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III. JURISPRUDENCE

ICCPR

- *Massera v. Uruguay* (R.1/5), ICCPR, A/34/40 (15 August 1979) 124 at paras. 2 and 10.

  ...
  2. ...The author claims that her stepfather, Jose Luis Massera, professor of mathematics and former Deputy to the National Assembly, was arrested on 22 October 1975 ... On 15 August 1976 he was tried by a military court on the charge of "subversive association" for being one of the leaders of a banned political party ... The author further submits that her stepfather remains imprisoned and that in his double quality as former Deputy and as an accused tried for a political offence, he has been deprived of all his political rights by a Government decree.
  ...
  10. The Human Rights Committee...is of the view that these facts in so far as they have occurred after 23 March 1976 disclose violations of the International Covenant on Civil and Political Rights, in particular:
  ...
  (ii) with respect to Jose Luis Massera,
  ...
  of article 25, because of unreasonable restrictions on his political rights
  ...

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

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

  Ismael Weinberger was first brought before a judge and charged on 16 December 1976, almost 10 months after his arrest. On 14 August 1979, three and a half years after his arrest, he was sentenced to eight years of imprisonment by the Military judge of the Court of First Instance for "subversive association" (art. 60 (V) of the Military Penal Code) with aggravating circumstances of conspiracy against the Constitution. The concrete factual basis of this offence has not been explained by the Government of Uruguay, although the author

of the communication claims that the true reasons were that his brother had contributed information on trade-union activities to a newspaper opposed to the Government and his membership in a political party which had lawfully existed while the membership lasted...Pursuant to *Acta lnstitucional No. 4* of 1 September 1976, Ismael Weinberger is deprived of the right to engage in political activities for 15 years.

...

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

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

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

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

...

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

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

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

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See also:

- *Tourón v. Uruguay* (32/1978) (R.7/32), ICCPR, A/36/40 (31 March 1981) 120 at paras. 8, 11 and 12.

- *Silva v. Uruguay* (34/1978) (R.8/34), ICCPR, A/36/40 (8 April 1981) 130 at paras. 8.4 and 9.

  ...
  8.4 ...[E]ven on the assumption that there exists a situation of emergency in Uruguay, the Human Rights Committee does not see what ground could be adduced to support the contention that, in order to restore peace and order, it was necessary to deprive all citizens, who as members of certain political groups had been candidates in the elections of 1966 and 1971, of any political right for a period as long as 15 years. This measure applies to everyone, without distinction as to whether he sought to promote his political opinions by peaceful means or by resorting to, or advocating the use of, violent means. The Government of Uruguay has failed to show that the interdiction of any kind of political dissent is required in order to deal with the alleged emergency situation and pave the way back to political freedom.

  9. The Human Rights Committee...is of the view that, by prohibiting the authors of the communication from engaging in any kind of political activity for a period as long as 15 years, the State party has unreasonably restricted their rights under article 25 of the Covenant.

- *Mauritian Women v. Mauritius* (35/1978) (R.9/35), ICCPR, A/36/40 (9 April 1981) 134 at paras. 9.2(c)1 - 9.2(c)3.

  ...
  9.2(c)1 ...The Committee is not called upon in this case to examine any restrictions on a citizen's right under article 25. Rather, the question is whether the opportunity also referred to there, i.e. a *de facto* possibility of exercising this right, is affected contrary to the Covenant.

  9.2(c)2 The Committee considers that restrictions established by law in various areas may prevent citizens in practice from exercising their political rights, i.e. deprive them of the opportunity to do so, in ways which might in certain circumstances be contrary to the purpose of Article 25...

  9.2(c)3 ...As regards Mrs. Aumeeruddy-Cziffra, who is actively participating in political life

as an elected member of the legislative assembly of Mauritius, she has neither in fact nor in law been prevented from doing so. It is true that on the hypothesis that if she were to leave the country as a result of interference with her family situation, she might lose this opportunity as well as other benefits which are in fact connected with residence in the country...The hypothetical side-effects just suggested do not warrant a finding of a separate violation of article 25 at the present stage, where no particular element requiring additional consideration under that article seems to be present.

- *Gonzalez v. Uruguay* (R.2/10), ICCPR, A/37/40 (29 March 1982) 122 at paras. 14-16.

...

14. As to the authors' allegation that the enactment of *Acta Institucional No. 4* of 1 September 1976, a/ which curtailed the political rights of various categories of citizens, made their father a victim of violations of article 25 of the Covenant, the Committee refers to the considerations reflected in its views on a number of other cases (e.g. in R.7/28, R.7/32, R.8/34 and R.10/44), concerning the compatibility of *Acta Institucional No. 4* with the provisions of article 25 of the Covenant, which proscribes "unreasonable restrictions" on the enjoyment of political rights. It has been the Committee's considered view that this enactment which deprives all citizens, who as members of certain political groups had been candidates in the elections of 1966 and 1971, of any political rights for a period protected by article 25 of the Covenant.

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

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

16. The Committee, accordingly, is of the view that the State party is under an obligation to provide the victim with effective remedies, including compensation for the violations which he has suffered.

Notes

a/ The relevant part of the act reads as follows:

> "...The Executive Power, in exercise of the powers conferred on it by the institutionalization of the revolutionary process,

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DECREES:

"Art.1. The following shall be prohibited, for a term of 15 years, from engaging in any of the activities of a political nature authorized by the constitution if the Republic, including the vote:

"(a) All candidates for elective office on the lists for the 1966 and 1971 elections of the Marxist and pro-Marxist Political Parties or Groups declared illegal by the resolutions of the Executive Power No. 1788/67 of 12 December 1967 and No. 1026/73 of 25 November 1973..."

- *M. A. v. Italy* (117/1981), ICCPR, (R.26/117), A/39/40 (10 April 1984) 190 at paras. 1.2 and 13.1-13.3.

...
1.2 The alleged victim is M.A. who at the time of submission was serving a sentence upon conviction of involvement in "reorganizing the dissolved fascist party", which is prohibited by an Italian penal law of 20 June 1952. By order of the Court of Appeals of Florence, M.A., was conditionally released and placed under mandatory supervision on 29 July 1983.
...
13.1 The Human Rights Committee observes that in so far as the author's complaints relate to the conviction and sentence of M.A. for the offence, in Italian penal law, of "reorganizing the dissolved fascist party" they concern events which took place prior to the entry into force of the International Covenant on Civil and Political Rights and the Optional Protocol for Italy (i.e. before 15 December 1978) and consequently they are inadmissible under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant, *ratione temporis*.

13.2 In so far as the authors' complaints relate to the consequences, after the entry into force of the Covenant and the Optional Protocol for Italy, of M.A.'s conviction and sentence, it must be shown that there were consequences which could themselves have constituted a violation of the Covenant.

In the opinion of the Committee there were no such consequences in the circumstances of the present case.

13.3 The execution of a sentence of imprisonment imposed prior to the entry into force of the Covenant is not in itself a violation of the Covenant. Moreover, it would appear to the Committee that the acts of which M.A. was convicted (reorganizing the dissolved fascist

party) were of a kind which are removed from the protection of the Covenant by article 5 thereof and which were in any event justifiably prohibited by Italian law having regard to the limitations and restrictions applicable to the rights in question under the provisions of articles 18 (3), 19 (3), 22 (2) and 25 of the Covenant. In these respects therefore the communication is inadmissible under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant, *ratione materiae*.

- *Muteba v. Zaire* (124/1982) (R.26/124), ICCPR, A/39/40 (24 July 1984) 182 at paras.10.2 and 12.

...
10.2 Mr. Tshitenge Muteba was arrested on 31 October 1981 by members of the Military Security of Zaire at Ngobila Beach, Zaire, when arriving from Paris via Brazzaville (Congo)...Although in the prison register he was charged with attempts against the internal and external security of the State and with the foundation of a secret political party, he was never brought before a judge nor brought to trial. After more than a year and a half of detention he was granted amnesty under a decree of 19 May 1983 and allowed to return to France. Mr. Muteba was arrested, detained and subjected to the ill-treatment described above for political reasons, as he was considered to be an opponent of the Government of Zaire.
...
12. The Human Rights Committee...is of the view that these facts disclose violations of the Covenant, in particular:
...
- of article 19, because he suffered persecution for his political opinions.

For dissenting opinions in this context, see Muteba v. Zaire (124/1982) (R.26/124), ICCPR, A/39/40 (24 July 1984) 182 at Individual Opinion by Messrs. Aguilar, Cooray, Ermacora, Errera and Mavrommatis, 189.

- *Jaona v. Madagascar* (132/1982) (R.28/132), 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.

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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...

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

...
8.2 Mr. André 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 25, because, notwithstanding the entitlement to stand for the presidency under Zairian law, (the author) was not so permitted.

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

...
10. The main question before the Committee is whether the author of the communication

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

11. ...[T]he facts as submitted do not sustain the author's claim that he has been denied access to public service in violation of article 25(c) or that he is a victim of an invidious distinction, that is, of discrimination within the meaning of articles 2 and 26 of the Covenant.

- *Delgado Páez v. Colombia* (195/1985), ICCPR, A/45/40 (12 July 1990) 43 at paras. 2.2, 2.4-2.6, 2.8, 2.9 and 5.9.

...
2.2 In October 1983, the Apostolic Prefect sent a letter to the Education Commission withdrawing the support that the Church had given to Mr. Delgado. On 10 December 1983, the Apostolic Prefect wrote to the Police Inspector accusing Mr. Delgado of having stolen money from a student.
...
2.4 On 5 February 1984, Mr. Delgado was informed that he would no longer teach religion. Instead, a course in manual labour and handicrafts (*manualidades y artesanías*), for which he had no training or experience, was assigned to him. In order not to lose employment altogether, he endeavoured to teach these subjects.

2.5 On 29 May 1984, the author requested from the Ministry of Education two weeks' leave...to attend an advanced course at Bogotá to further his teaching qualifications...but Mr. Delgado was subsequently denied leave. He considered this to be unjustified discrimination and decided to attend the course...

2.6 By administrative decisions of the Ministry of Education, dated 12 July, and 11 and 15

September 1984, he was suspended from his post for 60 days, and a six-months' salary freeze was imposed on him on grounds of having abandoned his post without permission from the Principal...

...

2.8 While at his residence in Bogotá, the author received anonymous phone calls threatening him with death if he returned to Leticia and did not withdraw his complaint against the Apostolic Prefect and the education authorities. He also received death threats at the teachers' residence at Leticia, which he reported to the military authorities at Leticia, the teachers' union, the Ministry of Education and the President of Colombia.

2.9 On 2 May 1986, a work colleague...was shot to death...by unknown killers. On 7 May 1986, the author was himself attacked in the city of Bogotá, and, fearing his own life, left the country and obtained political asylum in France in June 1986.

...

5.9 ...[C]onstant harassment and the threats against his person (in respect of which the State party failed to provide protection) made the author's continuation in public service teaching impossible. Accordingly, the Committee finds a violation of article 25, paragraph (c) of the Covenant.

- *Mikmaq Tribal Society v. Canada* (205/1986), ICCPR, A/47/40 (4 November 1991) 205 (CCPR/C/43/D/205/1986) at paras. 5.4, 5.5 and 6.

...

5.4 It remains to be determined what is the scope of the right of every citizen, without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives. Surely, it cannot be the meaning of article 25(a) of the Covenant that every citizen may determine either to take part directly in the conduct of public affairs or to freely chosen representatives. It is for the legal and constitutional system of the State party to provide for the modalities of such participation.

5.5 It must be beyond dispute that the conduct of public affairs in a democratic State is the task of representatives of the people, elected for that purpose, and public officials appointed in accordance with the law. Invariably, the conduct of public affairs affects the interest of large segments of the population or even the population as a whole, while in other instances it affects more directly the interests of more specific groups in society. Although prior consultations, such as public hearings or consultations with the most interested groups may often be envisaged by law or have evolved as public policy in the conduct of public affairs, article 25(a) cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct participation by the

citizens, far beyond the scope of article 25 (a).

6. Notwithstanding the right of every citizen to take part in the conduct of public affairs without discrimination and without unreasonable restrictions, the Committee concludes that, in the specific circumstances of the present case, the failure of the State party to invite representatives of the Mikmaq tribal society to the constitutional conferences on aboriginal matters, which constituted conduct of public affairs, did not infringe that right of the authors or other members of the Mikmaq tribal society. Moreover, in the view of the Committee, the participation and representation at these conferences have not been subjected to unreasonable restrictions. Accordingly, the Committee is of the view that the communication does not disclose a violation of article 25 or any other provisions of the Covenant.

- *Bwalya v. Zambia* (314/1988), ICCPR, A/48/40 vol. II (14 July 1993) 52 (CCPR/C/48/D/314/1988) at paras. 2.1-2.4, 6.2 and 6.6.

...

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

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

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

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

...

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

...

6.6 As to the alleged violation of article 25 of the Covenant, the Committee notes that the author, a leading figure of a political party in opposition to the former President, has been prevented from participating in a general election campaign as well as from preparing his candidacy for this party. This amounts to an unreasonable restriction on the author's right to "take part in the conduct of public affairs" which the State party has failed to explain or justify. In particular, it has failed to explain the requisite conditions for participation in the elections. Accordingly, it must be assumed that Mr. Bwalya was detained and denied the right to run for a parliamentary seat in the Constituency of Chifubu merely on account of his membership in a political party other than that officially recognised; in this context, the Committee observes that restrictions on political activity outside the only recognised political party amount to an unreasonable restriction of the right to participate in the conduct of public affairs.

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

...

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

- *Rodríguez v. Uruguay* (487/1992), ICCPR, A/49/40 vol. II (18 July 1994) 302 (CCPR/C/51/D/487/1992) at paras. 2.1 and 6.2.

...

2.1 ...During the period of military rule in Uruguay...[Walter Rodríguez Veiga] was dismissed from his post and stripped of all his functions, allegedly on purely arbitrary grounds. Together with some colleagues who found themselves in a similar position, he instituted judicial proceedings requesting his reinstatement...

...

6.2 ...[T]he Committee has *ex officio* examined whether the facts as submitted might raise potential issues under any provision of the Covenant, in particular under article 25 in conjunction with article 2, paragraph 3. It concludes that they do not, given that the author was reintegrated into the civil service, and that he was granted compensation for the prejudice he had suffered. The violation of article 25 has therefore been remedied. The Committee accordingly concludes that the author has no claim under article 2 of the Optional Protocol, and that the communication is inadmissible.

- *Debreczeny v. The Netherlands* (500/1992), ICCPR, A/50/40 vol. II (3 April 1995) 59 (CCPR/C/53/D/500/1992) at paras. 9.2 and 9.3.

...

9.2 The issue before the Committee is whether the application of the restrictions provided for in section 25 of the Municipalities Act, as a consequence of which the author was prevented from taking his seat in the municipal council of Dantumadeel to which he was elected, violated his right under article 25(b) of the Covenant. The Committee notes that the right provided for by article 25 is not an absolute right and that restrictions of this right are allowed as long as they are not discriminatory or unreasonable.

9.3 The Committee notes that the restrictions on the right to be elected to a municipal council are regulated by law and that they are based on objective criteria, namely the electee's professional appointment by or subordination to the municipal authority. Noting the reasons invoked by the State party for these restrictions, in particular, to guarantee the democratic decision-making process by avoiding conflicts of interest, the Committee considers that the said restrictions are reasonable and compatible with the purpose of the law. In this context, the Committee observes that legal norms dealing with bias, for example section 52 of the Municipalities Act to which the author refers, are not apt to cover the problem of balancing interests on a general basis. The Committee observes that the author was at the time of his election to the council of Dantumadeel serving as a police officer in the national police force, based Dantumadeel and as such for matters of public order subordinated to the mayor of Dantumadeel, who was himself accountable to the council for measures taken in that regard. In these circumstances, the Committee considers that a conflict of interests could indeed arise and that the application of the restrictions to the author does not constitute a violation of article 25 of the Covenant.

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- *Aduayom, Diasso and Dobou v. Togo* (422-424/1990), ICCPR, A/51/40 vol. II (12 July 1996) 17 (CCPR/C/57/D/422/1990) at paras. 7.5, 7.6 and 9.

...

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

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

...

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

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

...

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

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

...

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

...

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

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

- *Gauthier v. Canada* (633/1995), ICCPR, A/54/40 vol. II (7 April 1999) 93 (CCPR/C/65/D/633/1995) at paras. 2.1, 13.3-13.6, 15 and Individual Opinion by Rajsoomer Lallah (dissenting in part).

...

2.1 The author is publisher of the National Capital News, a newspaper founded in 1982. The author applied for membership in the Parliamentary Press Gallery, a private association that administers the accreditation for access to the precincts of Parliament. He was provided with a temporary pass that gave only limited privileges. Repeated requests for equal access on the same terms as other reporters and publishers were denied.

...

13.3 The issue before the Committee is...whether the restriction of the author's access to the press facilities in Parliament amounts to a violation of his right under article 19 of the Covenant, to seek, receive and impart information.

13.4 In this connection, the Committee also refers to the right to take part in the conduct of public affairs, as laid down in article 25 of the Covenant, and in particular to General Comment No. 25 (57) which reads in part: "In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This

implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion." 36/ Read together with article 19, this implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members. The Committee recognizes, however, that such access should not interfere with or obstruct the carrying out of the functions of elected bodies, and that a State party is thus entitled to limit access. However, any restrictions imposed by the State party must be compatible with the provisions of the Covenant.

13.5 In the present case, the State party has restricted the right to enjoy the publicly funded media facilities of Parliament, including the right to take notes when observing meetings of Parliament, to those media representatives who are members of a private organization, the Canadian Press Gallery. The author has been denied active (i.e. full) membership of the Press Gallery. On occasion he has held temporary membership which has given him access to some but not all facilities of the organization. When he does not hold at least temporary membership he does not have access to the media facilities nor can he take notes of Parliamentary proceedings. The Committee notes that the State party has claimed that the author does not suffer any significant disadvantage because of technological advances which make information about Parliamentary proceedings readily available to the public. The State party argues that he can report on proceedings by relying on broadcasting services, or by observing the proceedings. In view of the importance of access to information about the democratic process, however, the Committee does not accept the State party's argument and is of the opinion that the author's exclusion constitutes a restriction of his right guaranteed under paragraph 2 of article 19 to have access to information. The question is whether or not this restriction is justified under paragraph 3 of article 19. The restriction is, arguably, imposed by law, in that the exclusion of persons from the precinct of Parliament or any part thereof, under the authority of the Speaker, follows from the law of parliamentary privilege.

13.6 The State party argues that the restrictions are justified to achieve a balance between the right to freedom of expression and the need to ensure both the effective and dignified operation of Parliament and the safety and security of its members, and that the State party is in the best position to assess the risks and needs involved. As indicated above, the Committee agrees that the protection of Parliamentary procedure can be seen as a legitimate goal of public order and an accreditation system can thus be a justified means of achieving this goal. However, since the accreditation system operates as a restriction of article 19 rights, its operation and application must be shown as necessary and proportionate to the goal in question and not arbitrary. The Committee does not accept that this is a matter exclusively for the State to determine. The relevant criteria for the accreditation scheme should be specific, fair and reasonable, and their application should be transparent. In the instant case, the State party has allowed a private organization to control access to the Parliamentary press facilities, without intervention. The scheme does not ensure that there will be no arbitrary

exclusion from access to the Parliamentary media facilities. In the circumstances, the Committee is of the opinion that the accreditation system has not been shown to be a necessary and proportionate restriction of rights within the meaning of article 19, paragraph 3, of the Covenant, in order to ensure the effective operation of Parliament and the safety of its members. The denial of access to the author to the press facilities of Parliament for not being a member of the Canadian Press Gallery Association constitutes therefore a violation of article 19 (2) of the Covenant.

...

15. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Gauthier with an effective remedy including an independent review of his application to have access to the press facilities in Parliament. The State party is under an obligation to take measures to prevent similar violations in the future.

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Notes

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36/ General comment No. 25, paragraph 25, adopted by the Committee on 12 July 1996.

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Individual Opinion by Rajsoomer Lallah

...

It seems to me that articles 22 and 26 are, in the particular circumstances of this communication, particularly relevant in deciding whether there has been a violation of the author's right under article 19 (2) of the Covenant to seek, receive and impart information, in relation to Parliamentary proceedings which are matters of interest to the general public. It is to be noted that access to parliamentary press facilities in this regard is given exclusively to members of an association which has so to say a monopoly over access to those facilities.

Freedom of association under article 22 inherently includes freedom not to associate. To impose membership of an association on the author as a condition precedent to access to Parliamentary press facilities in effect means that the author is compelled to seek membership of the association, which may or may not accept the author as a member, unless he decides to forego the full enjoyment of his rights under article 19 (2) of the Covenant.

The rights of the author, in respect of equality of treatment guaranteed under article 26, have been violated in the sense that the State party has, in effect, delegated its control over the provision of equal press facilities within public premises to a private association which may, for reasons of its own and not open to judicial control, admit or not admit a journalist like the author as a member. The delegation of this control by the State party exclusively to a private association generates inequality of treatment as between members of the association and other journalists who are not members.

I conclude, therefore, that the author has been a victim of a violation of his rights under article 19 (2) by the State party's recourse to measures, designed to provide access to journalists reporting on Parliamentary proceedings, which are themselves violative of articles 22 and 26 of the Covenant and which cannot be justified by the restrictions permissible under

- *Diergaardt et al. v. Namibia* (760/1997), ICCPR, A/55/40 vol. II (25 July 2000) 140 at paras. 2.3-2.6, 10.2, 10.3, 10.8 and Individual Opinion by Martin Scheinin (concurring), 160.

...
2.3 By Act No. 56 of 1976, passed by the South African parliament, the Rehoboth people were granted "self-government in accordance with the Paternal Law of 1872". The law provided for the election of a Captain every five years, who appointed the Cabinet. Laws promulgated by the Cabinet had to be approved by a 'Volksraad' (Council of the people), consisting of nine members.

2.4 According to counsel, in 1989, the Rehoboth Basters accepted under extreme political pressure, the temporary transfer of their legislative and executive powers into the person of the Administrator-General of South West Africa, so as to comply with UN Security Council resolution nr.435 (1978)...

2.5 ...According to the counsel, this has had the effect of annihilating the means of subsistence of the community, since communal land and property was denied.

2.6 On 22 June 1991, the Rehoboth people organized general elections for a Captain, Council and Assembly according to the Paternal Laws. The new bodies were entrusted with protecting the communal properties of the people at all cost. Subsequently, the Rehoboth Baster Community and its Captain initiated a case against the Government of Namibia before the High Court. On 22 October 1993 the Court recognized the community's *locus standi*. Counsel argues that this implies the recognition by the Court of the Rehoboth Basters as a people in its own right. On 26 May 1995, the High Court however rejected the community's claim to the communal property. On 14 May 1996, the Supreme Court rejected the Basters' appeal ...
...
10.2 The Committee regrets that the State party has not provided any information with regard to the substance of the authors' claims. It recalls that it is implicit in the Optional Protocol that States parties make available to the Committee all information at its disposal. In the absence of a reply from the State party, due weight must be given to the authors' allegations to the extent that they are substantiated.

10.3 The authors have alleged that the termination of their self-government violates article

1 of the Covenant. The Committee recalls that while all peoples have the right of self-determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources, as stipulated in article 1 of the Covenant, the question whether the community to which the authors belong is a "people" is not an issue for the Committee to address under the Optional Protocol to the Covenant. The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive. 3/ As shown by the Committee's jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights. Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular articles 25, 26 and 27.

...

10.8 The authors have also claimed that the termination of self-government for their community and the division of the land into two districts which were themselves amalgamated in larger regions have split up the Baster community and turned it into a minority with an adverse impact on the rights under Article 25(a) and (c) of the Covenant. The right under Article 25(a) is a right to take part in the conduct of public affairs directly or through freely chosen representatives and the right under Article 25(c) is a right to have equal access, on general terms of equality, to public service in one's country. These are individual rights. Although it may very well be that the influence of the Baster community, as a community, on public life has been affected by the merger of their region with other regions when Namibia became sovereign, the claim that this has had an adverse effect on the enjoyment by individual members of the community of the right to take part in the conduct of public affairs or to have access, on general terms of equality with other citizens of their country, to public service has not been substantiated. The Committee finds therefore that the facts before it do not show that there has been a violation of article 25 in this regard.

Notes

...

3/ See the Committee's Views in case No. 167/1984 (*Ominayak v. Canada*), Views adopted on 26 March 1990.

Individual Opinion by Martin Scheinin

I share the Committee's conclusions in relation to all aspects of the case. On one particular point, however, I find that the Committee's reasoning is not fully consistent with the general line of its argumentation. In paragraph 10.8, the Committee, in my opinion unnecessarily, emphasizes the individual nature of rights of participation under article 25. In my view there are situations where article 25 calls for special arrangements for rights of participation to be

enjoyed by members of minorities and, in particular, indigenous peoples. When such a situation arises, it is not sufficient under article 25 to afford individual members of such communities the individual right to vote in general elections. Some forms of local, regional or cultural autonomy may be called for in order to comply with the requirement of effective rights of participation. As is emphasized at the end of paragraph 10.3 of the Views, the right of self-determination under article 1 affects the interpretation of article 25. This obiter statement represents, in my opinion, proper recognition of the interdependence between the various rights protected by the Covenant, including article 1 which according to the Committee's jurisprudence cannot, on its own, serve as the basis for individual communications under the Optional Protocol.

Irrespective of what has been said above, I concur with the Committee's finding that there was no violation of article 25. In my opinion, the authors have failed to substantiate how the 1996 law on regional government has adversely affected their exercise of article 25 rights, in particular the operation and powers of local or traditional authorities. On the basis of the material they presented to the Committee, no violation of article 25 can be established.

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

...
4.2 The author affirms that he is a victim of a violation of article 26, on the grounds that he has been discriminated against because of his political opinions. On 7 October 1997, the County Court of Zagreb initiated proceedings against the author on the basis of article 191 of the Criminal Code of Croatia, for spreading false information; the author notes that he may be sentenced to six months' imprisonment if found guilty. On 4 December 1997, the author was arrested at the Austrian border, allegedly after misinformation about the purpose of the author's visit had wilfully been given to the Austrian authorities by the Croatian Ministry of Foreign Affairs - the author was kept 16 hours in Austrian detention. A similar event had already occurred on the occasion of a visit by the author to Canada, when he was kept detained for six days in Toronto in June 1996, allegedly because the Croatian Government had accused him of subversive activities.
...
9.8 As to the author's claim that he is a victim of discrimination because of his political opposition to the then Government of Croatia, the Committee notes that the proceedings which were instituted against the author on 7 October 1997 were dismissed, a few months later, on 26 January 1998. In view of this fact, and lacking any further information that would substantiate this claim, the Committee cannot find a violation of any of the articles of the Covenant in this regard.

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- *Ignatane v. Latvia* (884/1999), ICCPR, A/56/40 vol. II (25 July 2001) 191 at paras. 2.1, 2.2, 2.6-2.8 and 7.3-7.5.

...

2.1 At the time of the events in question, Ms. Ignatane was a teacher in Riga. In 1993, she had appeared before a certification board to take a Latvian language test and had subsequently been awarded a language aptitude certificate stating that she had level 3 proficiency (the highest level).

2.2 In 1997, the author stood for local elections to be held on 9 March 1997, as a candidate of the Movement of Social Justice and Equal Rights in Latvia list. On 11 February 1997, she was struck off the list by decision of the Riga Election Commission, on the basis of an opinion issued by the State Language Board (SLB) to the effect that she did not have the required proficiency in the official language.

...

2.6 The author has submitted to the Committee a translation of articles 9, 17 and 22 of the Law on Elections to Town Councils and Municipal Councils, of 13 January 1994. Article 9 of the Law lists the categories of people who may not stand for local elections. According to article 9, paragraph 7, no one who does not have level 3 (higher) proficiency in the State language may stand for election. According to article 17, if anyone standing for election is not a graduate of a school in which Latvian is the language of instruction, a copy of his or her language aptitude certificate showing higher level (3) proficiency in the State language must be attached to the "candidate's application". The author's counsel has explained that the copy of the certificate is required to enable SLB to check its authenticity, not its validity.

2.7 According to article 22, only the Election Commission registering a list of candidates is competent to alter the list, and then only:

> (1) By striking a candidate from the list if: …
>
> (b) The conditions mentioned under article 9 of the present Law are applicable to the candidate...and, in cases covered by paragraph 1 (a), (b) and (c) of the present article, a candidate may be struck off the list on the basis of an opinion from the relevant institution or by court decision.
>
> In the case of a candidate who: ...
>
> (8) Does not meet the requirements corresponding to the higher level (3) of language proficiency in the State language, that fact must be certified by an opinion of the SLB.

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2.8 Lastly, Ms. Ignatane recalls that, according to statements made by the SLB at the time of the case hearings, the certification board in the Ministry of Education had received complaints about her proficiency in Latvian. It so happens, the author says, that it was just that Ministry that, in 1996, had been involved in a widely publicized controversy surrounding the closure of No. 9 secondary school in Riga, where she was the head teacher. The school was a Russian-language school and its closure had had a very bad effect on the Russian minority in Latvia.

...

7.3 According to the State party participation in public affairs requires a high level of proficiency in the State language and a language requirement for standing as a candidate in elections is hence reasonable and objective. The Committee notes that article 25 secures to every citizen the right and the opportunity to be elected at genuine periodic elections without any of the distinctions mentioned in article 2, including language.

7.4 The Committee notes that, in this case, the decision of a single inspector, taken a few days before the elections and contradicting a language aptitude certificate issued some years earlier, for an unlimited period, by a board of Latvian language specialists, was enough for the Election Commission to decide to strike the author off the list of candidates for the municipal elections. The Committee notes that the State party does not contest the validity of the certificate as it relates to the author's professional position, but argues on the basis of the results of the inspector's review in the matter of the author's eligibility. The Committee also notes that the State party has not contested counsel's argument that Latvian law does not provide for separate levels of proficiency in the official language in order to stand for election, but applies the standards and certification used in other instances. The results of the review led to the author's being prevented from exercising her right to participate in public life in conformity with article 25 of the Covenant. The Committee notes that the first examination, in 1993, was conducted in accordance with formal requirements and was assessed by five experts, whereas the 1997 review was conducted in an ad hoc manner and assessed by a single individual. The annulment of the author's candidacy pursuant to a review that was not based on objective criteria and which the State party has not demonstrated to be procedurally correct is not compatible with the State party's obligations under article 25 of the Covenant.

7.5 The Committee concludes that Mrs. Ignatane has suffered specific injury in being prevented from standing for the local elections in the city of Riga in 1997, because of having been struck off the list of candidates on the basis of insufficient proficiency in the official language. The Human Rights Committee considers that the author is a victim of a violation of article 25, in conjunction with article 2 of the Covenant.

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- *Mazou v. Cameroon* (630/1995), ICCPR, A/56/40 vol. II (26 July 2001) 30 at paras.2.1-2.7, 8.2, 8.4 and 9.

...

2.1 Following an attempted *coup d'état* in Cameroon in April 1984, the author, who at that time was a second class magistrate, was arrested on 16 April 1984. He was suspected of having sheltered his brother, who was wanted by the police for having taken part in the *coup d'état*. The author was found guilty and sentenced by the military court in Yaoundé to five years' imprisonment...

2.2 While the author was detained, the President of Cameroon signed a decree on 2 June 1987 (No. 87/747) removing the author from his post as Secretary-General in the Ministry of Education and Chairman of the Governing Council of the National Sports Office. The Decree gave no reasons for the action and, according to the author, was issued in violation of article 133 of the Civil Service Statute.

2.3 On 23 April 1990 the author was released from prison but placed under house arrest in Yagoua, his birthplace, in the far north of the country. Not until the end of April 1991, following the adoption of the Amnesty Act of 23 April 1991 (No. 91/002), were the restrictions lifted. On the date of transmission of the communication, however, the presidential decree of 2 June 1987 remained in force and the author had not been allowed to resume his duties.

2.4 On 12 June 1991 the author requested the President to reinstate him in the civil service. On 18 July 1991 he filed an appeal with the Ministry of Justice requesting the annulment of the presidential Decree of 2 June 1987. Receiving no response, on 9 September 1991 he applied for a judicial remedy to the administrative division of the Supreme Court, asking it to find that the Decree was illegal and ought therefore to be annulled. The author points out that although the Supreme Court has regularly ruled that such decrees should be annulled, as of 31 October 1994 the case had still not been settled.

2.5 On 4 May 1992, Decrees No. 92/091 and No. 92/092, setting out the terms of reinstatement and compensation of those covered by the Amnesty Act, were issued.

2.6 On 13 May 1992 the author applied to the Ministry of Justice for reinstatement in his post. Pursuant to Decree No. 92/091, his application was transmitted to the committee responsible for monitoring reinstatement in the civil service. On 12 May 1993 that committee issued an opinion in support of the author's reinstatement in the civil service. According to the author, however, the Ministry did not take action on this opinion.

2.7 On 22 September 1992 the author initiated proceedings before the administrative

division of the Supreme Court to attack Decree No. 92/091 and Decree No. 92/092. In his view, the Decrees sought to block the full implementation of the Amnesty Act of 23 April 1991 which, he claims, provided for automatic reinstatement. This application was also pending at the time of submission of his communication.

...

8.2 The Committee learned that, pursuant to the Supreme Court decision of 30 January 1997, the author had been reinstated in his post and that his salary had been paid retroactively from the date of his dismissal. However, there seems to be no question that the State party neither honoured the request for damages in compensation for the injury suffered nor sought to restore the author's career, which would have resulted in his being reinstated at the grade to which he would have been entitled had he not been dismissed.

...

8.4 With regard to the author's allegations that the State party violated both article 2 and article 25 of the Covenant, the Committee considers that the Supreme Court proceedings that gave rise to the decision of 30 January 1997 satisfying the request that the author had made in his communication were unduly delayed, taking place more than 10 years after the author's removal from his post, and were not followed by restoration of his career on reinstatement, to which he was legally entitled in view of the annulment decision of 30 January 1997. Such proceedings cannot, therefore, be considered to be a satisfactory remedy in the meaning of articles 2 and 25 of the Covenant.

9. Consequently, the State party has an obligation to reinstate the author of the communication in his career, with all the attendant consequences under Cameroonian law, and must ensure that similar violations do not recur in the future.

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

...

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

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

psychological and physical unfitness, as referred to in article 4, paragraph 1 (d)".

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

2.4 The author filed a remedy of *amparo*, which was rejected by the Constitutional Court on 3 November 1997 on the grounds that the ruling in question is not contrary to the principle of equality, since it deals with different problems on the basis of different criteria.
...
3.1 The author considers that the rights provided for in articles 25 (c) and 26 of the Covenant were violated when he was prevented from returning to active duty in the Guardia Civil after being declared fit by a Medical Court following the illness which had led to his change to reserve status, since reincorporation is allowed for civil guards who were on active reserve status for reasons of age. In this regard, the author maintains that the second transitional provision of Act No. 28/1994 (5) creates discrimination. It is also contrary to the right to access to public service in the Guardia Civil, which must be performed in conditions of equality.
...
9.2 With regard to the author's allegations that he is a victim of a violation of article 26 of the Covenant, the Committee notes that he was declared fit for active duty on 15 November 1994 and that he was notified of the Medical Court's agreement on 15 December. However, the author did not request a transfer to active duty at that time. The Committee notes that new Act No. 20/1994 entered into force on 20 January 1995 and that it eliminated the "active reserve status" category, leaving only the "reserve status" category, which, according to article 103 of Act No. 17/1989, does not allow military personnel on reserve status to change to active duty. The Committee notes that the author was affected by Act No. 20/1994 only to the extent that, as of 20 January 1995, he could not request a transfer to active duty. The Committee also notes that, since the author did not take the opportunity to request a transfer to active duty prior to 20 January 1995, the situation is of his own making, not that of the State party. The Committee takes note of the author's allegation that Act No. 20/1994 is discriminatory because it allows a return to active duty only for persons who went on reserve status for reasons of age. However, the Committee considers that this Act is not discriminatory, since it merely extends the retirement age to 56 years and allows persons who went on active reserve status at age 50 to apply to return to active duty, as provided for by

law, and then base themselves on the new age to change to reserve status. Consequently, the Committee takes the view that the facts as submitted by the author do not disclose a violation of article 26 of the Covenant.

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

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

_____

Notes

1/ He was born on 25 July 1961.

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

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

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

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For dissenting opinion in this context, see Marín Gómez v. Spain (865/1999), ICCPR, A/57/40 vol. II (22 October 2001) 198 (CCPR/C/73/D/865/1999) at Individual Opinion by Ms. Christine Chanet, 205.

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

...

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

2.2 On 29 March 1999, the author was tried in the Smorgon district court. The court considered the inscription on the poster as amounting to a call for insubordination against the

existing government and/or to the destruction of the constitutional order of the Byelorussian Republic. It ruled accordingly that the poster constituted an administrative offence under the Belarus Code of Administrative Offences (art. 167, para. 2). Accordingly, the author was convicted and fined five million Belarussian roubles. It also ordered confiscation of the poster. Militia officers who were present on duty during the picket were summoned to the court as witnesses.

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

...

7.2 The Committee is of the view that the particular expression of political opinion expressed by the author in carrying the poster in question falls within the scope of freedom of expression protected under article 19 of the Covenant. The State party has not advanced that any of the restrictions set out in article 19, paragraph 3, of the Covenant are applicable. The Committee therefore considers that the conviction of the author for expression of his views amounted to a violation of his rights under article 19 of the Covenant, and notes that his conviction had not been annulled when the communication was submitted to the Committee.

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

- *Karakurt v. Austria* (965/2000), ICCPR, A/57/40 vol. II (4 April 2002) 304 (CCPR/C/74/D/965/2000) at paras. 3.1-3.4 and 8.2.

...

3.1 The author possesses (solely) Turkish citizenship, while holding an open-ended residence permit in Austria. He is an employee of the 'Association for the Support of Foreigners' in Linz, which employs 10 persons in total. On 24 May 1994, there was an election for the Association's work-council ('Betriebsrat') which has statutory rights and responsibilities to promote staff interests and to supervise compliance with work conditions. The author, who fulfilled the formal legal requirements of being over 19 years old and having

been employed for over six months, and another employee, Mr Vladimir Polak, were both elected to the two available spaces on the work-council.

3.2 On 1 July 1994, Mr Polak applied to the Linz Regional Court for the author to be stripped of his elected position on the grounds that he had no standing to be a candidate for the work-council. On 15 September 1994, the Court granted the application, on the basis that the relevant labour law, that is s. 53(1) Industrial Relations Act (Arbeitsverfassungsgesetz), limited the entitlement to stand for election to such work-councils to Austrian nationals or members of the European Economic Area (EEA). Accordingly, the author, satisfying neither criteria, was excluded from standing for the work-council.

3.3 On 15 March 1995 the Linz Court of Appeal dismissed the author's appeal and upheld the lower Court's reasoning. It also held that no violation of Art. 11 of the European Convention on Human Rights (ECHR) was involved, considering that the right to join trade unions had not been interfered with. On 21 April 1995, the author appealed to the Supreme Court, including a request for a constitutional reference (including in terms of the ECHR) of s. 53(1) of the Act by the Constitutional Court.

3.4 On 21 December 1995, the Supreme Court discussed the author's appeal and denied the request for a constitutional reference. The Court considered that the work-council was not an 'association' within the meaning of Art. 11 ECHR. The work-council was not an association formed on a voluntary and private basis, but its organisation and functions were determined by law and was comparable to a chamber of trade. Nor were the staff as such an independent association, as they were not a group of persons associated on a voluntary basis. As to arguments of discrimination against foreigners, the Supreme Court, referring to the State party's obligations under the International Convention for the Elimination of All Forms of Racial Discrimination, considered the difference in treatment between Austrian nationals and foreigners to be justified both under the distinctions that the European economic treaties draw in labour matters between nationals and non-nationals, and also on account of the particular relationship between nationals and their home State. Moreover, as a foreigner's stay could be limited and subjected to administrative decision, the statutory period of membership in a work-council was potentially in conflict.

...

8.2 As to the State party's argument that the claim is, in truth, one under article 25 of the Covenant, the Committee observes that the rights protected by that article are to participation in the public political life of the nation, and do not cover private employment matters such as the election of an employee to a private company's work-council. It accordingly finds article 25, and any adverse consequences possibly flowing for the author from it, not applicable to the facts of the present case.

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- *Gedumbe v. Democratic Republic of the Congo* (641/1995), ICCPR, A/57/40 vol. II (9 July 2002) 24 (CCPR/C/75/D/641/1995) at paras. 2.1-2.5, 5.2, 5.3, 6.1 and 6.2.

...

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

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

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

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

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

...

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

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

...

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

6.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee is of the view that the author is entitled to an appropriate remedy, namely: (a) effective reinstatement to public service and to his post, with all the consequences that that implies, or, if necessary, to a similar post;2/ (b) compensation comprising a sum equivalent to the payment of the arrears

of salary and remuneration that he would have received from the time at which he was not reinstated to his post, beginning in September 1989.3/

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Notes

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

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

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

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

...

2.1 On 5 May 1998, two political organizations in New Caledonia, the *Front de Libération Nationale Kanak Socialiste* (FLNKS) and the *Rassemblement pour la Calédonie dans la République* (RPCR), together with the Government of France, signed the so-called Noumea Accord. The Accord, which forms part of a process of self-determination, established the framework for the institutional development of New Caledonia ... over the next 20 years.

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

Article 76 of the Constitution provides that:

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

Ministers."

Article 77 provides that:

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

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

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

2.5 For the first referendum on 8 November 1998, Decree No. 98-733 of 20 August 1998 on organization of a referendum of the people of New Caledonia, as provided for by article 76 of the Constitution, determined the electorate with reference to article 2 of Act No. 88-1028 of 9 November 1988 (also determined in article 6.3 of the Noumea Accord), namely: "Persons registered on the electoral rolls for the territory on that date and resident in New Caledonia since 6 November 1988 shall be eligible to vote."

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

> "Persons registered on the electoral roll on the date of the referendum and fulfilling one of the following conditions shall be eligible to vote:
>
> (a) They must have been eligible to participate in the referendum of 8 November 1998;
>
> (b) They were not registered on the electoral roll for the referendum of 8 November 1998, but fulfilled the residence requirement for that referendum;
>
> (c) They were not registered on the electoral roll for the 8 November 1998

referendum owing to non-fulfilment of the residence requirement, but must be able to prove that their absence was due to family, professional or medical reasons;

(d) They must enjoy customary civil status or, having been born in New Caledonia, they must have their main moral and material interests in the territory;

(e) Having one parent born in New Caledonia, they must have their main moral and material interests in the territory;

(f) They must be able to prove 20 years continuous residence in New Caledonia on the date of the referendum or by 31 December 2014 at the latest;

(g) Having been born before 1 January 1989, they must have been resident in New Caledonia from 1988 to 1998;

(h) Having been born on or after 1 January 1989, they must have reached voting age on the date of the referendum and have one parent who fulfilled the conditions for participation in the referendum of 8 November 1998.

Periods spent outside New Caledonia for the performance of national service, for study or training, or for family, professional or medical reasons shall, in the case of persons previously domiciled in the territory, be included in the periods taken into consideration in order to determine domicile."

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

...

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

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

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

13.1 The authors maintain, secondly, that the criteria used to determine the electorates in local ballots represent a departure from French rules on electoral matters (the right to vote

can be made dependent only on the criterion of inclusion on an electoral roll, either of the commune of domicile, irrespective of the period of residence, or of the commune of actual residence for at least 6 months) and thereby impose on them discriminatory restrictions which are contrary to the International Covenant on Civil and Political Rights.

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

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

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

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

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

13.7 The Committee observes that, in conformity with the issue in each ballot, apart from the requirement of inclusion on the electoral rolls, the criteria used are: (a) for the 1998 referendum relating to the continuation or non-continuation of the process of

self-determination, the condition of length of residence in New Caledonia; and (b) for the purpose of future referendums directly relating to the option of independence, additional conditions relating to possession of customary civil status, the presence in the territory of moral and material interests, combined with birth of the person concerned or his parents in the territory. It accordingly follows, as the date for a decision on self-determination approaches, that the criteria are more numerous and take into account the specific factors attesting to the strength of the links to the territory. To the length of residence condition (as opposed to the cut-off points for length of residence) for determining a general link with the territory are added more specific links.

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

...

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

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

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

14.4 The Committee notes that the 21 authors were excluded from the 1998 referendum because they did not meet the 10 years' continuous residence requirement. It also notes that one author will not be able to participate in the next referendum because of the 20 years' continuous residence requirement, whereas the other 20 authors do, as things stand, have the right to vote in that referendum - 18 authors on the basis of the residence criterion and 2 others on the strength of having been born in New Caledonia, their ethnic origin and national

extraction being of no consequence in this respect.

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

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

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

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

Notes

...

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

on the electoral rolls and who, if they were born before 1988, resided in New Caledonia from 1988 to 1998, or, if they were born after 1988, have one parent who fulfilled or could have fulfilled the conditions for voting in the referendum held at the end of 1998, shall also be eligible to vote in these referendums. Persons who, in 2013, are able to prove that they have resided continuously in New Caledonia for 20 years may also vote in these referendums."
...
22/ Communications No. 500/1992, *J. Debreczeny v. Netherlands*; No. 44/1979, Alba Pietraroia on behalf of *Rosario Pietraroia Zapala v. Uruguay*; General Comment No. 18 relating to article 25 (fifty-seventh session, 1996), paras. 4, 10, 11 and 14.

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

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

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

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

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

2.5 On 25 October 1991, the Office of the National Police Headquarters Legal Adviser issued a report stating that the author, in his capacity as Chief of the Drug Department, had failed to inform his superiors of the action he had taken against Mr. Pérez Arévalo for illicit

drug trafficking. The author, however, maintains that the Institutional Command was informed immediately and expediently of the detention of certain individuals for drug trafficking, in the report of the Trujillo Police Department secretariat dated 1 October 1991. The Ministry of the Interior was also informed of the arrest of Mr. Pérez Arévalo and others, in a letter dated 4 October 1991 from the National Police Directorate-General.

...

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

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

2.9 On 15 February 1996, the author requested the Trujillo Third Special Civil Court to urge the Ministry of the Interior to implement the Supreme Decision ordering his reinstatement and to publish it in the Official Gazette. On 23 May 1996, the Court issued a decision giving the Ministry of the Interior 10 days to implement and publish the Supreme Decision. However, on 28 May 1996, the National Police Public Prosecutor declared the decision null and void, claiming that the relevant procedures had not been completed and that the decision should be signed by the President of the Republic.

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

...

7.4 Although not explicitly stated by the author, the Committee considers that the communication raises issues under article 25 (c) concerning every citizen's right to have

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

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

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

Notes

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

...

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

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

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

POLITICAL RIGHTS

...

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

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

...

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

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

...

9.2 As regards the question whether article 25 of the Covenant was violated, the Committee notes that the Constitutional Court of the State party held that by drawing election districts for the same municipal council with substantial differences between the number of inhabitants per elected representative, despite the election law which required those voting districts to be proportional to the number of inhabitants, the equality of election rights required by the State party's constitution was violated. In the light of this pronouncement, based on a constitutional clause similar to the requirement of equality in article 25 of the

Covenant, and in the absence of any reference by the State party to factors that might explain the differences in the number of inhabitants or registered voters per elected representative in different parts of Roñ Áava, the Committee is of the opinion that the State party violated the author's rights under article 25 of the Covenant.

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

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

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

...

2.1 The author, along with other acquaintances, was an opponent of the State party's military regime of the 1980s. In 1984, he distributed pamphlets criticizing the regime and the use of security forces to harass him and others. At that time, he also made an unauthorized (and therefore criminal) visit to North Korea. In January, March and May 1985, he distributed dissident publications covering numerous political, historical, economic and social issues.

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

...

2.5 After his conviction, the author was held in solitary confinement. He was classified as a communist "confident criminal"4/ under the "ideology conversion system", a system given legal foundation by the 1980 Penal Administration Law and designed to induce change to a

prisoner's political opinion by the provision of favourable benefits and treatment in prison. Due to this classification, he was not eligible for more favourable treatment. On 14 March 1991, the author's detention regime was reclassified by the Regulation on the Classification and Treatment of Convicts ('the 1991 Regulation') to "those who have not shown signs of repentance after having committed crimes aimed at destroying the free and democratic basic order by denying it". Moreover, having been convicted under the National Security Law, the author was subject to an especially rigorous parole process.5/

...

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

_____

Notes

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

...

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

5/ Under the Parole Administration Law, in such cases, the Parole Examination Committee "shall examine whether the convict has converted the [sic] thought, and, when deemed necessary, shall request the convict to submit an announcement or statement of conversion".

...

15/ See the comments of the State party arguing the contrary with regard to the Committee's Concluding Observations on their second periodic report. (CCPR/C/79/Add.122, at para 2).

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- *Adrien Mundyo Buyso, Thomas Osthudi Wongodi, René Sibu Matubuka et al. v. Democratic Republic of the Congo* (933/2000), ICCPR, A/58/40 vol. II (31 July 2003) 224

(CCPR/C/78/D/933/2000) at paras. 2.1-2.3, 5.2, 6.1 and 6.2.

...

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

> "The President of the Republic;
>
> Having regard to Constitutional Decree-Law No. 003 of 27 May 1997 on the organization and exercise of power in the Democratic Republic of Congo, as subsequently amended and completed;
>
> Having regard to articles 37, 41 and 42 of Ordinance-Law No. 88-056 of 29 September 1988 on the status of judges;
>
> Given that the reports by the various commissions which were set up by the Ministry of Justice and covered the whole country show that the above-mentioned judges are immoral, corrupt, deserters or recognized to be incompetent, contrary to their obligations as judges and to the honour and dignity of their functions;
>
> Considering that the conduct in question has discredited the judiciary, tarnished the image of the system of justice and hampered its functioning;
>
> Having regard to urgency, necessity and appropriateness;
>
> On the proposals of the Minister of Justice;
>
> Hereby decrees:
>
> Article 1:
>
> The following individuals are dismissed from their functions as judges...".

2.2 Contesting the legality of these dismissals, the authors filed an appeal, following notification and within the three-month period established by law, with the President of the Republic to obtain the withdrawal of the above-mentioned decree. Having received no response, in accordance with Ordinance No. 82/017 of 31 March 1982 on procedure before the Supreme Court of Justice, the 68 judges all referred their applications to the Supreme Court during the period from April to December 1999. According to the information provided by the authors, it appears, first of all, that the Attorney-General of the Republic,

who was required to give his views within one month, deliberately failed to transmit the report1/ by the Public Prosecutor's Office until 19 September 2000 in order to block the appeal. Moreover the Supreme Court, by a ruling of 26 September 2001, decided that Presidential Decree No. 144 was an act of Government inasmuch as it came within the context of government policy aimed at raising moral standards in the judiciary and improving the functioning of one of the three powers of the State. The Supreme Court consequently decided that the actions taken by the President of the Republic, as the political authority, to execute national policy escaped the control of the administrative court and thus declared inadmissible the applications by the authors.

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

...

5.2 The Committee notes that the authors have made specific and detailed allegations relating to their dismissal, which was not in conformity with the established legal procedures and safeguards. The Committee notes in this regard that the Minister of Justice, in his statement of June 1999...and the Attorney-General of the Republic, in the report by the Public Prosecutor's Office of 19 September 2000 (see note 1), recognize that the established procedures and safeguards for dismissal were not respected. Furthermore, the Committee considers that the circumstances referred to in Presidential Decree No. 144 could not be accepted by it in this specific case as grounds justifying the fact that the dismissal measures were in conformity with the law and, in particular, with article 4 of the Covenant. The Presidential Decree merely refers to specific circumstances without, however, specifying the nature and extent of derogations from the rights provided for in domestic legislation and in the Covenant and without demonstrating that these derogations are strictly required and how long they are to last. Moreover, the Committee notes that the Democratic Republic of the Congo failed to inform the international community that it had availed itself of the right of derogation, as stipulated in article 4, paragraph 3, of the Covenant. In accordance with its jurisprudence,6/ the Committee recalls, moreover, that the principle of access to public service on general terms of equality implies that the State has a duty to ensure that it does not discriminate against anyone. This principle is all the more applicable to persons employed in the public service and to those who have been dismissed. With regard to article 14, paragraph 1, of the Covenant, the Committee notes the absence of any reply from the State party and also notes, on the one hand, that the authors did not benefit from the guarantees to which they were entitled in their capacity as judges and by virtue of which they should have been brought before the Supreme Council of the Judiciary in accordance with the law, and on the other hand, that the President of the Supreme Court had publicly, before the case had been heard, supported the dismissals that had taken place (see paragraph 3.8) thus damaging the equitable hearing of the case. Consequently, the Committee considers that those dismissals constitute an attack on the independence of the judiciary protected by article 14,

paragraph 1, of the Covenant. The dismissal of the authors was ordered on grounds that cannot be accepted by the Committee as a justification of the failure to respect the established procedures and guarantees that all citizens must be able to enjoy on general terms of equality. In the absence of a reply from the State party, and inasmuch as the Supreme Court, by its ruling of 26 September 2001, has deprived the authors of all remedies by declaring their appeals inadmissible on the grounds that Presidential Decree No. 144 constituted an act of Government, the Committee considers that, in this specific case, the facts show that there has been a violation of article 25, paragraph (c), read in conjunction with article 14, paragraph 1, on the independence of the judiciary, and of article 2, paragraph 1, of the Covenant.

...

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

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

Notes

1/ The authors transmitted a copy of the report by the Public Prosecutor's Office. In the report, the Office of the Attorney-General of the Republic requests the Supreme Court of Justice to declare, first and foremost, that Presidential Decree No. 144 is an act of Government that is outside its jurisdiction; and, secondly, that this decree is justified because of exceptional circumstances. On the basis of accusations made by both the population and foreigners living in the Democratic Republic of the Congo against allegedly incompetent, irresponsible, immoral and corrupt judges, as well as of the missions carried out by judges in this regard, the Attorney-General of the Republic maintains that the Head of State issued Presidential Decree No. 144 in response to a crisis situation characterized by war, partial territorial occupation and the need to intervene as a matter of urgency in order to combat impunity. He stressed that it was materially impossible for the authorities to follow the ordinary disciplinary procedure and that the urgency of the situation, the collapse of the judiciary and action to combat impunity were incompatible with any decision to suspend the punishment of the judges concerned.

...

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

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

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

- *Pastukhov v. Belarus* (814/1998), ICCPR, A/58/40 vol. II (5 August 2003) 69 (CCPR/C/78/D/814/1998) at paras. 2.1-2.5, 7.2, 7.3, 9 and Individual Opinion of Mrs. Ruth Wedgwood and Mr. Walter Kaelin (concurring), 75.

...

2.1 On 28 April 1994, the Supreme Council (Parliament), acting according to the relevant legal procedure and, in particular, the Constitution of 15 March 1994, elected the author a judge of the Constitutional Court for a period of 11 years.

2.2 By a presidential decree of 24 January 1997, the author lost his post on the ground that his term of office had expired following the entry into force of the new Constitution of 25 November 19961/.

2.3 On 11 February 1997, the author applied to a district court for reinstatement. On 21 February 1997, the court refused to admit the application.

2.4 On 31 March 1997, the author appealed that decision to the Minsk Municipal Court, which rejected his appeal on 10 April 1997 on the ground that the courts were not competent to consider disputes over the reinstatement of persons, such as Constitutional Court judges, who had been appointed by the Supreme Council of the Republic of Belarus.

2.5 On 2 June 1997, the author applied for judicial review to the Supreme Court. On 13 June 1997, the Supreme Court dismissed the application on the above ground.

...

7.2 In reaching its Views, the Committee has taken into account, first, the fact that the State party did not provide it with sufficiently well supported arguments concerning the effective remedies available in the present case and, second, that it did not respond to the author's

allegations concerning either the termination of his service on the bench or the independence of the courts in that regard. The Committee draws attention to the fact that article 4, paragraph 2, of the Optional Protocol requires States parties to submit to it written explanations or statements clarifying the matter and the remedies, if any, that they may have taken. That being so, the allegations in question must be recognized as carrying full weight, since they were adequately supported.

7.3 The Committee takes note of the author's claim that he could not be removed from the bench since he had, in accordance with the law in force at the time, been elected a judge on 28 April 1994 for a term of office of 11 years. The Committee also notes that presidential decree of 24 January 1997 No. 106 was not based on the replacement of the Constitutional Court with a new court but that the decree referred to the author in person and the sole reason given in the presidential decree for the dismissal of the author was stated as the expiry of his term as Constitutional Court judge, which was manifestly not the case. Furthermore, no effective judicial protections were available to the author to contest his dismissal by the executive. In these circumstances, the Committee considers that the author's dismissal from his position as a judge of the Constitutional Court, several years before the expiry of the term for which he had been appointed, constituted an attack on the independence of the judiciary and failed to respect the author's right of access, on general terms of equality, to public service in his country. Consequently, there has been a violation of article 25 (c) of the Covenant, read in conjunction with article 14, paragraph 1, on the independence of the judiciary and the provisions of article 2.

...

9. By virtue of article 2, paragraph 3, of the Covenant, the author has a right to an effective remedy including compensation. It is incumbent on the State party to ensure that there is no recurrence of such violations.

Notes

1/ "Presidential decree No. 106 of 24 January 1997 dismissing Mr. Mikhail Pastukhov from his duties as judge of the Constitutional Court: In conformity with article 146 of the Belarus Constitution, Mr. Pastukhov is dismissed from his duties as judge of the Constitutional Court upon expiry of his term of office."

Individual Opinion of Mrs. Ruth Wedgwood and Mr. Walter Kaelin (concurring)

The dismissal of Judge Mikhail Ivanovich Pastukhov from his position as a judge of the Belarus Constitutional Court was part of an attempt to diminish the independence of the judiciary. While the organization of a national court system may be changed by legitimate democratic means, the change here was part of an attempt to consolidate power in a single

branch of government through the pretense of a constitutional referendum. It has interrupted the state party's fledgling progress towards an independent judiciary. As such, the presidential decree dismissing Judge Pastukhov from his office as judge of the Constitutional Court violated the rights guaranteed to him and to the people of Belarus under Articles 14 and 25 of the Covenant.

- *Arenz v. Germany* (1138/2002), A/59/40 vol. II (24 March 2004) 548 at paras. 1, 2.1-2.5, 3.1-3.4, 4.1, 8.5, 8.6 and 9.

1. The authors of the communication are Paul Arenz (first author) and Thomas Röder (second author), as well as his wife Dagmar Röder (third author), all German citizens and members of the "Church of Scientology" (Scientology). They claim to be victims of violations by Germany 1/ of articles 2, 18, 19, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights...

2.1 On 17 December 1991, the Christian Democratic Union (CDU), one of the two major political parties in Germany, adopted resolution C 47 at its National Party Convention, declaring that affiliation with Scientology is not "compatible with CDU membership". This resolution still continues to operate.

2.2 By letter of 22 September 1994, the chairman of the municipal branch of the CDU at Mechernich (Northrhine-Westphalia), with the subsequent support of the Federal Minister of Labour and regional party leader of the CDU in Northrhine-Westphalia, asked the first author, a long-standing CDU member, to terminate his membership in the CDU with immediate effect by signing a declaration of resignation, stating that he had learned of the first author's affiliation with Scientology. When the latter refused to sign the declaration, the Euskirchen CDU District Board decided, on 17 October 1994, to initiate exclusion proceedings against him, thereby stripping him of his rights as a party member until the delivery of a final decision by the CDU party courts.

2.3 By letter of 24 October 1994, the President of the Euskirchen District Party Court informed the first author that the Board had decided to expel him from the CDU because of his membership in the Scientology Church and that it had requested the District Party Court to take a decision to that effect after providing him with an opportunity to be heard. After a hearing was held on 2 December 1994, the District Party Court, on 6 December 1994, informed the first author that it had confirmed the decision of the District Board to expel him from the party. On 2 October 1995, the Northrhine-Westphalia CDU State Party Court dismissed the first author's appeal. His further appeal was rejected by the CDU Federal Party Court on 18 December 1996.

2.4 In separate proceedings, the second author, a long-standing member and later chairman of the Municipal Board of the CDU at Wetzlar-Mitte (Hessia), as well as the third author, who had also been a CDU member for many years, were expelled from the party by decision of 29 January 1992 of the CDU District Association of Lahn-Dill. This decision was preceded by a campaign against the second author's party membership, culminating in the organization of a public meeting attended by approximately 1,000 persons, in January 1992, during which the second author's reputation and professional integrity as a dentist were allegedly slandered because of his Scientology membership.

2.5 On 16 July 1994, the Middle Hessia District Party Court decided that the expulsion of the second and third authors from the party was in conformity with the relevant CDU statutes. The authors' appeals to the Hessia CDU State Party Court and to the Federal Party Court at Bonn were dismissed on 26 January 1996 and, respectively, on 24 September 1996.

3.1 On 9 July 1997, the Bonn Regional Court (*Landgericht Bonn*) dismissed the authors' legal action against the respective decisions of the CDU Federal Party Tribunal, holding that these decisions were based on an objective investigation of the facts, were provided by law, and complied with the procedural requirements set out in the CDU statutes. As to the substance of the complaint, the Court limited itself to a review of arbitrariness, owing to the fundamental principle of party autonomy set out in article 21, paragraph 1,2/ of the Basic Law.

3.2 The Court considered the decisions of the Federal Party Tribunal not to be arbitrary, given that the authors had acted in a manner contrary to resolution C 47, which spelled out a party principle of the CDU, within the meaning of article 10, paragraph 4, 3/ of the Political Parties Act. The resolution itself was not arbitrary or inconsistent with the party's obligation to a democratic internal organization under article 21, paragraph 1, of the Basic Law, because numerous publications of Scientology and, in particular, its founder Ron Hubbard objectively indicated a conflict with the CDU's principles of free development of one's personality, tolerance and protection of the socially disadvantaged. This ideology could, moreover, be personally attributed to the authors, based on their self-identification with the organization's principles and their considerable financial contributions to it.

3.3 Although the CDU was bound to respect the authors' basic rights to freedom of expression and religious freedom, by virtue of its obligation to a democratic internal organization, the restriction of these rights was justified by the need to protect the autonomy and proper functioning of political parties, which by definition could not represent all political and ideological tendencies and were thus entitled to exclude opponents from within the party. Taking into account that the authors had considerably damaged the public image of the CDU and thereby decreased its electoral support at the local level, the Court considered that their expulsion was not disproportionate since it was the only means to

restore party unity, the authors being at liberty to found a new party. Lastly, the Court considered that the authors could not invoke their rights under the European Convention on the Protection of Human Rights and Fundamental Freedoms or under the International Covenant on Civil and Political Rights *vis-à-vis* the CDU, which was not bound by these treaties as a private association.

3.4 By judgement of 10 February 1998, the Cologne Court of Appeals dismissed the authors' appeal, endorsing the reasoning of the Bonn Regional Court and reiterating that political parties, by virtue of article 21, paragraph 1, of the Basic Law, had to balance their right to party autonomy against the competing rights of party members. In addition, the Court found that political parties were entitled to adopt resolutions on the incompatibility of their membership with parallel membership in another organization, in order to distinguish themselves from competing parties or other associations pursuing opposite objectives, unless such decisions are arbitrary. However, Resolution C 47, as well as the decision of the Federal Party Tribunal that the teachings of Scientology were incompatible with basic CDU principles, was not considered arbitrary by the Court.

...

4.1 The authors allege violations of their rights under articles 2, paragraph 1, 18, 19, 22, 25, 26 and 27 of the Covenant, as a result of their expulsion from the CDU, based on their affiliation with Scientology, and as a result of the German courts' decisions confirming these actions. In the authors' view, they were deprived of their right to take part in their communities' political affairs, as article 25 of the Covenant protected the right of "every citizen", meaning that "[n]o distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"4/. Their expulsion from the CDU amounted to an unreasonable restriction of that right, in the absence of any reference to a right of party autonomy in article 25.

...

8.5 With regard to the State party's argument that it cannot be held responsible for the authors' exclusion from the CDU, this being the decision not of one of its organs but of a private association, the Committee recalls that under article 2, paragraph 1, of the Covenant, the State party is under an obligation not only to respect but also to ensure to all individuals within its territory and subject to its jurisdiction all the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Where, as in the present case, the domestic law regulates political parties, such law must be applied without consideration. Furthermore, States parties are thus under an obligation to protect the practices of all religions or beliefs from infringement 11/ and to ensure that political parties, in their internal management, respect the applicable provisions of article 25 of the Covenant12/.

8.6 The Committee notes that although the authors have made some references to the hardship they have more generally experienced due to their membership in the Church of Scientology, and to the responsibility of the State party to ensure their rights under the Covenant, their actual claims before the Committee merely relate to their exclusion from the CDU, an issue in respect of which they also have exhausted domestic remedies in the meaning of article 5, paragraph 2 (b), of the Optional Protocol. Consequently, the Committee need not address the broader issue of what legislative and administrative measures a State party must take in order to secure that all citizens may meaningfully exercise their right of political participation under article 25 of the Covenant. The issue before the Committee is whether the State party violated the authors' rights under the Covenant in that its courts gave priority to the principle of party autonomy, over their wish to be members in a political party that did not accept them due to their membership in another organization of ideological nature. The Committee recalls its constant jurisprudence that it is not a fourth instance competent to re-evaluate findings of fact or re-evaluate the application of domestic legislation, unless it can be ascertained that the proceedings before the domestic courts were arbitrary or amounted to a denial of justice. The Committee considers that the authors have failed to substantiate, for purposes of admissibility, that the conduct of the courts of the State party would have amounted to arbitrariness or a denial of justice. Therefore, the communication is inadmissible under article 2 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

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

Notes

1/ The Covenant and the Optional Protocol to the Covenant entered into force for the State party on 23 March 1976 and 25 November 1993 respectively. Upon ratification of the Optional Protocol, the State party entered the following reservation: "The Federal Republic of Germany formulates a reservation concerning article 5 paragraph 2 (a) to the effect that the competence of the Committee shall not apply to communications:

(a) Which have already been considered under another procedure of international investigation or settlement; or

(b) By means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany;

(c) By means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."

2/ Article 21, paragraph 1, of the Basic Law reads: "Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds."

3/ Article 10, paragraphs 4 and 5, of the Political Parties Act read: "(4) A member may only be expelled from the party if he or she deliberately infringes the statutes or acts in a manner contrary to the principles or discipline of the party and thus seriously impairs its standing. (5) The arbitration court competent in accordance with the Code on Arbitration Procedure shall decide on expulsion from the party. The right to appeal to a higher court shall be granted. Reasons for the decisions shall be given in writing. In urgent and serious cases requiring immediate action, the executive committee of the party or a regional association may exclude a member from exercising his rights pending the arbitration court's decision."

4/ The authors quote the Committee's general comment 25, at para. 3.

...

11/ Cf. CCPR, forty-eighth session (1993), general comment No. 22, at para. 9.

12/ See CCPR, fifty-seventh session (1996), general comment No. 25, at para. 26.

- *Guido Jacobs v. Belgium* (943/2000), ICCPR, A/59/40 vol. II (7 July 2004) 138 at paras. 2.1-2.10, 9.2-9.11 and Individual Opinion of Ruth Wedgwood (concurring), at 158.

...

2.1 On 2 February 1999 the *Moniteur belge* published the Act of 22 December 1998 amending certain provisions of part two of the Judicial Code concerning the High Council of Justice, the nomination and appointment of magistrates and the introduction of an evaluation system.

2.2 As amended, article 259 bis-1, paragraph 1, of the Judicial Code provides that the High Council of Justice1/ shall comprise 44 members of Belgian nationality, divided into one 22-member Dutch-speaking college and one 22-member French-speaking college. Each college comprises 11 justices and 11 non-justices.

2.3 Article 259 bis-1, paragraph 3, stipulates:

> "The group of non-justices in each college shall have no fewer than four members of each sex and shall be composed of no fewer than:
>
> 1. Four lawyers with at least 10 years' professional experience at the bar;
>
> 2. Three teachers from universities or colleges in the Flemish or French communities with at least 10 years' professional experience relevant to the High Council's work;
>
> 3. Four members holding at least a diploma from a college in the Flemish or French community and with at least 10 years' professional experience in legal, economic, administrative, social or scientific affairs relevant to the High Council's work [...]."

2.4 Article 259 bis-2, paragraph 2, also stipulates:

> "Non-justices shall be appointed by the Senate by a two-thirds majority of those voting. Without prejudice to the right to submit individual applications, candidates may be put forward by each of the bar associations and each of the universities and colleges in the French community and the Flemish community. In each college, at least five members shall be appointed from among the candidates proposed."

2.5 Lastly, in accordance with paragraph 4 of the same article, "a list of alternate members of the High Council shall be drawn up for the duration of the term [...]. For non-justices this list shall be drawn up by the Senate [...] and shall comprise the candidates who are not appointed".

2.6 Article 259 bis-2, paragraph 5, stipulates that nominations should be sent to the Chairman of the Senate, by registered letter posted within a strict deadline of three months following the call for candidates.

2.7 On 25 June 1999, the Senate published in the *Moniteur belge* a call for candidates for a non-justice seat on the High Council of Justice.

2.8 On 16 September 1999, Mr. G. Jacobs, first legal assistant in the Council of State, submitted his application within the legal three-month period.

2.9 On 14 October 1999, the Senate published a second call.

2.10 On 29 December 1999, the Senate elected the members of the High Council of Justice. The author was not elected but was included in the list of alternates for non-justices as provided in article 295 bis-2, paragraph 4.

...

9.2 With regard to the complaints of violations of articles 2, 3, 25 (c) and 26 of the Covenant, arising from article 295 bis-1, paragraph 3, of the Act of 22 December 1998, the Committee takes note of the author's arguments challenging the gender requirement for access to a non-justice seat on the High Council of Justice on the grounds that it is discriminatory. The Committee also notes the State party's argument justifying such a requirement by reference to the law, the objective of the measure, and its effect in terms of the appointment of candidates and the constitution of the High Council of Justice.

9.3 The Committee recalls that, under article 25 (c) of the Covenant, every citizen shall have the right and opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions, to have access, on general terms of equality, to public service in his or her country. In order to ensure access on general terms of equality, the criteria and processes for appointment must be objective and reasonable. States parties may take measures in order to ensure that the law guarantees to women the rights contained in article 25 on equal terms with men 8/. The Committee must therefore determine whether, in the case before it, the introduction of a gender requirement constitutes a violation of article 25 of the Covenant by virtue of its discriminatory nature, or of other provisions of the Covenant concerning discrimination, notably articles 2 and 3 of the Covenant, as invoked by the author, or whether such a requirement is objectively and reasonably justifiable. The question in this case is whether there is any valid justification for the distinction made between candidates on the grounds that they belong to a particular sex.

9.4 In the first place, the Committee notes that the gender requirement was introduced by Parliament under the terms of the Act of 20 July 1990 on the promotion of a balance between men and women on advisory bodies 9/. The aim in this case is to increase the representation of and participation by women in the various advisory bodies in view of the very low numbers of women found there 10/. On this point, the Committee finds the author's assertion that the insufficient number of female applicants in response to the first call proves there is no inequality between men and women to be unpersuasive in the present case; such a situation may, on the contrary, reveal a need to encourage women to apply for public service on bodies such as the High Council of Justice, and the need for taking measures in this regard. In the present case, it appears to the Committee that a body such as the High Council of Justice could legitimately be perceived as requiring the incorporation of perspectives beyond one of juridical expertise only. Indeed, given the responsibilities of the judiciary, the promotion of an awareness of gender-relevant issues relating to the application of law, could well be understood as requiring that perspective to be included in a body involved in judicial appointments. Accordingly, the Committee cannot conclude that the requirement is not objective and reasonably justifiable.

9.5 Secondly, the Committee notes that the gender clause requires there to be at least four applicants of each sex among the 11 non-justices appointed, which is to say just over one

third of the candidates selected. In the Committee's view, such a requirement does not in this case amount to a disproportionate restriction of candidates' right of access, on general terms of equality, to public office. Furthermore, and contrary to the author's contention, the gender requirement does not make qualifications irrelevant, since it is specified that all non-justice applicants must have at least 10 years' experience. With regard to the author's argument that the gender requirement could give rise to discrimination between the three categories within the group of non-justices as a result, for example, of only men being appointed in one category, the Committee considers that in that event there would be three possibilities: either the female applicants were better qualified than the male, in which case they could justifiably be appointed; or the female and male applicants were equally well qualified, in which case the priority given to women would not be discriminatory in view of the aims of the law on the promotion of equality between men and women, as yet still lacking; or the female candidates were less well qualified than the male, in which case the Senate would be obliged to issue a second call for candidates in order to reconcile the two aims of the law, namely, qualifications and gender balance, neither of which may preclude the other. On that basis, there would appear to be no legal impediment to reopening applications. Lastly, the Committee finds that a reasonable proportionality is maintained between the purpose of the gender requirement, namely to promote equality between men and women in consultative bodies; the means applied and its modalities, as described above; and one of the principal aims of the law, which is to establish a High Council made up of qualified individuals. Consequently, the Committee finds that paragraph 3 of article 295 bis-1 of the Act of 22 December 1998 meets the requirements of objective and reasonable justification.

9.6 In the light of the foregoing, the Committee finds that article 295 bis-1, paragraph 3, does not violate the author's rights under the provisions of articles 2, 3, 25 (c) and 26 of the Covenant.

9.7 As regards the complaints of violations of articles 2, 3, 25 (c) and 26 of the Covenant arising from the application of the Act of 22 December 1998, and in particular article 295 bis-1, paragraph 3, the Committee takes note of the author's arguments claiming, in the first place, that the appointment of the Dutch-speaking non-justices, the group to which Mr. Jacobs belonged, was conducted without regard to an established procedure, without interviews, profiling or comparison of qualifications, being based rather on nepotism and political affiliation. The Committee has also examined the State party's arguments, which explain in detail the procedure for appointing the non-justices. The Committee notes that the Senate established and put into effect a special appointments procedure, *viz.*: first, a list of recommended candidates was drawn up after consideration and comparison of all applications on the basis of the relevant files and *curricula vitae*; secondly, each senator was given the choice of voting, in a secret ballot, either for the recommended list, or for a list of all the candidates. The Committee finds that this appointments procedure was objective and

reasonable for the reasons made clear in the State party's explanations: before the recommended list was drawn up and the Senate made the appointments, each candidate's curriculum vitae and files were examined and their qualifications compared; the choice of a procedure based on files and *curricula vitae* rather than on interviews was prompted by the number of applications and the constraints of the parliamentary timetable, and there was no legal provision specifying a particular method of evaluation, such as interviews...the choice of the recommended list method had to do with the large number of criteria and the overlap between them, and was a practice already established in the Senate and Chamber of Representatives; lastly, it was possible for the senators to make the appointments using two methods of voting, which guaranteed them freedom of choice. Furthermore, the Committee finds that the author's complaints that the appointment of candidates was made on the basis of nepotism and political considerations have not been sufficiently substantiated.

9.8 With regard to the complaint of discrimination between categories within the group of non-justices arising from the introduction of the gender requirement, the Committee finds that the author has not sufficiently substantiated this part of the communication and, in particular, has produced no evidence to show that any female candidates were appointed despite being less well qualified than male candidates.

9.9 With regard to the complaint of discrimination between applicants in connection with the Senate's second call for applications, and to the claim that the second call was illegal, the Committee notes that this call was issued because of the insufficient numbers of applications from women, i.e., two applications from women for the Dutch-speaking college - which the author concedes - whereas under article 295 bis-1, paragraph 3, each group of non-justices on the High Council of Justice must comprise at least four members of each sex. The Committee finds, therefore, that the second call was justified to allow the Council to be constituted and, furthermore, that there was no impediment to such action either in law or in parliamentary practice, particularly as the applications submitted in response to the first call remained valid.

9.10 As to the complaint of discrimination arising from the listing of non-justice alternates in alphabetical order, the Committee notes that article 295 bis-2, paragraph 4, of the Judicial Code gives the Senate the right to draw up the list of alternates but for them, unlike the justices, does not prescribe any particular method of ranking. Consequently it finds that, as shown by the State party's detailed argument, (a) the alphabetical order chosen by the Senate does not imply an order of succession; and (b) any succession in the event of a vacancy will require the appointments procedure to be conducted afresh. The author's complaints do not disclose a violation.

9.11 The Committee therefore finds that the application of the Act of 22 December 1998, and in particular of article 295 bis-1, paragraph 3, does not violate the provisions of articles

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2, 3, 25 (c) and 26 of the Covenant.

Notes

1/ Article 151 of the Constitution instituting the High Council of Justice provides in paragraph 2:

> "One High Council of Justice exists for all of Belgium. In the exercise of its attributes the High Council of Justice shall respect the independence referred to in paragraph 1. It shall consist of a French-speaking college and a Dutch-speaking college. Each college shall have an equal number of members and shall be composed equally of judges and officials of the public prosecutor's office directly elected by their peers under the conditions and according to the form determined by law, and of other members nominated by the Senate by a two-thirds majority of those voting, under the conditions established by law."
>
> "Within each college there shall be a nomination and appointments committee and an advisory and investigative committee, on which representation shall be equally distributed as provided in the previous paragraph […]."

Paragraph 3:

> "The High Council of Justice shall exercise its authority in the following areas:
>
> 1. Presentation of candidates for appointment as judges […] or members of the prosecutor's office;
> 2. Presentation of candidates for designation to the duties […] of *chef de corps* in the public prosecutor's office;
> 3. Access to the position of judge or member of the public prosecutor's office;
> 4. Training of judges and members of the public prosecutor's office;
> 5. Establishment of general profiles for the designations referred to in 2;
> 6. Issuance of opinions and proposals concerning the general operation and organization of the judicial branch;
> 7. General supervision and promotion of the use of internal monitoring methods;
> 8. To the exclusion of all disciplinary and criminal tribunals:
>
> - Acceptance and follow-up of complaints concerning the operation of the judicial branch;
> - Initiation of inquiries into the operation of the judicial branch [...]."

...

8/ General comment No. 28, on article 3 of the Covenant (sixty-eighth session, 2000), para. 29.

9/ "Since the High Council also serves as an advisory body, each college shall comprise eight

members of each sex." Bill of 15 July 1998, Discussion, p. 44, Belgian Chamber of Representatives...

10/ "A study of the actual situation reveals that, in the majority of the advisory bodies, the membership includes a very small number of women." Preamble to the Bill, p.1, 27 March 1990, Chamber of Representatives, parliamentary documents; "A survey of the national consultative bodies shows that the proportion of women is no more than 10 percent." Introduction to the Bill by the Secretary of State for Social Emancipation, p.1, 3 July 1990, Belgian Senate.

Individual Opinion of...Ruth Wedgwood (concurring)

The Committee has concluded that the norms of non-discriminatory access to public service and political office embodied in article 25 of the Covenant do not preclude Belgium from requiring the inclusion of at least four members of each gender on its High Council of Justice. The Council is a body of some significant powers, recommending candidates for appointment as judges and prosecutors, as well as issuing opinions and investigating complaints concerning the operation of the judicial branch. However, it is pertinent to note that the membership of the Council of Justice is highly structured by many other criteria as well, under the Belgium Judicial Code. The Council is comprised of two separate "colleges" for French-speaking and Dutch-speaking members. Within each college of 22 members, half are directly elected by sitting judges and prosecutors. The other "non-justice" members are chosen by the Belgium Senate, and the slate must include a minimum number of experienced lawyers, college or university teachers, and other professionals, with "no fewer than four members of each sex" included among the 11 members of these "non-justice" groups. This electoral rule may benefit men as well as women, although it was rather clearly intended to assure the participation of women on this "advisory" body. It is important to note that the constitution or laws of some States parties to the Covenant may disdain or forbid any use of set-asides or minimum numbers for participation in governmental bodies, and nothing in the instant decision interferes with that national choice. The Committee only decides that Belgium is free to choose a different method in seeking to assure the fair participation of women as well as men in the processes of government.

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

...
2.1 The author - a teacher in a high school - is a representative of the NGO - Belarusian Helsinki Committee (BHC) in the city of Krichev (Belarus). On 24 March 1999, the national

newspaper *Narodnaya Volya* (People's Will) published a declaration, criticizing the policy of the authorities in power. The declaration was written and signed by representatives of hundreds of Belarusian regional political and non-governmental organizations (NGOs), including the author. The latter observes that the declaration contained an appeal not to take part in the forthcoming local elections as a protest against the electoral law which the signatories believed was incompatible with "the Belarusian Constitution and the international norms".

...

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

...

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

7.3 The Committee recalls that according to article 25 (b), every citizen has the right to vote. In order to protect this right, States parties to the Covenant should prohibit intimidation or coercion of voters by penal laws and those laws should be strictly enforced.7/ The application of such laws constitutes, in principle, a lawful limitation of the freedom of expression, necessary for respect of the rights of others. However, intimidation and coercion must be distinguished from encouraging voters to boycott an election. The Committee notes that voting was not compulsory in the State party concerned and that the declaration signed by the author did not affect the possibility of voters to freely decide whether or nor to participate in the particular election. The Committee concludes that in the circumstances of the present case the limitation of the liberty of expression did not legitimately serve one of the reasons enumerated in article 19, paragraph 3, of the Covenant and that the author's rights under article 19, paragraph 2, of the Covenant have been violated.

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

of article 19, paragraph 2, of the International Covenant on Civil and Political Rights.

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

Notes

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

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

...

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

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

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

Individual Opinion of Sir Nigel Rodley (concurring)

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

disobey the pressures not to vote.

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

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

- *Gorji-Dinka v. Cameroon* (1134/2002), ICCPR, A/60/40 vol. II (17 March 2005) 194 at paras. 5.6, 6 and 7.

...
5.6 As regards the author's claim that the removal of his name from the voters' register violates his rights under article 25 (b) of the Covenant, the Committee observes that the exercise of the right to vote and to be elected may not be suspended or excluded except on grounds established by law which are objective and reasonable 14/. Although the letter dated 25 March 1998, which informed the author of the removal of his name from the register of voters, refers to the "current electoral law", it justifies that measure with his "judicial antecedent". In this regard, the Committee reiterates that persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote,15/ and recalls that the author was acquitted by the Military Tribunal in 1986 and that his conviction by another tribunal in 1981 was expunged by virtue of Amnesty Law 82/21. It also recalls that persons who are otherwise eligible to stand for election should not be excluded by reason of political affiliation 16/. In the absence of any objective and reasonable grounds to justify the author's deprivation of his right to vote and to be elected, the Committee concludes, on the basis of the material before it, that the removal of the author's name from the voters' register amounts to a violation of his rights under article 25 (b) of the

Covenant.

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.

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Notes

...

14/ General comment No. 25 [57] on art. 25, para. 4.

15/ *Ibid*., at para. 14.

16/ *Ibid*., at para. 15.

_____

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

...

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

2.2 On 14 July 2000, acting on instructions from the Supreme Court, the Chief Registrar communicated with the author. After the author had accepted the conditions of appointment, including his prior resignation from the post of Family Court judge, the Chief registrar sent him an offer of appointment to the post of District Court judge (with the starting salary of the

scale for District Court judges) and advertised the author's post of Family Court judge. By letter of 19 July 2000, the author accepted the written offer of appointment, which did not contain a proviso on his resignation from the post as Family Court judge.

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

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

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

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

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

...

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

...

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

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

6.5 While the revocation of appointments within the judiciary must not necessarily be determined by a court or tribunal, the Committee recalls that whenever a judicial body is entrusted under national law with the task of deciding on such matters, it must respect the

guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee 14/. However, the author has not rebutted the State party's argument that the Supreme Court's judgement in *Kourris v. The Supreme Council of Judicature* was a binding precedent to the effect that the Supreme Council's exercise of powers is not subject to judicial review and falls outside the Supreme Court's jurisdiction under article 146 of the Constitution. Accordingly, the Committee considers that the Supreme Court did not violate the guarantees of article 14, paragraph 1, when it declared itself incompetent to deal with the author's case, given that Cypriot law explicitly excluded the Court's jurisdiction to adjudicate the matter. The initiation of proceedings before a judicial body that manifestly lacks jurisdiction to deal with a matter cannot trigger the guarantees of article 14, paragraph 1. The Committee concludes that this part of the communication is therefore inadmissible *ratione materiae* under article 3 of the Optional Protocol.

Notes

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

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

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

...

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

...

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

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- *Jong-Choel v. Republic of Korea* (968/2001), ICCPR, A/60/40 vol. II (27 July 2005) 60 at paras. 1, 2.1, 2.2, 8.2, 8.3 and 9.

1. The author of the communication is Mr. Kim Jong-Cheol, a Korean national. He claims to be a victim of violations by the Republic of Korea of his rights under articles 19, paragraph 2, 25 (a) and (b), and 26 of the International Covenant on Civil on Civil and Political Rights. He is represented by counsel.

2.1 On 11 December 1997, the author, a journalist, published an article in a national weekly publication, reporting on opinion polls, between 31 July and 11 December 1997, for the Presidential election of 18 December 1997. In February 1998, he was charged by the District Attorney for violating section 108 (1) of the Election for Public Office and Election Malpractice Prevention Act (hereinafter the "Election Act"), which prohibits publication of public opinion polls during the electoral campaign period 1/. According to article 33 (1), the presidential campaign period is 23 days. The Election Act imposes criminal liability for the disclosure of political opinion polls for the 23-day period running up to and including election day 2/. On 16 July 1998, the author was found guilty as charged by the Seoul Criminal District Court Collegiate Division and fined 1,000,000 won (approx. US$ 445).

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

...

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

8.3 The Committee observes that any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address the aims enumerated in paragraph 3 of article 19, and must be necessary to achieve the purpose. The restrictions were provided for by law, under section 108 (1) of the Election for Public Office and Election Malpractice Prevention Act. As to whether the measures addressed one of the aims enumerated in paragraph 3, the Committee notes that the State party maintains that the restriction is justified in terms of the protection of public order (para. 3 (b)). The Committee considers that, to the extent that the restriction relates to the rights of Presidential candidates, this restriction may also fall within the terms of article 19, paragraph 3 (a) (necessary for the respect of the rights of others). The Committee notes the underlying reasoning for such a restriction is based on the wish to provide the electorate with a limited period of reflection, during which they are insulated from considerations extraneous to the issues under contest in the elections, and that similar restrictions can be found in many jurisdictions. The Committee also notes the recent historical specificities of the democratic political processes of the State party, including those invoked by the State party. Under such circumstances, a law restricting the publication of opinion polls for a limited period in advance of an election does not seem *ipso facto* to fall outside the aims contemplated in article 19, paragraph 3. As to the issue of proportionality, the Committee notes that, while a cut-off date of 23 days prior to the election is unusually long, it need not pronounce itself on the compatibility *per se* of the cut-off date with article 19, paragraph 3, since the author's initial act of publishing previously unreported opinion polls took place within seven days of the election. The author's conviction for such publication cannot be considered excessive in the context of the conditions obtaining in the State party. The Committee also notes that the sanction visited on the author, albeit one or criminal law, cannot be categorized as excessively harsh. It is not, therefore, in a position to conclude that the law, as applied to the author, is disproportionate to its aim. Accordingly, the Committee does not find a violation of article 19 of the Covenant in this regard.

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

Notes

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

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

two years, or a fine not exceeding four million won."

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

For related individual opinions in this context generally, see:

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

CAT

- *H. B. H., T. N. T., H.J.H., H. O. H., H. R. H. and H. G. H. v. Switzerland* (192/2001), CAT, A/58/44 (29 April 2003) 126 (CAT/C/30/D/192/2001) at paras. 1.1, 2.1-2.8, 6.2, 6.5 and 6.7-6.9.

  1.1 The complainants, Mr. H.B.H., his wife, Mrs. T.N.T., and their children H.J.H., H.O.H., H.R.H. and H.G.H. - are Syrian nationals of Kurdish origin. They are currently in Switzerland, where they submitted an application for asylum. The application was rejected, and the complainants maintain that their return to the Syrian Arab Republic would constitute a violation by Switzerland of article 3 of the Convention...

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  2.1 Mr. H. states that he was arrested while performing his compulsory military service owing to his refusal to join the ruling Baath party. He claims to have been imprisoned in Tadmur prison from 1 November 1987 to 31 March 1988, and to have been ill-treated.

  2.2 He also states that he has been a committed Yekiti party sympathizer since 1992, and that he became a member of the party in 1995. In this connection, he explains that he has distributed pamphlets and newspapers and taken part in party meetings. He asserts that on 5 November 1996 the Syrian political security service accused him of handing out prohibited leaflets and arrested him, releasing him owing to lack of evidence on 20 November 1996.

  2.3 On 18 July 1998 a meeting attended by some 45 to 50 people, including senior officials of the Yekiti party, was held at his home in Al Qamishli, at which he roundly criticized government policy. Following the meeting, on the advice of the organizer, the complainant went to stay with his sister for fear that the authorities would be told about his remarks. Shortly after the meeting, members of the Syrian security service in fact went to his home to look for him. Over the next few days he heard that the security forces had reportedly made

several attempts to arrest him. He first hid at his sister's home in Al Qamishli, then at his uncle's home, near to the border with Turkey. There he met up with his family, which had meanwhile also fled Al Qamishli. The complainants state that they left Syria together, in early August 1998, and crossed Turkey en route to Switzerland.

2.4 Mr. H. affirms that, after he fled, he remained in contact with organizations of party exiles in Europe. He also states that he took part in a demonstration against the Syrian regime in the spring of 2000 in Geneva.

2.5 The complainants applied for asylum in Switzerland on 17 August 1998; the application was rejected on 21 January 1999. The Swiss Asylum Appeal Commission (CRA), ruling on the appeal submitted by the complainants on 20 February 2001, confirmed the initial decision to reject the application on 11 April 2001. In a letter dated 23 April 2001 the complainants were given a deadline for departure of 23 July 2001.

2.6 On the basis of a new document intended to demonstrate that the fear of persecution cited was well founded - an internal memorandum from the Al Hasakah political security division, dated 21 August 1998, addressed to the Al Qamishli political security division for the arrest of Mr. H. for prohibited political propaganda on behalf of the Kurdish cause - the complainant, on 21 June 2001, submitted to CRA an application for review of the decision of 11 April 2001. By an interlocutory decision of 28 June 2001 CRA rejected a request for the applications for review to have suspensive effect and for expulsion to be deferred.

2.7 In a letter dated 27 August 2001 a copy of a judgement of 20 May 1999 by an Al Hasakah court sentencing Mr. H. to three years' imprisonment for belonging to a prohibited organization was sent to CRA. The Commission did not consider it appropriate to overturn its interlocutory decision.

2.8 On 31 August 2001 a report from the Swiss section, Berne, of Amnesty International was sent to CRA; the report concluded that the complainants would very probably be imprisoned, interrogated under torture and subjected to arbitrary detention if they returned to Syria. CRA did not change its original decision.

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6.2 The issue before the Committee is whether the return of the complainants to the Syrian Arab Republic would violate the obligation of the State party under article 3 of the Convention not to expel or return a person to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

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6.5 In this case the Committee notes that the State party draws attention to blatant inconsistencies and contradictions in the accounts and submissions by the complainants, casting doubt on the veracity of their allegations. It also takes note of the information

supplied in this regard by the complainants.

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6.7 Regarding the complainants' political activities, the Committee notes, firstly, that only Mr. H. reports such an involvement in Syria. Secondly, in view of the complainants' contradictions and inconsistencies and the serious doubts as to the authenticity of the internal memorandum from the Syrian security service of 21 August 1998 and of the Al Hasakah court judgement of 20 May 1999, the Committee considers that the complainant has not established, either in his statements or by means of the documents produced, his active membership in the Yekiti party and opposition to the Syrian authorities. Lastly, the Committee considers that the complainants have not shown involvement in opposition political activities in Switzerland.

6.8 The Committee considers that the above-mentioned documents were produced by the complainants only in response to decisions by the Swiss authorities to reject their application for asylum, and that the complainants have failed to offer any coherent explanation of the delay in making submissions.

6.9 Regarding the 2001 Amnesty International report, in addition to the contradictions pointed out by the State party concerning the conclusions drawn regarding the complainants' political activities in Syria, the Committee notes that the information relating to measures that might affect persons returning to Syria after a long stay abroad is invoked in general terms without being linked in a relevant manner to the specific cases of the complainants, and is contradicted by the information transmitted by the State party, in submissions which the complainants have not subsequently contested. It is also apparent that the Kurdish origin of the complainants would not in itself constitute a reason for ill-treatment or torture in Syria.

- *A.T.A. v. Switzerland* (236/2003), CAT, A/59/44 (11 November 2003) 323 (CAT/C/31/D/236/2003) at paras. 2.1-2.4 and 4.2.

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2.1 In 1996, the complainant, who belongs to the Ewé ethnic minority, joined the "Union des Forces du Changement" (UFC).

2.2 On 27 April 2000, the complainant played for the UFC soccer team in a match against the team of the ruling political party. The UFC team won the game after the complainant had scored the decisive goal. The same evening, two soldiers came to his residence looking for him. While attempting to escape, he allegedly had to dodge bullets fired by soldiers; however, he managed to escape.

2.3 The complainant argues that the security forces in Togo are controlled by the Khabyé

ethnic majority and frequently violate human rights, the Togolese Constitution and domestic laws which protect the rights and freedoms of the individual.

2.4 The complainant left Togo, he arrived in Europe and requested asylum in Switzerland on 30 May 2000. On 11 October 2000, the Federal Refugee Office refused his application and ordered his deportation from Switzerland. On 19 November 2001, the Asylum Appeals Commission dismissed his appeal and, on 15 July 2003, it confirmed the decision of the Federal Refugee Office ordering the complainant's deportation. On 18 September 2003, the Asylum Appeals Commission rejected his request to review its decision of 15 July 2003.

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4.2 The Committee notes that the information submitted by the complainant in substantiation of his claim is general and vague and does not reveal the existence of any personal and foreseeable risk of torture to which the complainant might be subjected in the event of his return in Togo. The bare assertion of membership in a political party, in the instant case of the UFC, and the vague allegation that he was shot at while attempting to escape, do not satisfy the Committee that the threshold of admissibility has been met in the complainant's case. In the circumstances, the Committee observes that the complaint, as formulated, does not give rise to any arguable claim under the Convention.

- *A. R. v. The Netherlands* (203/2002), CAT, A/59/44 (14 November 2003) 247 (CAT/C/31/D/203/2002) at paras. 1.1, 2.1-2.6, 7.3-7.6 and 8.

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1.1 The complainant is A.R., an Iranian national, born on 30 June 1966, currently residing in the Netherlands and awaiting deportation to Iran. He claims that his forcible return to Iran would constitute a violation by the Netherlands of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel.

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2.1 Counsel submits that, after the Iranian revolution in 1979, the complainant became associated with a political party, the Fedayeen Khalg-Iran. He became active in the organization whilst in secondary school. In January 1983 he was arrested on suspicion of distributing illegal pamphlets and causing disorder, and was detained for 25 days. During this time, he alleges that he was severely beaten. Upon release he was removed from his school.

2.2 The complainant continued his political activities. These consisted of handing out illegal pamphlets and attending illegal gatherings. He was arrested again in July 1983, and brought before a Revolutionary Court, which sentenced him to two years' imprisonment. During his first two weeks in prison he was interrogated, tortured and maltreated. He was

twice taken out for a mock execution, for which he was blindfolded and put against a wall, with shots being fired. He was then kept in solitary confinement for a month and a half. At the end of his term of imprisonment, the complainant was required to sign a statement that he would not engage in political activities, on pain of death.

2.3 After his release, the complainant was required to carry out his military service, during which time he claims he was discriminated against, in that he had to perform dangerous tasks at the front. After completing his military service, he took up tertiary studies at a private university, as he was not permitted to study at a regular university, and then obtained employment. In 1989 he resumed his political activities with a group of people associated with the Fedayeen-e-Khalg. The group distributed pamphlets and a political periodical, wrote slogans on walls, and collected financial aid for families of political detainees.

2.4 On the evening of 30 April 1994, the group distributed pamphlets and wrote slogans in certain areas of Tehran. The following morning, the complainant noticed that some of the slogans were unfinished, and learned that two members of the group had not notified them that they had finished work. Fearing that the activities of his group had been detected, the complainant fled Tehran. He later learned that officials had searched his apartment and taken away his belongings, including illegal pamphlets and other political material. He also learned that his father had been detained and interrogated by officials, and released on condition that he keep the authorities informed about the complainant's whereabouts. The complainant fled Iran on 21 June 1994.

2.5 After arriving in the Netherlands, the complainant became involved in a number of political activities, including co-founding an organization called Nabard, an organization of Iranian refugees which comments on the human rights situation in Iran. He was involved in writing and publishing reports for this group, although his name did not appear in them. Nabard has close connections with a Fedayeen group in France, and opposition groups in Iran. In 1996, the complainant was told by his brother, who had obtained asylum in Sweden, that a letter from the complainant to his father had been intercepted by the authorities, and that his father had been detained for not apprising the authorities about receiving the letter.

2.6 On 14 July 1994 the complainant applied for asylum in the Netherlands. His application was rejected by the State Secretary of the Department of Justice on 30 August 1994. An internal review of this decision, requested by the complainant, confirmed the original decision, and a subsequent appeal to the District Court in The Hague was dismissed on 11 February 1997. The Court found that the complainant had had no problems with the Iranian authorities between 1985 and 1994, and that there was no objective evidence regarding the supposed arrest of his fellow group members in May 1994.

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7.3 The Committee recalls its general comment on article 3, which states that the

Committee is to assess whether there are "substantial grounds for believing that the author would be in danger of torture" if returned, and that the risk of torture "must be assessed on grounds that go beyond mere theory or suspicion". The risk need not be "highly probable", but it must be "personal and present".c/ In this regard, in previous decisions, the Committee has determined that the risk of torture must be "foreseeable, real and personal". d/

7.4 In assessing the risk of torture in the present case, the Committee notes that the complainant claims to have been tortured and imprisoned previously by the Iranian authorities, because of his involvement with the Fedayeen Khalg-Iran. This is not contested by the State party. However, the alleged acts of torture occurred in 1983, some 20 years ago. The Committee notes that, in accordance with its general comment on article 3, information which is considered pertinent to risk of torture includes whether the complainant has been tortured in the past, and if so, whether this was in the *recent* past. e/ This cannot be said to be the case in the author's complaint.

7.5 The Committee's general comment also directs the inquiry at whether the author of the communication has engaged in any political or other activity within or outside the State concerned which appear to make him or her "particularly vulnerable" to the risk of torture.f/ In the current case, the complainant contends that he signed a form upon his release, to the effect that he would not engage in further political activities, and that he was harassed by the authorities after his release. He claims that, despite this, he did continue to engage in political activities in Iran, that he had good reason to flee Iran in 1994, and that he has continued his political activities in the Netherlands, of which the Iranian authorities might be aware. The complainant further alleges that he submitted to the authorities Iranian documents, issued by the Revolutionary Prosecutor's Office, which attest to the Iranian authorities' interest in him and the dangers confronting him in Iran.

7.6 The Committee notes that the complainant's arguments, and his evidence to support them, have all been considered by the State party's courts. The Committee recalls its jurisprudence to the effect that it is not an appellate, quasi-judicial or administrative body. Consistent with its general comment, whilst the Committee has the power of free assessment of the facts arising in the circumstances of each case, it must give considerable weight to findings of fact made by the organs of the State party. In this case, the Committee cannot determine that the State party's review of the complainant's case was deficient in this respect. On the basis of the above, the Committee considers that the complainant has not substantiated that he would face a foreseeable, real and personal risk of being subjected to torture upon his return to Iran.

8. The Committee against Torture...concludes that the removal of the complainant to Iran would not constitute a breach of article 3 of the Convention.

Notes

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c/ General comment No. 1 (1996).

d/ Views of the Committee on Communication No. 204/2002, *H.K.H. v. Sweden*, 28 November 2002.

e/ Paragraph 8 (b).

f/ Paragraph 8 (e).

- *T. M. v. Sweden* (228/2002), CAT, A/59/44 (18 November 2003) 294 (CAT/C/31/D/228/2003) at paras. 2.1-2.3, 2.6, 2.7, 7.1 and 7.3.

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2.1 The complainant entered Sweden on 26 September 1999 and immediately applied for asylum. During an Immigration Board interview on the same day, he stated he had been become a member of the Bangladesh Freedom Party (hereafter "BFP") in 1991, an allegedly illegal political party, and in 1994 started actively working for the party, including by organizing, and participating in, meetings and demonstrations. In 1997, upon release on bail three days after being arrested for illegal possession of weapons, he claimed to have gone into hiding for two years. As the political situation worsened, he paid a smuggler to arrange departure from Bangladesh.

2.2 On 29 September 1999, the Immigration Board held a second interview with the complainant. He stated that from 1994 to 1997 he was joint secretary of the party in the Dhaka city party district. He claimed Government members harass and abuse party members, and that he too, as a known party figure, suffered harassment. He claimed to have been falsely accused of murder, possession of weapons and taking bribes in 1997. While he was under arrest, he claimed to have been tortured with kicks and truncheons, and he adds that he continues to suffer from a back injury as a result. The party arranged for his release on bail, whereupon he went into hiding outside Dhaka. He allegedly was unaware whether he had been convicted of the offences of which he had been accused. By subsequent written submissions and seeking to clarify "misunderstandings", the complainant's counsel observed that the party was legal but due to Government impediments of its activities, its activities were "underground". Counsel stated that the bribe charges were in fact charges to the effect that the complainant had unlawfully extorted money, charges which had been brought by police upon pressure from the party then in Government, the Awami League.

2.3 On 8 October 1999, the Immigration Board denied his application. The Board established a variety of credibility problems related to documentation, and that he had not established his identity. On the substance of the claim, it found that the BFP was legal in Bangladesh, and that the complainant had not engaged in any impermissible political activity. While aware of some politically-motivated charges, the Board considered that the criminal justice system in Bangladesh provided sufficient guarantees for fair trial in respect of any criminal charges. The Board observed that the complainant had been released after 3 days in custody, had not been able to provide any documentary evidence supporting his allegations of charges against him and had provided very vague information as to any legal proceedings after his release. It thus concluded that the complainant had not shown reason to believe he was at risk of punishment for political reasons.

...

2.6 On 20 December 2002, the complainant lodged a new application with the Aliens Appeals Board, arguing that during his detention in January 1997, he had been subjected to different forms of severe torture that resulted in physical and mental injuries. His family had allegedly been threatened by Awami League members after his departure. If he returned, he would be arrested, and given allegedly widespread torture during criminal investigations it was "very improbable" that he would be able to avoid such treatment. As a result of the torture allegedly suffered, he suffered from post-traumatic stress syndrome (PTSS), such that return would place him at "great risk" of taking his own life. He presented psychiatric certificates on his state of mental health as well as detailed forensic reports undertaken in Sweden, which assessed that the complainant had been subjected to torture in 1997.

2.7 On 16 January 2003, the Board rejected the application, applying the standards of article 3 of the Convention and the Committee's general comment on its implementation. It observed that the complainant had waited three years since the expulsion order became final before first complaining about acts of torture during his detention in 1997. Applying an appropriately low burden of proof, however, it found that the medical evidence supported a claim of torture. As to whether there was a current risk of torture, the Board found that in the light of the passage of six years, of the complainant's inability to show he was still being sought by Bangladeshi authorities, and of the fall from power of the party allegedly persecuting him, there was no reason presently to fear such treatment. As to his health, the Board observed that he had at no previous point complained of the psychological problems suddenly alleged, nor had he shown that he had been in contact with any mental health-care provider in Sweden. It thus concluded that his mental health status was primarily due to his unsettled life in Sweden resulting from his failure to comply with the expulsion order and continued illegal presence in the country.

...

7.1 The issue before the Committee is whether the removal of the complainant to Bangladesh violated the State party's obligation under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing

that he or she would be in danger of being subjected to torture.

...

7.3 In the present case, the Committee observes that the Aliens Appeals Board accepted the complainant's (belated) contention that he had been subjected to torture in January 1997. The Committee notes, however, that the complainant's case was based on the contention that, as a political activist for the BFP, false charges were brought against him, and that he suffered abuse at the hands of the police, as a result of political pressure from the government authorities then in power. The Committee notes that this practice has been documented by several sources. In the light of the six years that have passed since the alleged torture took place, however, and, more pertinently, given that the complainant's political party now participates in government in Bangladesh, the Committee considers that the complainant has failed to show that substantial grounds existed, at the time of his removal, that he was at a real and personal risk of being subjected to torture.

- *A. K. v. Australia* (148/1999), CAT, A/59/44 (5 May 2004) 123 at paras. 1.1, 2.1-2.4, 2.8, 2.10, 2.11, 6.1 and 6.3-6.6.

1.1 The complainant is A.K., a Sudanese national, currently detained at the Immigration Detention Centre, New South Wales. He claims that his forcible return to Sudan would constitute a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment by Australia...

2.1 The complainant alleges that he is Ansari and a member of the Umma Party, which is one of the two traditionalist parties of the North opposing the current Government. From 1990 to 1995, the complainant attended Cairo University, Khartoum Branch, where he completed a law degree. The Umma Party had about 100 members at Cairo University, and the complainant became the leader of this group.

2.2 In April 1992, the complainant alleges to have organized rallies and demonstrations against the Government. Following one of these rallies, he was detained by members of the security forces. He was threatened, forced to sign an undertaking that he would not participate in political activities and then released. Following this incident, the security forces kept him under surveillance.

2.3 While he was attending university, the complainant alleges that students were compelled to join the People's Defence Force (PDF), the army of the ruling party, the National Islamic Front (NIF). To avoid conscription the complainant became a police officer, and from 1993 to 1995, he worked at the head office of the Khartoum prison administration and sometimes at Kober prison.

2.4 In 1994, the Government sent students who were seen as troublemakers and opponents of the regime to fight in Southern Sudan. On 1 June 1996, the complainant allegedly received a summons stating that he had to report to the PDF within 72 hours as he had been chosen "to fulfil the duty of Jihad". As he did not want to fight against his own people or to clear minefields, he decided to flee the country. He was unable to use his passport because of the summons and therefore used his older brother's passport. After his departure the military allegedly visited his home.

...

2.8 The complainant outlines the recent political history of Sudan and claims that there is a consistent pattern of gross, flagrant and mass violations of human rights. He refers, *inter alia*, to the adoption of a country resolution in April 1997 by the United Nations Commission on Human Rights, according to which human rights violations in Sudan included "extrajudicial killings, arbitrary arrests, detentions without due process, enforced or involuntary disappearances, violations of the rights of women and children, slavery and slavery-like practices, forced displacement of persons and systematic torture, and denial of the freedoms of religion, expression, association and peaceful assembly".

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2.10 The complainant alleges that although much of the religious persecution has been directed against non-Muslims, the fundamentalist nature of the current regime is such that many Muslims, including the Sufis, are not free to practise their own brand of Islam under the NIF regime. The Ansar (consisting largely of Sufis) have been subjected to government control with the confiscation of their mosques. In addition, Muslim groups critical of the Government continue to suffer harassment. b/ On the political level, the complainant submits that contrary Islamist political opinions, including centrist Islamic parties such as the Umma are not tolerated.

2.11 According to the complainant, there is evidence that military deserters will face torture and death. Amnesty International reported in April 1998 that: "Scores of student conscripts died as hundreds of youths broke out of a military training camp at al-Ayfun near Khartoum. The authorities announced that more than 50 deserters had drowned trying to cross the Blue Nile. However, other reports said that over 100 were killed, many of whom had been shot and others beaten to death." He also submits that both the UNHCR and Amnesty International have reported on the detention centres in Sudan and on the risk of ill-treatment and torture, in particular during interrogation in security offices. c/ According to the complainant, "a failed Sufi", Umma Party asylum-seeker, who has spent considerable time in the West, and who has qualified in law, whether or not his military service has been completed, would face considerable difficulty on return to Sudan.

...

6.1 The Committee must decide whether the forced return of the complainant to Sudan would violate the State party's obligation, under article 3, paragraph 1, of the Convention, not to expel or return (*refouler*) an individual to another State where there are substantial

grounds for believing that he would be in danger of being subjected to torture...

...

6.3 Concerning the allegations of political involvement and previous ill-treatment at the hands of the Sudanese authorities as grounds for fearing that the complainant would be subjected to torture on return, the Committee notes that even if it were to discount the above-mentioned inconsistencies and accept these claims as true, the complainant does not claim to have been politically involved since 1992, and at no time during the domestic proceedings nor in his complaint to the Committee did he claim to have been tortured by the Sudanese authorities.

6.4 On the issue of his alleged desertion, the Committee notes that the State party did examine the letter, dated 1 June 1996, in which the complainant was allegedly drafted by the PDF, but considered it not to be genuine. The Committee considers that due weight must be accorded to findings of fact made by domestic, judicial or competent government authorities unless it can be demonstrated that such findings are arbitrary or unreasonable. Even if the Committee were to consider that the complainant is a deserter or evaded the draft, he has not demonstrated that he would be subjected to torture upon his return to Sudan. The Committee observes that the State party considered a significant amount of information from various different sources before arriving at this conclusion.

6.5 The Committee notes the claim that if returned to Sudan, the complainant would be compelled to perform military service, despite the fact that he is a conscientious objector, and the implication that this would amount to torture, as defined by article 3 of the Convention. The Committee considers that the letter of 1 June 1996, the veracity of which has been challenged, as well as the complainant's allegation that opponents of the regime are called up to fight in the civil war, is insufficient to demonstrate that he either is a conscientious objector or that he would be drafted on return to Sudan. As with the other reasons for claiming a fear of torture on return, the State party's evaluation of the facts in this respect has not been shown to be unreasonable or arbitrary.

6.6 On the basis of the foregoing, the Committee considers that the complainant has not provided a verifiable basis to conclude that substantial grounds exist for believing that he would face a foreseeable, real and personal risk of being subjected to torture upon his return to Sudan, within the meaning of article 3 of the Convention.

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b/ The complainant refers to Amnesty's Annual Report of 1999 in which it reported that those detained in 1997 included five imams who were reported to have cast doubt on the religious credentials of Hassan al-Turabi, Secretary-General of the National Congress and ideological mentor of the Government.

c/ He refers to Amnesty International's Urgent Action of 21 January 1997.