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HUMAN RIGHTS COMMITTEE
Ninety-second session
17 March - 4 April 2008

DECISION

Communication No. 1496/2006

Submitted by:	Dilwyn Stow (not represented by counsel)
Alleged victims:	Graham Stow, Andrew Stow, Alhaji Modou Gai
State party:	Portugal
Date of communication:	4 May 2006 (initial submission)
Document references:	Special Rapporteur's rule 97 decision transmitted to the State party on 3 October 2006 (not issued in document form).
Date of adoption of decision:	1 April 2008

* Made public by decision of the Human Rights Committee.

Subject matter: Trial of alleged victims in a foreign country.

Substantive issue: Irregularities in the evaluation of evidence.

Procedural issues: Non-exhaustion of domestic remedies, evaluation of facts and evidence, lack of substantiation.

Articles of the Covenant: 14, paragraphs 1 and 3 (f).

Articles of the Optional Protocol: 2; 5, paragraph 2 (b).

[ANNEX]

ANNEX

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS

Ninety-second session

concerning

Communication No. 1496/2006[*]

Submitted by:	Dilwyn Stow (not represented by counsel)
Alleged victim:	Graham Stow, Andrew Stow, Alhaji Modou Gai
State party:	Portugal
Date of communication:	4 May 2006 (initial submission)

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

Meeting on 1 April 2008,

Adopts the following:

DECISION ON ADMISSIBILITY

1.1 The author of the communication is Mr. Dilwyn Stow. He submits the communication on behalf of his sons Graham and Andrew Stow, and Alhaji Modou Gai. Graham and Andrew Stow are both British citizens, while Alhaji Modou Gai is a Gambian citizen. The original communication is dated 4 May 2006, with further documents received on 5 and 21 July 2006.

1.2 On 19 January 2007, the Special Rapporteur on New Communications, on behalf of the Committee, decided that the admissibility of this case should be considered separately from the merits.

[*] 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. Walter Kälin, 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.

Facts as presented by the author

2.1 The Stow brothers are sailors and scuba divers. In July 1999 they were exploring the possibility of opening a diving school in the Gambia on a ship named "The Baltic". On their return journey from the Gambia they arrived, together with Mr. Alhaji Modou Gai who was working for them, on 12 July 1999, at Faro harbour, Portugal. They moored the ship at a place allocated to them by the Harbour Master. The ship's hold and compartments were routinely searched by customs officers and nothing suspicious was discovered. On 15 July 1999, the Harbour Master asked them to move the ship to make way for a larger boat. On 16 July 1999, they raised five packages from the seabed, wrapped in plastic, which they allegedly discovered when carrying out repairs in the ship. They maintain that they did so out of curiosity, not knowing their content and with full intention of informing the authorities. Around fifteen minutes later the *Policia Judiciaria* arrived. The brothers and Mr. Gai were arrested, since the packages contained cannabis.

2.2 On 17 July 1999, they were brought before the examining magistrate at the Olhão court. They were questioned in the presence of an interpreter and a court-appointed lawyer. The magistrate decided that there was enough evidence to keep them in provisional detention on suspicion of drug trafficking. On 6 July 2000, almost one year after their arrest, the Public Prosecutor charged them with drug trafficking. A hearing took place on 7 June 2001 before the Court of Faro. The authors requested that the hearing be taped but the Court refused. On 7 July 2001 the authors were found guilty of drug trafficking and sentenced to twelve years imprisonment (nine years for Mr. Gai). During the trial, the prosecution maintained that the brothers had dragged the cannabis across the sea bed from the Canary Islands, using a trawler net found on board. According to the author, expert witnesses dismissed this possibility. They stated that not only had the net never been used, but that it was not large enough to fit in the total load; furthermore, the net board would be too weak to hold such a weight. The judges nevertheless followed the prosecution hypothesis and found the accused guilty. The trial was conducted entirely in Portuguese.

2.3 On 24 October 2001, the Evora Court of Appeal declared the first instance trial and verdict null and void, as the trial had not been recorded. Accordingly, the Court ordered a retrial by the same court.

2.4 At the retrial two of the original three judges of the panel sat again on the bench, which according to the author compromised the independence and impartiality of the court. The authors lodged a request to replace those two judges, which was refused by the Appeal Court of Evora on 22 January 2002. On 15 July 2002, they were sentenced again to 12 years of imprisonment, and to pay interpretation fees. Again, the trial was held entirely in Portuguese.

2.5 After their second conviction, the authors appealed to the Appeal Court of Evora, arguing that the evidence presented was insufficient to justify the verdict. They argued also that the fact that two judges of the initial trial also took part in the second trial compromised the independence of the Court, in contravention of the Criminal Procedure Code, the Portuguese Constitution and the European Convention on Human Rights. The appeal was rejected on 20 November 2002. According to the Court, the mere fact that two judges had participated in both trials was not sufficient to conclude that they had acted in a partial manner; other evidence had to

be adduced in order to come to such a conclusion. The authors, however, had not provided such evidence. The Court recalled also that the first trial had been declared null and void on technical grounds, and not for reasons linked to the merits of the case.

2.6 The authors lodged an appeal in cassation with the Supreme Court, alleging the lack of impartiality of the Faro Court. They also alleged that the evidence was insufficient to find them guilty, that the judgement of the Court of second instance was poorly founded and that the sentences were excessive. On 30 April 2003, the Supreme Court rejected the appeal. It held, *inter alia*, that the domestic legislation did not forbid the participation of the same judges when the trial had to be repeated for reasons as in the present case, where the decision on the merits of the case was not questioned or even discussed by the Court of Appeal. The Court also decided that there had been no breach of the Constitution or the European Convention on Human Rights.

2.7 In connection with their claims regarding lack of impartiality of the judges, the authors filed an application with the Constitutional Court, claiming the unconstitutionality of articles 40 and 43, paragraphs 1 and 2 of the Code of Criminal Procedure, in order to allow the defendants to be judged by judges who had not taken part in the initial trial at which the sentence was past. On 13 August 2003, the Court rejected the application.

2.8 The two Stow brothers were transferred to the United Kingdom to serve the remainder of their sentences in January 2005; they were released on parole on 14 July 2005. Mr. Gai was also transferred back to Gambia.

2.9 The author then submitted their case to the European Court of Human Rights (App. No. 18306/04) alleging breaches of articles 5, 6, and 14 of the European Convention on Human Rights. On 4 October 2005, the Court declared the case inadmissible as manifestly ill-founded and for lack of exhaustion of domestic remedies.[1] Portugal has entered no reservation to article 5, paragraph 2 (a), of the Optional Protocol.

The complaint

3.1 The author does not refer to any particular provision of the Covenant. His claims, however, appear to raise issues under article 14 of the Covenant. Thus, he indicates that at the beginning of both trials the alleged victims made statements which were translated into Portuguese and that questions addressed to them by the judge were also translated. However, the rest of both trials were conducted entirely in Portuguese, with no interpretation available. Furthermore, the Faro Court sentenced them to pay the costs of 80,000 escudos for interpretation.

[1] On article 5(2) ECHR (right to be informed promptly in a language which he understands of the charges against him), the Court held that the authors had been informed of the charges the day after the arrest, in the presence of a lawyer and an interpreter; the claim was therefore manifestly ill-founded. As to article 6(1) (independent and impartial tribunal), the retrial was ordered for a technical reason, namely because the hearings had not been recorded, and not because of an error by the judges in question; accordingly, the Court considered the allegation manifestly ill-founded as there appeared to be no violation of the provision in question. Regarding other alleged violations raised in connection with articles 6, 14 and 5 of the Convention, the Court considered that domestic remedies had not been exhausted.

3.2 The author also complains about lack of impartiality of the Faro Court during the retrial, since two of the three deciding judges had also participated in the first trial. He says that it is impossible to ask a judge to forget what he had seen, listened and decided in the first trial and that such situation was in contravention of a number of provisions of the Code of Criminal Procedure, the Portuguese Constitution and article 6 of the European Convention on Human Rights.

3.3 The author claims that the alleged victims received the written charges only 10 and a half months after their arrest, and that the charges were not translated into English. He adds that the accused were sentenced on the basis of insufficient evidence and that experts' evidence which proved that the ship could not have transported the cannabis was not taken into consideration.

State party's observations on admissibility

4.1 On 29 November 2006, the State party raised objections to the admissibility of the communication. It submits that the author has not indicated which articles of the Covenant he considers to have been violated. That makes it very difficult for the State party to respond on the admissibility and the merits of the case. The author refers simply to provisions of the European Convention on Human Rights, which shows that he submits to the Committee the same application he had already submitted to the European Court on Human Rights, without making any adjustment. The communication, therefore, is not sufficiently substantiated and does not meet the requirements of Rule 96 (b) of the Rules of Procedure.

4.2 For the State party, the communication constitutes an abuse of the right of submission under article 3 of the Optional Protocol, as it was submitted three years after the adoption of the last decision at the domestic level. The State party is aware that the Optional Protocol does not set any time limit for the submission of communications to the Committee. However, the stability of judicial decisions, the coherence among international bodies and the principle of legal certainty would be damaged if a judicial decision could be challenged at any time and in the absence of new facts. One can argue that the communication was not brought earlier before the Committee because it was being dealt with by the European Court. However, a complaint before the European Court does not constitute a remedy which needs to be exhausted. Accordingly, a three-year delay in submission is not justified.

4.3 Although the rules of procedure do not prevent the examination by the Committee of a case dealt with under another international procedure, the principle of non-examination of a case already examined should be part of the general principles of law and guarantee the consistency of jurisprudence among the international bodies. Having been examined by the European Court, the present case should therefore not be examined by the Committee, even in the absence of a specific reservation to article 5, paragraph 2 a), of the Optional Protocol. Otherwise, the Committee would become an appeal body with respect to the decisions of other international instances and would generate uncertainty for those countries which have not made a reservation. Furthermore, the fact that a number of countries have made reservations to the above-mentioned provision points towards the existence of a principle according to which the Committee should declare cases already examined by another international body inadmissible. The State party invokes the dissenting opinion of Committee members Palm, Ando and O'Flaherty in Communication No. 1123/2002, *Correia de Matos v. Portugal*, expressing concern that two

international instances, instead of trying to reconcile their jurisprudence with one another, come to different conclusions when applying exactly the same provisions to the same facts.

4.4 The State party also challenges admissibility on grounds of non-exhaustion of domestic remedies. Among the claims made before the Committee only that concerning lack of impartiality of the first instance Court was raised at the domestic level. In particular, the claim regarding the absence of free assistance of an interpreter was not made before the Portuguese Courts.

4.5 As for the claim concerning lack of impartiality of the first instance Court, the fact that two judges participated in both the first and the second trial does not justify the conclusion that the Court was partial, in particular when the first trial was declared null and void on purely procedural issues.

Author's comments

5. On 27 March 2007 the author replied to the letter transmitting the State party's observations. However, he does not address the issues raised by the State party and merely repeats his initial allegations.

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee does not accept the argument of the State party that the communication is inadmissible because it was already considered by the European Court of Human Rights. On the one hand, article 5, paragraph 2 (a), of the Optional Protocol only applies when the same matter is "being examined" under another procedure of international investigation or settlement; on the other, Portugal has entered no reservation to article 5, paragraph 2 (a), of the Optional Protocol.[2]

6.3 The Committee notes the State party's argument that the communication should be considered inadmissible as constituting an abuse of the right to submit communications under article 3 of the Optional Protocol, in view of the excessive delay in submitting the communication to the Committee. The Committee reiterates that the Optional Protocol does not establish any deadline for the submission of communications, and that the period of time elapsing before doing so, other than in exceptional cases, does not in itself constitute an abuse of the right to submit a communication. In the instant case, the Committee does not consider the three-year delay as an abuse of the right of submission.[3]

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[2] See Communications No. 1123/2002, *Correia de Matos v. Portugal*, Views adopted on 28 March 2006, paragraphs 6.2 and 6.4; 1440/2005, *Aalbersberg et al. v. The Netherlands*, Decision adopted on 12 July 2006, paragraph 6.2.

[3] See Communication No. 1533/2006, *Ondracka v. Czech Republic*, Views adopted on 31 October 2007.

6.4 In relation to the question of exhaustion of domestic remedies, the Committee notes that no appeals were filed at the domestic level regarding the alleged violation of the right to have the free assistance of an interpreter or with regard to the delays in receiving the written charges. Therefore, the Committee finds that the authors have not exhausted available domestic remedies in these respects and declares this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.5 With respect to the claims that the alleged victims were sentenced on the basis of insufficient evidence, the Committee considers that the allegation relates in substance to the assessment of facts and evidence by the domestic courts. It recalls its jurisprudence and reiterates that it is generally for the courts of States parties to review or to evaluate facts and evidence, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence was manifestly arbitrary or amounted to a denial of justice. The Committee considers that the author has not sufficiently substantiated his claim that the trial and retrial suffered from such defects and consequently finds that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.6 Finally, regarding the allegation that the Faro Court was not impartial because two of the judges who sentenced the alleged victims had also participated in a first trial that was declared null, the Committee notes that this question was dealt with extensively by the Appeal Court, the Supreme Court and the Constitutional Court, in accordance with the applicable Portuguese law. The Committee also notes that the retrial was ordered for a procedural reason and not for reasons related to the merits of the case. In view of the fact that no new facts or evidence were presented during the retrial, the author has failed to substantiate, for purposes of admissibility, that the two judges were biased when sitting for the retrial. This part of the communication is accordingly inadmissible under article 2 of the Optional Protocol.[4]

7. Accordingly, the Committee decides:

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

(b) that this decision be transmitted to the State party and to the author.

[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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[4] Communication No. 802/1998, *Andrew Rogerson v. Australia*, Views adopted on 3 April 2002, paragraph 7.4.