



**International covenant  
on civil and political  
rights**

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HUMAN RIGHTS COMMITTEE  
Ninety-third session  
7 to 25 July 2008

**VIEWS**

**Communication 1437/2005**

<u>Submitted by:</u>	Mr. Wolfgang Jenny (represented by counsel, Mr. Alexander H.E. Morawa)
<u>Alleged victims:</u>	The author
<u>State party:</u>	Austria
<u>Date of communication:</u>	8 August 2005 (initial submission)
<u>Document references:</u>	- Special Rapporteur's rule 97 decision, transmitted to the State party on 21 November 2005 (not issued in document form)  - CCPR/C/89/D/1437/2005 – decision on admissibility adopted on 5 March 2007
<u>Date of adoption of Views</u>	9 July 2008

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\* Made public by decision of the Human Rights Committee.

*Subject matter:* Bias of judge during judicial proceedings

*Procedural issue:* Exhaustion of domestic remedies

*Substantive issue:* Fair and public hearing; equality of arms

*Articles of the Covenant:* 2, 14 and 26

*Article of the Optional Protocol:* 5, paragraph 2(b)

On 9 July 2008, the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1437/2005.

[ANNEX]

**ANNEX**

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights

Ninety-third session

concerning

**Communication 1437/2005\***

<u>Submitted by:</u>	Mr. Wolfgang Jenny (represented by counsel, Mr. Alexander H.E. Morawa)
<u>Alleged victims:</u>	The author
<u>State party:</u>	Austria
<u>Date of communication:</u>	8 August 2005 (initial submission)
<u>Decision of Admissibility:</u>	5 March 2007

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 9 July 2008,

Having concluded its consideration of communication No. 1437/2005, submitted to the Human Rights Committee on behalf of Mr. Wolfgang Jenny under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

### **Views under article 5, paragraph 4, of the Optional Protocol**

1.1 The author of the communication is Mr. Wolfgang Jenny, an Austrian citizen born on 2 October 1940. He claims to be a victim of violations by Austria<sup>1</sup> of articles 14, paragraph 1, alone and read in conjunction with articles 2, paragraph 1, and 26 of the International Covenant on Civil and Political Rights. The author is represented by counsel, Mr. Alexander H. E. Morawa.

1.2 On 24 January 2006, the Special Rapporteur for New Communications, on behalf of the Committee, determined that the admissibility of this case should be considered separately from the merits.

#### **The facts as submitted by the author**

2.1 On an unspecified date, the author engaged in a joint venture with three other individuals, to construct an apartment and office building in Salzburg. The author's share was 81.15%. In November 1997, the trustee appointed to manage the project accounts determined that the author had over-fulfilled his financial obligations as a partner, by approximately € 7, 475, and that the partners owed a total of approximately € 60,000, including financial obligations and taxes. The partners did not make the corresponding payments on time. On 9 September 1998, the tax authorities evaluated the outstanding turnover tax due by the end of 1996 at € 13,176, the author's share being € 10,692. On advice of his lawyer, Dr. W., the author paid the total amount with the intention to seek reimbursement from the partners.

2.2 In January 1999, after beginning negotiations for a friendly settlement, Dr. W. announced that the partners were willing to reimburse the author for the payment he had made to the tax authorities. In February 1999, the tax authorities evaluated a further corporate turnover tax at € 31,291 for the year 1997, which according to the trustee, was liable to be paid by the partners. However, Dr. W. informed the author that further action against the partners was precluded because on 27 January 1999, he had entered into a global settlement agreement on behalf of the author, which erased any mutual financial obligations between the parties in a binding way, precluding the author from pursuing any further action against the partners, also for future potential claims.

2.3 On 23 February 1999, the author instructed his lawyer to revoke the global settlement agreement with the partners, as it had been concluded without his knowledge and approval and exceeded the scope of the power of attorney given to him. He also revoked counsel's power of attorney with immediate effect, and engaged another lawyer.

2.4 On the advice of the latter, he instituted three distinct sets of proceedings:

- A civil lawsuit against his partners for their outstanding financial contributions (hereafter first set of proceedings);

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<sup>1</sup> The ICCPR and the Optional Protocol entered into force for Austria respectively on 10 December 1978 and on 10 March 1988. Austria has made a reservation to the effect of excluding a case which has already been examined by the ECHR.

- A civil lawsuit against Dr. W. for professional misconduct (hereafter second set of proceedings); and
- A criminal complaint against Dr. W. (hereafter third set of proceedings).

2.5 In the first set of proceedings, the author filed a lawsuit in the Salzburg Regional Court on 17 March 1999 against his partners, for their outstanding contributions towards the building costs, arguing that his claims remained enforceable since the global settlement agreement entered into by Dr. W. was not attributable to him, as Dr. W. had concluded the agreement without his knowledge and consent. He argued that it would be contrary to common sense to assume that he would have agreed to waive claims amounting to about € 60,000 for payment of a mere 20% of his total claim, and that the global settlement agreement, which was concluded in excess of the power of attorney and in breach of Dr. W.'s professional duties, had no effect under Austrian law. The partners based their defence on the global settlement agreement concluded by Dr. W. and argued that the matter was precluded from judicial review.

2.6 During the first hearing, the trial judge of the Salzburg Regional Court remarked that he had doubts whether the author had sued the right parties and asked why he had sued the partners and not Dr. W. He added that he "could not imagine that Dr. W. should have done something like that". The author challenged the trial judge's impartiality before the Review Senate of the Salzburg Regional Court, which rejected the challenge on 9 August 1999. During the challenge proceedings, the judge declared that "it cannot be excluded that my full impartiality has been impaired by the – from the viewpoint of the judge – unfounded challenge, although as a judge I still consider myself capable of deciding the matter based on the results of the evaluation of the evidence." The author did not appeal the rejection of his challenge. As a result, the same judge continued to deal with the case.

2.7 In a hearing on 30 June 2000, Dr. W. testified that he had called the author on 27 January 1999, the day he had concluded the agreement and that the author had verbally agreed to it. Dr. W. produced a memo to that effect.

2.8 On 18 April 2001, the Regional Court dismissed the author's lawsuit holding that the global settlement agreement precluded the author from pursuing any claims against the partners, and considering that "it cannot be presumed to be true that Dr. W., as an attorney and a witness under threat of criminal sanctions, would commit perjury in the present trial, nor that he would forge a memo about his telephone conversation with the author", during which the author had allegedly verbally agreed to the settlement. In his judgement, the trial judge reiterated his view on credibility of testimonies. He admitted his preference for the testimony of an attorney, by stating that "it cannot be presumed" that Dr. W. lied as a witness.

2.9 The author appealed to the Appeal Court of Linz, arguing that the trial court had failed to assess the facts from a "common sense" point of view, that it had failed to take into consideration all the evidence available and that it had breached procedural rules of evaluating evidence. The trial judge had based his judgement on a mere conviction that a lawyer such as Dr. W. could not possibly be presumed to have testified untruthfully and that a rule that the testimony of an attorney should generally be given more weight than other evidence was alien to the Austrian legal order. He denounced the alleged bias of the judge and the absence of a fair hearing, and requested the

Court to hold an evidentiary hearing and to summon, as witnesses, the author, Dr. W., and the legal counsel who had negotiated the global settlement agreement for the partners.

2.10 The appeal was dismissed on 9 January 2002, without the court having heard the witnesses. The Appeal Court stated that it was not its responsibility to evaluate the evidence in a hearing and that only an “obviously frivolous, superficial or arbitrary” evaluation of the evidence by a trial judge would warrant the finding of a lack of adequate reasoning. It considered that “there were no indications that Dr. W. had acted with the intent to cause damage” to the author and that “it cannot be excluded that even in a well-organised law firm, mistakes may happen”. With respect to the author’s renewed challenge of the trial judge, the Court considered that this issue had already been addressed by the Review Senate of the Salzburg Regional Court. The author filed an extraordinary petition for review to the Supreme Court, which was declared inadmissible on 13 March 2002 for formal reasons.

2.11 In the second set of proceedings, initiated on 23 November 1999, the author asked the Salzburg Regional Court to hold that the lawyer was liable for any and all future damages resulting from the fact that he had concluded the global settlement agreement without the author’s approval or consent. This lawsuit was dismissed on 4 December 2000, and the author appealed to the Linz Court of Appeal, which suspended the proceedings pending the conclusion of the case against the partners (first set of proceedings). Due to the outcome of that case, where it was held that Dr. W. was not guilty of professional misconduct, neither the author nor Dr. W. petitioned the court to reopen the proceedings, as they had become moot.

2.12 In the third set of proceedings, the author filed a criminal information report against Dr. W. with the Salzburg Federal Police, for fraud and perjury, and fraud committed during court proceedings. This complaint was rejected in September 2002, as Dr. W.’s guilt could not be proven. The author requested the Minister to review the decision not to prosecute, but his request was rejected in February 2003. Finally he submitted a private criminal complaint in the Salzburg Regional Court, which was dismissed on 13 June 2003.

### **The complaint**

3.1 The author contends that his claims were wrongly dismissed by the domestic courts, as they failed to adhere to the minimum requirements of a fair trial stipulated in article 14, paragraph 1, of the Covenant. While fully aware that the Committee is generally not in a position to evaluate facts and evidence, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice, he claims that a manifestly wrong decision was taken in his case. The failure of the domestic courts to arrive at a conclusion that does not contradict common sense and makes the decision “suspect”, should prompt the Committee to apply a heightened level of scrutiny in assessing the fulfilment of the requirements of fairness, independence and impartiality.

3.2 The author submits that the trial judge was manifestly biased, which rendered the hearing and decision flawed because the author was placed at a significant disadvantage with respect to the opposing party. The trial judge made it clear that he “[could] not imagine that Dr.W. should have

done something like that”. The author refers to the Committee’s decision in *Karttunen*<sup>2</sup>, where it found that “impartiality of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.” Furthermore, the partiality of the judge was ignored on appeal, as the Court of Appeal only assessed whether the trial judge had decided the matter in a manner that was “inconceivable”. The Court was not ready to undergo a reassessment of the evidence and failed to look into the details of the trial judge’s evaluation of evidence.

3.3 The author claims that the principle of equality of arms was not respected, in violation of articles 14, paragraph 1; 26 and 2, paragraph 1, as the judge stated that it “cannot be presumed” that the lawyer lied as a witness, which implicitly meant that the author’s conflicting statements could be presumed to be lies. Thus, the Court elevated the value of the testimony of a member of the legal profession (Dr. W.) above the value of the testimony of anyone else and raised the burden of proof beyond what is the standard in civil cases in Austria. The author was disadvantaged because he had to overcome a “presumption of credibility” of the opposing party.

3.4 The author claims that the same matter is not being examined under another procedure of international investigation or settlement and that he has exhausted domestic remedies.

#### **State party’s observations on admissibility**

4.1 On 19 January 2006, the State party challenged the admissibility of the communication, on grounds of non-exhaustion of domestic remedies, with respect to the first set of proceedings. The State party recalled that the author initiated proceedings before the Salzburg Regional Court, and challenged the trial judge during an oral hearing on 6 July 1999. On 9 August 1999, the Review Senate of the Salzburg Regional Court rejected the request challenging the judge. As the author did not appeal this decision, the proceedings continued before the same judge.

4.2 The State party indicates that the author had the possibility to appeal the decision of the Review Senate to the Linz Court of Appeal, under section 24, paragraph 2, of the Austrian Jurisdiction Act. However, he failed to do so and accepted the continuation of the civil proceedings. Accordingly, the communication should be declared inadmissible.

#### **Author’s comments**

5.1 On 1 April 2006, the author commented on the State party’s observations. He claimed that the State party had failed to show that the remedy which exists in theory under sections 23 and 24 of the Jurisdiction Act, would have been available and efficient to him to obtain a remedy for breaches of his Covenant rights. He argued that it is not sufficient to refer to a legal provision to describe a procedure, and that the application of the provision in judicial and administrative practice must be taken into consideration.

5.2 The author contended that the decision of the Review Senate of the Salzburg Regional Court, dated 9 August 1999, did not contain instructions as to which appeals could be filed or inform him of his right to bring an appeal against the rejection of his challenge of the trial judge to the Linz

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<sup>2</sup> Communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, para. 7.2.

Court of Appeals. He refers to a decision of the Constitutional Court, according to which a failure to give, or an incorrect appeals instruction, cannot be held against the party concerned<sup>3</sup>. Therefore, the author was deprived of equal and fair access to the remedy in question, and was not required to exhaust it.

5.3 The author argues that Austrian law governing challenges to judges is rigorous and requires a burden of proof for bias which is alien to the requirements of “impartiality” of article 14, paragraph 1. He refers to a judgement of the Supreme Court<sup>4</sup>, in which it was ruled that a challenge is the ‘sharpest weapon’ a party can use against a trial judge. Such a challenge can only be successful if the reasons advanced therein are so grave that the impartiality of the judge in question is in severe doubt. Reasons for a challenge must be provided in detail and concretely. The Supreme Court has also held that facts must be shown which permit the conclusion that a judge will be guided by other than reasonable considerations when deciding the case; mere subjective doubts or concerns of a party that the judge may be biased are insufficient.<sup>5</sup> According to the author, a challenge under these conditions is therefore not an effective remedy within the meaning of the Optional Protocol.

5.4 Under international standards, when testing the objective impartiality of a judge, petitioners are not required to *prove* that a judge was biased, but only to show that there existed a *legitimate doubt* as to his impartiality. Subjective bias is to be tested by assessing whether the judges “harbour preconceptions about the matter put before them.”<sup>6</sup> The personal conviction of a judge as perceived by a party may give rise to an “objectively justified fear” of a lack of impartiality. “In certain circumstances, the appearance of bias may be such as to violate the right to a fair hearing by an independent and impartial tribunal.”<sup>7</sup> Austrian law governing challenges, as applied by the Supreme Court, does not reflect these international standards. It imposes an exclusively objective standard for testing the impartiality of judges.

5.5 The Supreme Court has ruled that judges who consider it possible that they were biased but nevertheless “felt” that they could rule without bias in the given case would not be removed. This precedent would apply to the author’s case. An appeal would therefore have been futile.

5.6 The author contends that challenges of trial judges and appeals of decisions rejecting such challenges do not have suspensive effect, with the result that the challenged judge can continue to conduct the proceedings, although he cannot render a final decision. His handling of the case may or may not be set aside or repeated after a judge has been recused because of bias. This issue would be determined by the court deciding on the challenge, without substantive contribution from the petitioner.

5.7 The author claims that by challenging the trial judge in his appeal to the Court of Appeal, as required by the law, he exhausted domestic remedies. For the purposes of article 5, paragraph 2(b),

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<sup>3</sup> Constitutional Court Decision, B 1588/04 (28 February 2005).

<sup>4</sup> Supreme Court Judgement, 11 Bkd 9/03 (13 January 2004).

<sup>5</sup> Supreme Court Judgement, 11 Ns 4/89 (11 April 1989).

<sup>6</sup> See Communication No. 387/1989, *cit.*, para. 7.2.

<sup>7</sup> See Communication No. 904/2000, *Van Marcke v. Belgium*, Views adopted on 7 July 2004, para. 8.2.



authors are required to bring the substance of their complaint before the domestic authorities so that the State party is given an opportunity to rectify the matter<sup>8</sup>. The author did challenge the judge first during the hearing in which the judge expressed his bias, and again in his appeals brief to the Court of Appeal. That the renewed challenge was made in the appeals brief rather than in an appeal against the decision which rejected the original challenge is justified under Austrian law. Some reasons for challenging the trial judge became known to him only after the trial at first instance was concluded, which allowed him to raise this matter in his appeal on the merits. The author claimed in his appeal brief that the trial judge had decided the case arbitrarily by not evaluating the evidence fully, by not carefully balancing the evidence, by failing to take a certain memorandum into consideration, by not making due use of the evidence, and by introducing a “presumption of credibility” of a lawyer’s testimony over the testimony of a private party. The initial challenge, on the other hand, related only to the judge’s statements during the first hearing. The author refers to the jurisprudence of the Supreme Court<sup>9</sup> and indicates that in civil cases, as opposed to criminal cases, judges may be challenged *after* their decision on the merits has been made, if the reasons for the challenge have manifested themselves only when or after the lower court’s judgement has been given. These new reasons for a challenge could not have been raised by the author if he had appealed against the decision not to recuse the trial judge, but only in his appeal on the merits.

5.8 Furthermore, appeal courts can review matters only within the limits of the facts established by the first instance judge. The Supreme Court has ruled that “in an appeal against a rejection of a challenge of a judge, no new reasons for the challenge can be advanced”<sup>10</sup>.

5.9 Finally, the author argues that the scope of his communication extends beyond the bias of the trial judge, to the absence of adequate review at the appeal level and the absence of an equal opportunity to approach a court. These aspects of the communication are not covered by the State party’s objection to admissibility.

### **Decision on admissibility**

6.1 At its eighty-ninth session, on 5 March 2007, the Committee considered the admissibility of the communication. It noted that the State party had challenged the admissibility of the communication for non-exhaustion of domestic remedies, because the author did not appeal the decision rejecting his request to recuse the judge. The Committee observed, however, that under Austrian jurisprudence invoked by the author, he could challenge the judge in his appeal on the merits, if new grounds for a challenge arose from the decision. The author did so, on the grounds that the trial judge had decided the case arbitrarily by not evaluating the evidence fully, by not carefully balancing the evidence, by failing to take a certain memorandum into consideration, by not making due use of the evidence, and by introducing a “presumption of credibility” for a lawyer’s testimony over that of a private party. The author discovered these grounds only once the judgement was delivered and was therefore entitled to raise these claims in his appeal of that decision. His appeal to the Supreme Court was rejected on 13 March 2002. The Committee concluded that the author, who raised the issue of the bias of the judge at all levels up to the Supreme Court, had exhausted domestic remedies for purposes of article 5, paragraph 2(b), of the

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<sup>8</sup> See Communication No. 1356/2005, *Parra Coral v. Spain*, decision on admissibility adopted on 29 March 2005, para. 4.2.

<sup>9</sup> See Supreme Court Judgement, 6 Ob 276/05i (15 December 2005).

<sup>10</sup> Supreme Court Judgement, 5Ob347/87 (1 September 1987).

Optional Protocol.

6.2 Furthermore, the Committee noted that even if it was generally for the national courts to evaluate facts and evidence, it fell within the Committee's competence to examine whether the trial was conducted in accordance with article 14 of the Covenant. The Committee considered that the author had sufficiently substantiated his claims under article 14, read together with article 26 of the Covenant for purposes of admissibility. Accordingly, the Committee considered the communication admissible.

### **State party's observations on the merits**

7.1 By submissions of 9 October 2007, the State party claimed that the communication should be considered inadmissible under article 2 of the Optional Protocol. It also reiterated that the author failed to challenge the decision of the Review Senate of the Salzburg Regional Court, despite the fact that, under Austrian law, he had the right to appeal to the higher court. The author's view that he had exhausted domestic remedies as he had denounced the judge's bias in his appeal to the Appeal Court of Linz is incorrect, especially since the author had based his arguments concerning the bias of the trial judge on the latter's allegedly biased evaluation of the evidence and grounds given for the judgement, i.e. on a manifestly wrong allegation which was completely inadequate to dismiss the judge for partiality. On the contrary, the grounds given for the judgement clearly showed the impartiality of the trial judge.

7.2 Regarding the merits of the communication, the State party contends that there is no violation of articles 14 and 26 of the Covenant. The author's contention that the testimonies of members of the legal profession are generally more credible and that opposing allegations of other parties involved in a lawsuit would have to overcome a "presumption of credibility" has no legal basis. The Austrian judge has to evaluate the testimonies of all parties and witnesses impartially and give them – in particular based on his personal impression at the hearing - the appropriate weight. In the Austrian legal system there is no rule of evidence elevating the value of the testimony of specific parties or witnesses generally above the value of the testimony of anyone else.

7.3 The author's claim that the Regional Court had given more weight to the testimony of Dr. W. than to his regarding the conclusion of the global settlement agreement and particularly the decisive telephone conversation with the author, in view of the fact that Dr. W. was a lawyer, is incorrect. The evaluation of the evidence – which had been made with due care by the court – led to a completely different conclusion. The Regional Court did address the fact that there were contradictions between the testimonies of the author and Dr. W. with respect to the global settlement agreement. However, in evaluating the evidence the Court accepted the version of the facts presented by Dr. W. for the following reasons:

- Dr. W. delivered his testimony as a witness, and was thus under an obligation to present true facts and under threat of sanctions, while the testimony of the plaintiff (the author) was not subjected to the obligation of truthfulness under threat of (criminal) sanctions;
- The assumption that Dr. W. had given false testimony would not only have implied that he committed perjury in the trial, but also that he committed forgery of documents, i.e. that he had forged the memo about his telephone conversation with the plaintiff;

- The letter of his then trustee Mag. F. of 19 May 1998 indicated that the approval of the author to the global settlement clause was probable;
- The letter of the author to Dr. W. of 11 February 1999 also seemed to support the version of the facts presented by Dr. W.

7.4 The evaluation of the evidence by the Court also included an examination of the opposing testimonies of the author and Dr. W. The author's presumption that the Court did not believe his version of the facts because he was generally less credible as a non-lawyer is incorrect and unequivocally contradicts the very clear explanations given by the Court in evaluating the evidence. The considerations taken into account by the Court in its evaluation of the evidence are, in fact, based on understandable objective circumstances which unequivocally justify its conclusions.

7.5 No final conclusion can be drawn as to whether the trial judge might have caused this basic misunderstanding about his evaluation of the evidence by his remarks during the nonbinding talks about the legal foundation of the case. It could be that the trial judge should have exercised more caution. On the other hand, it is by no means unusual that the trial judge expresses certain preliminary views and assessments when he discusses the case for the first time with the parties and their counsels. Of course, this has to be subjected to the explicit reservation of a more in-depth examination, the course of the procedure of taking evidence and the concrete findings of the evaluation of evidence. In the present case, this reservation was made by the trial judge. Subsequently, the decision contained in the judgment of 18 April 2001 and the grounds given clearly showed that the judge was guided exclusively by objective criteria.

#### **Author's comments on the State party's observations on the merits**

8.1 On 19 December 2007, the author submitted comments with regard to the State party's observations. Regarding admissibility he stated that he had given the State party every opportunity provided for by Austrian law (namely, a challenge to the senate of the Regional Court and a review by the Court of Appeal) to rectify the alleged breach of his right to a hearing by an impartial tribunal.

8.2 The State party is incorrect in its assertion that the trial judge had not disclosed any bias in his judgment. As described in the initial communication, the judge, in his written judgment reiterated his earlier comments ("I cannot imagine that Dr. W. should have done something like that"). Thus, according to the transcript of the hearing of 6 July 1999 he said: "it cannot be presumed to be true that Dr. W. as an attorney and a witness under threat of criminal sanctions would commit perjury in the present trial, nor that he would falsify a memo about his telephone conversation [with the author]". The pursuit of the author's bias complaint in the appeal on the merits (after his initial challenge in a separate complaint) was thus entirely prudent, given that the same court (the Linz Court of Appeal) was in charge of examining the bias of the trial judge and the merits of the case. The author further reiterates his allegations regarding the inefficiency of a challenge as a remedy against lack of impartiality of a judge.

8.3 Regarding the merits, the State party is correct in its assertion that there is no formal rule in Austrian law that would elevate the testimony of members of the legal profession over that of ordinary citizens. This does not mean, however, that there may not be a systematic practice that

treats ordinary citizens who litigate against members of the legal profession, unfavorably. It does not mean either that there was not an explicit act of treating the author unfavorably because of his opponent being a member of the legal profession under the concrete circumstances of the case.

8.4 The State party's list of what the trial court actually based its decision on contains four items of which the first two are:

- The author's opponent testified under threat of sanctions, while such threat did not exist for the author. In fact, a party is as much under an obligation to testify truthfully as a witness; the difference lies only in the circumstances under which they are criminally liable. While witnesses are generally liable, parties are so only if they testify under oath. Austrian civil procedure law allows the judge to request that a statement is made or repeated under oath under any circumstances. Thus, the trial judge could very easily have "elevated" the criminal threat against the author to severe, if he had any doubt about the author's truthfulness. That he did not do it is an additional sign that he may already have made up his mind at that point in time.
- The "assumption" that the opponent of the author had given false testimony would have meant that he had committed perjury as well as forgery of documents. Without in any way suggesting that the author's opponent has in fact done that, the negative assumption that he has not is not based on any objective material evidence, except for him being a member of the – more credible – legal profession. The negative assumption also means that it is more probable that the author had testified falsely – an assumption that is not supported by any evidence whatsoever.

8.5 The State party concludes that there were understandable objective circumstances which unequivocally justify the conclusion arrived at by the Court. However, it does not explain which are those circumstances. Nothing in the State party's explanations undoes the impression of the author, grounded in two explicit statements by the trial judge, that his opponent, as a lawyer, was elevated to a witness of higher credibility.

### **Consideration of the merits**

9.1 The Human Rights Committee has considered 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.

9.2 The author claims that the judge who tried his case against Dr. W. was biased because during the proceedings he made remarks, on two occasions, which showed his partiality in favour of Dr. W.

9.3 The Committee recalls that the requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to

a reasonable observer to be impartial.<sup>11</sup> The two aspects refer to the subjective and objective elements of impartiality, respectively.

9.4 As to the subjective element, the impartiality of a judge must be presumed until there is evidence to the contrary. In this respect the Committee notes the State Party's statement regarding the evaluation of evidence carried out by the Regional Court, in particular the fact that the Court accepted the version of facts presented by Dr. W. in view of documentary evidence suggesting the approval of the author to the global settlement. The Committee concludes that the material before it does not disclose that the judge subjectively lacked impartiality in the present case.

9.5 It must further be determined whether, quite apart from the judge's personal mindset, there are ascertainable objective facts which may raise doubt as to his impartiality. Judges must not only be impartial, they must also be seen to be impartial. When deciding whether there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of those claiming that there is a reason to doubt his impartiality is significant but not decisive. What is decisive is whether the fear can be objectively justified.

9.6 In the present case, the remarks made by the judge may well have raised certain doubts as to his impartiality on the part of the author. However, the Committee finds that the remarks were not such as to objectively justify, in the absence of other elements, the author's fear as to the judge's impartiality. Accordingly, the Committee finds that in the present case the facts do not disclose a violation of Article 14, paragraph 1 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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<sup>11</sup> General Comment No. 32, para. 21.