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III. JURISPRUDENCE

ICCPR

- *Pinkney v. Canada* (R.7/27), ICCPR, A/37/40 (29 October 1981) 101 at paras. 31-34.

...
31. Mr. Pinkney...complains that while detained at the Lower Mainland Regional Correction Centre he was prevented from communicating with outside officials and was thereby subjected to arbitrary or unlawful interference with his correspondence contrary to article 17 (1) of the Covenant. In its submission of 22 July 1981 the State party gives the following explanation of the practice with regard to the control of prisoners' correspondence at the Correction Centre:

> "Mr. Pinkney, as a person awaiting trial, was entitled under section 1.21 (d) of the Gaol Rules and Regulations, 1961, British Columbia Regulations 73/61, in force at the time of his detention to the 'provision of writing material for communicating by letter with (his) friends or for conducting correspondence or preparing notes in connexion with (his) defence'. The Government of Canada does not deny that letters sent by Mr. Pinkney were subject to control and could even be censored. Section 2.40 (b) of the Gaol Rules and Regulations, 1961 is clear on that point:
>
> > '2.40 (b) Every letter to or from a prisoner shall (except as hereinafter provided in these regulations in the case of certain communications to or from a legal adviser) be read by the Warden or by a responsible officer deputed by him for the purpose, and it is within the discretion of the Warden to stop or censor any letter, or any part of a letter, on the ground that its contents are objectionable or that the letter is of excessive length.'
>
> "Section 42 of the Correctional Centre Rules and Regulations, British Columbia Regulation 284/78, which came into force on 6 July 1978 provides that:
>
> > '42 (1) A director or a person authorized by the director may examine all correspondence other than privileged correspondence between an inmate and another person where he is of the opinion that the correspondence may threaten the management, operation, discipline or security of the

correctional centre.

'(2) Where in the opinion of the director, or a person authorized by the director, correspondence contains matter that threatens the management, operation, discipline or security of the correctional centre, the director or person authorized by the director may censor that matter.

'(3) The director may withhold money, or drugs, weapons, or any other object which may threaten the management, operation, discipline, or security of a correctional centre, or an object in contravention of the rules established for the correctional centre by the director contained in correspondence, and where this is done the director shall

(a) Advise the inmate,

(b) In so far as the money or object is not held as evidence for the prosecution of an offence against an enactment of the province or of Canada, place the money or object in safe-keeping and give it to the inmate on his release from the correctional centre, and

(c) Carry out his duties under this section in a manner that, in so far as is reasonable, respects the privacy of the inmate and person corresponding with the inmate.

'(4) An inmate may receive books or periodicals sent to him directly from the publisher.

'(5) Every inmate may send as many letters per week as he sees fit.'

32. Although these rules were only enacted subsequent to Mr. Pinkney's departure from the Lower Mainland Regional Correction Centre, in practice they were being applied when he was detained in that institution. This means that privileged correspondence, defined in section 1 of the regulations as meaning “correspondence addressed by an inmate to a Member of Parliament, Members of the Legislative Assembly, barrister or solicitor, commissioner of corrections, regional director of corrections, chaplain, or the director of

inspection and standards", were not examined or subject to any control or censorship. As for non-privileged correspondence, it was only subject to censorship if it contained matter that threatened the management, operation, discipline, or security of the correctional centre. At the time when Mr. Pinkney was detained therein, the procedure governing prisoners' correspondence did not allow for a general restriction on the right to communicate with government officials. Mr. Pinkney was not denied this right. To seek to restrict his communication with various government officials while at the same time allowing his access to his lawyers would seem a futile gesture since through his lawyers, he could put his case to the various government officials whom he was allegedly prevented from contacting."

33. In his letter of 27 August 1981 Mr. Pinkney comments as follows on these submissions of the State party:

> "Further, on page 5 of the Government of Canada's submission, it is alleged by the Government that my mail was not tampered with at Oakalla, when in point of fact, not only was my mail interfered with by prison authorities in the normal sense of the requirements affecting all prisoners, but in point of fact, as the Government well knows, in some instances my mail to members of Government (whose mail should indeed have been privileged mail) never even got to these people, for it never even left the prison, once I mailed it. To imply, as does the Government, that such actions would be 'futile' for prison authorities to engage in, due to my having access to my lawyer at certain very definite times, is absolute nonsense."

34. No specific evidence has been submitted by Mr. Pinkney to establish that his correspondence was subjected to control or censorship which was not in accordance with the practice described by the State party. However, article 17 of the Covenant provides not only that "No one shall be subjected to arbitrary or unlawful interference with his correspondence" but also that "Everyone has the right to the protection of the law against such interference". At the time when Mr. Pinkney was detained at the Lower Mainland Regional Correction Centre the only law in force governing the control and censorship of prisoners' correspondence appears to have been section 2.40 (b) of the Gaol Rules and 'Regulations 1961. A legislative provision in the very general terms of this section did not, in the opinion of the Committee, in itself provide satisfactory legal safeguards against arbitrary application, though, as the Committee has already found, there is no evidence to establish that Mr. Pinkney was himself the victim of a violation of the Covenant as a result. The Committee also observes that section 42 of the Correctional Centre Rules and Regulations that came into force on 6 July 1978 has now made the relevant law considerably more specific in its terms.

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- *Estrella v. Uruguay* (74/1980) (R.18/74), ICCPR, A/38/40 (29 March 1983) 150 at paras. 1.13, 8.5 and 9.2.

...
1.13 The author states that the detainees' correspondence is subjected to severe censorship, that they cannot write to their lawyers or to international organizations and that prison officials who act as "censors" arbitrarily delete sentences and even refuse to dispatch letters. He claims that during his entire detention he was given only 35 letters, though he certainly received hundreds. During a seven-month period he was given none. He states that Lieutenant Rodriguez and Lieutenant Curruchaga asked him to sign for the receipt of letters which he never saw.
...
8.5 At Libertad prison the author was subjected to continued ill-treatment and to arbitrary punishments including 30 days in solitary confinement in a punishment cell and seven months without mail or recreation and subjected to harassment and searches. His correspondence was subjected to severe censorship (see para. 1.13 above).
...
9.2 With regard to the censorship of Miguel Angel Estrella's correspondence, the Committee accepts that it is normal for prison authorities to exercise measures of control and censorship over prisoners' correspondence. Nevertheless, article 17 of the Covenant provides that "no one shall be subjected to arbitrary or unlawful interference with his correspondence". This requires that any such measures of control or censorship shall be subject to satisfactory legal safeguards against arbitrary application (see para. 21 of the Committee's views of 29 October 1981 on communication No. R.14/63). Furthermore, the degree of restriction must be consistent with the standard of humane treatment of detained persons required by article 10 (1) of the Covenant. In particular, prisoners should be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, by correspondence as well as by receiving visits. On the basis of the information before it, the Committee finds that Miguel Angel Estrella's correspondence was censored and restricted at Libertad prison to an extent which the State party has not justified as compatible with article 17 read in conjunction with article 10 (1) of the Covenant.

- *J. R. T. v. Canada* (104/1981) (R.24/104), ICCPR, A/38/40 (6 April 1983) 231 at paras. 4 and 8.

...
4. ...The following claim was also made: pursuant to the provisions of section 7 of the Post Office Act (Canada), which forbids the transmission of "scurrilous material", Mr. T. had, since May 1965, been proscribed from receiving or sending any mail in Canada. The author...requests that the said proscription be considered by the Human Rights Committee,

together with the other claims, as a possible further violation of article 19 of the Covenant. (The author's initial submission of 18 July 1981 indicates that the proscription has also applied to the W.G. Party since 1980.)

...

8. On the basis of the information before it the Human Rights Committee, after careful examination, concludes:

> ...
>
> (c) As to the author's claim that the application of section 7 of the Post Office Act resulted in arbitrary interference with his correspondence, contrary to the provisions of article 17 and 19 of the Covenant, the Committee accepts that the broad scope of the prohibitory order, extending as it does to all mail, whether sent or received, raises a question of compatibility with articles 17 and 19 of the Covenant. However, this claim is inadmissible under article 5 (2) (b) of the Optional Protocol. Mr. T. did not challenge the validity and legality of the Minister's prohibitory order, or its extension, before the competent Canadian courts. Moreover, a prohibitory order may be revoked under certain conditions and Mr. T. has not applied for such revocation. He has therefore failed to exhaust domestic remedies.

The Human Rights Committee therefore decides:

> That the communication is inadmissible.

- *Toonen v. Australia* (488/1992), ICCPR, A/49/40 vol. II (31 March 1994) 226 (CCPR/C/50/D/488/1992) at paras. 8.1-8.6, 9, 10 and Individual Opinion by Mr. Bertil Wennergren, 236.

...

8.1 The Committee is called upon to determine whether Mr. Toonen has been the victim of an unlawful or arbitrary interference with his privacy, contrary to article 17, paragraph 1...

8.2 Inasmuch as article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of "privacy", and that Mr. Toonen is actually and currently affected by the continued existence of the Tasmanian laws. The Committee considers that Sections 122(a), (c) and 123 of the Tasmanian Criminal Code "interfere" with the author's privacy, even if these provisions have not been enforced for a decade. In this context, it notes that the policy of the Department of Public Prosecutions not to initiate criminal proceedings in respect of private homosexual conduct does not amount to a guarantee that no actions will be brought against homosexuals in the future, particularly in the light of undisputed statements of the Director of Public Prosecutions of Tasmania in 1988

and those of members of the Tasmanian Parliament. The continued existence of the challenged provisions therefore continuously and directly "interferes" with the author's privacy.

8.3 The prohibition against private homosexual behaviour is provided for by law, namely, Sections 122 and 123 of the Tasmanian Criminal Code. As to whether it may be deemed arbitrary, the Committee recalls that pursuant to its General Comment 16[32] on article 17, the "introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the circumstances".a/ The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

8.4 While the State party acknowledges that the impugned provisions constitute an arbitrary interference with Mr. Toonen's privacy, the Tasmanian authorities submit that the challenged laws are justified on public health and moral grounds, as they are intended in part to prevent the spread of HIV/AIDS in Tasmania, and because, in the absence of specific limitation clauses in article 17, moral issues must be deemed a matter for domestic decision.

8.5 As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV. The Australian Government observes that statutes criminalizing homosexual activity tend to impede public health programmes "by driving underground many of the people at the risk of infection". Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.

8.6 The Committee cannot accept either that for the purposes of article 17 of the Covenant, moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy. It further notes that with the exception of Tasmania, all laws criminalizing homosexuality have been repealed throughout Australia and that, even in Tasmania, it is apparent that there is no consensus as to whether Sections 122 and 123 should not also be repealed. Considering further that these provisions are not currently enforced, which implies that they are not deemed essential to the protection of morals in Tasmania, the Committee concludes that the provisions do not meet the "reasonableness" test in the circumstances of the case, and that they arbitrarily interfere with Mr. Toonen's right under article 17, paragraph

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1.

...

9. The Human Rights Committee...is of the view that the facts before it reveal a violation of articles 17, paragraph 1, *juncto* 2, paragraph 1, of the Covenant.

10. Under article 2(3)(a) of the Covenant, the author, victim of a violation of articles 17, paragraph 1, *juncto* 2, paragraph 1, of the Covenant, is entitled to a remedy. In the opinion of the Committee, an effective remedy would be the repeal of Sections 122(a), (c) and 123 of the Tasmanian Criminal Code.

Notes

a/ Official Records of the General Assembly, Forty-third Session, Supplement No. 40 (A/43/40), annex VI, general comment 16 (32), para. 4.

Individual Opinion by Mr. Bertil Wennergren

...In my opinion, a finding of a violation of article 17, paragraph 1, should rather be deduced from a finding of violation of article 26. My reasoning is the following:

Section 122 of the Tasmanian Criminal Code outlaws sexual intercourse between men and between women. While Section 123 also outlaws indecent sexual contacts between consenting men in open or in private, it does not outlaw similar contacts between consenting women. In paragraph 8.7, the Committee found that in its view, the reference to the term "sex" in article 2, paragraph 1, and in article 26 is to be taken as including sexual orientation. I concur with this view, as the common denominator for the grounds "race, colour and sex" are biological or genetic factors. This being so, the criminalization of certain behaviour operating under Sections 122(a), (c) and 123 of the Tasmanian Criminal Code must be considered incompatible with article 26 of the Covenant.

Firstly, these provisions of the Tasmanian Criminal Code prohibit sexual intercourse between men and between women, thereby making a distinction between heterosexuals and homosexuals. Secondly, they criminalize other sexual contacts between consenting men without at the same time criminalizing such contacts between women. These provisions therefore set aside the principle of equality before the law. It should be emphasized that it is the criminalization as such that constitutes discrimination of which individuals may claim to be victims, and thus violates article 26, notwithstanding the fact that the law has not been enforced over a considerable period of time: the designated behaviour none the less remains a criminal offence.

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Unlike the majority of the articles in the Covenant, article 17 does not establish any true right or freedom. There is no right to freedom or liberty of privacy, comparable to the right of liberty of the person, although article 18 guarantees a right to freedom of thought, conscience and religion as well as a right to manifest one's religion or belief in private. Article 17, paragraph 1, merely mandates that no one shall be subjected to arbitrary or unlawful interference with his privacy, family etc. Furthermore, the provision does not, as do other articles of the Covenant, specify on what grounds a State party may interfere by way of legislation.

A State party is therefore in principle free to interfere by law with the privacy of individuals on any discretionary grounds, not just on grounds related to public safety, order, health, morals, or the fundamental rights and freedoms of others, as spelled out in other provisions of the Covenant. However, under article 5, paragraph 1, nothing in the Covenant may be interpreted as implying for a State a right to perform any act aimed at the limitation of any of the rights and freedoms recognized therein to a greater extent than is provided for in the Covenant.

The discriminatory criminal legislation at issue here is not strictly speaking "unlawful" but it is incompatible with the Covenant, as it limits the right to equality before the law. In my view, the criminalization operating under Sections 122 and 123 of the Tasmanian Criminal Code interferes with privacy to an unjustifiable extent and, therefore, also constitutes a violation of article 17, paragraph 1.

A similar conclusion cannot, in my opinion, be reached on article 2, paragraph 1, of the Covenant, as article 17, paragraph 1 protects merely against arbitrary and unlawful interferences. It is not possible to find legislation unlawful merely by reference to article 2, paragraph 1, unless one were to reason in a circuitous way. What makes the interference in this case "unlawful" follows from articles 5, paragraph 1, and 26, and not from article 2, paragraph 1. I therefore conclude that the challenged provisions of the Tasmanian Criminal Code and their impact on the author's situation are in violation of article 26, in conjunction with articles 17, paragraph 1, and 5, paragraph 1, of the Covenant.

- *Coeriel and Aurik v. The Netherlands* (453/1991), ICCPR, A/50/40 vol. II (31 October 1994) 21 (CCPR/C/52/D/453/1991) at paras. 10.2-10.5 and 11.

...

10.2 The first issue to be determined by the Committee is whether article 17 of the Covenant protects the right to choose and change one's own name. The Committee observes that article 17 provides, *inter alia*, that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence. The Committee considers

that the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone. The Committee is of the view that a person's surname constitutes an important component of one's identity and that the protection against arbitrary or unlawful interference with one's privacy includes the protection against arbitrary or unlawful interference with the right to choose and change one's own name. For instance, if a State were to compel all foreigners to change their surnames, this would constitute interference in contravention of article 17. The question arises whether the refusal of the authorities to recognize a change of surname is also beyond the threshold of permissible interference within the meaning of article 17.

10.3 The Committee now proceeds to examine whether in the circumstances of the present case the State party's dismissal of the authors' request to have their surnames changed amounted to arbitrary or unlawful interference with their privacy. It notes that the State party's decision was based on the law and regulations in force in the Netherlands, and that the interference can therefore not be regarded as unlawful. It remains to be considered whether it is arbitrary.

10.4 The Committee notes that the circumstances in which a change of surname will be recognized are defined narrowly in the Guidelines and that the exercise of discretion in other cases is restricted to exceptional cases. The Committee recalls its General Comment on article 17, in which it observed that the notion of arbitrariness "is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances". Thus, the request to have one's change of name recognized can only be refused on grounds that are reasonable in the specific circumstances of the case.

10.5 In the present case, the authors' request for recognition of the change of their first names to Hindu names in order to pursue their religious studies had been granted in 1986. The State party based its refusal of the request also to change their surnames on the grounds that the authors had not shown that the changes sought were essential to pursue their studies, that the names had religious connotations and that they were not 'Dutch sounding'. The Committee finds the grounds for so limiting the authors' rights under article 17 not to be reasonable. In the circumstances of the instant case the refusal of the authors' request was therefore arbitrary within the meaning of article 17, paragraph 1, of the Covenant.

11. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 17 of the Covenant.

For dissenting opinions in this context, see Coeriel and Aurik v. The Netherlands (453/1991), ICCPR, A/50/40 vol. II (31 October 1994) 21 (CCPR/C/52/D/453/1991) at Individual Opinion by Mr. Nisuke Ando, 28 and Individual Opinion by Mr. Kurt Herndl, 28.

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- *Mónaco v. Argentina* (400/1990), ICCPR, A/50/40 vol. II (3 April 1995) 10 (CCPR/C/53/D/400/1990) at paras. 2.1-2.4, 10.4, 10.5, 11.1 and 11.2.

...
2.1 On 5 February 1977, Ximena Vicario's mother was taken with the then nine-month-old child to the Headquarters of the Federal Police (*Departamento Central de la Policía Federal*) in Buenos Aires. Her father was apprehended in the city of Rosario on the following day. The parents subsequently disappeared, and although the National Commission on Disappeared Persons investigated their case after December 1983, their whereabouts were never established. Investigations initiated by the author herself finally led, in 1984, to locating Ximena Vicario, who was then residing in the home of a nurse, S.S., who claimed to have been taking care of the child after her birth. Genetic blood tests (*histocompatibilidad*) revealed that the child was, with a probability of 99.82 per cent, the author's granddaughter.

2.2 In the light of the above, the prosecutor ordered the preventive detention of S.S., on the ground that she was suspected of having committed the offences of concealing the whereabouts of a minor (*ocultamiento de menor*) and forgery of documents...

2.3 On 2 January 1989, the author was granted "provisional" guardianship of the child; S.S., however, immediately applied for visiting rights, which were granted by order of the Supreme Court on 5 September 1989. In this decision, the Supreme Court also held that the author had no standing in the proceedings about the child's guardianship since, under article 19 of Law 10.903, only the parents and the legal guardian have standing and may directly participate in the proceedings.

2.4 On 23 September 1989 the author, basing herself on psychiatric reports concerning the effects of the visits of S.S. on Ximena Vicario, requested the court to rule that such visits should be discontinued. Her action was dismissed on account of lack of standing. On appeal, this decision was upheld on 29 December 1989 by the Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal of Buenos Aires...
...
10.4 As to Ximena Vicario's and her grandmother's right to privacy, it is evident that the abduction of Ximena Vicario, the falsification of her birth certificate and her adoption by S.S. entailed numerous acts of arbitrary and unlawful interference with their privacy and family life, in violation of article 17 of the Covenant. The same acts also constituted violations of article 23, paragraph 1, and article 24, paragraphs 1 and 2, of the Covenant. These acts, however, occurred prior to the entry into force of the Covenant and of the Optional Protocol for Argentina on 8 November 1986, 4/ and the Committee is not in a position *ratione temporis* to emit a decision in their respect. The Committee could, however,

make a finding of a violation of the Covenant if the continuing effects of those violations were found themselves to constitute violations of the Covenant. The Committee notes that the grave violations of the Covenant committed by the military regime of Argentina in this case have been the subject of numerous proceedings before the courts of the State party, which have ultimately vindicated the right to privacy and family life of both Ximena Vicario and her grandmother. As to the visiting rights initially granted to S.S., the Committee observes that the competent courts of Argentina first endeavoured to determine the facts and balance the human interests of the persons involved and that in connection with those investigations a number of measures were adopted to give redress to Ximena Vicario and her grandmother, including the termination of the regime of visiting rights accorded to S.S, following the recommendations of psychologists and Ximena Vicario's own wishes. Nevertheless, these outcomes appear to have been delayed by the initial denial of standing of Mrs. Mónaco to challenge the visitation order.

10.5 While the Committee appreciates the seriousness with which the Argentine courts endeavoured to redress the wrongs done to Ms. Vicario and her grandmother, it observes that the duration of the various judicial proceedings extended for over 10 years, and that some of the proceedings have not yet been completed. The Committee notes that in the meantime Ms. Vicario, who was 7 years of age when found, reached the age of maturity (18 years) in 1994, and that it was not until 1993 that her legal identity as Ximena Vicario was officially recognized. In the specific circumstances of this case, the Committee finds that the protection of children stipulated in article 24 of the Covenant required the State party to take affirmative action to grant Ms. Vicario prompt and effective relief from her predicament. In this context, the Committee recalls its General Comment on article 24, 5/ in which it stressed that every child has a right to special measures of protection because of his/her status as a minor; those special measures are additional to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant. Bearing in mind the suffering already endured by Ms. Vicario, who lost both of her parents under tragic circumstances imputable to the State party, the Committee finds that the special measures required under article 24, paragraph 1, of the Covenant were not expeditiously applied by Argentina, and that the failure to recognize the standing of Mrs. Mónaco in the guardianship and visitation proceedings and the delay in legally establishing Ms. Vicario's real name and issuing identity papers also entailed a violation of article 24, paragraph 2, of the Covenant, which is designed to promote recognition of the child's legal personality.

...

11.1 The Human Rights Committee...is of the view that the facts which have been placed before it reveal a violation by Argentina of article 24, paragraphs 1 and 2, of the Covenant.

11.2 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and her granddaughter with an effective remedy, including compensation from the State for the undue delay of the proceedings and resulting

suffering to which they were subjected. Furthermore, the State party is under an obligation to ensure that similar violations do not occur in the future.

Notes

...

4/ See the Committee's decision on admissibility concerning Communication No. 275/1988, *S.E. v. Argentina*, declared inadmissible *ratione temporis* on 26 March 1990, para. 5.3.

5/ General Comment No. 17, adopted at the thirty-fifth session of the Committee, in 1989.

- *Fei v. Colombia* (514/1992), ICCPR, A/50/40 vol. II (4 April 1995) 77 (CCPR/C/53/D/514/1992) at para. 8.8.

...

8.8 The author has claimed arbitrary and unlawful interferences with her right to privacy. The Committee notes that the author's claim about harassment and threats on the occasions of her visits to Colombia have remained generalized, and the transcript of the court proceedings made available to the Committee do not reveal that this matter was addressed before the courts. Nor has the claim that correspondence with her children was frequently tampered with been further documented. As to the difficulties the author experienced following the court proceedings before different judicial instances, the Committee notes that even serious inconvenience caused by judicial proceedings to which the author of a communication is a party cannot be qualified as "arbitrary" or "unlawful" interference with that individual's privacy. Finally, there is no indication that the author's honour was unlawfully attacked by virtue of the court proceedings themselves. The Committee concludes that these circumstances do not constitute a violation of article 17.

- *Kulomin v. Hungary* (521/1992), ICCPR, A/51/40 vol. II (22 March 1996) 73 (CCPR/C/56/D/521/1992) at para. 11.4.

...

11.4 The author has further claimed that he was not allowed to study Hungarian while in police custody and that he was not allowed to correspond with his family and friends. The State party denied the allegations, stating that the author requested permission for reading on 9 November 1988, which request was granted, and there is no trace of a request concerning correspondence, but that no records of the inmates's correspondence are kept. In the circumstances, the Committee finds that the facts before it do not sustain a finding that the author was a victim of a violation of article 10 of the Covenant.

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- *Pinto v. Trinidad and Tobago* (512/1992), ICCPR, A/51/40 vol. II (16 July 1996) 61 at para. 8.5.

  ...
  8.5 The author has finally contended that his correspondence is being interfered with arbitrarily, in violation of his right to privacy. Although the State party has failed to comment on this allegation, the Committee notes that the material before it does not reveal that the State party deliberately withheld or intercepted some of the author's letters to the Committee; many letters written before and after the adoption of the admissibility decision in October 1994, including handwritten "copies" of letters to the Permanent Secretary of the Ministry of National Security and the Attorney-General, and which contained serious allegations against the State party, did in fact reach the Committee without undue delay. There is no evidence that their content was interfered with. After carefully weighing the information available to it, the Committee finds no violation of article 17, paragraph 1, of the Covenant.

- *Tomlin v. Jamaica* (589/1994), ICCPR, A/51/40 vol. II (16 July 1996) 191 (CCPR/C/57/D/589/1994) at para. 8.3.

  ...
  8.3 The author has finally contended that his correspondence has been interfered with arbitrarily, in violation of his right to privacy. The State party contends that there is no evidence to support this claim. The Committee notes that the material before it does not reveal that the State party's authorities, in particular the prison administration, withheld the author's letter to counsel for a period exceeding two months. In this respect, it cannot be said that there was an "arbitrary" interference with the author's correspondence within the meaning of article 17, paragraph 1. The Committee considers, however, that a delay of two and half months in the transmittal of the author's letter to his counsel could raise an issue in respect of article 14, paragraph 3 (b) in so much as it could constitute a breach of the author's right to freely communicate with his counsel. Nevertheless, as this delay did not adversely affect the author's right to prepare adequately his defense, it cannot be considered to amount to a violation of article 14, paragraph 3 (b). After carefully weighing the information available to it, the Committee concludes that there has been no violation of either article 14 paragraph 3 (b), or of article 17, paragraph 1, of the Covenant.

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- *Hopu et al. v. France* (549/1993), ICCPR, A/52/40 vol. II (29 July 1997) 70 (CCPR/C/60/D/549/1993) at para. 10.3.

  ...
  10.3 The authors claim that the construction of the hotel complex on the contested site would destroy their ancestral burial grounds, which represent an important place in their history, culture and life, and would arbitrarily interfere with their privacy and their family lives, in violation of articles 17 and 23. They also claim that members of their family are buried on the site. The Committee observes that the objectives of the Covenant require that the term "family" be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term "family" in a specific situation. It transpires from the authors' claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life. This has not been challenged by the State party; nor has the State party contested the argument that the burial grounds in question play an important role in the authors' history, culture and life. The State party has disputed the authors' claim only on the basis that they have failed to establish a kinship link between the remains discovered in the burial grounds and themselves. The Committee considers that the authors' failure to establish a direct kinship link cannot be held against them in the circumstances of the communication, where the burial grounds in question pre-date the arrival of European settlers and are recognized as including the forbears of the present Polynesian inhabitants of Tahiti. The Committee therefore concludes that the construction of a hotel complex on the authors' ancestral burial grounds did interfere with their right to family and privacy. The State party has not shown that this interference was reasonable in the circumstances, and nothing in the information before the Committee shows that the State party duly took into account the importance of the burial grounds for the authors, when it decided to lease the site for the building of a hotel complex. The Committee concludes that there has been an arbitrary interference with the authors' right to family and privacy, in violation of articles 17, paragraph 1, and 23, paragraph 1.

For dissenting opinions in this context, see Hopu et al. v. France (549/1993), ICCPR, A/52/40 vol. II (29 July 1997) 70 (CCPR/C/60/D/549/1993) at Individual Opinion by David Kretzmer, Thomas Buergenthal, Nisuke Ando and Lord Colville, 81 at paras. 1-7.

- *Polay Campos v. Peru* (577/1994), ICCPR, A/53/40 vol. II (6 November 1997) 36 at paras. 8.4 and 8.6.

  ...
  8.4 The author claims that Victor Polay Campos was detained *incommunicado* from the time

of his arrival at the prison in Yanamayo until his transfer to the Callo Naval Base detention centre. The State party has not refuted this allegation; nor has it denied that Mr. Polay Campos was not allowed to speak or to write to anyone during that time, which also implies that he would have been unable to talk to a legal representative, or that he was kept in his unlit cell for 23 and a half hours a day in freezing temperatures. In the Committee's opinion, these conditions amounted to a violation of article 10, paragraph 1, of the Covenant.
...
8.6 As to the detention of Victor Polay Campos at Callao, it transpires from the file that he was denied visits by family and relatives for one year following his conviction, i.e. until 3 April 1994. Furthermore, he was unable to receive and to send correspondence. The latter information is corroborated by a letter dated 14 September 1993 from the International Committee of the Red Cross to the author, which indicates that letters from Mr. Polay Campos' family could not be delivered by Red Cross delegates during a visit to him on 22 July 1993, since delivery and exchange of correspondence were still prohibited. In the Committee's opinion, this total isolation of Mr. Polay Campos for a period of a year and the restrictions placed on correspondence between him and his family constitute inhuman treatment within the meaning of article 7 and are inconsistent with the standards of human treatment required under article 10, paragraph 1, of the Covenant.

- *Rojas García v. Colombia* (687/1996), ICCPR, A/56/40 vol. II (3 April 2001) 48 at paras. 2.1, 10.3, 10.4, 11 and 12.

...
2.1 On 5 January 1993, at 2 a.m., a group of armed men wearing civilian clothes, from the Public Prosecutor's Office (Cuerpo Técnico de Investigación de la Fiscalía), forcibly entered the author's house through the roof. The group carried out a room-by-room search of the premises, terrifying and verbally abusing the members of the author's family, including small children. In the course of the search, one of the officials fired a gunshot. Two more persons then entered the house through the front door; one typed up a statement and forced the only adult male (Alvaro Rojas) in the family to sign it; he did not allow him to read it, or to keep a copy. When Alvaro Rojas asked whether it was necessary to act with such brutality, he was told to talk to the Public Prosecutor, Carlos Fernando Mendoza. It was at this juncture that the family was informed that the house was being searched as part of an investigation into the murder of the mayor of Bochalema, Ciro Alonso Colmenares.
...
10.3 The Committee must first determine whether the specific circumstances of the raid on the Rojas García family's house (hooded men entering through the roof at 2 a.m.) constitute a violation of article 17 of the Covenant. By submission of 28 December 1999, the State party reiterates that the raid on the Rojas García family's house was carried out according to the letter of the law, in accordance with article 343 of the Code of Criminal Procedure. The

Committee does not enter into the question of the legality of the raid; however, it considers that, under article 17 of the Covenant, it is necessary for any interference in the home not only to be lawful, but also not to be arbitrary. The Committee considers, in accordance with its General Comment No. 16 (HRI/GEN/1/Rev.4 of 7 February 2000) that the concept of arbitrariness in article 17 is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. It further considers that the State party's arguments fail to justify the conduct described. Consequently, the Committee concludes that there has been a violation of article 17, paragraph 1, insofar as there was arbitrary interference in the home of the Rojas García family.

10.4 In view of the fact that the Committee has found a violation of article 17 in respect of the arbitrariness of the raid on the author's house, it does not consider it necessary to decide whether the raid constituted an attack on the family's honour and reputation.

...

11. The Human Rights Committee...is of the view that the facts before it disclose a violation by the State party of article 7 and article 17, paragraph 1, of the International Covenant on Civil and Political Rights in respect of the Rojas García family.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Rafael A. Rojas García and his family with an effective remedy, which must include reparation. The State party is also under an obligation to take steps to prevent similar violations occurring in the future.

- *Boodoo v. Trinidad and Tobago* (721/1996), ICCPR, A/57/40 vol. II (2 April 2002) 76 (CCPR/C/74/D/721/1996) at paras. 2.1, 2.6, 2.7, 6.7, 7 and 8.

...

2.1 The author states that he has been detained since 21 April 1989. On 24 January 1992, he was convicted and sentenced to ten years imprisonment for larceny. He states that his earliest release date is 31 December 1998.1/

...

2.6 On 18 January 1993, the author was searched, his prayer clothes were taken from him and his beard was forcibly shaven off. He was then assaulted by prison warders. He received blows to the head, chest, groin and legs and his request for immediate medical attention were ignored. Some weeks later, on complaining of continual pain, the medical officer gave him painkillers. On 27 May 1993, the author complained in writing to the Inspector of Prisons, but no action was taken.

2.7 From time to time, the author is transferred to Port-of-Spain prison for brief periods of

incarceration. When at Port-of-Spain Prison, the author is left in a dimly-lit cell 24 hours a day and is not let out for recreation or airing. He does not know the reason why he is shuttled between prisons. Upon returning to Carrera Prison, the author is forced to strip naked, and pull back the foreskin on his penis. He is forced to pull his buttocks apart and squat 3 to 4 times in front of the prison guards. According to the author, no other prisoners are subjected to such humiliation.

...

6.7 As to the author's claims concerning attacks on his privacy and dignity, in the absence of any explanation from the State party, the Committee concludes that his rights under article 17 were violated.

7. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 7, 9, paragraph 3, 10, paragraph 1, 14(3)(c), 17 and 18, of the International Covenant on Civil and Political Rights.

8. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an appropriate remedy including compensation for the treatment to which he has been subjected. The State party is under an obligation to ensure that similar violations do not occur in the future.

Notes

1/ No up-to-date information has been provided as to whether the author is still in detention.

- *Coronel et al. v . Colombia* (778/1997), ICCPR, A/58/40 vol. II (24 October 2002) 40 (CCPR/C/76/D/778/1997) at paras. 2.1, 2.3, 9.7, 9.8 and10.

...

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

...

2.3 On 26 January 1993, Luis Ernesto Ascanio Ascanio, aged 16, disappeared while on his way home, abducted by soldiers who, a few days before, had raided the home of the Ascanio Ascanio family, ill-treating and harassing the family members, who included six minors and also a 22-year-old mentally deficient young man, whom they attempted to hang. The soldiers remained in the house until 31 January, holding its inhabitants hostage. Luis Ernesto Ascanio Ascanio was seen for the last time some 15 minutes away from the family home. On the same day, members of the Ascanio family heard shouts and shots coming from outside the house. On 27 January, two of the brothers of Luis Ernesto Ascanio Ascanio succeeded in evading the military guards and fled to Ocaña, where they advised the local authorities and submitted a complaint to the Provincial Office of the Attorney-General. Once the military patrol had withdrawn, the search for Luis Ernesto Ascanio Ascanio began; the outcome was the discovery of a pocket knife belonging to him some 300 metres away from the house.

...

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

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

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party has an obligation to provide the victims' relatives with effective remedy, including compensation...

- *Howell v. Jamaica* (798/1998), ICCPR, A/59/40 vol. II (21 October 2003) 21 CCPR/C/79/D/798/1998 at paras. 2.8 and 6.4.

...

2.8 On 20 March 1997, the Superintendent issued a "standing order", reportedly prohibiting all inmates to keep either papers or writing implements in their cells. It is noted that, however, the author was able to correspond in writing with his counsel on 21 March and 17 April 1997 and on 15 August 1997 with a friend, Ms. Katherine Shewell.

...

6.4 The Committee has noted the claim that the Superintendent's standing order allegedly deprived the author of writing implements and violated his right under article 19(2). It observes, however, that the author was able to communicate with counsel within one day of the issuance of this order, and thereafter with counsel and a friend. In the circumstances, the Committee is not in the position to conclude that the author's rights under article 19(2) were violated.

...

- *Ngambi v. France* (1179/2003), ICCPR, A/59/40 vol. II (9 July 2004) 558 at paras. 2.1-2.4, 6.5 and 7.1.

...

2.1 Mr. B. Ngambi states that he married Ms. M.-L. Nébol in Cameroon on 15 January 1983. After engaging in political activity, he was arrested by the police on two occasions and fled Cameroon in 1993. He submitted an application for refugee status in France in 1994.

2.2 On 8 March 1995, the French authorities accorded refugee status to Mr. B. Ngambi and, on 16 May 1995, issued a record of civil status acknowledging his marriage to Ms. M.-L. Nébol.

2.3 Nevertheless, in a decision dated 19 September 1999, the Consul General of France in Douala, Cameroon, denied the application for a visa for Ms. M.-L. Nébol on the ground of family reunification, as the Cameroonian authorities had indicated that the authors' marriage certificate was not genuine. The decision states that the denial did not constitute a disproportionate interference with the right to privacy and to a family life owing to the circumstances indicated above, and to the fact that in practice Ms. M.-L. Nébol and Mr. B. Ngambi had no conjugal life together; the latter had in fact had a relationship with Ms. M.K., with whom he had had a child.

2.4 On 23 May 2001, in a ruling on Ms. M.-L. Nébol's appeal against the decision by the Consul General of France, the Council of State found that the fact that the marriage certificate submitted by the authors was not genuine, and that this circumstance became known subsequent to recognition by the French authorities of the authors' marriage certificate, constituted legal justification for the denial of a visa for Ms. M.-L. Nébol. The Council concluded that, since the authors did not cohabit as spouses, the decision of 19

September 1999 was not a disproportionate interference with the right of the party to respect for private and family life, as guaranteed by article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

...

6.5 With regard to the alleged violation of article 17 of the Covenant, that is, interference with private and family life, the Committee notes that the inquiries conducted by the French authorities as to Ms. Nébol's status and family relations followed upon her request for a visa for family reunification, and necessarily had to cover considerations relating to the private and family life of the authors. The Committee considers that the authors have not demonstrated that these inquiries amounted to arbitrary and illegal interference in their private and family life. Nor have the authors substantiated their allegations of pressure and intimidation on the part of the French authorities aimed at undermining their so-called marriage.

7.1 Accordingly, the Committee finds the complaints inadmissible under article 2 of the Optional Protocol.

- *Van Hulst v. The Netherlands* (903/2000), ICCPR, A/60/40 vol. II (1 November 2004) 29 at paras. 2.1-2.6, 3.1 and 7.2-7.11.

...

2.1 During a preliminary inquiry against Mr. A.T.M.M., the author's lawyer, telephone conversations between A.T.M.M. and the author were intercepted and recorded. On the basis of the information obtained by this operation, a preliminary inquiry was opened against the author himself, and the interception of his own telephone line was authorized.

2.2 By judgement of 4 September 1990, the District Court of 's-Hertogenbosch convicted the author of participation in a criminal organization, persistent acquisition of property without intent to pay, fraud and attempted fraud, extortion, forgery and handling stolen goods, and sentenced him to six years' imprisonment.

2.3 During the criminal proceedings, counsel for the author contended that the public prosecutor's case should not be admitted, because the prosecution's case contained a number of reports on telephone calls between the author and his lawyer, A.T.M.M, which it was unlawful to receive in evidence. Counsel argued that, in accordance with article 125h,2/ paragraph 2, read in conjunction with section 218,3/ of the Code of Criminal Procedure, the evidence obtained unlawfully should have been discarded.

2.4 Although the District Court agreed with the author that the telephone calls between him and A.T.M.M., could not be used as evidence, insofar as the latter acted as the author's

lawyer and not as a suspect, it rejected the author's challenge to the prosecution's case, noting that the prosecutor had not relied on the contested telephone conversations in establishing the author's guilt. While the Court ordered their removal from the evidence, it admitted and used as evidence other telephone conversations, which had been intercepted and recorded in the context of the preliminary inquiry against A.T.M.M., in accordance with section 125g 4/ of the Code of Criminal Procedure, and which did not concern the lawyer-client relationship with the author.

2.5 On appeal, the author's defence counsel argued that not all records of the tapped telephone calls, which should have been destroyed pursuant to section 125h, paragraph 2, had in fact been destroyed. However, by judgement of 10 April 1992, the-Hertogenbosch Court of Appeal rejected this defence, stating that the author's request to examine whether the reports in question had been destroyed would be irrelevant, "as their absence from the case file would provide no certainty about [their destruction]." The Court convicted the author of persistent acquisition of property without intent to pay, forgery, and resort to physical threats, without making use of the telephone records, and sentenced him to five years' imprisonment.

2.6 Before the Supreme Court, the author's defence counsel stated that the Court of Appeal had not responded to his defence that the records of the telephone conversations with his lawyer had been illegally obtained without having subsequently been destroyed. The Supreme Court rejected this argument and, by decision of 30 November 1993, for different reasons, it partially quashed the judgement of the Court of Appeal on two counts, as well as the sentence, and referred the matter back to the Arnhem Court of Appeal.

...

3.1 The author claims that the Supreme Court's dismissal, by mere reference to section 101a of the Judiciary Act, of his defence relating to the tapped telephone calls, as well as the admission as evidence and use of reports on tapped telephone calls between him and his lawyer, violated his rights under article 14 of the Covenant, and that the interference with his right to confidential communication with his lawyer was unlawful and arbitrary, in violation of article 17 of the Covenant.

...

7.2 The issue before the Committee is whether the interception and recording of the author's telephone calls with Mr. A.T.M.M. constituted an unlawful or arbitrary interference with his privacy, in violation of article 17 of the Covenant.

7.3 The Committee recalls that, in order to be permissible under article 17, any interference with the right to privacy must cumulatively meet several conditions set out in paragraph 1, i.e. it must be provided for by law, be in accordance with the provisions, aims and objectives of the Covenant and be reasonable in the particular circumstances of the case 12/.

7.4 The Committee notes that section 125g of the Dutch Code of Criminal Procedure

authorizes the investigating judge to order, during the preliminary judicial investigation, the interception or recording of data traffic, in which the suspect is believed to be taking part, provided that this is strictly required in the interests of the investigation and relates to an offence for which pretrial detention may be imposed. The author has not contested that the competent authorities acted in accordance with the requirements of this provision. The Committee is therefore satisfied that the interference with his telephonic conversations with Mr. A.T.M.M. was lawful within the meaning of article 17, paragraph 1, of the Covenant.

7.5 One other question which arises is whether the State party was required by section 125h, paragraph 2, read in conjunction with section 218 of the Code of Criminal Procedure, to discard and destroy any information obtained as a result of the interception and recording of the author's conversations with Mr. A.T.M.M., insofar as the latter acted as his lawyer and as such was subject to professional secrecy. The Committee notes, in this regard, that the author challenges the Supreme Court's jurisprudence that cognizance may be taken of tapped telephonic conversations involving a person entitled to decline evidence, even though section 125h, paragraph 2, provides that the reports on such conversations must be destroyed. The Committee considers that an interference is not "unlawful", within the meaning of article 17, paragraph 1, if it complies with the relevant domestic law, as interpreted by the national courts.

7.6 Finally, the Committee must consider whether the interference with the author's telephonic conversations with Mr. A.T.M.M. was arbitrary or reasonable in the circumstances of the case. The Committee recalls its jurisprudence that the requirement of reasonableness implies that any interference with privacy must be proportionate to the end sought, and must be necessary in the circumstances of any given case.13/ The Committee has noted the author's argument that clients can no longer rely on the confidentiality of communication with their lawyer, if there is a risk that the content of such communication may be intercepted and used against them, depending on whether or not their lawyer is suspected of having committed a criminal offence, and irrespective of whether this is known to the client. While acknowledging the importance of protecting the confidentiality of communication, in particular that relating to communication between lawyer and client, the Committee must also weigh the need for States parties to take effective measures for the prevention and investigation of criminal offences.

7.7 The Committee recalls that the relevant legislation authorizing interference with one's communications must specify in detail the precise circumstances in which such interference may be permitted and that the decision to allow such interference can only be taken by the authority designated by law, on a case-by-case basis 14/. It notes that the procedural and substantive requirements for the interception of telephone calls are clearly defined in section 125g of the Dutch Code of Criminal Procedure and in the Guidelines for the Examination of Telephone Conversations of 2 July 1984. Both require interceptions to be based on a

written authorization by the investigating judge.

7.8 The Committee considers that the interception and recording of the author's telephone calls with A.T.M.M. did not disproportionately affect his right to communicate with his lawyer in conditions ensuring full respect for the confidentiality of the communications between them, as the District Court distinguished between tapped conversations in which A.T.M.M. participated as the author's lawyer, and ordering their removal from the evidence, and other conversations, which were admitted as evidence because they were intercepted in the context of the preliminary inquiry against A.T.M.M. Although the author contested that the State party accurately made this distinction, he has failed to substantiate this challenge.

7.9 Insofar as the author claims that the reports of the tapped conversations between him and his lawyer should have been destroyed immediately, the Committee notes the State party's uncontested argument that the records of the tapped conversations were kept intact in their entirety, separately from the case file, for possible inspection by the defence. As the right to privacy implies that every individual should have the right to request rectification or elimination of incorrect personal data in files controlled by public authorities,15/ the Committee considers that the separate storage of the recordings of the author's tapped conversations with Mr. A.T.M.M. cannot be regarded as unreasonable for purposes of article 17 of the Covenant.

7.10 In the light of the foregoing, the Committee concludes that the interference with the author's privacy in regard to his telephone conversations with A.T.M.M. was proportionate and necessary to achieve the legitimate purpose of combating crime, and therefore reasonable in the particular circumstances of the case, and that there was accordingly no violation of article 17 of the Covenant.

7.11 The Human Rights Committee is of the view that the facts before it do not disclose any violation of article 17 of the Covenant.

Notes

...

2/ Section 125h of the Code of Criminal Procedure reads, in pertinent parts: "(1) The investigating judge shall, as soon as possible, order the destruction in his presence of any official reports or other objects from which information may be obtained that has been acquired as a result of the provision of information referred to in section 125f, or of the interception or recording of data traffic referred to in section 125g, and which is of no relevance to the investigation. An official report shall immediately be drawn up on the said destruction. (2) The investigating judge shall, in the same way, order the destruction without delay of any official reports or other objects, as referred to in paragraph 1, if they relate to statements made by or to a person who would be able to decline to give evidence, pursuant

to section 218, if he were asked as a witness to disclose the content of the statements. (3) [...] (4) [...]" (Translation provided by the State party.)

3/ Section 218 of the Code of Criminal Procedure reads: "Those who are bound to secrecy by virtue of their position, profession or office may decline to give evidence or to answer certain questions, but only in so far as the information concerned was imparted to them in that capacity." (Translation provided by the State party.)

4/ Section 125g of the Code of Criminal Procedure reads: "During the preliminary judicial investigation, the investigating judge is empowered to order an investigating officer to intercept or record data traffic not intended for the public, which is carried via the telecommunications infrastructure, and in which he believes that the suspect is taking part, provided this is urgently necessary in the interests of the investigation and concerns an offence for which pretrial detention may be imposed. An official report of such interception or recording shall be drawn up within forty-eight hours." (Translation provided by the State party.)

...

12/ General comment 16 [32], at paras. 3-4.

13/ See communication No. 488/1992, *Toonen v. Australia*, at para. 8.3.

14/ General comment 16 [32], at para. 8.

15/ *Ibid.*, at para. 10.

CEDAW

- *A. T. v. Hungary* (2/2003), CEDAW, A/60/38 part I (26 January 2005) 80 at paras. 2.1, 2.4 and 9.3.

...

2.1 The author states that for the past four years she has been subjected to regular severe domestic violence and serious threats by her common law husband, L. F., father of her two children, one of whom is severely brain-damaged...

...

2.4 The author states that there have been civil proceedings regarding L. F.'s access to the family's residence, a 2 and a half room apartment (of 54 by 56 square metres) jointly owned by L. F. and the author. Decisions by the court of the first instance, the Pest Central District Court (*Pesti Központi Kerületi Bíróság*), were rendered on 9 March 2001 and 13 September

2002 (supplementary decision). On 4 September 2003, the Budapest Regional Court (*Főrvărosi Bíróság*) issued a final decision authorizing L. F. to return and use the apartment. The judges reportedly based their decision on the following grounds: (a) lack of substantiation of the claim that L. F. regularly battered the author; and (b) that L. F.'s right to the property, including possession, could not be restricted. Since that date, and on the basis of the earlier attacks and verbal threats by her former partner, the author claims that her physical integrity, physical and mental health and life have been at serious risk and that she lives in constant fear. The author reportedly submitted to the Supreme Court a petition for review of the 4 September 2003 decision, which was pending at the time of her submission of supplementary information to the Committee on 2 January 2004.

...

9.3 With regard to article 2 (a), (b), and (e), the Committee notes that the State party has admitted that the remedies pursued by the author were not capable of providing immediate protection to her against ill-treatment by her former partner and, furthermore, that legal and institutional arrangements in the State party are not yet ready to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence. While appreciating the State party's efforts at instituting a comprehensive action programme against domestic violence and the legal and other measures envisioned, the Committee believes that these have yet to benefit the author and address her persistent situation of insecurity. The Committee further notes the State party's general assessment that domestic violence cases as such do not enjoy high priority in court proceedings. The Committee is of the opinion that the description provided of the proceedings resorted to in the present case, both the civil and criminal proceedings, coincides with this general assessment. Women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy. The Committee also takes note that the State party does not offer information as to the existence of alternative avenues that the author might have pursued that would have provided sufficient protection or security from the danger of continued violence. In this connection, the Committee recalls its concluding comments from August 2002 on the State party's combined fourth and fifth periodic report, which state "...[T]he Committee is concerned about the prevalence of violence against women and girls, including domestic violence. It is particularly concerned that no specific legislation has been enacted to combat domestic violence and sexual harassment and that no protection or exclusion orders or shelters exist for the immediate protection of women victims of domestic violence". Bearing this in mind, the Committee concludes that the obligations of the State party set out in article 2 (a), (b) and (e) of the Convention extend to the prevention of and protection from violence against women, which obligations in the present case, remain unfulfilled and constitute a violation of the author's human rights and fundamental freedoms, particularly her right to security of person.