under section 75 of the Criminal Justice Act 1985,1/ concurrently to 14 years' imprisonment in respect of the second charge of rape, to 2 years' imprisonment in respect of the aggravated burglary and to two years' imprisonment for the assault with intent to commit rape. He was convicted and discharged in respect of the remaining indecent assault charge, as the sentencing judge viewed it as included in the other matters dealt with. He appealed against the sentence of preventive

detention as being both manifestly excessive and inappropriate, and against the sentence of 14 years' imprisonment for rape as being manifestly excessive.

2.3 On 18 June 1997, the Court of Appeal dismissed the appeal, finding that the sentencing judge was entitled to conclude, on the evidence, that there was a "substantial risk" that Mr. Rameka would offend again in an aggressive and violent manner upon release, and that there was "a high level of future dangerousness" from which the community had to be protected. The Court supported its conclusion by reference to Mr. Rameka's repeated use of a knife and violence in the context of sex-related offences, and his lengthy detention of his victim in each instance. It also found, with respect to the sentence for rape, that the 14 year term of imprisonment was "well within" the discretion of the sentencing judge.

Mr. Harris' case

2.4 On 12 May 2000, Mr. Harris was found guilty by the High Court at Auckland, following pleas of guilty, of 11 counts of sexual offences occurring over a period of three months against a boy who turned 12 during the period in question. They comprised two charges of sexual violation involving oral genital contact and nine charges of indecent assault or inducing indecent acts in respect of a boy under 12. He had previously been convicted of two charges of unlawful sexual connection with a male under 16 and one of indecently assaulting a male under 12, all in respect of an 11 year old boy. On the two unlawful sexual connection counts, he was sentenced to six years' imprisonment, and concurrently to four years' on the remaining counts.

2.5 The Solicitor-General, for the Crown, sought leave to appeal on the basis that preventive detention, or at least a longer finite sentence, should have been imposed. On 27 June 2000, the Court of Appeal agreed, and substituted a sentence of preventive detention in respect of each count. The Court referred to the warning of serious consequences given by the court sentencing the author for his previous offences, his failure to amend his behaviour following a sexual offenders' course in prison, the features of breach of a child's trust in offending, the failure to heed police warnings provided to the author against illicit contact with the child victim, as well as the comprehensive psychiatric report defining him as a homosexual paedophile attracted to pre-pubescent boys and the risk factors analysed in the report. While observing that the case would warrant a finite sentence of "not less" than seven and a half years, the Court however concluded, in the circumstances, that no appropriate finite sentence would adequately protect the public, and that preventive detention, with its features of continuing supervision after release and amenability to recall, was the appropriate sentence.

Mr. Tarawa's case

2.6 On 2 July 1999, Mr. Tarawa was found guilty of sexual violation by rape, two charges

of sexual violation by unlawful sexual connection, indecent assault, burglary, two charges of aggravated burglary, two charges of kidnapping, being an accessory after the fact, three charges of aggravated robbery, demanding with menaces, and unlawfully entering a building. Previously, he had committed multiple offences in three earlier incidents, involving breaking into homes and engaging in sexually-motivated violence, including two rapes. Subsequently, he committed further burglary and assault. The sentencing judge found a consistent pattern of predatory conduct, planned and executed with professionalism, exacerbated by the fact that some offences were committed while on bail. After considering the nature of the offending, its gravity and timespan, the nature of the victims, the response to previous rehabilitative efforts, the time since previous offending, the steps taken to avoid reoffending, the (non)acceptance of responsibility, the pre-sentence report, the psychological report and the psychiatric assessment of a very high risk of reoffending along with the relevant risk factors, the judge sentenced him to preventive detention in respect of the three sexual violation charges, and encouraged him to make use of the counselling and rehabilitative services available in prison. He was concurrently sentenced to 4 years' imprisonment on the aggravated burglary charge, 6 years for the kidnapping, 3 years for demanding with menaces, 3 years for aggravated burglary and aggravated robbery, 18 months for burglary and being an accessory after the fact, 6 years for a further kidnapping and 5 years for a further aggravated robbery, 6 months for indecent assault and 9 months for unlawful entry.

2.7 On 20 July 2000, the Court of Appeal, examining the appeal on the basis of the author's written submissions, considered the pattern of circumstances of each set of offences and found, on the entire background of the appellant, his unsuccessful rehabilitation efforts as well as the pre-sentence, psychiatric and psychological reports, that the conclusions of substantial risk requiring the protection of the public were open to the sentencing judge, who had properly weighed the available alternatives of finite sentences.

2.8 On 19 September 2001, the Judicial Committee of the Privy Council rejected all three authors' applications for special leave to appeal.

...

6.2 As to whether the authors can claim to be victims of a violation of the Covenant concerning preventive detention, as they have not yet served the amount of time that they would have had to have served to become eligible for release on parole under finite sentences applicable to their conduct, the Committee observes that the authors, having been sentenced to and begun to serve such sentences, will become effectively subject to the preventive detention regime after they have served 10 years of their sentence. As such, it is essentially inevitable that they will be exposed, after sufficient passage of time, to the particular regime, and they will be unable to challenge the imposition of the sentence of preventive detention upon them at that time. This situation may be contrasted with that in *A.R.S. v Canada*23/, where the future application of the mandatory supervision regime to the prisoner in question was at least in part dependent on his behaviour up to that point, and thus speculative at an

ealier point of time in the imprisonment. The Committee accordingly does not consider it inappropriate that the authors argue the compatibility of their sentence with the Covenant at an earlier point, rather than when ten years' imprisonment have elapsed. The communication is thus not inadmissible for want of a victim of a violation of the Covenant.

...

7.2 The Committee observes at the outset that Mr. Harris would have been subjected, according to the Court of Appeal, to a finite sentence of "not less than" seven and a half years with respect to his offences. Accordingly, Mr. Harris will serve two and a half years of detention, for preventive purposes, before the non-parole period arising under his sentence of preventive detention expires. Given that the State party has demonstrated no case where the Parole Board has acted under its exceptional powers to review *proprio motu* a prisoner's continued detention prior to the expiry of the non-parole period, the Committee finds that, while Mr. Harris' detention for this period of two and a half years is based on the State party's law and is not arbitrary, his inability for that period to challenge the existence, at that time, of substantive justification of his continued detention for preventive reasons is in violation of his right under article 9, paragraph 4, of the Covenant to approach a "court" for a determination of the “lawfulness” of his detention over this period.

7.3 Turning to the issue of the consistency with the Covenant of the sentences of preventive detention of both the remaining authors, Messrs. Rameka and Harris, once the non-parole period of 10 years expires, the Committee observes that after the 10-year period has elapsed, there are compulsory annual reviews by the independent Parole Board, with the power to order the prisoner's release if they are no longer a significant danger to the public, and that the decisions of the Board are subject to judicial review. The Committee considers that the remaining authors' detention for preventive purposes, that is, protection of the public, once a punitive term of imprisonment has been served, must be justified by compelling reasons, reviewable by a judicial authority, that are and remain applicable as long as detention for these purposes continues. The requirement that such continued detention be free from arbitrariness must thus be assured by regular periodic reviews of the individual case by an independent body, in order to determine the continued justification of detention for purposes of protection of the public. The Committee is of the view that the remaining authors have failed to show that the compulsory annual reviews of detention by the Parole Board, the decisions of which are subject to judicial review in the High Court and Court of Appeal, are insufficient to meet this standard. Accordingly, the remaining authors have not demonstrated, at the present time, that the future operation of the sentences they have begun to serve will amount to arbitrary detention, contrary to article 9, once the preventive aspect of their sentences commences.

7.4 Furthermore, in terms of the ability of the Parole Board to act in judicial fashion as a "court" and determine the lawfulness of continued detention under article 9, paragraph 4, of the Covenant, the Committee notes that the remaining authors have not advanced any reasons

why the Board, as constituted by the State party's law, should be regarded as insufficiently independent, impartial or deficient in procedure for these purposes. The Committee notes, moreover, that the Parole Board's decision is subject to judicial review in the High Court and Court of Appeal. In the Committee's view, it also follows from the permissibility, in principle, of preventive detention for protective purposes, always provided that the necessary safeguards are available and in fact enjoyed, that detention for this purpose does not offend the presumption of innocence, given that no charge has been laid against the remaining authors which would attract the applicability of article 14, paragraph 2, of the Covenant.24/ As the detention in the remaining authors' cases for preventive purposes is not arbitrary, in terms of article 9, and no suffering going beyond the normal incidents of detention has been suggested, the Committee also finds that the remaining authors have not made out any additional claim under article 10, paragraph 1, that their sentence of preventive detention violates their right as prisoners to be treated with respect for their inherent dignity.

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 9, paragraph 4, of the Covenant with respect to Mr. Harris.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Harris with an effective remedy, including the ability to challenge the justification of his continued detention for preventive purposes once the seven and a half year period of punitive sentence has been served. The State party is under an obligation to avoid similar violations in the future.

Notes

...

1/ Sections 75, 77 and 89 *Criminal Justice Act* 1985 provide as follows:

Sentence of preventive detention

"(1) This section shall apply to any person who is not less than 21 years of age, and who either

> (a) is convicted of an offence against section 128 (1) [sexual violation] of the Crimes Act 1961; or
>
> (b) Having been previously convicted on at least one occasion since that person attained the age of 17 years of a specified offence, is convicted of another specified offence, being an offence committed after that previous conviction.

(2) Subject to the provisions of this section, the High Court, if it is satisfied that it is expedient for the protection of the public that an offender to whom this section applies

should be detained in custody for a substantial period, may pass a sentence of preventive detention…

(3A) A court shall not impose a sentence of preventive detention on an offender to whom subsection (1)(a) of this section applies unless the court

(c) Has first obtained a psychiatric report on the offender; and

(d) Having regard to that report and any other relevant report,-

Is satisfied that there is a substantial risk that the offender will commit a specified offence upon release."

Period of preventive detention indefinite

"An offender who is sentenced to preventive detention shall be detained until released on the direction of the Parole Board in accordance with this Act."

Discretionary release on parole

"(1) Subject to subsection (2) of this section, an offender who is subject to an indeterminate sentence is eligible to be released on parole after the expiry of 10 years of that sentence."

...

23/ [Case No. 91/1981, Decision adopted on 28 October 1991].

24/ See also Wilson v. The Philippines case No. 868/1999, Views adopted on 30 October 2003 at para. 6.5.

For dissenting opinions in this context, see Rameka v. New Zealand (1090/2002), ICCPR, A/59/40 vol. II (6 November 2003) 330 (CCPR/C/79/D/1090/2002) at Individual Opinion by Mr. Bhagwati, Ms. Chanet, Mr. Ahanhanzo and Mr. Yrigoyen, 347, Individual Opinion of Mr. Kälin, 348, Individual Opinion of Mr. Lallah, 349, Individual Opinion of Mr. Shearer and Mr. Wieruszewki, 352, and Individual Opinion of Mr. Ando, 353.

- *Ahani v. Canada* (1051/2002), ICCPR, A/59/40 vol. II (29 March 2004) 260 at paras. 2.1-2.10, 8.1, 8.2, 10.2-10.10, 11 and 12.

...

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.

...

8.1 The Committee finds, in the circumstances of the case, that the State party breached its obligations under the Optional Protocol, by deporting the author before the Committee could address the author's allegation of irreparable harm to his Covenant rights. The Committee observes that torture is, alongside the imposition of the death penalty, the most grave and irreparable of possible consequences to an individual of measures taken by the State party. Accordingly, action by the State party giving rise to a risk of such harm, as indicated *a priori*

by the Committee's request for interim measures, must be scrutinized in the strictest light.

8.2 Interim measures pursuant to rule 86 of the Committee's rules adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from a State party to face torture or death in another country, undermines the protection of Covenant rights through the Optional Protocol.

...

10.2 As to the claims under article 9 concerning arbitrary detention and lack of access to court, the Committee notes the author's argument that his detention pursuant to the security certificate as well as his continued detention until deportation was in violation of this article. The Committee observes that, while the author was mandatorily taken into detention upon issuance of the security certificate, under the State party's law the Federal Court is to promptly, that is within a week, examine the certificate and its evidentiary foundation in order to determine its "reasonableness". In the event that the certificate is determined not to be reasonable, the person named in the certificate is released. The Committee observes, consistent with its earlier jurisprudence, that detention on the basis of a security certification by two Ministers on national security grounds does not result *ipso facto* in arbitrary detention, contrary to article 9, paragraph 1. However, given that an individual detained under a security certificate has neither been convicted of any crime nor sentenced to a term of imprisonment, an individual must have appropriate access, in terms of article 9, paragraph 4, to judicial review of the detention, that is to say, review of the substantive justification of detention, as well as sufficiently frequent review.

10.3 As to the alleged violation of article 9, paragraph 4, the Committee is prepared to accept that a "reasonableness" hearing in Federal Court promptly after the commencement of mandatory detention on the basis of a Ministers' security certificate is, in principle, sufficient judicial review of the justification for detention to satisfy the requirements of article 9, paragraph 4, of the Covenant. The Committee observes, however, that when judicial proceedings that include the determination of the lawfulness of detention become prolonged the issue arises whether the judicial decision is made "without delay" as required by the provision, unless the State party sees to it that interim judicial authorization is sought separately for the detention. In the author's case, no such separate authorization existed although his mandatory detention until the resolution of the "reasonableness" hearing lasted 4 years and 10 months. Although a substantial part of that delay can be attributed to the author who chose to contest the constitutionality of the security certification procedure instead of proceeding directly to the "reasonableness" hearing before the Federal Court, the latter procedure included hearings and lasted nine and half months after the final resolution of the constitutional issue on 3 July 1997. This delay alone is in the Committee's view too long in respect of the Covenant requirement of judicial determination of the lawfulness of detention without delay. Consequently, there has been a violation of the author's rights

under article 9, paragraph 4, of the Covenant.

10.4 As to the author's later detention, after the issuance of a deportation order in August 1998, for a period of 120 days before becoming eligible to apply for release, the Committee is of the view that such a period of detention in the author's case was sufficiently proximate to a judicial decision of the Federal Court to be considered authorized by a court and therefore not in violation of article 9, paragraph 4.

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. 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 had 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 did 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.

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

- *Smirnova v. Russian Federation* (712/1996), ICCPR, A/59/40 vol. II (5 July 2004) 1 at paras. 2.3, 2.4, 10.1, 11 and 12.

...

2.3 According to the author, her arrest and detention were unlawful because she was taken into custody after the expiration of the designated period for the completion of a preliminary investigation. She explains that under Russian criminal procedure, a suspect can be arrested only pursuant to an official investigation. In the author's case the investigation began on 5 February 1993 and expired on 5 April 1993, pursuant to article 133 (1) of the Code of Criminal Procedure. Article 133 (4) of the Code allows for a one-month extension of suspended and resumed investigations. Pursuant to this article, the preliminary investigation in the author's case was extended six times, three of which illegally, as acknowledged by the Municipal Prosecutor.

2.4 On 27 August 1995, the author submitted a complaint to the police investigator contesting the legality of her arrest and detention pursuant to article 220(1) of the Code of Criminal Procedure. The investigator did not refer the complaint to the Tver inter-municipal Court until 1 September 1995, in violation of the requirement that such complaints be submitted to a court within one day. The author states that the Court dismissed the complaint on 13 September 1995 without having heard any argument from the parties, on the ground that it was not competent to review the legality of the arrest and detention since the investigation in the case had been completed. Yet this was the basis of the author's claim that her arrest had been unlawful. The author submits that the Court should have heard her case, because in reality the investigation had been extended and was ongoing, albeit, as the author contends, unlawfully. The author was unable to appeal against the decision of the Court, as article 331 of the Code of Criminal Procedure did not allow for an appeal against

a decision in relation to a claim brought under article 220.

...

10.1 With regard to the author's claim that she was denied access to a Court to challenge the lawfulness of her detention on 27 August 1995, the Committee notes that the State party, in its observations dated 23 November 2000, refers only to the fact that the author's complaint about the lawfulness of her detention dated 27 August 1995 reached the Tver inter-municipal Court in Moscow on 1 September 1995 (although it was not considered until 13 September), and that the judge declined to entertain it. It transpires from the submissions that the trial judge did not entertain the complaint on the basis that the investigation had been completed, and that therefore the Court was not competent to hear the author's petition. The right of a person deprived of her liberty to take proceedings before a court to challenge the lawfulness of her detention is a substantive right, and entails more than the right to file a petition - it contemplates a right for a proper review by a court of the lawfulness of the detention. Accordingly, the Committee finds a violation by the State party of article 9 (4). Similarly, given that the decision of the judge not to entertain the author's petition on 13 September was made *ex parte*, the Committee is of the view that the author was not brought promptly before a judge, in violation of article 9 (3). In this regard, the Committee notes with concern the State party's submission of 29 March 1999 that its criminal procedure laws, at least at that time, made no provision for a person in police custody to be brought before a judge or other judicial officer.

...

11. The Human Rights Committee...finds that the State party violated article 9, paragraphs 3 and 4, and article 10 (1) of the Covenant.

12. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an effective remedy, including appropriate compensation for the violations suffered. The State party is also under an obligation to take effective measures to ensure that similar violations do not recur.

- *Mulezi v. Democratic Republic of the Congo* (962/2001), ICCPR, A/59/40 vol. II (6 July 2004) 159 at paras. 2.2, 2.4, 2.5, 2.8, 5.2, 5.3, 6 and 7.

...

2.2 At around 5 a.m. on 27 December 1997, members of a military intelligence service of the Congolese Armed Forces - known as "Détection Militaire des Activités Antipatrie" or DEMIAP associated with the regime of Congolese President Laurent Désiré Kabila - called on the author at his home to tell him that his services were required by Commander Mortos. The author was taken to the Gemena military camp, where he was immediately placed in detention. At 9 a.m. he was subjected to an interrogation directed by Commander Mortos concerning his alleged collaboration with the former President of the Congo, General Joseph

Désiré Mobutu, and his associates.

...

2.4 When he contested these accusations, the author was brutally beaten up by at least six soldiers. In addition to injuries to the nose and mouth, his fingers were broken. He was tortured again the following day, when he was tied up and beaten all over his body until he lost consciousness. In the course of some two weeks of detention in Gemena, the author was tortured four or five times every day: hung upside down; lacerated; the nail of his right forefinger pulled out with pincers; cigarette burns; both legs broken by blows to the knees and ankles with metal tubing; two fingers broken by blows with rifle butts. Despite his condition, and in particular his loss of mobility, he was not allowed to see a doctor. Like his fellow detainees, the author was unable to leave his cell even for a shower or a walk. He states that he was in a cell measuring 3 metres by 3, which he shared at first with 8 and, eventually, 15 other detainees. Furthermore, since he was being held *incommunicado*, he was not getting enough food, unlike the other prisoners, who were brought food by their families.

2.5 After about two weeks, the author was transferred by air to the Mbandaka military camp, where he was held for 16 months. Again, he was unable to see a doctor, despite his physical condition, notably loss of mobility. He was never informed of any charge against him; he was never brought before a judge; and he was not allowed access to a lawyer. He states that he was held with 20 others in a cockroach-ridden cell measuring roughly 5 metres by 3, with no sanitation, no windows and no mattresses. His food rations consisted of manioc leaves or stalks. Two showers a week were permitted and the soldiers occasionally put the author out in the yard as he could not move by himself. The author states that he eventually obtained some medicines when Médecins sans Frontières (Doctors without Borders) visited the camp.

...

2.8 On 25 May 1999, the author bribed some soldiers to take him to the harbour next to the military camp, and a boat owner agreed to help him to leave Mbandaka. The author then managed to escape from Africa to Switzerland. According to a medical certificate from the Geneva University Hospital, the author was hospitalized as soon as he arrived in Switzerland in December 1999, for physical and psychological *sequelae* of the violence he had been subjected to in his country of origin. After intensive medical care, the author has recovered partial mobility, but he requires further treatment if he is to regain his independence to any satisfactory degree.

...

5.2 With regard to the complaint of a violation of article 9, paragraphs 1, 2 and 4, of the Covenant, the Committee notes the author's statement that no warrant was issued for his arrest and that he was taken to the Gemena military camp under false pretences. Mr. Mulezi also maintains that he was arbitrarily detained without charge from 27 December 1997 onwards, first at Gemena, for two weeks, and then at the Mbandaka military camp, for 16

months. It is clear from the author's statements that he was unable to appeal to a court for a prompt determination of the lawfulness of his detention. The Committee considers that these statements, which the State party has not contested and which the author has sufficiently substantiated, warrant the finding that there has been a violation of article 9, paragraphs 1, 2 and 4, of the Covenant. On the same basis, the Committee concludes, however, that there has been no violation of article 9, paragraph 5, as it does not appear that the author has in fact claimed compensation for unlawful arrest or detention.

5.3 As to the complaint of a violation of articles 7 and 10, paragraph 1, of the Covenant, the Committee notes that the author has given a detailed account of the treatment he was subjected to during his detention, including acts of torture or ill-treatment and, subsequently, the deliberate denial of proper medical attention despite his loss of mobility. Indeed, he has provided a medical certificate attesting to the sequelae of such treatment. Under the circumstances, and in the absence of any counter-argument from the State party, the Committee finds that the author was a victim of multiple violations of article 7 of the Covenant, prohibiting torture and cruel, inhuman and degrading treatment. The Committee considers that the conditions of detention described in detail by the author also constitute a violation of article 10, paragraph 1, of the Covenant.

...

6. The Human Rights Committee...is of the view that the facts before it reveal violations by the Democratic Republic of the Congo of articles 6, paragraph 1; 7; 9, paragraphs 1, 2 and 4; 10, paragraph 1; and 23, paragraph 1, of the Covenant.

7. Under article 2, paragraph 3 (a), of the Covenant, the State party has an obligation to ensure that the author has an effective remedy available. The Committee therefore urges the State party (a) to conduct a thorough investigation of the unlawful arrest, detention and mistreatment of the author and the killing of his wife; (b) to bring to justice those responsible for these violations; and (c) to grant Mr. Mulezi appropriate compensation for the violations. The State party is also under an obligation to take effective measures to ensure that similar violations do not occur in future.

- *Madafferi v. Australia* (1011/2001), ICCPR, A/59/40 vol. II (28 July 2004) 208 at paras. 2.1-2.7, 9.2-9.4, 10 and 11.

...

2.1 On 21 October 1989, Francesco Madafferi arrived in Australia on a tourist visa, which was valid for six months from the date of entry. He came from Italy, where he had served a two-year prison term and was released in 1986. On entering Australia, Mr. Madafferi had no outstanding criminal sentence or matters pending in Italy.

LIBERTY AND SECURITY OF THE PERSON

2.2 After April 1990, Mr. Madafferi became an unlawful non-citizen. On 26 August 1990, he married Anna Maria Madafferi, an Australian national. He believed that his marriage had automatically granted him residence status. The couple had four children together, all born in Australia. Mr. Madafferi's extended family are all residents in Australia.

2.3 In 1996, having been brought to the attention of the Department of Immigration and Multicultural Affairs (hereinafter "DIMIA"), Mr. Madafferi filed an application for a spouse visa to remain permanently in Australia. In this application, he disclosed his past convictions and included details of sentences handed down, *in absentia*, in Italy which only became known to him following his initial interview with the immigration officers. Extradition was never sought by the Italian authorities.

2.4 In May 1997, DIMIA refused the application for a spouse visa, as he was considered to be of "bad character", as defined by the Migration Act, in light of his previous convictions. This decision was appealed to the Administrative Appeals Tribunal (hereinafter referred to as "AAT").

2.5 On 7 June 2000, and after a two-day hearing, the AAT set aside the decision under review and remitted the matter to the Minister of DIMIA (hereinafter "the Minister") for reconsideration in accordance with a direction that Mr. Madafferi "not be refused a visa on character grounds solely on the basis of the information presently available …".2/ In July 2000, rather than reconsidering the matter in accordance with the direction of the AAT, the Minister gave notice of his intention under a separate section of the Migration Act 1958 - subsection 501A - to refuse Mr. Madafferi's request for a visa.

2.6 In August 2000, the Italian authorities, on their own motion, extinguished part of the outstanding sentences and declared that the remainder of the outstanding sentences would be extinguished in May 2002 3/. According to the authors, the Minister did not take these actions of the Italian authorities into account.

2.7 On 18 October 2000, the Minister used his discretionary power, under subsection 501A, to overrule the AAT decision and refused Mr. Madafferi a permanent visa. On 21 December 2000, following an application by Mr. Madafferi's lawyer, the Minister gave his reasons, claiming that since Mr. Madafferi had prior convictions and an outstanding term of imprisonment in Italy, he was of "bad character" and that therefore it would be in the "national interest" to remove him from Australia. According to the authors, the Minister failed to make proper enquiries with the Italian authorities and relied incorrectly on the assumption that Mr. Madafferi had an outstanding sentence of over four years. Further clarification was asked of the Minister and provided by him in January 2001. On 16 March 2001, Mr. Madafferi surrendered himself to the authorities and was placed in the Maribyrnong Immigration Detention Centre in Melbourne for an indefinite period.

LIBERTY AND SECURITY OF THE PERSON

...

9.2 As to the claim of a violation of article 9, relating to the author's detention, the Committee notes that the author has been detained since 16 March 2001, albeit for part of the period at home. It recalls its jurisprudence that, although the detention of unauthorized arrivals is not *per se* arbitrary, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case: the element of proportionality becomes relevant. It notes the reasons behind the State party's decision to detain Mr. Madafferi and cannot find that his detention was disproportionate to these reasons. It also notes that although Mr. Madafferi did begin to suffer from psychological difficulties while detained at the Maribynong Immigration Centre until March 2002, at which point and on the advice of doctors, the State party removed him to home detention, he had not displayed any signs of such psychological problems on arrival at the detention centre one year earlier. Thus, although it is a matter of concern to the Committee now, after the events, that the detention of Mr. Madafferi apparently greatly contributed to the deterioration of his mental health, it cannot expect the State party to have anticipated such an outcome. Accordingly, the Committee cannot find that the State party's decision to detain Mr. Madafferi from 16 March 2001 onwards, was arbitrary within the meaning of article 9, paragraph 1, of the Covenant.

9.3 As to Mr. Madafferi's return to Maribyrnong Immigration Detention Centre on 25 June 2003, where he was detained until his committal to a psychiatric hospital on 18 September 2003, the Committee notes the State party's argument that as Mr. Madafferi had by then exhausted domestic remedies, his detention would facilitate his removal, and that the flight risk had increased. It also observes the author's arguments, which remain uncontested by the State party, that this form of detention was contrary to the advice of various doctors and psychiatrists, consulted by the State party, who all advised that a further period of placement in an immigration detention centre would risk further deterioration of Mr. Madafferi's mental health. Against the backdrop of such advice and given the eventual involuntary admission of Mr. Madafferi to a psychiatric hospital, the Committee finds that the State party's decision to return Mr. Madafferi to Maribyrnong and the manner in which that transfer was affected was not based on a proper assessment of the circumstances of the case but was, as such, disproportionate. Consequently, the Committee finds that this decision and the resulting detention was in violation of article 10, paragraph 1, of the Covenant. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary to separately consider the claims arising under article 7.

9.4 The Committee notes the authors' claim that Mr. Madafferi's rights were violated under articles 10, paragraph 1, and 7 also, on the grounds of his conditions of detention, while detained in the detention centre; his alleged ill-treatment including the events surrounding the birth of his child; and, in particular, the State party's failure to address the deterioration

of his mental health and to take appropriate action. The Committee recalls that Mr. Madafferi spent a first period in the detention centre between 16 March 2001 and March 2002, and was released into home detention after a decision of the Minister in February 2002, on the basis of medical evidence. Although the Committee considers it unfortunate that the State party did not react more expeditiously in implementing the Minister's decision, which the State party has acknowledged took six weeks, it does not conclude that such delay in itself violated any of the provisions of the Covenant. Equally, the Committee does not find that the conditions of Mr. Madafferi's detention or the events surrounding the birth of his child or return into detention, amount to a violation of any of the provisions of the Covenant beyond the finding already made in the previous paragraph.

...

10. The Human Rights Committee...is of the view that the State party has violated the rights of Mr. Francesco Madafferi under articles 10, paragraph 1, of the Covenant. Moreover, the Committee considers that the removal by the State party of Mr. Madafferi would, if implemented, constitute arbitrary interference with the family, contrary to article 17, paragraph 1, in conjunction with article 23, of the Covenant in respect of all of the authors, and additionally, a violation of article 24, paragraph 1, in relation to the four minor children due to a failure to provide them with the necessary measures of protection as minors.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy, including refraining from removing Mr. Madafferi from Australia before he has had the opportunity to have his spouse visa examined with due consideration given to the protection required by the children's status as minors. The State party is under an obligation to avoid similar violations in the future.

Notes

...

2/ According to this decision, although the Deputy President initially remarked that Mr. Madafferi is not of good character he went on to say that, "There is no reliable evidence that he has committed any crime since the mid-1980's. He was only 23 years old at the time of the second attempted extortion and 24 years old at the time of the fight in prison. He is now 39 years old…I think it would be inappropriate to judge him by the crimes that he committed long ago in another country." The Tribunal also pointed out that some of the convictions in Italy were conducted in absentia and possibly subject to appeal and reversal should he choose to pursue such remedies. In addition, it added that such convictions conducted in absentia are intolerable under Australian law and accordingly should not be given weight under Australian jurisprudence. Appropriate attention was also paid to Mr. Madafferi's children who "…must be regarded as a primary consideration." The weight attached to the interests of the children, is in accordance with the High Court's decision in *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273. The presiding judge concluded that, "... the

factors weighting in favour of the granting of a visa, particularly the interests of the children, should predominate over the factors weighting in favour of refusing one".

3/ On 22 June 2002 the Italian authorities notified Mr. Madafferi that they had extinguished his outstanding sentence and cancelled the outstanding warrant for his arrest.

- *Khomidov v. Tajikistan* (1117/2002), ICCPR, A/59/40 vol. II (29 July 2004) 363 at paras. 6.3, 7 and 8.

...
6.3 The author has claimed that her son was detained for one month, during which time he was not informed of the charges against him, and that her son's detention was illegal, in that he was not brought promptly before a judge or other official officer authorized by law to exercise judicial power to review the legality of his detention. In the absence of any State party observations, due weight must be given to the author's allegations. Accordingly, the Committee considers that the facts before it disclose a violation of article 9, paragraphs 1 and 2, 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.

- *Gorji-Dinka v. Cameroon* (1134/2002), ICCPR, A/60/40 vol. II (17 March 2005) 194 at paras. 2.1, 2.6-2.9, 5.1, 5.4, 5.5, 6 and 7.

...
2.1 The author is a former President of the Bar Association of Cameroon (1976-1981), the *Fon*, or traditional ruler, of Widikum in Cameroon's North-West province, and claims to be the head of the exile government of "Ambazonia". His complaint is closely linked to events which occurred in British Southern Cameroon in the context of decolonization.
...
2.6 On 31 May 1985, the author was arrested and taken from Bamenda (Ambazonia) to

Yaoundé, where he was detained in a wet and dirty cell without a bed, table or any sanitary facilities. He fell ill and was hospitalized. After having received information on plans to transfer him to a mental hospital, he escaped to the residence of the British Ambassador, who rejected his asylum request and handed him over to the police. On 9 June 1985, the author was redetained at the headquarters of the *Brigade mixte mobile* (BMM), a paramilitary police force, where he initially shared a cell with 20 murder convicts.

2.7 Allegedly as a result of the physical and mental torture he was subjected to during detention, the author suffered a stroke which paralysed his left side.

2.8 The author's detention reportedly provoked the so-called "Dinka riots", whereupon schools closed for several weeks. On 11 November 1985, Parliament adopted a resolution calling for a National Conference to address the Ambazonian question. In response, President Biya accused the President of Parliament of leading a "pro-Dinka" parliamentary revolt against him; he had the author charged with high treason before a Military Tribunal, allegedly asking for the death penalty. The prosecution's case collapsed in the absence of any legal provision which would have criminalized the author's call on President Biya to comply with the Restoration Law by withdrawing from Ambazonia. On 3 February 1986, the author was acquitted of all charges and released from detention.

2.9 President Biya's intention to appeal the judgement, after having ordered the author's rearrest, was frustrated because the law establishing the Military Tribunal did not provide for the possibility of appeal in cases involving high treason. The author was then placed under house arrest between 7 February 1986 and 28 March 1988. In a letter dated 15 May 1987, the Department of Political Affairs of the Ministry of Territorial Administration advised the author that his behaviour during house arrest was incompatible with his "probationary release" by the Military Tribunal, since he continued to hold meetings at his palace, to attend customary court sessions, to invoke his prerogatives as *Fon*, to contempt and disregard the law enforcement and other authorities, and to continue the practice of the illegal Olumba Olumba religion. On 25 March 1988, the Sub-Divisional Office of the Batibo Momo Division informed the author that because of his "judicial antecedent", his name had been removed from the register of electors until such time he could produce a "certificate of rehabilitation".

...

5.1 The first issue before the Committee is whether the author's detention from 31 May 1985 to 3 February 1986 was arbitrary. In accordance with the Committee's constant jurisprudence,10/ "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. This means that remand in custody must not only be lawful but reasonable and necessary in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime 11/. The State party has not invoked

any such elements in the instant case. The Committee further recalls the author's uncontested claim that it was only after his arrest on 31 May 1985 and his rearrest on 9 June 1985 that President Biya filed criminal charges against him, allegedly without any legal basis and with the intention to influence the outcome of the trial before the Military Tribunal. Against this background, the Committee finds that the author's detention between 31 May 1985 and 3 February 1986 was neither reasonable nor necessary in the circumstances of the case, and thus in violation of article 9, paragraph 1, of the Covenant.

...

5.4 As to the author's claim that his house arrest between 7 February 1986 and 28 March 1988 was arbitrary, in violation of article 9, paragraph 1, of the Covenant, the Committee takes note of the letter dated 15 May 1987 from the Department of Political Affairs of the Ministry of Territorial Administration, which criticized the author's behaviour during his house arrest. This confirms that the author was indeed under house arrest. The Committee further notes that this house arrest was imposed on him after his acquittal and release by virtue of a final judgement of the Military Tribunal. The Committee recalls that article 9, paragraph 1, is applicable to all forms of deprivation of liberty 13/ and observes that the author's house arrest was unlawful and therefore arbitrary in the circumstances of the case, and thus in violation of article 9, paragraph 1.

5.5 In the absence of any exceptional circumstances adduced by the State party, which would have justified any restrictions on the author's right to liberty of movement, the Committee finds that the author's rights under article 12, paragraph 1, of the Covenant were violated during his house arrest, which was itself unlawful and arbitrary.

...

6. The Human Rights Committee...is of the view that the facts before it reveal violations of articles 9, paragraph 1; 10, paragraphs 1 and 2 (a); 12, paragraph 1; and 25 (b) of the Covenant.

7. In accordance with article 2, paragraph 3, of the Covenant, the author is entitled to an effective remedy, including compensation and assurance of the enjoyment of his civil and political rights. The State party is also under an obligation to take measures to prevent similar violations in the future.

Notes

...

10/ See communication No. 305/1988, *Van Alphen v. The Netherlands*, Views adopted on 23 July 1990, para. 5.8; communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.8.

11/ See *ibid*.

...

LIBERTY AND SECURITY OF THE PERSON

13/ General comment No. 8 [16] on art. 9, para. 1.

- *Marques v. Angola* (1128/2002), ICCPR, A/60/40 vol. II (29 March 2005) 181 at paras. 2.1-2.6, 6.1-6.6, 7 and 8.

...
2.1 On 3 July, 28 August and 13 October 1999, the author, a journalist and the representative of the Open Society Institute in Angola, wrote several articles critical of Angolan President *dos Santos* in an independent Angolan newspaper, the *Agora*. In these articles, he stated, *inter alia*, that the President was responsible "for the destruction of the country and the calamitous situation of State institutions" and was "accountable for the promotion of incompetence, embezzlement and corruption as political and social values."

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

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

2.4 From 16 to 26 October 1999, the author was held *incommunicado* at the high security Central Forensic Laboratory (CFL) in Luanda, where he was denied access to his lawyer and family and was intimidated by prison officials, who asked him to sign documents disclaiming responsibility of the CFL or the Angolan Government for eventual death or any injuries sustained by him during detention, which he refused to do. He was not informed of the reasons for his arrest. On arrival at the CFL, the chief investigator merely stated that he was being held as a UNITA (National Union for the Total Independence of Angola) prisoner.

2.5 On or about 29 October 1999, the author was transferred to *Viana* prison in Luanda and granted access to his lawyer. On the same day, his lawyer filed an application for *habeas corpus* with the Supreme Court, challenging the lawfulness of the author's arrest and detention, which was neither acknowledged, nor assigned to a judge or heard by the Angolan courts.

LIBERTY AND SECURITY OF THE PERSON

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

...

6.1 The first issue before the Committee is whether the author's arrest on 16 October 1999 and his subsequent detention until 25 November 1999 were arbitrary or otherwise in violation of article 9 of the Covenant. In accordance with the Committee's constant jurisprudence,16/ the notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. This means that remand in custody must not only be lawful but reasonable and necessary in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime. No such element has been invoked in the instant case. Irrespective of the applicable rules of criminal procedure, the Committee observes that the author was arrested on, albeit undisclosed, charges of defamation which, although qualifying as a crime under Angolan law, does not justify his arrest at gunpoint by 20 armed policemen, nor the length of his detention of 40 days, including 10 days of *incommunicado* detention. The Committee concludes that in the circumstances, the author's arrest and detention were neither reasonable nor necessary but, at least in part, of a punitive character and thus arbitrary, in violation of article 9, paragraph 1.

6.2 The Committee notes the author's uncontested claim that he was not informed of the reasons for his arrest and that he was charged only on 25 November 1999, 40 days after his arrest on 16 October 1999. It considers that the chief investigator's statement, on 16 October 1999, that the author was held as a UNITA prisoner, did not meet the requirements of article 9, paragraph 2. In the circumstances, the Committee concludes that there has been a violation of article 9, paragraph 2.

6.3 As regards the author's claim that he was not brought before a judge during the 40 days of detention, the Committee recalls that the right to be brought "promptly" before a judicial authority implies that delays must not exceed a few days, and that *incommunicado* detention as such may violate article 9, paragraph 3.17/ It takes note of the author's argument that his 10-day *incommunicado* detention, without access to a lawyer, adversely affected his right to be brought before a judge, and concludes that the facts before it disclose a violation of article

9, paragraph 3. In view of this finding, the Committee need not pronounce itself on the alleged violation of article 14, paragraph 3(b).

6.4 As to the author's claim that, rather than being detained in custody for 40 days, he should have been released pending trial, in the absence of a risk of flight, the Committee notes that the author was not charged until 25 November 1999, when he was also released from custody. He was therefore not "awaiting" trial within the meaning of article 9, paragraph 3, before that date. Moreover, he was not brought before a judicial authority before that date, which could have determined whether there was a lawful reason to extend his detention. The Committee therefore considers that the illegality of the author's 40-day detention, without access to a judge, is subsumed by the violations of article 9, paragraphs 1 and 3, first sentence, and that no issue of prolonged pretrial detention arises under article 9, paragraph 3, second sentence.

6.5 As regards the alleged violation of article 9, paragraph 4, the Committee recalls that the author had no access to counsel during his *incommunicado* detention, which prevented him from challenging the lawfulness of his detention during that period. Even though his lawyer subsequently, on 29 October 1999, applied for *habeas corpus* to the Supreme Court, this application was never adjudicated. In the absence of any information from the State party, the Committee finds that the author's right to judicial review of the lawfulness of his detention (art. 9, para. 4) has been violated.

6.6 With respect to the author's claim under article 9, paragraph 5, the Committee recalls that this provision governs the granting of compensation for arrest or detention that is "unlawful" either under domestic law or within the meaning of the Covenant.18/ It recalls that the circumstances of the author's arrest and detention gave rise to violations of article 9, paragraphs 1 to 4, of the Covenant, and notes the author's uncontested argument that the State party's failure to bring him before a judge during his 40-day detention also violated article 38 of the Angolan Constitution. Against this background, the Committee deems it appropriate to deal with the issue of compensation in the remedial paragraph.

...

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

8. In accordance with article 2, paragraph 3, of the Covenant, the author is entitled to an effective remedy, including compensation for his arbitrary arrest and detention, as well as for the violations of his rights under articles 12 and 19 of the Covenant. The State party is under an obligation to take measures to prevent similar violations in the future.

Notes

...

16/ See communication No. 305/1988, *Van Alphen v. The Netherlands*, Views adopted on 23 July 1990, at para. 5.8; communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, at para. 9.8; communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, at para. 9.2.

17/ Communication No. 277/1988, *Terán Jijón v. Ecuador*, Views adopted on 26 March 1992, at para. 5.3.

18/ See communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, at para. 9.5.

- *Fernando v. Sri Lanka* (1189/2003), ICCPR, A/60/40 vol. II (31 March 2005) 226 at paras. 2.1, 2.2, 9.2, 10 and 11.

...

2.1 The author filed a workers compensation claim with the Deputy Commissioner of Worker's Compensation, for redress in respect of injuries he had suffered. According to the Court proceedings, the author was an employee of the Young Men's' Christian Association (Y.M.C.A). While engaged in that employment he suffered injuries as a result of a fall. The Deputy Commissioner of Workmen's Compensation held an inquiry into the incident. The author and the Y.M.C.A were represented by lawyers. A settlement was arrived at but when the matter was called before the Deputy Commissioner on 9 January 1998, the author refused to accept the settlement. The author's claim was thereafter dismissed and following the rejection of his claim, the author filed four successive motions in the Supreme Court. The first two motions concerned alleged violations of his constitutional rights by the Deputy Commissioner of Worker's Compensation. On 27 November 2002, the Supreme Court considered these two motions jointly and dismissed them. Thereafter, on 30 January 2003, the author filed a third motion, claiming that the first two motions should not have been heard jointly, and that their consolidation violated his constitutional right to a "fair trial". On 14 January 2003, this motion was similarly dismissed.

2.2 On 5 February 2003, the author filed a fourth motion, claiming that the Chief Justice of Sri Lanka and the two other judges who had considered his third motion should not have done so, as they were the same judges who had consolidated and considered the first two motions. During the hearing of this motion on 6 February 2003, the author was summarily convicted of contempt of court and sentenced to one year's "rigorous imprisonment" (meaning that he would be compelled to perform hard labour). He was imprisoned on the same day. According to the author, approximately two weeks later, a "second" contempt order was issued by the Chief Justice, clarifying that, despite earlier warnings, the author had

persisted in disturbing court proceedings. The operative part of the Order stated as follows: "The petitioner was informed that he cannot abuse the process of Court and keep filing applications without any basis. At this stage he raised his voice and insisted on his right to pursue the application. He was then warned that he would be dealt with for contempt of Court if he persists in disturbing the proceedings of Court. In spite of the warning, he persists in disturbing the proceedings of Court. In the circumstances, we find him guilty of the offence of contempt of Court and sentence him to one year rigorous imprisonment. The Registrar is directed to remove the Petitioner from Court and commit him to prison on the sentence that is imposed". The Order was based on article 105 (3) of the Sri Lankan Constitution, which confers on the Supreme Court "the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit…"1/. According to the author, neither the Constitution nor any other statutory provisions regulate the procedure for informing the person in contempt of the charges against him, so as to enable him to consult a lawyer or appeal against the order of the Supreme Court, nor does it specify the sentence that may be imposed in cases of contempt.

...

9.2 The Committee notes that courts notably in Common Law jurisdictions have traditionally enjoyed authority to maintain order and dignity in court debates by the exercise of a summary power to impose penalties for "contempt of court." But here, the only disruption indicated by the State party is the repetitious filing of motions by the author, for which an imposition of financial penalties would have evidently been sufficient, and one instance of "rais[ing] his voice" in the presence of the court and refusing thereafter to apologize. The penalty imposed was a one year term of "Rigorous Imprisonment". No reasoned explanation has been provided by the court or the State party as to why such a severe and summary penalty was warranted, in the exercise of a court's power to maintain orderly proceedings. Article 9, paragraph 1, of the Covenant forbids any "arbitrary" deprivation of liberty. The imposition of a draconian penalty without adequate explanation and without independent procedural safeguards falls within that prohibition. The fact that an act constituting a violation of article 9, paragraph 1 is committed by the judicial branch of government cannot prevent the engagement of the responsibility of the State party as a whole. The Committee concludes that the author's detention was arbitrary, in violation of article 9, paragraph 1. In the light of this finding in the present case, the Committee does not need to consider the question whether provisions of article 14 may have any application to the exercise of the power of criminal contempt. Similarly, the Committee does not need to consider whether or not there was a violation of article 19.

10. The Human Rights Committee...is of the view that the State party has violated articles 9, paragraph 1, of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under

an obligation to provide 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/ "Article 105 (3), provides that "The Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each be a superior court of record and shall have all the powers of such court including the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit. The power of the Court of Appeal shall include the power to punish for contempt of any other court, tribunal or institution referred to in paragraph (1) (c) of this article, whether committed in the presence of such court or elsewhere: Provided that the preceding provisions of this article shall not prejudice or affect the rights now or hereafter vested by any law in such other court, tribunal or institution or punishment for contempt of itself."

2/ The author refers to *Karttunen v. Finland*, case No. 387/1989 and *Gonzalez del Rio v. Peru*, case No. 263/1987. He also distinguishes the current case from that of *Rogerson v. Australia*, case No. 802/1998 and *Collins v. Jamaica*, case No. 240/1987.

3/ He refers to a press release of 17 February 2003, in which it is stated that the United Nations Special Rapporteur on the independence of the judges and lawyers and the Sri Lankan Legal Profession, are of the view that contempt of court cases are not an exception to the right of an accused to present a defence.

- *Rouse v. The Philippines* (1089/2002), ICCPR, A/60/40 vol. II (25 July 2005) 123 at paras. 2.4, 7.7, 8 and 9.

...

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.

...

7.7 In relation to the alleged violation of the right to be free from arbitrary arrest and detention, it is uncontested that the author was arrested without a warrant. The State party

has neither contested this allegation nor given any justification for arresting the author without a warrant. The Committee concludes that the author was the victim of a violation of article 9, paragraph 1.

...

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.

- *Fijalkovska v. Poland* (1061/2002), ICCPR, A/60/40 vol. II (26 July 2005) 103 at paras. 2.1-2.6, 4.3-4.5, 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.

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.

...

4.3 The State party...noted that on 17 December 1997, the author's sister had requested the Torun District Court, under article 29 of the Mental Health Protection Act, to commit the author to a psychiatric institution as she suffered from schizophrenia. She had previously been hospitalized from 29 November 1996 to 18 February 1997, when her illness was brought under control. However, a few weeks after her discharge from hospital, her state of health deteriorated as she stopped taking her medication. She also became aggressive. In support of her application, the author's sister submitted a medical certificate issued by a psychiatrist, who stated that failure to confine the author to a psychiatric institution would cause serious deterioration of her mental health. He also confirmed that such treatment would help improve her mental health.

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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For dissenting opinions in this context generally, see:

- *Giry v. Dominican Republic* (193/1985), ICCPR, A/45/40 vol. II (20 July 1990) 38 at Individual Opinion by Miss Christine Chanet and Messrs. Francisco Aguilar Urbina, Nisuke Ando and Bertil Wennergren (dissenting in part), 42.
- *Randolph v. Togo* (910/2000), ICCPR, A/59/40 vol. II (27 October 2003) 79 CCPR/C/79/D/910/2000 at Individual Opinion by Mr. Hipolito Solari-Yrigoyen, 89.

CEDAW

- *A. T. v. Hungary* (2/2003), CEDAW, A/60/38 part I (26 January 2005) 80 at paras. 2.1-2.7, 3.1 and 9.2-9.6.

...

2.1 The author states that for the past four years she has been subjected to regular severe domestic violence and serious threats by her common law husband, L. F., father of her two children, one of whom is severely brain-damaged. Although L. F. allegedly possesses a firearm and has threatened to kill the author and rape the children, the author has not gone to a shelter, reportedly because no shelter in the country is equipped to take in a fully disabled child together with his mother and sister. The author also states that there are currently no protection orders or restraining orders available under Hungarian law.

2.2 In March 1999, L. F. moved out of the family apartment. His subsequent visits allegedly typically included battering and/or loud shouting, aggravated by his being in a drunken state. In March 2000, L. F. reportedly moved in with a new female partner and left the family home, taking most of the furniture and household items with him. The author claims that he did not pay child support for three years, which forced her to claim the support by going to the court and to the police, and that he has used this form of financial abuse as a violent tactic in addition to continuing to threaten her physically. Hoping to protect herself and the children, the author states that she changed the lock on the door of the family's apartment on 11 March 2000. On 14 and 26 March 2000, L. F. filled the lock with glue and on 28 March 2000, he kicked in a part of the door when the author refused to allow him to enter the apartment. The author further states that, on 27 July 2001, L. F. broke into the apartment

using violence.

2.3 L. F. is said to have battered the author severely on several occasions, beginning in March 1998. Since then, 10 medical certificates have been issued in connection with separate incidents of severe physical violence, even after L. F. left the family residence, which, the author submits, constitute a continuum of violence. The most recent incident took place on 27 July 2001 when L. F. broke into the apartment and subjected the author to a severe beating, which necessitated her hospitalization.

2.4 The author states that there have been civil proceedings regarding L. F.'s access to the family's residence, a 2 and a half room apartment (of 54 by 56 square metres) jointly owned by L. F. and the author. Decisions by the court of the first instance, the Pest Central District Court (*Pesti Központi Kerületi Bíróság*), were rendered on 9 March 2001 and 13 September 2002 (supplementary decision). On 4 September 2003, the Budapest Regional Court (*Fővărosi Bíróság*) issued a final decision authorizing L. F. to return and use the apartment. The judges reportedly based their decision on the following grounds: (a) lack of substantiation of the claim that L. F. regularly battered the author; and (b) that L. F.'s right to the property, including possession, could not be restricted. Since that date, and on the basis of the earlier attacks and verbal threats by her former partner, the author claims that her physical integrity, physical and mental health and life have been at serious risk and that she lives in constant fear. The author reportedly submitted to the Supreme Court a petition for review of the 4 September 2003 decision, which was pending at the time of her submission of supplementary information to the Committee on 2 January 2004.

2.5 The author states that she also initiated civil proceedings regarding division of the property, which have been suspended. She claims that L. F. refused her offer to be compensated for half of the value of the apartment and turn over ownership to her. In these proceedings the author reportedly submitted a motion for injunctive relief (for her exclusive right to use the apartment), which was rejected on 25 July 2000.

2.6 The author states that there have been two ongoing criminal procedures against L. F., one that began in 1999 at the Pest Central District Court (*Pesti Központi Kerületi Bíróság*) concerning two incidents of battery and assault causing her bodily harm and the second that began in July 2001 concerning an incident of battery and assault that resulted in her being hospitalized for a week with a serious kidney injury. In her submission of 2 January 2004, the author states that there would be a trial on 9 January 2004. Reportedly, the latter procedure was initiated by the hospital *ex officio*. The author further states that L. F. has not been detained at any time in this connection and that no action has been taken by the Hungarian authorities to protect the author from him...

2.7 The author also submits that she has requested assistance in writing, in person and by

phone, from the local child protection authorities, but that her requests have been to no avail since the authorities allegedly feel unable to do anything in such situations.

The Claim

3.1 The author alleges that she is a victim of violations by Hungary of articles 2 (a), (b) and (e), 5 (a) and 16 of the Convention on the Elimination of All Forms of Discrimination against Women for its failure to provide effective protection from her former common law husband. She claims that the State party passively neglected its "positive" obligations under the Convention and supported the continuation of a situation of domestic violence against her.
...
9.2 The Committee recalls its general recommendation No. 19 on violence against women, which states that "...[T]he definition of discrimination includes gender-based violence" and that "[G]ender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence". Furthermore, the general recommendation addresses the question of whether States parties can be held accountable for the conduct of non-State actors in stating that "...discrimination under the Convention is not restricted to action by or on behalf of Governments..." and "[U]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation". Against this backdrop, the immediate issue facing the Committee is whether the author of the communication is the victim of a violation of articles 2 (a), (b) and (e), 5 (a) and 16 of the Convention because, as she alleges, for the past four years the State party has failed in its duty to provide her with effective protection from the serious risk to her physical integrity, physical and mental health and her life from her former common law husband.

9.3 With regard to article 2 (a), (b), and (e), the Committee notes that the State party has admitted that the remedies pursued by the author were not capable of providing immediate protection to her against ill-treatment by her former partner and, furthermore, that legal and institutional arrangements in the State party are not yet ready to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence. While appreciating the State party's efforts at instituting a comprehensive action programme against domestic violence and the legal and other measures envisioned, the Committee believes that these have yet to benefit the author and address her persistent situation of insecurity. The Committee further notes the State party's general assessment that domestic violence cases as such do not enjoy high priority in court proceedings. The Committee is of the opinion that the description provided of the proceedings resorted to in the present case, both the civil and criminal proceedings, coincides with this general assessment. Women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right

to privacy. The Committee also takes note that the State party does not offer information as to the existence of alternative avenues that the author might have pursued that would have provided sufficient protection or security from the danger of continued violence. In this connection, the Committee recalls its concluding comments from August 2002 on the State party's combined fourth and fifth periodic report, which state "...[T]he Committee is concerned about the prevalence of violence against women and girls, including domestic violence. It is particularly concerned that no specific legislation has been enacted to combat domestic violence and sexual harassment and that no protection or exclusion orders or shelters exist for the immediate protection of women victims of domestic violence". Bearing this in mind, the Committee concludes that the obligations of the State party set out in article 2 (a), (b) and (e) of the Convention extend to the prevention of and protection from violence against women, which obligations in the present case, remain unfulfilled and constitute a violation of the author's human rights and fundamental freedoms, particularly her right to security of person.

9.4 The Committee addressed articles 5 and 16 together in its general recommendation No. 19 in dealing with family violence. In its general recommendation No. 21, the Committee stressed that "the provisions of general recommendation 19...concerning violence against women have great significance for women's abilities to enjoy rights and freedoms on an equal basis with men". It has stated on many occasions that traditional attitudes by which women are regarded as subordinate to men contribute to violence against them. The Committee recognized those very attitudes when it considered the combined fourth and fifth periodic report of Hungary in 2002. At that time it was concerned about the "persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family...". In respect of the case now before the Committee, the facts of the communication reveal aspects of the relationships between the sexes and attitudes towards women that the Committee recognized *vis-à-vis* the country as a whole. For four years and continuing to the present day, the author has felt threatened by her former common law husband, the father of her two children. The author has been battered by this same man, her former common law husband. She has been unsuccessful, either through civil or criminal proceedings, to temporarily or permanently bar L. F. from the apartment where she and her children have continued to reside. The author could not have asked for a restraining or protection order since neither option currently exists in the State party. She has been unable to flee to a shelter because none are equipped to accept her together with her children, one of whom is fully disabled. None of these facts have been disputed by the State party and, considered together, they indicate that the rights of the author under articles 5 (a) and 16 of the Convention have been violated.

9.5 The Committee also notes that the lack of effective legal and other measures prevented the State party from dealing in a satisfactory manner with the Committee's request for interim measures.

LIBERTY AND SECURITY OF THE PERSON

9.6 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Committee is of the view that the State party has failed to fulfil its obligations and has thereby violated the rights of the author under article 2 (a), (b) and (e) and article 5 (a) in conjunction with article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, and makes the following recommendations to the State party:

I. Concerning the author of the communication

(a) Take immediate and effective measures to guarantee the physical and mental integrity of A. T. and her family;

(b) Ensure that A. T. is given a safe home in which to live with her children, receives appropriate child support and legal assistance as well as reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights;

II. General

(a) Respect, protect, promote and fulfil women's human rights, including their right to be free from all forms of domestic violence, including intimidation and threats of violence;

(b) Assure victims of domestic violence the maximum protection of the law by acting with due diligence to prevent and respond to such violence against women;

(c) Take all necessary measures to ensure that the national strategy for the prevention and effective treatment of violence within the family is promptly implemented and evaluated;

(d) Take all necessary measures to provide regular training on the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol thereto to judges, lawyers and law enforcement officials;

(e) Implement expeditiously and without delay the Committee's concluding comments of August 2002 on the combined fourth and fifth periodic report of Hungary in respect of violence against women and girls, in particular the Committee's recommendation that a specific law be introduced prohibiting domestic violence against women, which would provide for protection and exclusion orders as well as support services, including shelters;

(f) Investigate promptly, thoroughly, impartially and seriously all allegations of domestic violence and bring the offenders to justice in accordance with international standards;

(g) Provide victims of domestic violence with safe and prompt access to justice, including

free legal aid where necessary, in order to ensure them available, effective and sufficient remedies and rehabilitation;

(h) Provide offenders with rehabilitation programmes and programmes on non-violent conflict resolution methods.