EFFECTIVE REMEDIES - COMPENSATION

III. JURISPRUDENCE

CERD

- *Habassi v. Denmark* (10/1997), CERD, A/54/18 (17 March 1999) 86 at paras. 9.3, 9.4, 10, 11.1 and 11.2.

...

9.3 In the present case the author was refused a loan by a Danish bank on the sole ground of his non-Danish nationality and was told that the nationality requirement was motivated by the need to ensure that the loan was repaid ...

9.4 The Committee notes that the author, considering the incident an offence under the Danish Act against Discrimination, reported it to the police. First the police and subsequently the State Prosecutor in Viborg accepted the explanations provided by a representative of the bank and decided not to investigate the case further. In the Committee's opinion, however, the steps taken by the police and the State Prosecutor were insufficient to determine whether or not an act of racial discrimination had taken place.

10. In the circumstances, the Committee is of the view that the author was denied effective remedy within the meaning of article 6 of the Convention in connection with article 2 (d).

11.1 The Committee recommends that the State party take measures to counteract racial discrimination in the loan market.

11.2 The Committee further recommends that the State party provide the applicant with reparation or satisfaction commensurate with any damage he has suffered.

ICCPR

- *Burgos v. Uruguay* (R.12/52), ICCPR, A/36/40 (29 July 1981) 176 at paras. 13 and 14.

...

13. The Human Rights Committee...is of the view that the communication discloses violations of the Covenant, in particular:

> article 7 because of the treatment (including torture) suffered...at the hands of Uruguayan military officers...both in Argentina and Uruguay;
>
> article 9(1) because the act of abduction into Uruguayan territory constituted

> an arbitrary arrest and detention;
>
> article 9(3) because Lopez was not brought to trial within a reasonable time;
> ...
> article 14(3) (d) because Lopez was forced to accept counsel, and article 14 (3) (g) was compelled to sign a statement incriminating himself;
>
> of article 22 (1) in conjunction with article 19 (1) and (2) because Lopez Burgos has suffered persecution for his trade union activities.

14. The Committee, accordingly, is of the view that the State party is under an obligation pursuant to article 2(3) of the Covenant to provide effective remedies to López Burgos, including immediate release, permission to leave Uruguay and compensation for the violations which he has suffered and to take steps to ensure that similar violations do not occur in the future.

- *Barbato v. Uruguay* (84/1981) (R.21/84), ICCPR, A/38/40 (21 October 1982) 124 at paras. 10 and 11.

> ...
> 10. The Human Rights Committee...is of the view that the communication discloses violations of the covenant, in particular:
>
> With respect to Hugo Harold Dermit Barbato:
>
> > article 6 because the Uruguayan authorities failed to take appropriate measures to protect his life while in custody...
> > ...
>
> 11. The Committee, accordingly, is of the view that the State party is under an obligation to take effective steps (a) to establish the facts of Hugo Dermit's death, to bring to justice any persons found to be responsible for his death and to pay appropriate compensation to his family...

See also:

- *Miango v. Zaire* (194/1985), ICCPR, A/43/40 (27 October 1987) 218 at paras. 10 and 11.

EFFECTIVE REMEDIES - COMPENSATION

- *Mbenge v. Zaire* (16/1977) (R.3/16), ICCPR, A/38/40 (25 March 1983) 134 at paras. 21 and 22.

...
21. The Human Rights Committeee...disclose violations...in particular:

> article 6 (2) because Daniel Monguya Mbenge was twice sentenced to death contrary to provisions of the Covenant;
> ...
> article 14 (a) (b) (d) (e) because...he could not effectively enjoy the safeguards of due process, enshrined in these provisions,
>
> article 9 because Abraham Oyabi was subjected to arbitrary arrest and detention.

22. The Committee, accordingly, is of the view that the State party is under an obligation to provide the victims with effective remedies, including compensation for the violations they have suffered, and to take steps to ensure that similar violations do not occur in the future.

- *Quinteros v. Uruguay* (107/1981), ICCPR, A/38/40 (21 July 1983) 216 at paras. 13, 15 and 16.

...
13. It is, therefore, the Committee's view that the information before it reveals breaches of articles 7, 9 and 10(1) of the International Covenant on Civil and Political Rights.
...
15. The Human Rights Committee reiterates that the Government of Uruguay has a duty to conduct a full investigation into the matter. There is no evidence that this has been done.

16. The Human Rights Committee...therefore concludes that responsibility for the disappearance of Elena Quinteros falls on the authorities of Uruguay and that, consequently, the Government of Uruguay should take immediate and effective steps (a) to establish what has happened to Elena Quinteros since 28 June 1976, and secure her release; (b) to bring to justice any persons found to be responsible for her disappearance and ill-treatment; (c) to pay compensation for the wrongs suffered; and (d) to ensure that similar violations do not occur in the future.

EFFECTIVE REMEDIES - COMPENSATION

- *Luyeye v. Zaire* (90/1981)(R.22/90), ICCPR, A/38/40 (21 July 1983) 197 at paras. 8 and 9.

...
8. The Human Rights Committee...is of the view that the facts found by the Committee...disclose violations of the International Covenant on Civil and Political Rights, particularly,

> article 9(1) because Luyeye Magana ex-Philibert has been subjected to arbitrary arrest and detention;
>
> article 9(2) because he was not informed, at the time of his arrest, of the reasons for his arrest and of any charges against him;
>
> article 9(3) (4), because he was not brought promptly before a judge and no court decided within a reasonable time on the lawfulness of his detention;
>
> article 10(1)...while in detention, he was not treated with humanity;
>
> article 2(3), because there is no effective remedy under the domestic law of Zaire against violations of the Covenant complained of.

9. The Committee, accordingly, is of the opinion that the State party is under an obligation (a) to investigate the complaints made and to provide Luyeye Magana ex-Philibert with effective remedies for the violations he has suffered, including compensation and the return of his property to him, and (b) to take steps to ensure that similar violations do not occur in the future.

- *Baboeram v. Suriname* (146/1983 and 148-154/1983), ICCPR, A/40/40 (4 April 1985) 187 at paras. 15 and 16.

...
15. The Human Rights Committee...is of the view that the victims were arbitrarily deprived of their lives contrary to article 6 (1) of the International Covenant on Civil and Political Rights. In the circumstances, the Committee does not find it necessary to consider assertions that other provisions of the Covenant were violated.

16. The Committee therefore urges the State party to take effective steps (i) to investigate the killings of December 1982; (ii) to bring to justice any persons found to be responsible for the death of the victims); (iii) to pay compensation to the surviving families; and (iv) to ensure that the right to life is duly protected in Suriname.

EFFECTIVE REMEDIES - COMPENSATION

- *Muhonen v. Finland* (89/1981), ICCPR, A/40/40 (8 April 1985) 164 at paras. 11.2, 11.3 and 12.

...
11.2 The Committee's task is limited to determining whether, in the particular circumstances of the case, Mr. Muhonen was entitled to receive compensation in accordance with article 14, paragraph 6, of the Covenant. Such a right to compensation may arise in relation to criminal proceedings if either the conviction of a person has been reversed or if he or she "has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice". As far as the first alternative is concerned, the Committee observes that Mr. Muhonen's conviction...has never been set aside by any later judicial decision. Furthermore, Mr. Muhonen was not pardoned because it had been established that his conviction rested on a miscarriage of justice...Mr. Muhonen's pardoning was motivated by considerations of equity.

11.3 To be sure, Mr. Muhonen's conviction came about as a result of the decision of the Examining Board of 18 October 1977, denying him the legal status of conscientious objector. This decision was based on the evidence which the Examining Board had before it at that time. Mr. Muhonen succeeded in persuading the Examining Board of his ethical objection to military service only after he had personally appeared before that body following his renewed application in the autumn of 1980, while in 1977 he had failed to avail himself of the opportunity to be present during the Examining Board's examination of his case.

12. Accordingly, the Human Rights Committee is of the view that Mr. Muhonen has no right to compensation which the Finnish authorities have failed to honour and that consequently there has been no breach of article 14(6) of the Covenant.

- *W. J. H. v. The Netherlands* (408/1990), ICCPR, A/47/40 (22 July 1992) 420 (CCPR/C/45/D/408/1990) at paras. 2.1, 2.2, 6.2 and 6.3.

...
2.1 The author was arrested on 8 December 1983 and kept in pre-trial detention until 8 February 1984. On 24 December 1985, the Arnhem Court of Appeal convicted him on a variety of criminal charges, including forgery and fraud. On 17 March 1987, the Supreme Court (Hoge Raad) quashed the earlier conviction and referred the case to the 's-Hertogenbosch Court of Appeal, which acquitted the author on 11 May 1988.

2.2 Pursuant to sections 89 and 591a of the Code of Criminal Procedure, the author subsequently filed a request with the 's-Hertogenbosch Court of Appeal for award of

compensation for damages resulting from the time spent in pre-trial detention and for the costs of legal representation. Section 90, paragraph 1, of the Code of Criminal Procedure provides that, after an acquittal, the Court may grant compensation for reasons of equity. On 21 November 1988, the Court of Appeal rejected the author's request. The Court was of the opinion that it would not be fair to grant compensation to the author, since his acquittal was due to a procedural error; it referred in this context to the judgment of the Arnhem Court of Appeal of 24 December 1985, by which the author was convicted on the basis of evidence that later was found to have been irregularly obtained.

...

6.2 With respect to the author's alleged violation of the principle of presumption of innocence enshrined in article 14, paragraph 2...the Committee observes that this provision applies only to criminal proceedings and not to proceedings for compensation; it accordingly finds that the provision does not apply to the facts as submitted.

6.3 With regard to the author's claim for compensation under article 14, paragraph 6, of the Covenant, the Committee observes that the conditions for the application of this article are:

(a) A final conviction for a criminal offence;

(b) Suffering or punishment as a result of such conviction; and

(c) A subsequent reversal or pardon on the ground of a new or newly discovered fact showing conclusively that there has been a miscarriage of justice.

The Committee observes that since the final decision in this case, that of the Court of Appeal of 11 May 1988, acquitted the author, and since he did not suffer any punishment as the result of his earlier conviction of 24 December 1985, the author's claim is outside the scope of article 14, paragraph 6, of the Covenant.

- *W. B. E. v The Netherlands* (432/1990), ICCPR, A/48/40 vol. II (23 October 1992) 205 (CCPR/C/46/D/432/1990) at paras. 6.4 and 6.5.

...

6.4 The Committee considers that, since pre-trial detention to prevent interference with evidence is, as such, compatible with article 9, paragraph 3, of the Covenant, and since the author has not substantiated, for purposes of admissibility, his claim that there was no lawful reason to extend his detention, this part of the communication is inadmissible under articles 2 and 3 of the Optional Protocol.

EFFECTIVE REMEDIES - COMPENSATION

6.5 With regard to the author's allegation that his right to compensation under article 9, paragraph 5, was violated, the Committee recalls that this provision grants victims of unlawful arrest or detention an enforceable right to compensation. The author, however, has not substantiated, for purposes of admissibility, his claim that his detention was unlawful. In this connection, the Committee observes that the fact that the author was subsequently acquitted does not in and of itself render the pre-trial detention unlawful. This part of the communication is therefore inadmissible under articles 2 and 3 of the Optional Protocol.

- *Mika Miha v. Equatorial Guinea* (414/1990), ICCPR, A/49/40 vol. II (8 July 1994) 96 (CCPR/C/51/D/414/1990) at paras. 6.5, 7 and 8.

...

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

7. The Human Rights Committee...is of the view that the material before it discloses violations of articles 7; 9, paragraphs 1, 2 and 4; 10, paragraph 1; and 19, paragraphs 1 and 2, of the Covenant.

8. Under article 2 of the Covenant, the State party is under an obligation to provide Mr. Mika Miha with an appropriate remedy, including appropriate compensation for the treatment to which he has been subjected.

See also:

- *Mukong v. Cameroon* (458/1991), ICCPR, A/49/40 vol. II (21 July 1994) 171 (CCPR/C/51/D/458/1991) at paras. 10 and 11.
- *Pennant v. Jamaica* (647/1995), ICCPR, A/54/40 vol. II (20 October 1998) 121 (CCPR/C/64/D/647/1995) at para.10.

EFFECTIVE REMEDIES - COMPENSATION

- *Rodríguez v. Uruguay* (322/1988), ICCPR, A/49/40 vol. II (19 July 1994) 5 (CCPR/C/51/D/322/1988) at paras. 12.1, 12.2, 12.4, 13 and 14.

...

12.1 With regard to the merits of the communication, the Committee notes that the State party has not disputed the author's allegations that he was subjected to torture by the authorities of the then military regime in Uruguay. Bearing in mind that the author's allegations are substantiated, the Committee finds that the facts as submitted sustain a finding that the military regime in Uruguay violated article 7 of the Covenant...[T]he State party has limited itself to justifying, in general terms, the decision of the Government of Uruguay to adopt an amnesty law.

12.2 As to the appropriate remedy that the author may claim pursuant to article 2, paragraph 3, of the Covenant, the Committee finds that the adoption of Law No. 15,848 and subsequent practice in Uruguay have rendered the realization of the author's right to an adequate remedy extremely difficult.

...

12.4 The Committee moreover reaffirms its position that amnesties for gross violations of human rights and legislation such as Law No. 15,848, *Ley de Caducidad de la Pretensión Punitiva del Estado*, are incompatible with the obligations of the State party under the Covenant. The Committee notes with deep concern that the adoption of this law effectively excludes in a number of cases the possibility of investigation into past human rights abuses and thereby prevents the State party from discharging its responsibility to provide effective remedies to the victims of those abuses. Moreover, the Committee is concerned that, in adopting this law, the State party has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations. e/

13. The Human Rights Committee... is of the view that the facts before it disclose a violation of article 7, in connection with article 2, paragraph 3, of the Covenant.

14. The Committee is of the view that Mr. Hugo Rodríguez is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy. It urges the State party to take effective measures (a) to carry out an official investigation into the author's allegations of torture, in order to identify the persons responsible for torture and ill-treatment and to enable the author to seek civil redress; (b) to grant appropriate compensation to Mr. Rodríguez; and (c) to ensure that similar violations do not occur in the future.

EFFECTIVE REMEDIES - COMPENSATION

- *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, 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.

...

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

...

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

_____

- *Simunek et al. v. The Czech Republic* (516/1992), ICCPR, A/50/40 vol. II (19 July 1995) 89 at paras. 2.1, 11.3, 11.5, 11.6, 12.1 and 12.2.

...

2.1 Alina Simunek, a Polish citizen born in 1960, and Jaroslav Simunek, a Czech citizen, currently reside in Ontario, Canada. They state that they were forced to leave Czechoslovakia in 1987, under pressure of the security forces of the communist regime. Under the legislation then applicable, their property was confiscated. After the fall of the Communist government on 17 November 1989, the Czech authorities published statements which indicated that expatriate Czech citizens would be rehabilitated in as far as any criminal conviction was concerned, and their property restituted.

...

11.3 ...[T]he right to property, as such, is not protected under the Covenant. However, a confiscation of private property or the failure by a State party to pay compensation for such confiscation could still entail a breach of the Covenant if the relevant act or omission was based on discriminatory grounds in violation of article 26 of the Covenant.

...

11.5 In the instant cases, the authors have been affected by the exclusionary effect of the requirement in Act 87/1991 that claimants be Czech citizens and residents of the Czech Republic. The question before the Committee, therefore, is whether these preconditions to restitution or compensation are compatible with the non-discrimination requirement of article 26 of the Covenant. In this context the Committee reiterates its jurisprudence that not all differentiation in treatment can be deemed to be discriminatory under article 26 of the Covenant. 27/ A differentiation which is compatible with the provisions of the Covenant and is based on reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.

11.6 In examining whether the conditions for restitution or compensation are compatible with the Covenant, the Committee must consider all relevant factors, including the authors' original entitlement to the property in question and the nature of the confiscations. The State party itself acknowledges that the confiscations were discriminatory, and this is the reason

why specific legislation was enacted to provide for a form of restitution. The Committee observes that such legislation must not discriminate among the victims of the prior confiscations, since all victims are entitled to redress without arbitrary distinctions. Bearing in mind that the authors' original entitlement to their respective properties was not predicated either on citizenship or residence, the Committee finds that the conditions of citizenship and residence in Act 87/1991 are unreasonable. In this connection the Committee notes that the State party has not advanced any grounds which would justify these restrictions. Moreover, it has been submitted that the authors and many others in their situation left Czechoslovakia because of their political opinions and that their property was confiscated either because of their political opinions or because of their emigration from the country. These victims of political persecution sought residence and citizenship in other countries. Taking into account that the State party itself is responsible for the departure of the authors, it would be incompatible with the Covenant to require them permanently to return to the country as a prerequisite for the restitution of their property or for the payment of appropriate compensation.

...

12.1 The Human Rights Committee...is of the view that the denial of restitution or compensation to the authors constitutes a violation of article 26 of the International Covenant on Civil and Political Rights.

12.2 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, which may be compensation if the properties in question cannot be returned. To the extent that partial restitution of Mr. Prochazka's property appears to have been or may soon be effected ... the Committee welcomes this measure, which it deems to constitute partial compliance with these Views. The Committee further encourages the State party to review its relevant legislation to ensure that neither the law itself nor its application is discriminatory.

Notes

...

27/ *Zwaan de Vries v. The Netherlands*, Communication No. 182/1984, Views adopted on 9 April 1987, para. 13.

See also:

- *Adam v. The Czech Republic* (586/1994), ICCPR, A/51/40 vol. II (23 July 1996) 165 at paras. 2.1, 12.2, 12.4-12.6, 13.1 and 13.2.
- *Blazek et al. v. The Czech Republic* (857/1999), ICCPR, A/56/40 vol. 11 (12 July 2001) 168 at paras. 2.1, 5.4, 5.6, 5.8 and 7.

EFFECTIVE REMEDIES - COMPENSATION

- *Sohn v. Republic of Korea* (518/1992), ICCPR, A/50/40 vol. II (19 July 1995) 98 (CCPR/C/54/D/518/1992) at paras. 11 and 12.

...
11. The Human Rights Committee...finds that the facts before it disclose a violation of article 19, paragraph 2, of the Covenant.

12. The Committee is of the view that Mr. Sohn is entitled, under article 2, paragraph 3(a), of the Covenant, to an effective remedy, including appropriate compensation, for having been convicted for exercising his right to freedom of expression...

- *Celis Laureano v. Peru* (540/1993), ICCPR, A/51/40 vol. II (25 March 1996) 108 (CCPR/C/56/D/540/1993) at paras. 9 and 10.

...
9. The Human Rights Committee...is of the view that the facts before the Committee reveal violations of articles 6, paragraph 1; 7; and 9, paragraph 1, all *juncto* article 2, paragraph 1; and of article 24, paragraph 1, of the Covenant.

10. Under article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the victim and the author with an effective remedy. The Committee urges the State party to open a proper investigation into the disappearance of Ana Rosario Celis Laureano and her fate, to provide for appropriate compensation to the victim and her family, and to bring to justice those responsible for her disappearance, notwithstanding any domestic amnesty legislation to the contrary.

- *Aduayom v. Togo* (422-424/1990), ICCPR, A/51/40 vol. II (12 July 1996) 17 (CCPR/C/51/D/422/1990/423/1990/424/1990) at para. 7.3.

...
7.3 The authors contend that they have not been compensated for the time they were arbitrarily arrested, contrary to article 9, paragraph 5. The procedures they initiated before the Administrative Chamber of the Court of Appeal have not, on the basis of the information available to the Committee, resulted in any judgment or decision, be it favourable or unfavourable to the authors. In the circumstances, the Committee sees no reason to go back on its admissibility decision, in which it had held that recourse to the Administrative Chamber of the Court of Appeal did not constitute an available and effective remedy. As to whether it is precluded *ratione temporis* from considering the authors' claim under article 9, paragraph 1, the Committee wishes to note that its jurisprudence has been not to entertain

claims under the Optional Protocol based on events which occurred after entry into force of the Covenant but before entry into force of the Optional Protocol for the State party. Some of the members feel that the jurisprudence of the Committee on this issue may be questionable and may have to be reconsidered in an appropriate (future) case. In the instant case, however, the Committee does not find any elements which would allow it to make a finding under the Optional Protocol on the lawfulness of the authors' arrest, since the arrests of the authors took place in September and December 1985, respectively, and they were released in April and July 1986, respectively, prior to the entry into force of the Optional Protocol for Togo on 30 June 1988. Accordingly, the Committee is precluded *ratione temporis* from examining the claim under article 9, paragraph 5.

For dissenting opinion in this context, see Aduayom v. Togo (422-424/1990), ICCPR, A/51/40 vol. II (12 July 1996) 17 (CCPR/C/51/D/422/1990/423/1990/424/1990) at Individual Opinion by Fausto Pocar, 23.

- *A. v. Australia* (560/1993), ICCPR, A/52/40 vol. II (3 April 1997) 125 (CCPR/C/59/D/560/1993) at paras. 9.5 and 11.

...

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

indeed a "designated person" within the meaning of the Migration Amendment Act, the Committee concludes that the author's right, under article 9, paragraph 4, to have his detention reviewed by a court, was violated.

...

11. Under article 2, paragraph 3, of the Covenant, the author is entitled to an effective remedy. In the Committee's opinion, this should include adequate compensation for the length of the detention to which A was subjected.

- *Richards v. Jamaica* (639/1995), ICCPR, A/52/40 vol. II (28 July 1997) 183 (CCPR/C/60/D/639/1995) at paras. 9 and 10.

...

9. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 10, paragraph 1, in respect of Mr. Walker and 14, paragraphs 3 (c), of the Covenant in respect of both authors.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Messrs. Walker and Richards with an effective remedy, entailing compensation for the delay in issuing a written judgment and providing the trial transcripts and in Mr. Walker's case for the ill-treatment suffered. The State party is under an obligation to ensure that similar violations do not occur in the future.

- *McTaggart v. Jamaica* (749/1997), ICCPR, A/53/40 vol. II (31 March 1998) 221 (CCPR/C/62/D/749/1997) at paras. 9, 10 and Individual Opinion by Mr Martin Scheinin, 230.

...

9. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 7 and 10, paragraph 1, of the Covenant.

10. Pursuant to article 2, paragraph 3 (a) of the Covenant, the author is entitled to an effective remedy including compensation. The Committee urges the State party to take effective measures to carry out an official investigation into the author's allegations of beatings by wardens and where appropriate, identify the perpetrators and punish them accordingly, and to ensure that similar violations do not occur in the future.

Individual Opinion by Mr. Scheinin

...

The question of an effective remedy

EFFECTIVE REMEDIES - COMPENSATION

The practice of the Committee in relation to the remedy has undergone a process of evolution during the twenty years of the Committee's work under the Optional Protocol. It is a legal obligation of a State party under article 2, paragraph 3, of the Covenant to ensure that any person whose rights protected by the Covenant have been violated "shall have an effective remedy". In addition to this general provision, article 9, paragraph 5, establishes a right to compensation for unlawful arrest or detention either under the Covenant or domestic law. Both of these obligations stem directly from the Covenant and not from the Committee's mandate to issue, when performing its functions under the Optional Protocol, interpretations or recommendations on what measures would in each case constitute an effective remedy. In its very first views the Committee did not specify the nature of the remedy even though the case clearly fell under article 9, paragraph 5 (see the views in *Moriana Hernández Valentini de Bazzano et al. v. Uruguay*, Communication No. 5/1977). However, already in its second case the Committee specified that compensation was the appropriate form of remedy in a case where a violation of article 9 was established (see, *Edgardo Dante Santullo Valcada v. Uruguay*, Communication No. 9/1977). In later years the Committee has recommended compensation as the remedy or as a part of the remedy in many cases in which a violation of only other articles than article 9 have been found. The first such recommendations of compensation were issued in the Committee's views adopted in its 15th session (1982) in the cases of *Pedro Pablo Camargo v. Colombia* (Communication No. 45/1979) and *Mirta Cubas Simones v. Uruguay* (Communication No. 70/1980), after finding a violation of article 6, and articles 10 and 14, respectively.

It is to be expected that the evolution towards more specific pronouncements on the remedy will continue. It should, for instance, be welcomed by the Committee that authors or counsel specify, when sending submissions to the Committee, the amount of compensation they consider appropriate for the violation suffered, and that State parties present their observations on such claims when answering to communications. This would enable the Committee to take the next logical step in addressing the issue of remedies, namely, to specify the amount and currency of compensation in those cases where compensation is seen by the Committee to be an appropriate remedy. This would strengthen both the nature of the Optional Protocol procedure as an international recourse to justice and the Committee's role as the internationally authoritative interpreter of the Covenant.

...

In the light of what has been said above the pronouncement in paragraph 10 of the Committee's views in the present case is not as clear as I would have hoped. In accordance with article 2, paragraph 3, the Committee states that the remedy to be provided to the author must be an effective one. After that reaffirmation of the legal obligation the State party has directly under the Covenant the Committee, however, indicates that in the present case an "effective remedy" would entail compensation. On the basis of the violations determined by the Committee, it should in my opinion have been made clear that an effective remedy must include both commutation and compensation. As I have found a violation of articles 9 and

14 in addition to those determined by the Committee, I would have seen it appropriate to state that the author is entitled, as an immediate and irreversible measure, to the commutation of his death sentence, and thereafter to either a new trial or release. In any case it should be made more clear that an "effective remedy" in a case involving the death penalty and in which a violation of the Covenant is found must include, first and foremost, absolute protection of the victim against execution. To a person on death row it is a precondition for any other remedy being "effective" that he or she can preserve his or her life.

See also:

- *Thomas v. Jamaica* (321/1988), ICCPR, A/49/40 vol. II (19 October 1993) 1 (CCPR/C/49/D/321/1988) at para. 11.
- *Howell v. Jamaica* (798/1998), ICCPR, A/59/40 vol. II (21 October 2003) 21 (CCPR/C/79/D/798/1998) at paras. 6.2 and 8.

- *Park v. Republic of Korea* (628/1995), ICCPR, A/54/40 vol. II (20 October 1998) 85 (CCPR/C/64/D/628/1995) at paras. 10.3 and 12.

...

10.3 The Committee has carefully studied the judicial decisions by which the author was convicted and finds that neither those decisions nor the submissions by the State party show that the author's conviction was necessary for the protection of one of the legitimate purposes set forth by article 19 (3). The author's conviction for acts of expression must therefore be regarded as a violation of the author's right under article 19 of the Covenant.

...

12. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Tae-Hoon Park with an effective remedy, including appropriate compensation for having been convicted for exercising his right to freedom of expression. The State party is under an obligation to ensure that similar violations do not occur in the future.

- *Forbes v. Jamaica* (649/1995), ICCPR, A/54/40 vol II (20 October 1998) 127 at paras. 7.2, 7.5 and 9.

...

7.2 ...[T]o detain the author for a period of 14 days before bringing him before a competent judicial authority constitutes a violation of article 9, paragraph 3, of the Covenant.

...

7.5 The author has alleged...that he throughout his detention there has spent twenty-three hours and forty-five minutes each day in solitary confinement, with nothing to keep him occupied, and in enforced darkness. The State party has made no attempt to refute these

specific allegations. In these circumstances, the Committee takes the allegations as proven. It finds that holding a prisoner in such conditions of detention constitutes a violation of article 10, paragraph 1.

...

9. ...[T]he State party is under an obligation to provide Mr. Forbes with an effective remedy including compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

- *Malik v. Czech Republic* (669/1995), ICCPR, A/54/40 vol. II (21 October 1998) 291 at para. 6.5.

...

6.5 The Committee has consistently held that not every distinction or differentiation in treatment amounts to discrimination within the meaning of articles 2 and 26. The Committee considers that in the present case, legislation adopted after the fall of the Communist regime in Czechoslovakia to compensate victims of that regime does not appear to be *prima facie* discriminatory within the meaning of article 26 merely because, as the author contends, it does not compensate the victims of injustices committed in the period before the communist regime. 1/ The Committee considers that the author has failed to substantiate, for purposes of admissibility, his claim that he is a victim of violations of articles 14 and 26 in this regard. This part of the communication is thus inadmissible under article 2 of the Optional Protocol.

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Notes

1/ See the Committee's decision declaring inadmissible communication No. 643/1995 (*Drobek v. Slovakia*), adopted on 14 July 1997.

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For dissenting opinion in this context, see Malik v. Czech Republic (669/1995), ICCPR, A/54/40 vol. II (21 October 1998) 291 at Individual Opinion by Cecilia Medina Quiroga and Eckart Klein, 297.

See also:

- *Schlosser v. Czech Republic* (670/1995), ICCPR, A/54/40 vol. II (21 October 1998) 298 at para. 6.5.

- *Brown v. Jamaica* (775/1997), ICCPR, A/54/40 vol. II (23 March 1999) 260 (CCPR/C/65/D/775/1997) at paras. 7 and 8.

...

EFFECTIVE REMEDIES - COMPENSATION

7. The Human Rights Committee...is of the view that the facts before it disclose violations of articles 7, 9, paragraph 3, 10, paragraph 1, 14, paragraph 3 (c) and (d), and consequently 6, of the Covenant.

8. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Christopher Brown with an effective remedy, including either a retrial in compliance with all guarantees under article 14 or release, as well as immediate commutation and compensation. The State party is under an obligation to take measures to prevent similar violations in the future.

- *Mukunto v. Zambia* (768/1997), ICCPR, A/54/40 vol. II (23 July 1999) 257 at paras. 2.2, 6.4, 7 and 8.

...
2.2 In 1982, the author filed a petition for compensation for unlawful detention, ill-treatment and inhuman treatment. 126/ The judge who was dealing with the case, died in 1986. The case was then transferred to another judge, who also died, in 1990, before delivering judgment. A hearing was scheduled to be heard on 31 July 1991 before a new judge. The author states that at the hearing, he was informed by the judge that he was not ready to proceed and that he would be informed about a date for a hearing. According to the author, he has never heard anything since.
...
6.4 With regard to the author's claim that he has been denied access to court to claim compensation for the illegal detention he suffered in 1979, the Committee notes that the author filed a complaint for compensation before the Supreme Court in 1982 and 1985. The author's claim relates to his rights and obligations in a suit at law and therefore falls within the ambit of article 14, paragraph 1, of the Covenant. It is now 1999 and the author's case still has not been adjudicated on. Neither the author's claim nor the facts of the case have been refuted by the State party, which instead has put forward reasons for the non payment of compensation for the detention the author suffered in 1987 including alleged economic difficulties to provide adequate conditions to all detained persons. It is the Committee's reiterated jurisprudence that the rights set forth in the Covenant constitute minimum standards which all States parties have agreed to observe. 127/ In this respect, the Committee considers that the author's rights under article 14 of the Covenant have not been respected.

7. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 14, paragraph 1, of the Covenant.

8. ...[T]he State party is under an obligation to provide Mr. Mukunto with an effective

remedy, entailing compensation for the undue delay in deciding his compensation claim for the illegal detention he suffered in 1979. The State party is under an obligation to ensure that similar violations do not occur in the future.

_____

Notes

...

126/ From the documents in the file it appears that the author made a submission, for compensation, to the High Court on 18 November 1985.

127/ Communication No. 390/1990 (*Lubuto v. Zambia*), Views adopted on 31 October 1995.

_____

- *Spakmo v. Norway* (631/1995), ICCPR, A/55/40 vol. II (5 November 1999) 22 at paras. 6.3, 7 and 8.

...

6.3 ...In the circumstances, the Committee finds that the author's detention for eight hours was unreasonable and constituted a violation...

7. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 9, paragraph 1, of the International Covenant on Civil and Political Rights.

8. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Spakmo with an effective remedy, including compensation. The State party is under an obligation to take measures to prevent similar violations in the future.

- *Osbourne v. Jamaica* (759/1997), ICCPR, A/55/40 vol. II (15 March 2000) 133 at paras. 9.1 and 11.

...

9.1 ...Irrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant. The Committee finds that by imposing a sentence of whipping with the tamarind switch, the State party has violated the author's rights under article 7.

...

11. ...[T]he State party is under an obligation to provide Mr. Osbourne with an effective remedy, and should compensate him for the violation. The State party is also under an

obligation to refrain from carrying out the sentence of whipping upon Mr. Osbourne. The State party should ensure that similar violations do not occur in the future by repealing the legislative provisions that allow for corporal punishment.

- *Laptsevich v. Belarus* (780/1997), ICCPR, A/55/40 vol. II (20 March 2000) 178 at paras. 2, 8.5 and 10.

...

2. On 23 March 1997, in the centre of the city of Mogilev in Belarus, the author distributed leaflets devoted to the anniversary of the proclamation of independence of the People's Republic of Belarus. While distributing the leaflets, the author was approached by officers of the Mogilev Central District Internal Affairs Department who confiscated the 37 copies of the leaflet still in the author's possession and subsequently charged the author under article 172(3) of the Code of Administrative Offences for disseminating leaflets not bearing the required publication data. In accordance with the charge, the author was fined 390 000 roubles by the Administrative Commission. The author appealed the decision to the Central District Court, which on 13 June 1997 rejected his appeal. Further appeals to the Regional Court and the Supreme Court were dismissed respectively on 18 June 1997 and 22 July 1997. With this, it is submitted, all available domestic remedies have been exhausted.

...

8.5 ...In the absence of any explanation justifying the registration requirements and the measures taken, it is the view of the Committee that these cannot be deemed necessary for the protection of public order (*ordre public*) or for respect of the rights or reputations of others. The Committee therefore finds that article 19, paragraph 2, has been violated in the present case.

...

10. ...[T]he State party is under an obligation to provide Mr. Laptsevich with an effective remedy, including compensation amounting to a sum not less than the present value of the fine and any legal costs paid by the author. The State party is also under an obligation to take measures to prevent similar violations in the future.

- *Robinson v. Jamaica* (731/1996), ICCPR, A/55/40 vol. II (29 March 2000) 116 at paras. 10.1, 11 and 12.

...

10.1 The author has claimed a violation of articles 7 and 10, paragraph 1, on the ground of the conditions of detention to which he was subjected while detained at St. Catherine's District Prison...

...

EFFECTIVE REMEDIES - COMPENSATION

11. The Human Rights Committee...is of the view that the facts before it disclose violations of articles 7 and 10, paragraph 1, of the International Covenant on Civil and Political Rights.

12. ...[T]he State party is under an obligation to provide Mr. Robinson with an effective remedy, including compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

- *Gridin v. Russian Federation* (770/1997), ICCPR, A/55/40 vol. II (20 July 2000) 172 at paras. 9 and 10.

...
9. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 14, paragraphs [1], 2 and 3(b), of the Covenant.

10. ...[T]he State party is under an obligation to provide Mr. Gridin with an effective remedy, entailing compensation and his immediate release. The State party is under an obligation to ensure that similar violations do not occur in the future.

- *Arredondo v. Peru* (688/1996), ICCPR, A/55/40 vol. II (27 July 2000) 51 at paras. 11 and 12.

...
11. The Human Rights Committee...is of the view that the facts as found by the Committee constitute violations of article 10, paragraph 1, of the Covenant as regards Ms. Arredondo's conditions of detention; of article 9 as regards the manner of her arrest; of article 14, paragraph 1, as regards her trial by a court made up of "faceless judges"; of article 14, paragraph 3 (c), with respect to the delay in the completion of the proceedings initiated in 1985.

12. ...[T]he State party is under an obligation to provide Ms. Arredondo with an effective remedy. The Committee considers that Ms. Arredondo should be released and adequately compensated. The State party is under an obligation to ensure that similar violations do not occur in the future.

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

...

EFFECTIVE REMEDIES - COMPENSATION

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

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

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

_____

Notes

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

_____

- *Rojas García v. Colombia* (687/1996), ICCPR, A/56/40 vol. II (3 April 2001) 48 at paras. 2.1, 10.3, 10.5, 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 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.

...

10.5 With regard to the alleged violation of article 7 of the Covenant, the Committee notes that the treatment received by the Rojas García family at the hands of the police, as described in paragraph 2.1 above, has not been refuted by the State party. The Committee therefore decides that there has been a violation of article 7 of the Covenant in this case.

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.

- *Blazek et al. v. The Czech Republic* (857/1999), ICCPR, A/56/40 vol. 11 (12 July 2001) 168 at paras. 2.1, 2.5, 3.3 and 5.9.

...

2.1 The authors are naturalized United States citizens, who were born in Czechoslovakia and lost Czechoslovak citizenship by virtue of the 1928 Naturalization Treaty between the United States and Czechoslovakia, which precludes dual citizenship. They left Czechoslovakia after

the Communist takeover in 1948. Their properties in Czechoslovakia were subsequently confiscated pursuant to confiscation regulations of 1948, 1955 and 1959.

...

2.5 ...In order to qualify under the restitution law, Mr. Hartman continued to seek to obtain Czech citizenship for many years. Since 9 November 1999 he has dual Czech and United States citizenship. Notwithstanding his current Czech citizenship, he has not been able to obtain restitution because the statute of limitations for filing claims for restitution expired in 1992.

...

3.3 The authors contend that, in order to frustrate the restitution claims of Czech émigrés to the United States, the Czech authorities used to invoke the 1928 United States Treaty with Czechoslovakia which required that anyone applying for the return of Czech citizenship first renounce United States citizenship. Although the Treaty was abrogated in 1997, the subsequent acquisition of Czech citizenship does not, in the view of Czech authorities, entitle the authors to reapply for restitution, because the date for submission of claims has expired.

...

5.9 ...[W]ith regard to time limits, whereas a statute of limitations may be objective and even reasonable *in abstracto*, the Committee cannot accept such a deadline for submitting restitution claims in the case of the authors, since under the explicit terms of the law they were excluded from the restitution scheme from the outset.

- *Sextus v. Trinidad and Tobago* (818/1998), ICCPR, A/56/40 vol. II (16 July 2001) 111 at paras. 2.2-2.4, 7.2-7.4, 9 and Individual Opinion by Mr. Hipólito Solari Yrigoyen (concurring), 121.

...

2.2 After a period of over 22 months, the author was brought to trial on 23 July 1990 in the High Court of Justice. On 25 July 1990, the author was convicted by unanimous jury verdict and sentenced to death for the murder charged. From this point (until commutation of his sentence), the author was confined in Port-of-Spain State Prison (Frederick Street) in a solitary cell measuring 9 feet by 6 feet, containing an iron bed, mattress, bench and table.1/ In the absence of integral sanitation, a plastic pail was provided as toilet. A small ventilation hole measuring 8 inches by 8 inches, providing inadequate ventilation, was the only opening. In the absence of any natural light, the only light was provided by a fluorescent strip light illuminated 24 hours a day (located above the door outside the cell). Due to his arthritis, the author never left his cell save to collect food and empty the toilet pail. Due to stomach problems, the author was placed on a vegetable diet, and when these were not provided the author went without food. The author did not receive a response from the Ombudsman on a written complaint on this latter matter.

EFFECTIVE REMEDIES - COMPENSATION

2.3 After a period of over 4 years and 7 months, on 14 March 1995, the Court of Appeal refused the author's application for leave to appeal. 2/ On 10 October 1996, the Judicial Committee of the Privy Council in London rejected the author's application for special leave to appeal against conviction and sentence. In January 1997, the author's death sentence was commuted to 75 years' imprisonment.

2.4 From that point, the author has been detained in Port-of-Spain Prison in conditions involving confinement to a cell measuring 9 feet by 6 feet together with 9 to 12 other prisoners, which overcrowding causes violent confrontations between prisoners. One single bed is provided for the cell and therefore the author sleeps on the floor. One plastic bucket is provided as slop pail and is emptied once a day, such that it sometimes overflows. Inadequate ventilation consists of a 2 foot by 2 foot barred window. The prisoner is locked in his cell, on average 23 hours a day, with no educational opportunities, work or reading materials. The location of the prison food-preparation area, around 2 metres from where the prisoners empty their slop pails, creates an obvious health hazard. The contention is repeated that the provision of food does not meet the author's nutritional needs.

...

7.2 As to the claim of unreasonable pre-trial delay, the Committee recalls its jurisprudence that

> "[i]n cases involving serious charges such as homicide or murder, and where the accused is denied bail by the court, the accused must be tried in as expeditious a manner as possible". 23/ In the present case, where the author was arrested on the day of the offence, charged with murder and held until trial, and where the factual evidence was straightforward and apparently required little police investigation, the Committee considers that substantial reasons must be shown to justify a 22-month delay until trial. The State party points only to general problems and instabilities following a coup attempt, and acknowledges delays that ensued. In the circumstances, the Committee concludes that the author's rights under article 9, paragraph 3 and article 14, paragraph 3 (c), have been violated.

7.3 As to the claim of a delay of over four years and seven months between conviction and the judgment on appeal, the Committee...recalls its jurisprudence that the rights contained in article 14, paragraphs 3 (c) and 5, read together, confer a right to a review of a decision at trial without delay. 24/ In *Johnson v. Jamaica*, 25/ the Committee established that, barring exceptional circumstances, a delay of four years and three months was unreasonably prolonged. In the present case, the State party has pointed again simply to the general situation, and implicitly accepted the excessiveness of the delay by explaining remedial measures taken to ensure appeals are now disposed of within a year. Accordingly, the Committee finds a violation of article 14, paragraphs 3 (c) and 5.

EFFECTIVE REMEDIES - COMPENSATION

7.4 ...The Committee considers...that the author's conditions of detention as described violate his right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to article 10, paragraph 1.

...

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Sextus with an effective remedy, including adequate compensation. The State party is also under an obligation to improve the present conditions of detention of the author, or to release him.

_____

Notes

1/ Counsel's description of these conditions is derived from the author's correspondence and a personal visit by counsel to the author in custody in July 1996.

2/ On this date, after hearing argument, the Court refused leave to appeal and affirmed the conviction and sentence. The reasons for judgement (20 pages) were delivered shortly thereafter on 10 April 1995.

...

23/ *Barroso v. Panama* (Communication 473/1991, at 8.5).

24/ *Lubuto v. Zambia* (Communication 390/1990) and *Neptune v. Trinidad and Tobago* (Communication 523/1992).

25/ Communication 588/1994.

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Individual Opinion by Mr. Hipólito Solari Yrigoyen

I should like to express an individual opinion with regard to paragraph 9, which I believe should read: "In accordance with article 2, paragraph 3 (a), of the International Covenant on Civil and Political Rights, the State party is under an obligation to provide Mr. Sextus with an effective remedy, including adequate compensation. The State party is also under an obligation to release the author."

- *Mansaraj et al. v. Sierra Leone*, *Gborie et al. v. Sierra Leone*, and *Sesay et al. v. Sierra Leone* (839/1998, 840/1998, 841/1998), ICCPR, A/56/40 vol. II (16 July 2001) 153 at paras. 2.1-2.4, 5.1, 5.2 and 6.1-6.3.

...

2.1 The authors of the communications (submitted 12 and 13 October 1998), at the time of

submission, were awaiting execution at one of the prisons in Freetown. The following 12 of the 18 authors were executed by firing squad on 19 October 1998: Gilbert Samuth Kandu-Bo; Khemalai Idrissa Keita; Tamba Gborie; Alfred Abu Sankoh (alias Zagalo); Hassan Karim Conteh; Daniel Kobina Anderson; John Amadu Sonica Conteh; Abu Bakarr Kamara; Abdul Karim Sesay; Kula Samba; Victor L. King; and Jim Kelly Jalloh.

2.2 The authors are all members or former members of the armed forces of the Republic of Sierra Leone. The authors were charged with, *inter alia*, treason and failure to suppress a mutiny, were convicted before a court martial in Freetown, and were sentenced to death on 12 October 1998.1/ There was no right of appeal.

2.3 On 13 and 14 October 1998, the Committee's Special Rapporteur for New Communications requested the Government of Sierra Leone, under rule 86 of the Rules of Procedure, to stay the execution of all the authors while the communications were under consideration by the Committee.

2.4 On 4 November 1998, the Committee examined the State party's refusal to respect the rule 86 request by executing 12 of the authors. The Committee deplored the State party's failure to comply with the Committee's request and decided to continue the consideration of the communications in question under the Optional Protocol.2/

...

5.1 By adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and article 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its Views to the State party and to the individual (article 5 (1), (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.

5.2 Quite apart from any violation of the rights under the Covenant charged against a State party in a communication, the State party would be committing a serious breach of its obligations under the Optional Protocol if it engages in any acts which have the effect of preventing or frustrating consideration by the Committee of a communication alleging any violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In respect of the present communication, counsel submits that the authors were denied their right under article 14, paragraph 5 of the Covenant. Having been notified of the communication, the State party breached its obligations under the Protocol, by proceeding to execute the following alleged victims, Gilbert Samuth Kandu-Bo, Khemalai Idrissa Keita, Tamba Gborie, Alfred Abu Sankoh (alias

Zagalo), Hassan Karim Conteh, Daniel Kobina Anderson, John Amadu Sonica Conteh, Abu Bakarr Kamara, Abdul Karim Sesay, Kula Samba, Victor L. King, and Jim Kelly Jalloh, before the Committee could conclude its examination of the communication, and the formulation of its Views. It was particularly inexcusable for the State to do so after the Committee had acted under its Rule 86 requesting the State party to refrain from doing so.
...
6.1 The Human Rights Committee... is of the view that the facts as found by the Committee reveal a violation by Sierra Leone of articles 6 and 14, paragraph 5 of the Covenant.

6.2 The Committee reiterates its conclusion that the State committed a grave breach of its obligations under the Optional Protocol by putting 12 of the authors to death before the Committee had concluded its consideration of the communication. 3/

6.3 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide, Anthony Mansaraj, Alpha Saba Kamara, Nelson Williams, Beresford R. Harleston, Bashiru Conteh and Arnold H. Bangura, with an effective remedy. These authors were sentenced on the basis of a trial that failed to provide the basic guarantees of a fair trial. The Committee considers, therefore, that they should be released unless Sierra Leonian law provides for the possibility of fresh trials that do offer all the guarantees required by article 14 of the Covenant. The Committee also considers that the next of kin of Gilbert Samuth Kandu-Bo, Khemalai Idrissa Keita, Tamba Gborie, Alfred Abu Sankoh (alias Zagalo), Hassan Karim Conteh, Daniel Kobina Anderson, John Amadu Sonica Conteh, Abu Bakarr Kamara, Abdul Karim Sesay, Kula Samba, Victor L. King, and Jim Kelly Jalloh should be afforded an appropriate remedy which should entail compensation.

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Notes

1/ This is the only information provided by counsel on the convictions.

2/ Vol. 1, A/54/40, chap. 6, para. 420, annex X.

3/ *Piandiong, Morallos and Bulan v. The Philippines* (869/1999).

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- *Cagas v. Philippines* (788/1997), ICCPR, A/57/40 vol. II (23 October 2001) 131 (CCPR/C/73/D/788/1997) at paras. 2.6, 2.7, 7.3, 7.4, 8 and 9.

...
2.6 The authors were arrested on 26, 29 and 30 June 1992, on suspicion of murder (the so-called Libmanan massacre)...

EFFECTIVE REMEDIES - COMPENSATION

2.7 On 14 August 1992, the authors appeared in Court and were ordered detained until the trial. On 11 November 1992, the authors filed a petition for bail and on 1 December 1992, they filed a motion to quash the arrest warrants. On 22 October 1993, the regional Trial Court refused to grant bail. On 12 October 1994, the Court of Appeals in Manila confirmed the Trial Court Order of 22 October 1993. A motion for reconsideration of the Court of Appeals' decision was dismissed on 20 February 1995. On 21 August 1995, the Supreme Court dismissed the authors' appeal against the Court of Appeals' decision.

...

7.3 With regard to the allegation of violation of article 14 (2), on account of the denial of bail, the Committee finds that this denial did not *a priori* affect the right of the authors to be presumed innocent. Nevertheless, the Committee is of the opinion that the excessive period of preventive detention, exceeding nine years, does affect the right to be presumed innocent and therefore reveals a violation of article 14 (2).

7.4 With regard to the issues raised under articles 9 (3) and 14 (3) of the Covenant, the Committee notes that, at the time of the submission of the communication, the authors had been detained for a period of more than four years, and had not yet been tried. The Committee further notes that, at the time of the adoption of the Committee's Views, the authors appear to have been detained without trial for a period in excess of nine years, which would seriously affect the fairness of the trial. Recalling its General Comment 8 according to which "pre-trial detention should be an exception and as short as possible", and noting that the State party has not provided any explanation justifying such a long delay, the Committee considers that the period of pre-trial detention constitutes in the present case an unreasonable delay. The Committee therefore concludes that the facts before it reveal a violation of article 9 (3) of the Covenant. Furthermore, recalling the State party's obligation to ensure that an accused person be tried without undue delay, the Committee finds that the facts before it also reveal a violation of article 14 (3) (c) of the Covenant.

...

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 9 (3), 14 (2) and 14 (3) (c) of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, which shall entail adequate compensation for the time they have spent unlawfully in detention. The State party is also under an obligation to ensure that the authors be tried promptly with all the guarantees set forth in article 14 or, if this is not possible, released.

- *Äärelä and Näkkäläjärui v. Finland* (779/1997) ICCPR, A/57/40 vol. II (24 October 2001) 117 (CCPR/C/73/D/779/1997) at paras. 2.1-2.5, 7.2, 8.1, 8.2 and Individual Opinion by Prafullachandra N. Bhagwati (concurring).

EFFECTIVE REMEDIES - COMPENSATION

...
2.1 The authors are reindeer breeders of Sami ethnic origin and members of the Sallivaara Reindeer Herding Co-operative...

2.2 On 30 August 1996, the District Court decided, following an on-site forest inspection at the authors' request, to prohibit logging or road construction in the 92 hectare Kariselkä area, but to allow it in the Mirhaminmaa area. 2/ ...

2.3 On appeal by the Forestry Service to the Rovaniemi Court of Appeal, the Forestry Board sought the then exceptional measure of oral hearings. The Court granted this motion, while rejecting the author's motion that the appellate court itself conduct an on-site inspection...

2.4 On 11 July 1997, the Appeal Court, reversing the first instance decision, allowed logging also in the Kariselkä area, and awarded costs of 75,000 Finnish marks against the authors.4/...

2.5 On 15 December 1997, the Ombudsman decided that the municipality of Inari and its mayor had exerted inappropriate pressure on the authors by formally asking them to withdraw from their legal proceedings, but did not find that the Forestry Service had acted unlawfully or otherwise wrongly. 6/ The Ombudsman limited his remedy to bringing this conclusion to the attention of the parties. On 1 June 1998, a decision of the Ministry of Agriculture and Forestry (of 13 November 1997) entered into effect reducing the permissible size of the Sallivaara herd by 500 head from 9,000 to 8,500 animals. On 3 and 11 November 1998, the Forestry Service required a total sum of over 20,000 Finnish marks from the authors towards meeting the costs judgement. 7/ This sum distrained by the Forestry Service corresponds to a major share of the authors' taxable income.
...
7.2 As to the authors' argument that the imposition of a substantial award of costs against them at the appellate level violated their rights under article 14, paragraph 1, to equal access to the courts, the Committee considers that a rigid duty under law to award costs to a winning party may have a deterrent effect on the ability of persons who allege their rights under the Covenant have been violated to pursue a remedy before the courts. In the particular case, the Committee notes that the authors were private individuals bringing a case alleging breaches of their rights under article 27 of the Covenant. In the circumstances, the Committee considers that the imposition by the Court of Appeal of substantial costs award, without the discretion to consider its implications for the particular authors, or its effect on access to court of other similarly situated claimants, constitutes a violation of the authors' rights under article 14, paragraph 1, in conjunction with article 2 of the Covenant. The Committee notes that, in the light of the relevant amendments to the law governing judicial procedure in 1999, the State party's courts now possess the discretion to consider these elements on a case by

case basis.

...

8.1 The Human Rights Committee...is of the view that the facts before it reveal of a violation by Finland of article 14, paragraph 1, taken in conjunction with article 2 of the Covenant, and additionally a violation of article 14, paragraph 1, of the Covenant taken alone.

8.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the authors are entitled to an effective remedy. In terms of the award of costs against the authors, the Committee considers that as the costs award violated article 14, paragraph 1, of the Covenant and, moreover, followed proceedings themselves in violation of article 14, paragraph 1, the State party is under an obligation to restitute to the authors that proportion of the costs award already recovered, and to refrain from seeking execution of any further portion of the award...

_____

Notes

...

2/ The State party points out that the 92 hectare area amounts to some 3 per cent of the 6,900 hectares of the Co-operative's lands used for forestry.

...

4/ Costs, for which the authors were jointly liable, totalled 73,965.28 Finnish marks, with 11 per cent annual interest.

...

6/ The complaint had been submitted almost three years earlier.

7/ No information is provided on whether the Forestry Service is pursuing the outstanding portion of costs awarded to it (some 55,000 Finnish marks).

_____

...

Individual Opinion by Prafullachandra N. Bhagwati (concurring)

I have gone through the text of the views expressed by the majority members of the Committee. I agree with those views save in respect of paragraph 7.2 and, partly, in respect of paragraph 8.2. Since I am in substantial agreement with the majority on most of the issues, I do not think it necessary to set out the facts again in my opinion and I will therefore straightaway proceed to discuss my dissenting opinion in regard to paragraphs 7.2 and 8.2.

So far as the alleged violation of article 14, paragraph 1, in conjunction with article 2, by the imposition of substantial costs is concerned, the majority members have taken the view that such imposition, on the facts and circumstances of the case, constitutes a violation of those articles. While some of the members have expressed a dissenting view, I agree with the

majority view but I would reason in a slightly different way.

It is clear that under the law as it then stood, the Court had no discretion in the matter of award of costs. The Court was under a statutory obligation to award costs to the winning party. The Court could not tailor the award of costs - even refuse to award costs - against the losing party taking into account the nature of the litigation, the public interest involved, and the financial condition of the party. Such a legal provision had a chilling effect on the exercise of the right of access to justice by none too wealthy litigants, and particularly those pursuing an *actio popularis*. The imposition of substantial costs under such a rigid and blind-folded legal provision in the circumstances of the present case, where two members of the Sami tribe were pursuing public interest litigation to safeguard their cultural rights against what they felt to be a serious violation, would, in my opinion, be a clear violation of article 14, paragraph 1, in conjunction with article 2. It is a matter of satisfaction that such a situation would not arise in the future, because we are told that the law in regard to the imposition of costs has since been amended. Now the Court has a discretion whether to award costs at all to the winning party, and, if so, what the amount of such costs should be depending upon various circumstances such as those I have mentioned above.

So far as paragraph 8.2 is concerned, I would hold that the authors are entitled to the relief set out in paragraph 8.2 in regard to the costs, not only because the award of costs followed upon the proceedings in the appellate Court which were themselves in violation of article 14, paragraph 1, for the reasons set out in paragraph 7.4, but also because the award of costs was itself in violation of article 14, paragraph 1, read in conjunction with article 2, for the reasons set out in paragraph 7.2. I entirely agree with the rest of paragraph 8.2

- *Boodlal Sooklal v. Trinidad and Tobago* (928/2000), ICCPR, A/57/40 vol. II (25 October 2001) 264 (CCPR/C/73/D/928/2000) at paras. 4.6, 4.8-4.10, 5 and 6.

...

4.6 The Committee notes that the author was sentenced to 12 strokes of the birch and recalls its decision in *Osbourne v. Jamaica*6/ in which it decided that irrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman or degrading treatment or punishment contrary to article 7 of the Covenant. In the present case, the Committee finds that by imposing a sentence of whipping with the birch, the State party has violated the author's rights under article 7.

...

4.8 As to counsel's contention that the State party has violated article 14, paragraph 3 (c), as the author's trial was not held within a reasonable time after he was charged, the Committee notes that the author waited for a period of seven years and nine months from the

time of his arrest to the date of his trial. The State party has provided no justification for this delay. In the circumstances, the Committee considers that this is an excessive period of time and, therefore, that the State party has violated article 14, paragraph 3 (c), of the Covenant.

4.9 The Committee notes counsel's contention that, because of the delay of seven years and nine months from the date of the author's arrest to his trial, the witnesses could not have been expected to testify accurately to events alleged to have taken place nine years previously, and that the fairness of the trial was seriously prejudiced. As it appears from the file that issues related to the credibility and assessment of the evidence were addressed by the High Court, the Committee takes the view that the effect of the delay on the credibility of the witnesses testimonies does not give rise to a finding of a violation of the Covenant that would be separate from the conclusion reached above under article 14, paragraph 3 (c).

4.10 With regard to an alleged violation of article 14, paragraph 3 (d), the Committee notes that the State appointed defence counsel conceded that there were no grounds for appeal. The Committee, however, recalls its prior jurisprudence7/ and is of the view that the requirements of fair trial and of representation require that the author be informed that his counsel does not intend to put arguments to the Court and that he have an opportunity to seek alternative representation, in order that his concerns may be ventilated at appeal level. In the present case, it does not appear that the Appeal Court took any steps to ensure that this right was respected. In these circumstances, the Committee finds that the author's right under article 14, paragraph 3 (d), has been violated.

...

5. The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by Trinidad and Tobago of articles 9, paragraph 3, 14, paragraph 3 (c) and (d), and article 7 of the Covenant.

6. Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy entailing compensation and the opportunity to lodge a new appeal, or should this no longer be possible, to due consideration of granting him early release. The State party is under an obligation to ensure that similar violations do not occur in the future. If the corporal punishment imposed on the author has not been executed, the State party is under an obligation not to execute the sentence.

Notes

...

6/ Communication No. 759/97.

7/ In the following cases, the Committee decided that the withdrawal of an appeal without consultation, would amount to a violation of article 14, paragraph 3 (d) of the Covenant: *Collins v. Jamaica* (356/89), *Steadman v. Jamaica* (528/93), *Smith and Stewart v. Jamaica*

(668/95), *Morrison and Graham v. Jamaica* (461/91), *Morrison v. Jamaica* (663/95), *McLeod v. Jamaica* (734/97), *Jones v. Jamaica* (585/94).

- *Des Fours v. Czech Republic* (747/1997), ICCPR, A/57/40 vol. II (30 October 2001) 88 (CCPR/C/73/D/747/1997) at paras. 2.1-2.3, 2.7, 8.3, 8.4, 9.1 and 9.2.

...

2.1 Dr. Des Fours Walderode was born a citizen of the Austrian-Hungarian empire on 4 May 1904 in Vienna, of French and German descent. His family had been established in Bohemia since the seventeenth century. At the end of the First World War in 1918, he was a resident of Bohemia, a kingdom in the former empire, and became a citizen of the newly created Czechoslovak State. In 1939, because of his German mother tongue, he automatically became a German citizen by virtue of Hitler's decree of 16 March 1939, establishing the Protectorate of Bohemia and Moravia. On 5 March 1941, the author's father died and he inherited the Hruby Rohozec estate.

2.2 At the end of the Second World War, on 6 August 1945, his estate was confiscated under Benes Decree 12/1945, pursuant to which the landed properties of German and Magyar private persons were confiscated without any compensation. However, on account of his proven loyalty to Czechoslovakia during the period of Nazi occupation, he retained his Czechoslovak citizenship, pursuant to paragraph 2 of Constitutional Decree 33/1945. Subsequently, after a Communist government came to power in 1948, he was forced to leave Czechoslovakia in 1949 for political and economic reasons. In 1991, after the "velvet revolution" of 1989, he again took up permanent residence in Prague. On 16 April 1991 the Czech Ministry of Interior informed him that he was still a Czech citizen. Nevertheless, Czech citizenship was again conferred on him by the Ministry on 20 August 1992, apparently after a document was found showing that he had lost his citizenship in 1949, when he left the country.

2.3 On 15 April 1992, Law 243/1992 came into force. The law provides for restitution of agricultural and forest property confiscated under Decree 12/1945. To be eligible for restitution, a claimant had to have Czech citizenship under Decree 33/1945 (or under Law 245/1948, 194/1949 or 34/1953), permanent residence in the Czech Republic, having been loyal to the Czechoslovak Republic during the period of German occupation, and to have Czech citizenship at the time of submitting a claim for restitution. The author filed a claim for restitution of the Hruby Rohozec estate within the prescribed time limit and on 24 November 1992 concluded a restitution contract with the then owners, which was approved by the Land Office on 10 March 1993 (PU-R 806/93). The appeal by the town of Turnov was rejected by the Central Land Office by decision 1391/93-50 of 30 July 1993. Consequently,

on 29 September 1993 the author took possession of his lands.

...

2.7 On 9 February 1996, Law 243/1992 was amended. The condition of permanent residence was removed (following the judgement of the Constitutional Court of 12 December 1995, holding the residence requirement to be unconstitutional), but a new condition was added, of uninterrupted Czechoslovak/Czech citizenship from the end of the war until 1 January 1990. The author claims that this law specifically targeted him and submits evidence of the use of the term "Lex Walderode" by the Czech media and public authorities. On 3 March 1996 the Semily Land Office applied the amended Law to his case to invalidate the restitution agreement of 24 November 1992, since Dr. Des Fours did not fulfil the new eligibility requirement of continuous citizenship. On 4 April 1996, the author lodged an appeal with the Prague City Court against the Land Office's decision.

...

8.3 With regard to the author's allegation of a violation of article 26 of the Covenant, the Committee begins by noting that Law No. 243/1992 already contained a requirement of citizenship as one of the conditions for restitution of property and that the amending Law No. 30/1996 retroactively added a more stringent requirement of continued citizenship. The Committee notes further that the amending Law disqualified the author and any others in this situation, who might otherwise have qualified for restitution. This raises an issue of arbitrariness and, consequently, of a breach of the right to equality before the law, equal protection of the law and non-discrimination under article 26 of the Covenant.

8.4 The Committee recalls its Views in cases No. 516/1993 (*Simunek et al.*), 586/1994 (*Joseph Adam*) and 857/1999 (*Blazek et al.*) that a requirement in the law for citizenship as a necessary condition for restitution of property previously confiscated by the authorities makes an arbitrary, and, consequently a discriminatory distinction between individuals who are equally victims of prior state confiscations, and constitutes a violation of article 26 of the Covenant. This violation is further exacerbated by the retroactive operation of the impugned Law.

9.1 The Human Rights Committee...is of the view that article 26, in conjunction with article 2 of the Covenant, has been violated by the State party.

9.2 In accordance with article 2, paragraph 3 (a) of the Covenant, the State party is under an obligation to provide the late author's surviving spouse, Dr. Johanna Kammerlander, with an effective remedy, entailing in this case prompt restitution of the property in question or compensation therefor, and, in addition, appropriate compensation in respect of the fact that the author and his surviving spouse have been deprived of the enjoyment of their property since its restitution was revoked in 1995. The State party should review its legislation and administrative practices to ensure that all persons enjoy both equality before the law as well as the equal protection of the law.

EFFECTIVE REMEDIES - COMPENSATION

- *Simpson v. Jamaica* (695/1996), ICCPR, A/57/40 vol. II (31 October 2001) 67 (CCPR/C/73/D/695/1996) at paras. 2.1, 2.6, 2.7, 7.2, 7.3, 8 and 9.

...

2.1 On 15 August 1991, the author was arrested on suspicion of murder. He was assaulted by the police and was refused medical treatment. He did not bring this matter to the attention of the authorities, as he was not aware that the beatings violated his rights. He was kept in a cell with 17 other inmates at the Half-Way-Tree Police Lock Up, where some of the inmates had already been convicted. Shortly afterwards, he was moved to the General Prison, where he shared a cell of 8 by 4 feet with five other inmates. There was no artificial light in the cell, no slop bucket, and he was only allowed to use the toilet once a day.

...

2.6 Since his conviction, the author has been confined in a cell alone for periods of up to 22 hours each day, most of his waking time is spent in darkness making it impossible for him to keep occupied. Slop buckets are used, filled with human waste and stagnant water, and only emptied once per day. There is also no running water provided in the author's cell. Consequently, the author has to wait until he is released to get running water which he then stores in a bottle. It is also stated that the author slept on cardboard and newspapers on concrete until October 1994 when he was provided with an old mattress.

2.7 For several years the author has been experiencing an undiagnosed and untreated medical condition giving rise to symptoms of great pain and swelling in his testicle. He complains of a back problem, from which he has suffered since childhood, and which makes it difficult for him to sit upright for a long period of time. He has also developed eye problems because of the darkness in his cell. Although he was visited by a doctor in prison, the tablets the author has been given do not provide any relief and he has been refused specialist treatment.

...

7.2 As to the allegation of a violation of articles 7 and 10 of the Covenant, the Committee notes that counsel has provided specific and detailed allegations concerning inappropriate conditions of detention prior to his trial and since his conviction, and lack of medical treatment. The State party has not responded to these allegations with specific responses but in its initial submission merely denies that the conditions constitute a violation of the Covenant and then goes on to say that it would investigate these allegations, including the allegation of the failure to provide medical treatment...The Committee notes that the State party has not informed the Committee of the outcome of its investigations. In the absence of any explanation from the State party, the Committee considers that the author's conditions of detention and his lack of medical treatment as described violate his right to be treated with humanity and with respect for the inherent dignity of the human person and are therefore contrary to article 10, paragraph 1...

EFFECTIVE REMEDIES - COMPENSATION

7.3 With respect to counsel's allegation that the author's lawyer was absent for the hearing of two of the four witnesses during the preliminary hearing ... The Committee recalls its prior jurisprudence that it is axiomatic that legal assistance be available at all stages of criminal proceedings, particularly in capital cases 9/. It also recalls its decision in communication No. 775/1997 (*Brown v. Jamaica*), adopted on 23 March 1999, in which it decided that a magistrate should not proceed with the deposition of witnesses during a preliminary hearing without allowing the author an opportunity to ensure the presence of his lawyer. In the present case, the Committee notes that it is not disputed that the author's lawyer was absent during the hearing of two of the witnesses nor does it appear that the magistrate adjourned the proceedings until her return. Accordingly, the Committee finds that the facts before it disclose a violation of article 14, paragraph 3 (d), of the Covenant...

8. The Human Rights Committee...is of the view that the facts as found by the Committee reveal a violation by Jamaica of articles 10, and 14, paragraph 3 (d) of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an appropriate remedy, including adequate compensation, an improvement in the present conditions of detention and due consideration of early release.

_____

Notes

...

9/ See *inter alia*, the Committee's Views in respect of communication No. 730/1996 *Clarence Marshall v. Jamaica*, adopted on 3 November 1998, communication No. 459/991, *Osbourne Wright and Eric Harvey v. Jamaica*, adopted on 27 October 1995, and communication No. 223/1987, *Frank Robinson v. Jamaica*, adopted on 30 March 1989.

_____

- *Brok v. Czech Republic* (774/1997), ICCPR, A/57/40 vol. II (31 October 2001) 110 (CCPR/C/73/D/774/1997) at paras. 2.1-2.6, 7.2-7.4, 8 and 9.

...

2.1 Robert Brok's parents owned a house in the centre of Prague since 1927 (hereinafter called the property). During 1940 and 1941, the German authorities confiscated their property with retroactive effect to 16 March 1939, because the owners were Jewish. The property was then sold to the company Matador on 7 January 1942. The author himself, was deported by the Nazis, and returned to Prague on 16 May 1945, after having been released from a concentration camp. He was subsequently hospitalized until October 1945.

2.2 After the end of the war, on 19 May 1945, President Benes' Decree No. 5/1945, followed up later by Act 128/1946, declared null and void all property transactions effected under

pressure of the occupation regime on the basis of racial or political persecution. National administration was imposed on all enemy assets. This included the author's parents' property pursuant to a decision taken by the Ministry of Industry on 2 August 1945. However, in February 1946, the Ministry of Industry annulled that decision. It also annulled the prior property confiscation and transfers, and the author's parents were reinstated as the rightful owners, in accordance with Benes Decree No. 5/1945.

2.3 However, the company Matador, which had been nationalized on 27 October 1945, appealed against this decision. On 7 August 1946, the Land Court in Prague annulled the return of the property to the author's parents and declared Matador to be the rightful owner. On 31 January 1947, the Supreme Court confirmed this decision.... The property thereby stayed in possession of Matador, and was later, in 1954, transferred to the state company Technomat.

2.4 Following the change to a democratic government at the adoption of restitution legislation, the author applied for restitution under Act No. 87/1991 as amended by Act No. 116/1994. The said law provides restitution or compensation to victims of illegal confiscation carried out for political reasons during the Communist regime (25 February 1948 -1 January 1990). The law also matter provisions for restitution or compensation to victims of racial persecution during the Second World War, who have an entitlement by virtue of Decree No. 5/1945. The courts (District Court decision 26 C 49/95 of 20 November 1995 and Prague City Court decision 13 Co 34/94-29 of 28 February 1996), however, rejected the author's claim. The District Court states in its decision that the amended Act extends the right to restitution to persons who lost their property during the German occupation and who could not have their property restituted because of political persecution, or who went through legal procedures that violated their human rights subsequent to 25 February 1948, on condition that they comply with the terms set forth in Act No. 87/1991. However, the court was of the opinion that the author was not eligible for restitution, because the property was nationalized before 25 February 1948, the retroactive cut-off date for claims under Act No. 87/1991 Section 1, paragraph 1, and Section 6. This decision was confirmed by the Prague City Court.

2.5 Pursuant to section 72 of Act No. 182/1993, the author filed a complaint before the Constitutional court that his right to property had been violated. This provision allows an individual to file a complaint to the Constitutional Court if the public authority has violated the claimant's fundamental rights guaranteed by a constitutional law or by an international treaty in particular the right to property.

2.6 The Constitutional Court concluded that since the first and second instances had decided that the author was not the owner of the property, there were no property rights that could have been violated. In its decision, the Constitutional Court invoked the question of fair trial

on its own motion and concluded that "the legal proceedings were conducted correctly and all the legal regulations have been safeguarded". Accordingly, the Constitutional Court rejected the author's constitutional complaint on 12 September 1996.

...

7.2 The question before the Committee is whether the application of Act No. 87/1991, as amended by Act No. 116/1994, to the author's case entails a violation of his right to equality before the law and to the equal protection of the law.

7.3 These laws provide restitution or compensation to victims of illegal confiscation carried out for political reasons during the Communist regime. The law also provides for restitution or compensation to victims of racial persecution during the Second World War who had an entitlement under Benes Decree No. 5/1945. The Committee observes that legislation must not discriminate among the victims of the prior confiscation to which it applies, since all victims are entitled to redress without arbitrary distinctions.

7.4 The Committee notes that Act No. 87/1991 as amended by Act No. 116/1994 gave rise to a restitution claim of the author which was denied on the ground that the nationalization that took place in 1946/47 on the basis of Benes Decree No. 100/1945 falls outside the scope of laws of 1991 and 1994. Thus, the author was excluded from the benefit of the restitution law although the Czech nationalization in 1946/47 could only be carried out because the author's property was confiscated by the Nazi authorities during the time of German occupation. In the Committee's view this discloses a discriminatory treatment of the author, compared to those individuals whose property was confiscated by Nazi authorities without being subjected, immediately after the war, to Czech nationalization and who, therefore, could benefit from the laws of 1991 and 1994. Irrespective of whether the arbitrariness in question was inherent in the law itself or whether it resulted from the application of the law by the courts of the State party, the Committee finds that the author was denied his right to equal protection of the law in violation of article 26 of the Covenant.

8. The Human Rights Committee...is of the view that the facts before it substantiate a violation of article 26 in conjunction with article 2 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. Such remedy should include restitution of the property or compensation, and appropriate compensation for the period during which the author and his widow were deprived of the property, starting on the date of the court decision of 20 November 1995 and ending on the date when the restitution has been completed. The State party should review its relevant legislation and administrative practices to ensure that neither the law nor its application entails discrimination in contravention of article 26 of the Covenant.

EFFECTIVE REMEDIES - COMPENSATION

For dissenting opinion in this context, see Brok v. Czech Republic (774/1997), ICCPR, A/57/40 vol. II (31 October 2001) 110 (CCPR/C/73/D/774/1997) at Individual Opinion by Martin Scheinin (partly dissenting), Individual Opinion by Mr. Nisuke Ando (dissenting) and Individual Opinion by Ms. Christine Chanet (dissenting).

- *Sahadeo v. Guyana* (728/1996), ICCPR, A/57/40 vol. II (1 November 2001) 81 (CCPR/C/73/D/728/1996) at paras. 2.2, 9.2, 10 and 11.

...

2.2 The author states that Mr. Sahadeo and his co-accused were convicted and sentenced to death on 8 November 1989, four years and two months after their arrest. Apparently, two prior trials, in June 1988 and February 1989, had been aborted. On appeal, heard in 1992, a retrial was ordered. On 26 May 1994, Mr. Sahadeo and his co-accused were again convicted and sentenced to death. In 1996, their appeal was dismissed and the sentence confirmed.

...

9.2 With regard to the length of the proceedings, the Committee notes that the alleged victim was arrested on 18 September 1985 and remained in detention until he was first convicted and sentenced to death on 8 November 1989, four years and two months after his arrest. The Committee recalls that article 9, paragraph 3, of the Covenant entitles an arrested person to trial within a reasonable time or to release. Paragraph 3 (c) of article 14 provides that the accused shall be tried without undue delay. The Committee recalls that, if criminal charges are brought in cases of custody and pre-trial detention, the full protection of article 9, paragraph 3, as well as article 14, must be granted. With respect to the alleged other delays in the criminal process, the Committee notes that Mr. Sahadeo's appeal was heard from the end of April to the beginning of May 1992 and, upon retrial, the alleged victim was again convicted and sentenced to death on 26 May 1994, two years and one month after the judgment of the Court of Appeal. In 1996, the appeal against that decision was dismissed and the sentence confirmed. The Committee finds that, in the absence of a satisfactory explanation by the State party or other justification discernible from the file, the detention of the author awaiting trial constitutes a violation of article 9, paragraph 3, of the Covenant and a further separate violation of article 14, paragraph 3 (c).

...

10. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 9, paragraph 3; and 14, paragraph 3 (c), of the Covenant.

11. The Committee is of the view that Mr. Sahadeo is entitled, under article 2, paragraph 3 (a), to an effective remedy, in view of the prolonged pretrial detention in violation of article 9, paragraph 3, and the delay in the subsequent trial, in violation of article 14, paragraph 3 (c), entailing a commutation of the sentence of death and compensation under article 9, paragraph 5, of the Covenant. The State party is under an obligation to take appropriate

measures to ensure that similar violations do not occur in the future.

- *Ashby v. Trinidad and Tobago* (580/1994), ICCPR, A/57/40 vol. II (21 March 2002) 12 (CCPR/C/74/D/580/1994) at paras. 3.1-3.4, 10.9, 10.10, 11 and 12.

...

3.1 Mr. Ashby's communication under the Optional Protocol was received by the secretariat of the Human Rights Committee on 7 July 1994. On 13 July 1994, counsel submitted additional clarifications. On the same day, the Committee's Special Rapporteur on New Communications issued a decision under rules 86 and 91 of the Committee's rules of procedure to the Trinidad and Tobago authorities, requesting a stay of execution, pending the determination of the case by the Committee, and seeking information and observations on the question of the admissibility of the complaint.

3.2 The combined rule 86/rule 91 request was handed to the Permanent Mission of Trinidad and Tobago at Geneva at 4.05 p.m. Geneva time (10.05 a.m. Trinidad and Tobago time) on 13 July 1994. According to the Permanent Mission of Trinidad and Tobago, this request was transmitted by facsimile to the authorities in Port-of-Spain between 4.30 and 4.45 p.m. on the same day (10.30-10.45 a.m. Trinidad and Tobago time).

3.3 Efforts continued throughout the night of 13 to 14 July 1994 to obtain a stay of execution for Mr. Ashby, both before the Court of Appeal of Trinidad and Tobago and before the Judicial Committee of the Privy Council in London. When the Judicial Committee issued a stay order shortly after 11.30 a.m. London time (6.30 a.m. Trinidad and Tobago time) on 14 July, it transpired that Mr. Ashby had already been executed. At the time of his execution, the Court of Appeal of Trinidad and Tobago was also in session, deliberating on the issue of a stay order.

3.4 On 26 July 1994, the Committee adopted a public decision expressing its indignation over the State party's failure to comply with the Committee's request under rule 86; it decided to continue consideration of the Mr. Ashby's case under the Optional Protocol and strongly urged the State party to ensure, by all means at its disposal, that situations similar to that surrounding the execution of Mr. Ashby do not recur. The Committee's public decision was transmitted to the State party on 27 July 1994.

...

10.9 With regard to Mr. Ashby's execution, the Committee recalls its jurisprudence that apart from any violation of the rights under the Covenant, the State party commits a serious breach of its obligations under the Optional Protocol if it engages in any acts which have the effect of preventing or frustrating consideration by the Committee of a communication alleging any violation of the Covenant, or to render examination by the Committee moot and

the expression of its Views nugatory and futile.8/ The behaviour of the State party represents a shocking failure to demonstrate even the most elementary good faith required of a State party to the Covenant and of the Optional Protocol.

10.10 The Committee finds that the State party breached its obligations under the Protocol, by proceeding to execute Mr. Ashby before the Committee could conclude its examination of the communication, and the formulation of its Views. It was particularly inexcusable for the State to do so after the Committee had acted under its Rule 86 requesting the State party to refrain from doing so. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim, undermines the protection of Covenant rights through the Optional Protocol.

11. The Human Rights Committee...is of the view that the facts before it disclose violations of articles 6, paragraphs 1 and 2 and 14, paragraphs 3 (c) and 5, of the Covenant.

12. Under article 2, paragraph 3, of the Covenant, Mr. Ashby would have been entitled to an effective remedy including, first and foremost, the preservation of his life. Adequate compensation must be granted to his surviving family.

Notes

...

8/ See Communication No. 707/1996, *Patrick Taylor v. Jamaica*, para. 8.5.

- *Jiménez Vaca v. Colombia* (859/1999), ICCPR, A/57/40 vol. II (25 March 2002) 187 (CCPR/C/74/D/859/1999) at paras. 7.1-7.4 and 9.

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

7.2 In the case in question, Mr. Jiménez Vaca had an objective need for the State to take steps to ensure his safety, given the threats made against him. The Committee takes note of the State party's observations, set out in paragraph 5.1, but notes that the State party does not refer to the complaint which the author claims to have filed with the regional procurator's

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

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

7.4 With regard to the author's claims that paragraphs 1 and 4 of article 12 have been violated, the Committee notes the observations of the State party whereby the State cannot be held responsible for the loss of other rights which may be indirectly affected as a result of violent acts. Nevertheless, considering the Committee's view that the right to security of person (art. 9, para. 1) was violated and that there were no effective domestic remedies allowing the author to return from involuntary exile in safety, the Committee concludes that the State party has not ensured to the author his right to remain in, return to and reside in his own country. Paragraphs 1 and 4 of article 12 of the Covenant were therefore violated. This violation necessarily has a negative impact on the author's enjoyment of the other rights ensured under the Covenant.

...

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

Notes

...

3/ Communication No. 195/1985, *William Eduardo Delgado Páez v. Colombia*, Views adopted on 12 July 1990.

- *Lantsova v. Russian Federation* (763/1997), ICCPR, A/57/40 vol. II (26 March 2002) 96 (CCPR/C/74/763/1997) at paras. 9.1, 9.2, 10 and 11.

...

9.1 Regarding the conditions of detention, the Committee notes that the State party concedes that prison conditions were bad and that detention centres at the time of the events held twice the intended number of inmates. The Committee also notes the specific information received from the author, in particular that the prison population was, in fact, five times the allowed capacity and that the conditions in Matrosskaya Tishina prison were inhuman, because of poor ventilation, inadequate food and hygiene. The Committee finds that holding the author's son in the conditions prevailing at this prison during that time entailed a violation of his rights under article 10, paragraph 1 of the Covenant.

9.2 Concerning the death of Mr. Lantsov, the Committee notes the author's allegations, on the strength of testimony by several fellow detainees, that after the deterioration of the health of the author's son, he received medical care only during the last few minutes of his life, that the prison authorities had refused such care during the preceding days and that this situation caused his death. It also takes note of the information provided by the State party, namely that several inquiries were carried out into the causes of the death, i.e. acute pneumonia leading to cardiac insufficiency, and that Mr. Lantsov had not requested medical assistance. The Committee affirms that it is incumbent on States to ensure the right of life of detainees, and not incumbent on the latter to request protection. The stated intention of the State party to improve conditions has no impact in the assessment of this case. The Committee notes that the State party has not refuted the causal link between the conditions of the detention of Mr. Lantsov and the fatal deterioration of his state of health. Further, even if the Committee starts from the assertion of the State party that neither Mr. Lantsov himself nor his co-detainees had requested medical help in time, the essential fact remains that the State party by arresting and detaining individuals takes the responsibility to care for their life. It is up to the State party by organizing its detention facilities to know about the state of health of the detainees as far as may be reasonably expected. Lack of financial means cannot reduce this responsibility. The Committee considers that a properly functioning medical service within the detention centre could and should have known about the dangerous change in the state of health of Mr. Lantsov. It considers that the State party failed to take appropriate measures to protect Mr. Lantsov's life during the period he spent in the detention centre. Consequently, the Human Rights Committee concludes that, in this case, there has been a violation of paragraph 1 of article 6 of the Covenant.

EFFECTIVE REMEDIES - COMPENSATION

...
10. The Human Rights Committee...is of the view that the State party failed in its obligation to ensure the protection of Mr. Lantsov, who lost his life as a direct result of the existing prison conditions. The Committee finds that articles 6, paragraph 1, and article 10, paragraph 1 of the Covenant were violated.

11. The Committee is of the view that Mrs. Lantsova is entitled, under article 2, paragraph 3 (a) of the Covenant, to an effective remedy. The State party should take effective measures: (a) to grant appropriate compensation (b) to order an official inquiry into the death of Mr. Lantsov; and (c) to ensure that similar violations do not recur in the future, especially by taking immediate steps to ensure that conditions of detention are compatible with the State party's obligation under articles 6 and 10 of the Covenant.

- *Kennedy v. Trinidad and Tobago* (845/1998), ICCPR, A/57/40 vol. II (26 March 2002) 161 (CCPR/C/74/D/845/1998) at paras. 7.5-7.8, 7.10, 8 and 9.

...
7.5 In connection with counsel's claim that the length of judicial proceedings in his case amounted to a violation of article 14, paragraphs 3(c)and 5, the Committee notes that more than ten years passed from the time of the author's trial to the date of the dismissal of his petition for special leave to appeal by the Judicial Committee of the Privy Council. It considers that the delays invoked by counsel...in particular the delays in judicial proceedings after the ordering of a re-trial, i.e. over six years from the ordering of the re-trial in early 1992 to the dismissal of the second appeal in March 1998, were 'unreasonable' within the meaning of article 14, paragraphs 3(c) and 5, read together. Accordingly, the Committee concludes to a violation of these provisions.

7.6 The author has alleged violations of articles 9, paragraphs 2 and 3, because he was not charged until five days after his arrest, and not brought before a judge until six days after arrest. It is uncontested that the author was not formally charged until 9 February 1987 and not brought before a magistrate until 10 February 1987. While the meaning of the term "promptly" in paragraphs 2 and 3 of article 9 must be determined on a case by case basis, the Committee recalls its jurisprudence under the Optional Protocol pursuant to which delays should not exceed a few days. While the information before the Committee does not enable it to determine whether Mr. Kennedy was "promptly" informed of the charges against him, the Committee considers that in any event he was not brought "promptly" before a judge, in violation of article 9, paragraph 3.

7.7 The Committee has noted the author's allegations of beatings sustained after arrest in police custody. It notes that the State party has not challenged these allegations; that the

author has provided a detailed description of the treatment he was subjected to, further identifying the police officers allegedly involved; and that the magistrate before whom he was brought on 10 February 1987 ordered him to be taken to hospital for treatment. The Committee considers that the treatment Mr. Kennedy was subjected to in police custody amounted to a violation of article 7 of the Covenant.

7.8 The author claims that his conditions of detention are in violation of articles 7 and 10(1). Once again, this claim has not been addressed by the State party. The Committee notes that the author was kept on remand for a total of 42 months with at least five and up to ten other detainees in a cell measuring 6 by 9 feet; that for a period of almost eight years on death row, he was subjected to solitary confinement in a small cell with no sanitation except for a slop pail, no natural light, being allowed out of his cell only once a week, and with wholly inadequate food that did not take into account his particular dietary requirements. The Committee considers that these - uncontested - conditions of detention amount to a violation of article 10, paragraph 1, of the Covenant.

...

8. The Human Rights Committee...is of the view that the facts before it reveal violations by Trinidad and Tobago of articles 6, paragraph 1, 7, 9, paragraph 3, 10 paragraph 1, 14, paragraphs 3(c) and 5, and 14, paragraphs 1 and 3(d), the latter in conjunction with article 2, paragraph 3, of the Covenant.

9. Under article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide Mr. Rawle Kennedy with an effective remedy, including compensation and consideration of early release. The State party is under an obligation to take measures to prevent similar violations in the future.

- *Higginson v. Jamaica* (792/1998), ICCPR, A/57/40 vol. II (28 March 2002) 140 (CCPR/C/74/D/792/1998) at paras. 2.1, 4.6, 5 and 6.

...

2.1 On 19 May 1995, the author was convicted of illegal possession of a firearm, rape and robbery with aggravation by the High Court Division Gun Court, Kingston, Jamaica, and sentenced to respectively 5, 10 and 7 years imprisonment with hard labour, to run concurrently, and in addition to receive 6 strokes of the tamarind switch.

...

4.6 ...The author has claimed that the use of the tamarind switch constitutes cruel, inhuman and degrading punishment, and that the imposition of the sentence violated his rights under article 7 of the Covenant. The State party has not contested the claim. Irrespective of the nature of the crime that is to be punished or the permissibility of corporal punishment under domestic law, it is the consistent opinion of the Committee that corporal punishment

constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant. The Committee finds that the imposition or the execution of a sentence of whipping with the tamarind switch constitutes a violation of the author's rights under article 7.

5. The Human Rights Committee...is of the view that the facts before it reveal a violation of article 7 of the International Covenant on Civil and Political Rights.

6. Under article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including refraining from carrying out the sentence of whipping upon the author or providing appropriate compensation if the sentence has been carried out. The State party should ensure that similar violations do not occur in the future by repealing the legislative provisions that allow for corporal punishment.

- *Teesdale v. Trinidad and Tobago* (677/1996) ICCPR, A/57/40 vol. II (1 April 2002) 36 (CCPR/C/74/D/677/1996) at paras. 9.1, 9.3-9.5, 10 and 11.

...
9.1 With regard to the conditions of the author's detention at State Prison, Port-of-Spain, both before and after conviction, the Committee notes that in his different submissions the author made specific allegations, in respect of the deplorable conditions of detention...The Committee recalls its earlier jurisprudence that certain minimum standards regarding the conditions of detention must be observed and that it appears from the author's submissions that these requirements were not met during the author's detention since 28 May 1988. In the absence of any response from the State party, the Committee must give due weight to the allegations of the author. Consequently, the Committee finds that the circumstances described by the author disclose a violation of articles 10, paragraph 1, of the Covenant. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, is not necessary to consider separately the claims arising under article 7.
...
9.3 With regard to the delays in bringing the author to trial, the Committee notes that the author was detained on 28 May 1988 and formally charged with murder on 2 June 1988. His trial began on 6 October 1989 and he was sentenced to death on 2 November 1989. Under article 9, paragraph 3, of the Covenant anyone arrested or detained on a criminal charge shall be entitled to trial within a reasonable time. It appears from the transcript of the trial before the San Fernando Assize Court that all evidence for the case of the prosecution was gathered by 1 June 1988 and no further investigations were carried out. The Committee is of the view that in the context of article 9, paragraph 3, in the specific circumstances of the present case

and in the absence of any explanation for the delay by the State party, the length of time that the author was in pre-trial detention is unreasonable and, therefore, constitutes a violation of this provision.

9.4 With regard to the delays in hearing the author's appeal, the Committee notes that he was convicted on 2 November 1989 and that his appeal was dismissed on 22 March 1994. The Committee recalls that all stages of the procedure must take place 'without undue delay' within the meaning of article 14, paragraph 3 (c). Furthermore, the Committee recalls its previous jurisprudence that article 14, paragraph 3 (c), should be strictly observed in any criminal procedure. In the absence of an explanation by the State party, the Committee, therefore, finds that a delay of four years and five months between the conviction and the dismissal of his appeal constitutes a violation of article 14, paragraph 3 (c), of the Covenant in this regard.

9.5 Concerning the author's representation at trial, the Committee notes that counsel was not assigned to him until the day of the trial itself. The Committee recalls that article 14, paragraph 3 (b), provides that the accused must have time and adequate facilities for the preparation of his defence. Therefore, the Committee finds that article 14, paragraph 3 (b), was violated.

...

10. The Human Rights Committee...is of the view that the facts before it disclose violations of articles 7; 9, paragraph 3; 10, paragraph 1; and 14, paragraphs 3 (b) and (c) of the Covenant.

11. Under article 2, paragraph 3, of the Covenant, Mr. Teesdale is entitled to an effective remedy, including compensation and consideration by the appropriate authorities of a reduction in sentence. The State party is under an obligation to ensure that similar violations do not occur in the future.

- *Irving v. Australia* (880/1999), ICCPR, A/57/40 vol. II (1 April 2002) 324 (CCPR/C/74/D/880/1999) at paras. 2.1, 2.5, 8.2-8.4 and 9.

...

2.1 On 8 December 1993, a jury in the District Court of Cairns convicted the author of an armed robbery of a branch office of the ANZ bank in Cairns, committed on 19 March 1993; he was sentenced to eight years of imprisonment. He applied for legal aid to appeal the decision, but Legal Aid Queensland turned down his request. He appeared without legal representation before the Queensland Court of Appeal, which dismissed the appeal on 20 April 1994.

...

EFFECTIVE REMEDIES - COMPENSATION

2.5 After exhausting all possible avenues of representation and assistance known to him, the author considered that he had no alternative but to represent himself in the High Court of Australia, notwithstanding his previous failure as a self-represented applicant in the Queensland Court of Appeal. On 2 May 1996, the High Court accepted the documentation compiled by the author in custody as an application for special leave to appeal. On 8 December 1997, four years to the day from his original conviction, the High Court at once granted the author's application for special leave to appeal, allowed the appeal, quashed the conviction and ordered a retrial. The Court accepted the Crown's concession at the hearing that the author's original trial had been unfair. The Court observed that it had "the gravest misgivings about the circumstances of this case", that "it is a very disturbing situation" and that "in all of this, the accused has been denied legal aid for his appeal". On 11 December 1997, the author was released from prison on bail. On 2 October 1998, the Director of Public Prosecutions of Queensland indicated that the author would not be re-tried, and entered a *nolle prosequi*.

...

8.2 The facts laid out in the communication, which have not been contested by the State party, show that Mr. Irving was subject to manifest injustice. It would appear that they raise a serious issue regarding compliance by the State party with article 14, paragraph 3 (d), of the Covenant, as Mr. Irving was repeatedly denied legal aid in a case in which the High Court of Australia itself considered that the interests of justice required such aid to be provided. It would therefore appear that Mr. Irving should be entitled to compensation. The only claim made by the author of the communication was a claim based on article 14, paragraph 6, of the Covenant and the question before the Committee is therefore whether this claim is admissible.

8.3 The Committee recalls the conditions of application of article 14, paragraph 6:

> "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

8.4 The Committee observes that the author's conviction in the District Court of Cairns of 8 December 1993 was affirmed by the Court of Appeal of Queensland on 20 April 1994. Mr. Irving applied for leave to appeal this decision before the High Court of Australia. Leave to appeal was granted and on 8 December 1997 the High Court of Australia quashed the conviction on the ground that the author's trial had been unfair. As the decision of the Court of Appeal of Queensland was subject to appeal (albeit with leave) on the basis of the normal grounds for appeal, it would appear that until the decision of the High Court of Australia,

the author's conviction may not have constituted a "final decision" within the meaning of article 14, paragraph 6. However, even if the decision of the Court of Appeal of Queensland were deemed to constitute the "final decision" for the purposes of article 14, paragraph 6, the author's appeal to the High Court of Australia was accepted on the grounds that the original trial had been unfair and not that a new, or newly discovered fact, showed conclusively that there had been a miscarriage of justice. In these circumstances, the Committee considers that article 14, paragraph 6, does not apply in the present case, and this claim is inadmissible ratione materiae under article 3 of the Optional Protocol.

...

9. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

...

For dissenting opinion in this context, see Irving v. Australia (880/1999), ICCPR, A/57/40 vol. II (1 April 2002) 324 (CCPR/C/74/D/880/1999) at Individual Opinion by Mr. Louis Henkin and Mr. Martin Scheinin.

- *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. 6.4, 6.6-6.7, 7 and 8.

...

6.4 The Committee notes the author's complaint...that he has been held in appalling and insalubrious conditions as a result of which his eyesight has deteriorated. In the Committee's opinion, the conditions described therein are such as to violate his right to be treated with humanity and with respect for the inherent dignity of the human person and are therefore contrary to article 10, paragraph 1, of the Covenant.

...

6.6 As to the author's claim that he has been forbidden from wearing a beard and from worshipping at religious services, and that his prayer books were taken from him, the Committee reaffirms that the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts and that the concept of worship extends to ritual and ceremonial acts giving expression to belief, as well as various practices integral to such acts. In the absence of any explanation from the State party concerning the author's allegations...the Committee concludes that there has been a violation of article 18 of the Covenant.

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.

EFFECTIVE REMEDIES - COMPENSATION

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.

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

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

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

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

EFFECTIVE REMEDIES - COMPENSATION

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

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

...

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

5.3 To the extent that the Committee has found that there was no effective legal procedure allowing the author to invoke his rights before a tribunal (article 25 (c) in conjunction with article 2), no separate issue arises concerning the conformity of proceedings before such a

tribunal with article 14 of the Covenant. With regard to article 26, the Committee sustains the author's reasoning by finding a violation of article 25 (c).

...

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

6.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee is of the view that the author is entitled to an appropriate remedy, namely: (a) effective reinstatement to public service and to his post, with all the consequences that that implies, or, if necessary, to a similar post;2/ (b) compensation comprising a sum equivalent to the payment of the arrears of salary and remuneration that he would have received from the time at which he was not reinstated to his post, beginning in September 1989.3/

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Notes

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

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

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

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

...

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

...

2.7 On 30 January 1995, the author submitted an application for *amparo* to the Trujillo Third Special Civil Court, requesting that the Supreme Decision relieving him of his duties should be declared unenforceable. In its judgement of 2 March 1995, the Court declared the decision unenforceable and ordered the reinstatement of the author to active service in the

National Police with the rank of commander. The judgement was appealed by the Public Prosecutor of the Ministry of the Interior in the Trujillo First Civil Division which, on 20 June 1995, upheld the order for the author's reinstatement. The Public Prosecutor then appealed to the Constitutional Division of the Supreme Court, which, in its decision of 6 December 1995, declared itself incompetent to hear the appeal. On 27 December 1995, the appeal was declared inadmissible by the Trujillo First Civil Division.

...

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

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

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

Notes

...

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

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

EFFECTIVE REMEDIES - COMPENSATION

- *Francis et al. v. Trinidad and Tobago* (899/1999), ICCPR, A/57/40 vol. II (25 July 2002) 206 (CCPR/C/75/D/899/1999) at paras. 2.1-2.5, 5.6, 6, 7 and Individual Opinion by Mr. Hipólito Solari Yrigoyen (dissenting in part).

...

2.1 Messrs. Francis, Glaude and George were arrested on 24 July 1986, 23 July 1986 and 24 May 1987 respectively for suspicion of murder on 19 July 1986 of one Ramesh Harriral. Until their trial in November 1990, the authors were detained at the remand section of Golden Grove Prison, Arouca, in a cell measuring 9 feet by 6 feet with between 8 to 15 other inmates.

2.2 After a period of four years and three months for Messrs. Francis and Glaude, and of three years and five months for Mr. George, the authors were tried between 6 and 30 November 1990, convicted by unanimous jury verdict and sentenced to death for the murder charged. From their conviction on 30 November 1990 until the commutation of their sentences on 3 March 1997, the authors were confined on death row at Port of Spain Prison, Trinidad. They were detained in solitary confinement in a cell measuring 9 feet by 6 feet, containing an iron bed, mattress, bench and table.1/

2.3 In the absence of sanitation facilities in the cell, a plastic pail was provided as toilet. A small ventilation hole, measuring 8 inches by 8 inches, provided scarce and inadequate ventilation. The only light provided was by a fluorescent strip illuminated 24 hours a day located outside the cell above the door. The authors remained locked inside their cell continuously, save for collecting food, bathing, and slopping out the contents of their plastic pail. They enjoyed exercise outside their cell approximately once a month only in handcuffs. They were allowed only a limited number of personal items, excluding radios, and access to writing and reading material remained very limited. Mr. Francis further stated that he had no right to see copies of the Prison Rules, that he was not allowed to write to the Ministry of National Security complaining as to his conditions of detention, that doctors visits were irregular and that letters to his family had been intercepted and not processed without explanation. Mr. Glaude also stated that poor food had resulted in significant weight loss, and that no medicine had been provided to him.

2.4 On 10 October 1994, the authors applied for leave to appeal against their convictions to the Court of Appeal of Trinidad and Tobago. The Court of Appeal dismissed their application for leave on 13 March 1995. The authors' petitions to the Judicial Committee of the Privy Council for Special Leave to Appeal as Poor Persons were dismissed on 14 November 1996. On 3 March 1997 the authors' death sentences were commuted to 75 years' imprisonment.

EFFECTIVE REMEDIES - COMPENSATION

2.5 From that point, the authors have been detained in Port of Spain Prison in conditions involving confinement to a cell measuring 9 feet by 6 feet together with 9 to 12 other prisoners. It is stated that such overcrowding leads to violent confrontations amongst the prisoners. One single bed is provided for the cell and therefore the authors sleep on the floor. One plastic bucket is provided as slop pail and is emptied once a day, such that it sometimes overflows or is spilled over. Inadequate ventilation consists of a 2 foot by 2 foot barred window. The prisoners are locked in their cell, on average 23 hours a day, with no educational opportunities, work or reading materials. The location of the prison food-preparation area, around 2 metres from where the prisoners empty their slop pails, creates an obvious health hazard. The quantity and quality of food are said not to meet the authors' nutritional needs, and the complaint mechanisms for prisoners are inadequate.

...

5.6 As to the authors' claims that the conditions of detention in each phase of their imprisonment violated articles 7 and 10, paragraph 1, in the absence of any responses by the State party to the allegations concerning the conditions of detention as described by the authors, the Committee must give due consideration to the authors' allegations since they have not been properly refuted. The Committee considers that the authors' conditions of detention as described violate their right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to article 10, paragraph 1, of the Covenant. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary separately to consider the claims arising under article 7 of the Covenant.

...

6. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 9, paragraph 3, 10, paragraph 1, and 14, paragraph 3 (c), of the Covenant.

7. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including adequate compensation. In the light of the long years spent by the authors in deplorable conditions of detention that violate article 10 of the Covenant, the State party should consider release of the authors. The State party should, in any event, improve the conditions of detention in its prisons without delay, in order to bring the authors' conditions of detention into line with article 10 of the Covenant.

Notes

1/ Counsel's description of these conditions of confinement on death row is derived from a visit by him to, and interviews with, the authors on 15 July 1996. The description of conditions post-commutation is derived from counsel's visits to, and interviews with, other prisoners at the same prison on the same day.

Individual Opinion by Mr. Hipólito Solari Yrigoyen (dissenting in part)

In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including adequate compensation. In the light of the long years spent by the authors in deplorable conditions of detention that violate article 10 of the Covenant, the State party should release the authors. The State party should, in any event, improve the conditions of detention in its prisons without delay, in order to bring the authors' conditions of detention into line with article 10 of the Covenant.

- *Borisenco v. Hungary* (852/1999), ICCPR, A/58/40 vol. II (14 October 2002) 119 (CCPR/C/76/D/852/1999) at paras. 7.4, 7.5, 8 and 9.

...
7.4 With regard to the claim of a violation of article 9, paragraph 3, the Committee notes that the author was detained for three days before being brought before a judicial officer. In the absence of an explanation from the State party on the necessity to detain the author for this period, the Committee finds a violation of article 9, paragraph 3 of the Covenant.

7.5 With respect to the author's claim that he was not provided with legal representation from the time of his arrest to his release from detention, which included a hearing on detention at which he had to represent himself, the Committee notes that the State party has confirmed that although it assigned a lawyer to the author, the lawyer failed to appear at the interrogation or at the detention hearing. In its previous jurisprudence, the Committee has made it clear that it is incumbent upon the State party to ensure that legal representation provided by the State guarantees effective representation. It recalls its prior jurisprudence that legal assistance should be available at all stages of criminal proceedings. Consequently the Committee finds that the facts before it reveal a violation of article 14, paragraph 3 (d) of the Covenant.

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 9, paragraph 3, and 14, paragraph 3 (d) of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. The State party is also under an obligation to prevent similar violations in the future.

EFFECTIVE REMEDIES - COMPENSATION

- *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. 2.1-2.4, 2.14, 3.5, 3.6, 9.3-9.5, 9.8 and 10.

...

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

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

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

2.4 The Second Mobile Brigade reported various alleged armed clashes with guerrillas of the Revolutionary Armed Forces of Colombia (FARC) - the first on 13 January 1993, the second on 18 January 1993 and two incidents on 27 January 1993. The version given by the military authorities was that during the clashes the regular troops had killed a number of guerrillas. On 13 January 1993, three bodies were removed by the judicial police (SIJIN) in Ocaña, one of which was identified as the body of Gustavo Coronel Navarro. On 18 January,

the soldiers deposited at the hospital the bodies of four alleged guerrillas "killed in combat". The SIJIN removed these corpses and confirmed the deaths of Luis Honorio Quintero Ropero, Ramón Emilio Quintero Ropero, Nahún Elías Sánchez Vega and Ramón Emilio Sánchez. On 29 January 1993, the Second Mobile Brigade brought in the bodies of four persons killed in the alleged clashes of 27 January 1993; again the SIJIN removed the bodies. On 21 May 1993, the bodies of the last four dead were exhumed in the cemetery of Ocaña; one of these was the body of Luis Ernesto Ascanio Ascanio, which was recognized by his relatives. The forensic report stated that one of the bodies brought to the hospital on 18 January contained a number of bullet entry holes with powder burns. In the records relating to the removal of the bodies on 21 May 1993, SIJIN officials stated that the bodies were clothed in uniforms used exclusively by the National Police.

...

2.14 On 28 November 1994, the Human Rights Division opened disciplinary proceedings file No. 008-153713 and began preliminary investigations. On 26 April 1996, it informed one of the NGOs that the proceedings were still at the preliminary inquiry stage.

...

3.5 The authors allege a violation of article 2, paragraph 3, of the Covenant since the State party has not provided an effective remedy for cases where it fails in its obligation to safeguard the rights protected by the Covenant.

3.6 The authors submit that, in view of the nature of the rights infringed and the gravity of the incidents, only remedies of a judicial nature can be considered effective; that is not the case with disciplinary remedies, according to the Committee's case law. 4/ The authors also consider that the military courts cannot be considered as offering an effective remedy within the meaning of article 2, paragraph 3, since in military justice the persons implicated are both judge and party. It is indeed an incongruous situation, since the judge of first instance in criminal military cases is the commander of the Second Mobile Brigade, who is precisely the person responsible for the military operation that gave rise to the incidents forming the subject of the complaint.

...

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

Villegas Téllez and Luis Ernesto Ascanio Ascanio, in violation of article 6, paragraph 1, of the Covenant.

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

9.5 With regard to the authors' allegations of a violation of article 7 of the Covenant, the Committee notes that, in the decision of 27 February 1998 referred to in the preceding paragraphs, the Attorney-General's Office acknowledged that the victims Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Luis Ernesto Ascanio Ascanio and Luis Honorio Quintero Ropero had been subjected to treatment incompatible with article 7. Taking into account the circumstances of the disappearance of the four victims and that the State party has not denied that they were subjected to treatment incompatible with that article, the Committee concludes that the four victims were the object of a clear violation of article 7 of the Covenant.

...

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

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

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Notes

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2/ On 25 January, 2 February and 10 February 1993, respectively.

...

4/ See the Views adopted in cases Nos. 563/1993 (*Nydia Bautista de Arellana v. Colombia*), on 27 October 1995, para. 8.2, and 612/1995 (*Arhuacos v. Colombia*), 29 July 1997, para. 8.2.

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EFFECTIVE REMEDIES - COMPENSATION

- *Pezoldova v. The Czech Republic* (757/1997), ICCPR, A/58/40 vol. II (25 October 2002) 25 (CCPR/C/76/D/757/1997) at paras. 2.1-2.7, 7.1-7.3, 11.2-11.6, 12.1, 12.2 and Individual Opinion by Justice Prafullachandra Natwarlal Bhagwati (concurring), 39.

...

2.1 Mrs. Pezoldova was born on 1 October 1947 in Vienna as the daughter and lawful heiress of Dr. Jindrich Schwarzenberg. The author states that the Nazi German Government had confiscated all of her family's properties in Austria, Germany, and Czechoslovakia, including an estate in Czechoslovakia known as "the Stekl" in 1940. She states that the property was confiscated because her adoptive grandfather Dr. Adolph Schwarzenberg was an opponent of Nazi policies. He left Czechoslovakia in September 1939 and died in Italy in 1950. The author's father, Jindrich, was arrested by the Germans in 1943 and imprisoned in Buchenwald from where he was released in 1944. He went into exile in the United States and did not return to Czechoslovakia after the war.

2.2 After the Second World War, the family properties were placed under National Administration by the Czechoslovak Government in 1945. Pursuant to the Decrees issued by the Czechoslovak President Edward Benes, No. 12 of 21 June 1945 and No. 108 of 25 October 1945, houses and agricultural property of persons of German and Hungarian ethnic origin were confiscated...

2.3 On 13 August 1947, a general confiscation law No. 142/1947 was enacted, allowing the Government to nationalize, in return for compensation, agricultural land over 50 hectares and industrial enterprises employing more than 200 workers. This law was, however, not applied to the Schwarzenberg estate because on the same day a *lex specialis*, Law No. 143/1947 (the so-called "Lex Schwarzenberg"), was promulgated, providing for the transfer of ownership of the Schwarzenberg properties to the State without compensation, notwithstanding the fact that the properties had already been confiscated pursuant to Benes' Decrees 12 and 108.2/ The author contends that Law No. 143/1947 was unconstitutional, discriminatory and arbitrary, perpetuating and formalizing the earlier persecution of the Schwarzenberg family by the Nazis. According to the author, the Law did not automatically affect the previous confiscation under the Benes' Decrees. However, on 30 January 1948, the confiscation of the Schwarzenberg agricultural lands under Decrees Nos. 12 and 108 was revoked. Schwarzenberg's representative was informed by letter of 12 February 1948, and the parties were given the possibility to appeal within 15 days. The author submits therefore that the revocation only took effect after 27 February 1948 (two days after the qualifying date 25 February 1948 for restitution under law 229/1991).

2.4 According to the author, the transfer of the property was not automatic upon the coming into force of Law No. 143/1947, but subject to the intabulation (writing into the register) in the public register of the transfer of the relevant rights of ownership. In this context, the

author states that National Administration (see paragraph 2.2) remained in force until June 1948, and that intabulation of the properties by land offices and Courts shows that, at the time, Law No. 143/1947 was not considered as having immediately transferred title.

2.5 Following the collapse of communist administration in 1989, several restitution laws were enacted. Pursuant to Law No. 229/1991,3/ the author applied for restitution to the regional land authorities, but her applications for restitution were rejected by decisions of 14 February, 20 May and 19 July 1994.

2.6 The Prague City Court, by decisions of 27 June 1994 4/ and 28 February 1995,5/ refused the author's appeal and decided that the ownership of the properties had been lawfully and automatically transferred to the State by operation of Law No. 143/1947, on 13 August 1947. Since according to restitution Law No. 229/1991 the qualifying period for claims of restitution started on 25 February 1948, the Prague City Court decided that the author was not entitled to claim restitution.6/ The Court refused the author's request to suspend the proceedings in order to request the Constitutional Court to rule on the alleged unconstitutionality and invalidity of Law No. 143/1947.

2.7 On 9 March 1995 the author's application before the Constitutional Court concerning the City Court's decision of 27 June 1994 was rejected. The Court upheld the City Court's decision that ownership had been transferred to the State automatically by operation of Law No. 143/1947 and refused to consider whether Law No. 143/1947 was unconstitutional and void. The author did not appeal the City Court's decision of 28 February 1995 to the Constitutional Court, as it would have been futile in light of the outcome of the first appeal.
...
7.1 By submission of 23 March 2002, the author refers to the Committee's Views in case No. 774/1997 (*Brok v. The Czech Republic*), and, with respect to the issue of equal access, within the limits of the admissibility granted for issues under articles 2 and 26 of the Covenant, alleges that the Ministry of Agriculture and various State archives, until the year 2001, consistently denied to the author and to all land authorities access to the complete file on the confiscation procedures against her grandfather Dr. Adolph Schwarzenberg and his appeals lodged in due course...In particular, it is stated that as late as 2001 author's counsel was denied the inspection of the Schwarzenberg file by the director for legal affairs in the Ministry, Dr. Jindrich Urfus, and only when the author had found other relevant documents in another archive, was counsel informed by the Ministry, on 11 May 2001, that the file indeed existed and he was allowed to inspect it. Moreover, it is stated that on 5 October 1993 the head of the State archive in Krumlov, Dr. Anna Kubikova, had denied the author the use of the archive in the presence of her assistant Ing. Zaloha, dismissing her with the words "All Czech citizens are entitled to use this archive but you are not entitled to do so." The author complains that such denials of access illustrate the inequality of treatment to which she has been subjected by the Czech authorities since 1992.

7.2 The documents suppressed prove that, in fact, the Schwarzenberg estate was confiscated pursuant to Presidential Decree No. 12/45. The authorities of the State party not only prevented the author from detecting and reporting the complete facts of her case to the land authorities and courts and to meet the deadlines for lodging claims according to laws 87/91 and 243/92, but also wilfully misled all land authorities and the Human Rights Committee.

7.3 On 29 November 2001, the Regional Court of Ceske Budejovice (15 Co 633/2001-115) as court of appeal confirmed that the Schwarzenberg estate was indeed confiscated pursuant to Section 1, par. 1, lit (a) of Decree No. 12/45, thus underlining the inapplicability of Law 143/47. However, the Court granted no redress to the author, because according to the author, there was no remedy available for anybody deemed to be of German or Hungarian stock.

...

11.2 The question before the Committee is whether the author was excluded from access to an effective remedy in a discriminatory manner. According to article 26 of the Covenant, all persons are equal before the law and every person has the right to equal protection of the law.

11.3 The Committee notes the statement of the author that the essence of her complaint is that the Czech authorities have violated her right to equal treatment by arbitrarily denying her right to restitution on the basis of Laws Nos. 229/1991 and 243/1992 with the argument that the properties of her adoptive grandfather were confiscated under Law No. 143/1947 and not under Benes' Decrees Nos. 12 and 108/1945 and therefore the restitution laws of 1991 and 1992 would not apply. The Committee notes further the author's argument that the State party constantly, until the year 2001, denied her access to the relevant files and archives, so that only then could documents be presented that would prove that, in fact, the confiscation occurred on the basis of the Benes' Decrees of 1945 and not of Law No. 143/1947, with the consequence that the author would be entitled to restitution under the laws of 1991 and 1992.

11.4 The Committee recalls its jurisprudence that the interpretation and application of domestic law is essentially a matter for the courts and authorities of the State party concerned. However, in pursuing a claim under domestic law, the individual must have equal access to remedies, which includes the opportunity to ascertain and present the true facts, without which the courts would be misled. The Committee notes that the State party has not addressed the allegation of the author that she was denied access to documents which were crucial for the correct decision of her case. In the absence of any explanation by the State party, due weight must be given to the author's allegations.

11.5 In this context, the Committee also notes that by decision of 29 November 2001, the Regional Court of Ceske Budejovice recognized that the taking of Dr. Adolph Schwarzenberg's property had been effected pursuant to Benes' Decree 12/1945. The Committee further notes that on 30 January 1948 the confiscation of the Schwarzenberg agricultural lands under Benes' Decrees Nos. 12 and 108/1945 was revoked, apparently in

order to give way for the application of Law 143/1947. The point in time when the revocation became effective seems not to have been clarified, because the courts proceeded from the premise that Law No. 143 was the only applicable legal basis.

11.6 It is not the task of the Committee but of the courts of the State party to decide on questions of Czech Law. The Committee finds, however, that the author was repeatedly discriminated against in being denied access to relevant documents which could have proved her restitution claims. The Committee is, therefore, of the view that the author's rights under article 26 in conjunction with article 2 of the Covenant were violated.

12.1 The Human Rights Committee...is of the view that the facts before it reveal a violation of article 26, in conjunction with article 2 of the Covenant.

12.2 In accordance with article 2, paragraph 3 (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including an opportunity to file a new claim for restitution or compensation. The State party should review its legislation and administrative practices to ensure that all persons enjoy both equality before the law as well as the equal protection of the law.

...

Individual Opinion by Justice Prafullachandra Natwarlal Bhagwati (concurring)

I agree with the Committee's conclusion that the facts before it reveal a violation of articles 26 and 2 of the Covenant. However, I am persuaded that there is also a violation of article 14, paragraph 1, of the Covenant, which stipulates that all persons shall be equal before the courts and tribunals and be entitled to a fair and public hearing of their rights and obligations in a suit at law. As a prerequisite to have a fair and meaningful hearing of a claim, a person should be afforded full and equal access to public sources of information, including land registries and archives, so as to obtain the elements necessary to establish a claim. The author has demonstrated that she was denied such equal access, and the State party has failed to explain or refute the author's allegations. Moreover, the protracted legal proceedings in this case, now lasting over 10 years, have not yet been completed. In the context of this particular case and in the light of previous Czech restitution cases already adjudicated by the Committee, the apparent reluctance of the Czech authorities and of the Czech courts to process restitution claims fairly and expeditiously also entails a violation of the spirit, if not the letter of article 14. It should also be remembered that, subsequent to the entry into force of the Optional Protocol for the Czech Republic, the State party has continued to apply Law No. 143/1947 (the "law Schwarzenberg") which targeted exclusively the property of the author's family. Such ad hominem legislation is incompatible with the Covenant, as a general denial of the right to equality. In the light of the above, I believe that the appropriate remedy should have been restitution and not just the opportunity of resubmitting a claim to the Czech courts.

EFFECTIVE REMEDIES - COMPENSATION

In 1999 the Committee had declared this communication admissible, insofar as it might raise issues under articles 26 and 2 of the Covenant. I do not think that this necessarily precluded the Committee from making a finding of a violation of article 14, since the State party was aware of all elements of the communication and could have addressed the article 14 issues raised by the author. Of course, the Committee could have revised its admissibility decision so as to include the claims under article 14 of the Covenant, and requested relevant observations from the State party. This, however, would have further delayed disposition of a case which has been before the Courts of the State party since 1992 and before the Committee since 1997.

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Notes

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2/ The law reads:

"1 (1) The ownership of the property of the so-called primogeniture branch of the Schwarzenberg family in Hluboká nad Vlatavou - as far as it is situated in the Czechoslovak Republic - is transferred by law to the county of Bohemia ...

"4 The annexation of the property rights as well as all other rights according to paragraph 1 in favour of the county of Bohemia will be dealt with by the courts and offices, which keep public records of immobile property or other rights, and that following an application by the National Committee in Prague.

"5 (1) The property is transferred into the ownership of the county of Bohemia without compensation for the former owners …"

3/ Act No. 229/1991 enacted by the Federal Assembly of the Czech and Slovak Federal Republic came into force on 24 June 1991. The purpose of this law was "to alleviate the consequences of some property injuries suffered by the owners of agrarian and forest property in the period from 1948 to 1989". According to the Act persons who are citizens of the Czech and Slovak Federal Republic who reside permanently on its territory and whose land and buildings and structures belonging to their original farmstead devolved to the State or other legal entities between 25 February 1948 and 1 January 1990 are entitled to restitution of this former property *inter alia* if it devolved to the State by dispossession without compensation under Law No. 142/1947, and in general by expropriation without compensation. By judgement of 13 December 1995 the Constitutional Court - held that the requirement of permanent residence in Act No. 229/1991 was unconstitutional.

4/ Concerning the "Stekl" property.

5/ Concerning properties in Krumlov and Klatovy.

6/ The Prague City Court decided that the author was not an "entitled person" under section 4 (1) of Act No. 229/1991 on the ground that the transfer of the Schwarzenberg property to Czechoslovakia occurred immediately upon the promulgation of Act No. 143/1947 on 13 August 1947, before the qualifying date of 25 February 1948 prescribed by section 4 (1) of Act no. 229/1991. However, before the judgement by the Prague City Court, the interpretation had been that the material date was the date of intabulation of the property, which in the instant case occurred after 25 February 1948. In this context, the author states that the Constitutional Court, by judgement of 14 June 1995, concerning Act No. 142/1947 recognized that until 1 January 1951 intabulation had been necessary for the transfer of property.

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For dissenting opinion in this context, see Pezoldova v. Czech Republic (757/1997), ICCPR, A/58/40 vol. II (25 October 2002) 25 (CCPR/C/76/D/757/1997) at Individual Opinion by Mr. Nisuke Ando, 38.

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

...

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

8.3 As to the author's further claim of a violation of article 9, paragraph 4, related to this period of detention, the Committee...observes that the court review available to the author was confined purely to a formal assessment of the question whether the person in question

was a "non-citizen" without an entry permit. The Committee observes that there was no discretion for a court, as indeed held by the Full Court itself in its judgement of 15 June 1994, to review the author's detention in substantive terms for its continued justification. The Committee considers that an inability judicially to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4.

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

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

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

EFFECTIVE REMEDIES - COMPENSATION

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

_____

Notes

...

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

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

_____

See also:

- *Baban et al. v. Australia* (1014/2001), ICCPR, A/58/40 vol. II (6 August 2003) 331 (CCPR/C/78/D/1014/2001) at paras. 7.2, 8 and 9.

- *Zheludkov v. Ukraine* (726/1996), ICCPR, A/58/40 vol. II (29 October 2002) 12 (CCPR/C/76/D/726/1996) at paras. 2, 8.2-8.4, 9 and 10.

...

2. The author states that her son was arrested on 4 September 1992 and was charged, alongside two other men, with the rape of a minor, a 13-year-old girl, H.K. The rape was alleged to have occurred on 23 August 1992. On 28 March 1994, the author's son was convicted by the Ordzhonikidzevsky District Court (Mariupol) and sentenced to seven years' imprisonment. His appeal to the Donetsk Regional Court was dismissed on 6 May 1994. His subsequent appeal to the Supreme Court of Ukraine was dismissed on 28 June 1995.

...

8.2 The Committee must decide whether the State party violated Mr. Zheludkov's rights under articles 9, paragraphs 2 and 3, and article 10, paragraph 1 of the Covenant. The Committee notes the author's claim that her son was held for more than 50 days without being informed of the charges against him and that he was not brought before a competent judicial authority during this period, and further, that medical attention was insufficient, and that he was allegedly denied access to the information in his medical records.

8.3 The Committee notes...the author's allegations that her son was not informed of the precise charges against him until he had been in detention for 50 days and that he was not brought before a judge or any other official empowered by law to exercise judicial functions during this period. The State party has not contested that Mr. Zheludkov was not brought

promptly before a judge after he was arrested on a criminal charge, but has stated that he was placed in pre-trial detention by decision of the procurator (*prokuror*). The State party has not provided sufficient information, showing that the procurator has the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3 of the Covenant. The Committee therefore concludes that the State party violated the author's rights under paragraph 3 of article 9 of the Covenant.

8.4 With regard to the alleged violation of article 10, paragraph 1, in respect of the alleged victim's treatment in detention, in particular as to his medical treatment and access to medical records, the Committee takes note of the State party's reply, according to which Mr. Zheludkov received medical care and underwent examinations and hospitalization during his stay in the centre and the prison, and that a medical certificate based on the medical records was issued, upon request, on 2 March 1994. However, these statements do not contradict the argument presented on behalf of the alleged victim that despite repeated requests, direct access to the actual medical records was denied by the State party's authorities. The Committee is not in a position to determine what the relevance of the medical records in question would be for the assessment of the conditions of Mr. Zheludkov's detention, including medical treatment afforded to him. In the absence of any explanation for such denial, the Committee is of the view that due weight must be given to the author's allegations. Therefore, in the circumstances of the present communication, the Committee concludes that the consistent and unexplained denial of access to medical records to Mr. Zheludkov must be taken as sufficient ground for finding a violation of article 10, paragraph 1, of the Covenant.

9. The Human Rights Committee...is of the view that the facts before it disclose a violation of paragraph 3 of article 9, and paragraph 1 of article 10, of the International Covenant on Civil and Political Rights.

10. The Committee is of the view that Mr. Zheludkov is entitled, under article 2, paragraph 3 (a) of the Covenant, to an effective remedy, entailing compensation...

- *Ruiz Agudo v. Spain* (864/1999), ICCPR, A/58/40 vol. II (31 October 2002) 134 (CCPR/C/76/D/864/1999) at paras. 2.1-2.3, 9.1, 10 and 11.

...
2.1 From 1971 to 1983, Alfonso Ruiz Agudo held the post of Director of the Caja Rural Provincial in the small town of Cehegín (Murcia), where he was responsible for customer relations. In the period from 1981 to 1983, 75 fictitious loan policies, which duplicated an equal number of real loans, were transacted in the office of the Cehegín bank. In other words,

there were bank customers who signed blank loan forms that were later completed in duplicate.

2.2 The Caja Rural Provincial was taken over by the Caja de Ahorros de Murcia, and both banks appeared in the criminal proceedings opened against Alfonso Ruiz Agudo and others as private complainant or injured party. Alfonso Ruiz Agudo's counsel immediately asked for the original files of the accounts, which the author kept at the Cehegín bank and where, according to the complainant, the money from the fictitious loans was deposited, to be produced at the proceedings. According to the author of the communication, these files would have shown that the money went not to Alfonso Ruiz Agudo but to other persons. The bank submitted a computerized version of the files.

2.3 Counsel maintains that, although proceedings were initiated against his client in 1983, no judgement was handed down until 1994. The judgement was eventually passed by the judge of the No. 1 Criminal Court of Murcia, sentencing the author to a custodial penalty of two years, four months and one day of ordinary imprisonment with a fine for an offence of fraud, and to a further identical penalty for the offence of falsifying a commercial document.

...

9.1 ...The Committee notes that the State party has expressly confirmed that the trial of Alfonso Ruiz Agudo was excessively long, and that this was stated in the domestic legal remedies; however, the State party has given no explanation to justify such a delay. The Committee recalls its position as reflected in its General Comment on article 14, which provides that all stages of judicial proceedings must take place without undue delay and that, to make this right effective, a procedure must be available to ensure that this applies in all instances. The Committee considers that, in the present case, a delay of 11 years in the judicial process at first instance and of more than 13 years until the rejection of the appeal violates the author's right under article 14, paragraph 3 (c), of the Covenant, to be tried without undue delay. 2/ The Committee further considers that the mere possibility of obtaining compensation after, and independently of, a trial that was unduly prolonged does not constitute an effective remedy.

...

10. The Human Rights Committee...is of the view that the facts before it constitute violations by Spain of article 14, paragraph 3 (c), of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party has the obligation to provide an effective remedy, including compensation for the excessive length of the trial. The State party should adopt effective measures to prevent proceedings from being unduly prolonged and to ensure that individuals are not obliged to initiate a new judicial action to claim compensation.

Notes

...

2/ See, for example, communications No. 614/1995, *Samuel Thomas v. Jamaica*; No. 676/1996, *Yasseen and Thomas v. Republic of Guyana*; and No. 526/1993, *Hill and Hill v. Spain*.

_____

- *Bondarenko v. Belarus* (886/1999), ICCPR, A/58/40 vol. II (3 April 2003) 161 (CCPR/C/77/D/886/1999) at paras. 2.1, 10.2 and 12.

...

2.1 Mr. Bondarenko was accused of murder and several other crimes, found guilty as charged and sentenced by the Minsk Regional Court on 22 June 1998 to death by firing squad. The decision was confirmed by the Supreme Court on 21 August 1998...

...

10.2 The Committee notes that the author's claim that her family was informed of neither the date, nor the hour, nor the place of her son's execution, nor of the exact place of her son's subsequent burial, has remained unchallenged. In the absence of any challenge to this claim by the State party, and any other pertinent information from the State party on the practice of execution of capital sentences, due weight must be given to the author's allegation. The Committee understands the continued anguish and mental stress caused to the author, as the mother of a condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his gravesite. The Committee considers that complete secrecy surrounding the date of execution, and the place of burial and the refusal to hand over the body for burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee considers that the authorities' initial failure to notify the author of the scheduled date for the execution of her son, and their subsequent persistent failure to notify her of the location of her son's grave amounts to inhuman treatment of the author, in violation of article 7 of the Covenant.

...

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including information on the location where her son is buried, and compensation for the anguish suffered. The State party is also under an obligation to prevent similar violations in the future.

See also:

- *Lyashkevich v. Belarus* (887/1999), ICCPR, A/58/40 vol. II (3 April 2003) 169 (CCPR/C/77/D/887/1999) at paras. 2.1, 9.2 and 11.

EFFECTIVE REMEDIES - COMPENSATION

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

...
2.2 After detention for over one year without any production before a court or a judicial officer, the author applied for release. On 22 September 1988, the High Court of Zambia decided that there were no reasons to keep him in detention. Nevertheless, the author was not released until December 1988, when the President revoked his detention. According to the author, the maximum prison sentence for the offence he was charged with was 6 months.
...
7.2 With regard to the author's allegation that he was subjected to arbitrary detention, the Committee has noted that the author was detained for a period of 22 months, dating from 7 February 1987, a claim that has not been contested by the State party. Moreover, the State party has not sought to justify this lengthy detention before the Committee. Therefore, the detention was, in the Committee's view, arbitrary and constituted a violation of article 9, paragraph 1, read together with article 2, paragraph 3.

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

8. The Human Rights Committee...is of the view that the facts before it, disclose violations of article 9, paragraph 1, read together with article 2, paragraph 3, and of article 9, paragraph 5, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. In view of the fact that the State party has committed itself to pay compensation, the Committee urges the State party to grant as soon as possible compensation to the author for the period that he was arbitrarily detained from 7 February 1987 to December 1988. The State party is under an obligation to ensure that similar violations do not occur in the future.

- *Kang v. Republic of Korea* (878/1999), ICCPR, A/58/40 vol. II (15 July 2003) 152 (CCPR/C/78/D/878/1999) at paras. 2.1, 2.3, 2.5, 7.2, 7.3, 8 and 9.

...
2.1 The author, along with other acquaintances, was an opponent of the State party's

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

...

2.3 In January 1986, the author was tried before the 10th Panel of the Seoul Criminal District Court for alleged violations of the National Security Law, as part of a spy ring case in which 15 persons were convicted in 1985 and 1986.2/ At trial, he contended that his confessions had been obtained by torture. On 20 January 1986, the court relied on the author's confessions, convicting and sentencing him to life imprisonment. The court found that he had "become a member of an anti-State organization", and that dialogue and meeting with other regime critics constituted a "crime of praising, encouraging or siding with the anti-State organization" and "crime of meeting with a member of the anti-State organization". The distribution of publications was said to amount to "espionage".

...

2.5 After his conviction, the author was held in solitary confinement. He was classified as a communist "confident criminal"4/ under the "ideology conversion system", a system given legal foundation by the 1980 Penal Administration Law and designed to induce change to a prisoner's political opinion by the provision of favourable benefits and treatment in prison. Due to this classification, he was not eligible for more favourable treatment. On 14 March 1991, the author's detention regime was reclassified by the Regulation on the Classification and Treatment of Convicts ('the 1991 Regulation') to "those who have not shown signs of repentance after having committed crimes aimed at destroying the free and democratic basic order by denying it". Moreover, having been convicted under the National Security Law, the author was subject to an especially rigorous parole process.5/

...

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

7.3 As to the author's remaining claims under article 10, the Committee considers that his detention in solitary confinement for a period as long as 13 years, of which more than eight were after the entry into force of the Optional Protocol, is a measure of such gravity, and of

such fundamental impact on the individual in question, that it requires the most serious and detailed justification. The Committee considers that confinement for such a lengthy period, apparently on the sole basis of his presumed political opinion, fails to meet that such particularly high burden of justification, and constitutes at once a violation of article 10, paragraph 1, protecting the inherent dignity of the author, and of paragraph 3, requiring that the essential aim of detention be reformation and social rehabilitation.

...

8. The Human Rights Committee...is of the view that the facts before it disclose violations of article 10, paragraphs 1 and 3, and articles 18, paragraph 1, and 19, paragraph 1, in conjunction with 26, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. The Committee notes that, although the author has been released, the State party is under an obligation to provide the author with compensation commensurate with the gravity of the breaches in question. The State party is under an obligation to avoid similar violations in the future.

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Notes

...

2/ In 1994, the Working Group on Arbitrary Detention of the Commission on Human Rights found, in the absence of a response from the State party, the imprisonment of two of these other individuals to be of arbitrary character. (E/CN.4/1994/27, at 95 *et seq*.)

...

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

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

...

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

_____

- *Sarma v. Sri Lanka* (950/2000), ICCPR, A/58/40 vol. II (16 July 2003) 248 (CCPR/C/78/D/950/2000) at paras. 2.1-2.4, 10 and 11.

...

2.1 The author alleges that, on 23 June 1990, at about 8.30 a.m., during a military operation,

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

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

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

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

...

10. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 7 and 9 of the International Covenant on Civil and Political Rights with regard to the author's son and article 7 of the International Covenant on Civil and Political Rights with regard to the author and his wife.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author's son, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the violations suffered by the author's son, the author and his family...

EFFECTIVE REMEDIES - COMPENSATION

- *Adrien Mundyo Buyso, Thomas Osthudi Wongodi, René Sibu Matubuka et al. v. Democratic Republic of the Congo* (933/2000), ICCPR, A/58/40 vol. II (31 July 2003) 224 (CCPR/C/78/D/933/2000) at paras. 2.1, 2.2, 6.1 and 6.2.

...

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

2.2 Contesting the legality of these dismissals, the authors filed an appeal, following notification and within the three-month period established by law, with the President of the Republic to obtain the withdrawal of the above-mentioned decree. Having received no response, in accordance with Ordinance No. 82/017 of 31 March 1982 on procedure before the Supreme Court of Justice, the 68 judges all referred their applications to the Supreme Court during the period from April to December 1999. According to the information provided by the authors, it appears, first of all, that the Attorney-General of the Republic, who was required to give his views within one month, deliberately failed to transmit the report1/ by the Public Prosecutor's Office until 19 September 2000 in order to block the appeal. Moreover the Supreme Court, by a ruling of 26 September 2001, decided that Presidential Decree No. 144 was an act of Government inasmuch as it came within the context of government policy aimed at raising moral standards in the judiciary and improving the functioning of one of the three powers of the State. The Supreme Court consequently decided that the actions taken by the President of the Republic, as the political authority, to execute national policy escaped the control of the administrative court and thus declared inadmissible the applications by the authors.

...

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

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

Notes

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

...

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

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

See also:

- *Pastukhov v. Belarus* (814/1998), ICCPR, A/58/40 vol. II (5 August 2003) 69 (CCPR/C/78/D/814/1998) at paras. 7.3 and 9.

- *Jan Filipovich v. Lithuania* (875/1999), ICCPR, A/58/40 vol. II (4 August 2003) 145 (CCPR/C/78/D/875/1999) at paras. 7.1 and 9.

...

7.1 As to the author's allegations that the trial went on for too long, since the investigation began in September 1991 and the court of first instance convicted him on 1 January 1996, the Committee takes note of the State party's arguments that the duration of the proceedings should be calculated as from the entry into force of the Covenant and the Protocol for Lithuania on 20 February 1992. The Committee nevertheless notes that, although the investigation began before the entry into force, the proceedings continued until 1996. The Committee also takes note of the fact that the State party has not given any explanation of the reason why four years and four months elapsed between the start of the investigation and

the conviction in first instance. Considering that the investigation ended, according to the information available to the Committee, following the report by the forensic medical commission and that the case was not so complex as to justify a delay of four years and four months, or three years and 2 months after the preparation of the forensic medical report, the Committee concludes that there was a violation of article 14, paragraph 3 (c).

...

8. The Human Rights Committee...is of the view that the facts as found by the Committee constitutes a violation of article 14, paragraph 3 (c), of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. The State party is also under an obligation to ensure that similar violations do not occur in future.

Notes

1/ Article 104 of the Criminal Code.

...

- *Cabal and Pasini v. Australia* (1020/2002), ICCPR, A/58/40 vol. II (7 August 2003) 346 (CCPR/C/78/D/1020/2002) at paras. 8.3, 9 and 10.

...

8.3 As to the issues raised by the authors' detention for an hour in a triangular "cage", the Committee notes the State party's justification that this holding cell was the only one capable of holding two persons at the time, and that the authors requested to be placed together. In the Committee's view, a failure to have a cell sufficiently adequate to hold two persons is insufficient explanation for requiring two prisoners to alternately stand and sit, even if only for an hour, within such enclosure. In the circumstances, the Committee considers this incident to disclose a violation of article 10, paragraph 1, of the Covenant.

9 The Human Rights Committee...is of the view that the facts as found by the Committee reveal a violation by Australia of article 10, paragraph 1, of the International Covenant on Civil and Political Rights.

10. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee concludes that the authors are entitled to an effective remedy of compensation for both authors. The State party is under an obligation to ensure that similar violations of the Covenant do not occur in the future.

EFFECTIVE REMEDIES - COMPENSATION

- *Bakhtiyari v. Australia* (1069/2002), ICCPR, A/59/40 vol. II (29 October 2003) 301 (CCPR/C/79/D/1069/2002) at paras. 9.3, 9.5, 10 and 11.

...

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

...

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

...

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

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. As to the violation of article 9, paragraphs 1 and 4, continuing up to the present time with respect to Mrs Bakhtiyari, the State party should release her and pay her appropriate compensation. So far as concerns the violations of articles 9 and 24 suffered in the past by the children, which came to an end with their release on 25 August 2003, the State party is under an obligation to pay appropriate compensation to the children...

EFFECTIVE REMEDIES - COMPENSATION

- *Wilson v. The Philippines* (868/1999), ICCPR, A/59/40 vol. II (30 October 2003) 48 (CCPR/C/79/D/868/1999) at paras. 2.1, 2.3, 2.4-2.10, 7.2-7.5, 8 and 9.

...

2.1 On 16 September 1996, the author was forcibly arrested without warrant as a result of a complaint of rape filed by the biological father of the author's twelve year old step-daughter and transferred to a police station. He was not advised of his rights, and, not speaking the local language, was unaware as to the reasons for what was occurring. At the police station, he was held in a 4 x 4 ft cage with three others, and charged on the second day with attempted rape of his stepdaughter. He was then transferred to Valenzuela municipal jail, where the charge was changed to rape. There he was beaten and ill-treated in a "concrete coffin". This 16 x 16 ft cell held 40 prisoners with a 6 inch air gap some 10 ft from the floor. One inmate was shot by a drunken guard, and the author had a gun placed to his head on several occasions by guards. The bottoms of his feet were struck by a guard's baton, and other inmates struck him on the guards' orders. He was ordered to strike other prisoners and was beaten when he refused to do so. He was also constantly subjected to extortion by other inmates with the acquiescence and in some instances on the direct instruction of the prison authorities, and beaten when he refused to pay or perform the directed act(s). There was no running water, insufficient sanitary conditions (a single non-flush bowl in the cell for all detainees), no visiting facility, and severe food rationing. Nor was he segregated from convicted prisoners.

...

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

2.4 The author was then placed on death row in Muntinlupa prison, where 1,000 death row prisoners were kept in three dormitories. Foreign inmates were continually extorted by other inmates with the acquiescence, and sometimes at the direction of, prison authorities. The author refers to media reports that the prison was controlled by gangs and corrupt officials, at whose mercy the author remained throughout his confinement on death row. Several high-ranking prison officials were sentenced for extortion of prisoners, and large amounts of weapons were found in cells. The author was pressured and tortured to provide gangs and officials with money. There were no guards in the dormitory or cells, which contained over 200 inmates and remained unlocked at all times. His money and personal effects had been removed from him en route to the prison, and for three weeks he had no visitors, and therefore no basic necessities such as soap or bedding. Food comprised unwashed rice and other inappropriate substances. Sanitation consisted of two non-flushing toilet bowls in an area which was also a 200-person communal shower.

2.5 The author was forced to pay for the 8 x 8 ft area in which he slept and financially to

support the eight others with him. He was forced to sleep alongside drug-deranged individuals and persons who deliberately and constantly deprived him of sleep. He was forcibly tattooed with a permanent gang mark. Inmates were stretched out on a bench on public display and beaten with wood across the thighs, or otherwise "taught a lesson". The author states he lived in constant fear coming close to death and suicidal depression, watching six inmates walk to their execution while five others died violent deaths. Fearing death after a "brutally unfair and biased" trial, he suffered severe physical and psychological distress and felt "total helplessness and hopelessness". As a result, he is "destroyed both financially and in many ways emotionally".

2.6 On 21 December 1999, i.e. subsequent to the submission of the communication under the Optional Protocol, the Supreme Court, considering the case on automatic review, set aside the conviction, finding it based on allegations "not worthy of credence", and ordered the author's immediate release. The Solicitor-General had filed a brief with the Court recommending acquittal on the basis that material contradictions in witness testimony, as well as the physical evidence to the contrary, justified the conclusion that the author's guilt had not been shown beyond reasonable doubt.

2.7 On 22 December 1999, on his release from death row, the Bureau of Immigration lifted a Hold Departure Order, on condition that the author paid fees and fines amounting to P22,740 for overstaying his tourist visa. The order covered the entirety of his detention, and if he had not paid, he would not have been allowed to leave the country for the United Kingdom. The ruling was confirmed after an appeal by the British Ambassador to the Philippines, and subsequent efforts directed from the United Kingdom to the Bureau of Immigration and the Supreme Court in order to recover these fees proved similarly unavailing.

2.8 Upon his return to the United Kingdom, the author sought compensation pursuant to Philippine Republic Act 7309. The Act creates a Board of Claims under the Department of Justice for victims of unjust imprisonment or detention, compensation being calculable by month. Upon inquiry, he was informed on 21 February 2001 that on 1 January 2001, he had been awarded P14,000, but that he would be required to claim it in person in the Philippines. On 12 March 2001, he wrote to the Board of Claims seeking reconsideration of quantum, on the basis that according to the legal scale 40 months in prison should result in a sum of P40,000. On 23 April 2001, he was informed that the amount claimed was “subject to availability of funds” and that the person liable for the author's misfortune was the complainant accusing him of rape. No further clarification on the discrepancy of the award was received.

2.9 On 9 August 2001, after applying for a tourist visa to visit his family, the author was informed that as a result of having overstayed his tourist visa and having been convicted of

a crime involving moral turpitude, he had been placed on a Bureau of Immigration watchlist. When he inquired why the conviction should have such effect after it had been quashed, he was informed that to secure travel certification he would have to attend the Bureau of Immigration in the Philippines itself.

2.10 The author also sought to lodge a civil suit for reparation, on the basis that the administrative remedy for compensation outline above would not take into account the extent of physical and psychological suffering involved. He was not eligible for legal aid in the Philippines, and from outside the country was unable to secure pro bono legal assistance.
...
7.2 As to the author's claims relating to the imposition of the death penalty, including passing of sentence of death for an offence that under the law of the State party, enacted subsequent to capital punishment having once been removed from the criminal code, carried mandatory capital punishment, without allowing the sentencing court to pay due regard to the specific circumstances of the particular offence and offender, the Committee observes that the author is no longer subject to capital punishment, as his conviction and hence the imposition of capital punishment was annulled by the Supreme Court in late December 1999, after the author had spent almost 15 months in imprisonment following sentence of death. In these circumstances, the Committee considers it appropriate to address the remaining issues related to capital punishment in the context of the author's claims under article 7 of the Covenant instead of separately determining them under article 6.

7.3 As to the author's claims under articles 7 and 10 regarding his treatment in detention and the conditions of detention, both before and after conviction, the Committee observes that the State party, rather than responding to the specific allegations made, has indicated that they require further investigation. In the circumstances, therefore, the Committee is obliged to give due weight to the author's allegations, which are detailed and particularized. The Committee considers that the conditions of detention described, as well as the violent and abusive behaviour both of certain prison guards and of other inmates, as apparently acquiesced in by the prison authorities, are seriously in violation of the author's right, as a prisoner, to be treated with humanity and in with respect for his inherent dignity, in violation of article 10, paragraph 1. As at least some of the acts of violence against the author were committed either by the prison guards, upon their instigation or with their acquiescence, there was also a violation of article 7. There is also a specific violation of article 10, paragraph 2, arising from the failure to segregate the author, pre-trial, from convicted prisoners.

7.4 As to the claims concerning the author's mental suffering and anguish as a consequence of being sentenced to death, the Committee observes that the authors' mental condition was exacerbated by his treatment in, as well as the conditions of, his detention, and resulted in documented long-term psychological damage to him. In view of these aggravating factors constituting further compelling circumstances beyond the mere length of time spent by the

author in imprisonment under a sentence of death,13/ the Committee concludes that the author's suffering under a sentence of death amounted to an additional violation of article 7. None of these violations were remedied by the Supreme Court's decision to annul the author's conviction and death sentence after he had spent almost 15 months of imprisonment under a sentence of death.

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

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

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. In respect of the violations of article 9 the State party should compensate the author. As to the violations of articles 7 and 10 suffered while in detention, including subsequent to sentence of death, the Committee observes that the compensation provided by the State party under its domestic law was not directed at these violations, and that compensation due to the author should take due account both of the seriousness of the violations and the damage to the author caused. In this context, the Committee recalls the duty upon the State party to undertake a comprehensive and impartial investigation of the issues raised in the course of the author's detention, and to draw the appropriate penal and disciplinary consequences for the individuals found responsible. As to the imposition of immigration fees and visa exclusion, the Committee takes the view that in order to remedy the violations of the Covenant the State party should refund to the author the moneys claimed from him. All monetary compensation thus due to the author by the State party should be made available for payment to the author at the venue of his choice, be it within the State party's territory or abroad. The State party is also under an obligation to avoid similar violations in the future.

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Notes

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13/ *Johnson v. Jamaica* case No. 588/1994, Views adopted on 22 March 1996; *Francis v. Jamaica* case No. 606/1994, Views adopted on 25 June 1995.

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EFFECTIVE REMEDIES - COMPENSATION

- *Martinez Muñoz v. Spain* (1006/2001), ICCPR, A/59/40 vol. II (30 October 2003) 198 (CCPR/C/79/D/1006/2001) at paras. 7.1 and 7.2.

  ...
  7.1 The author claims that there were undue delays in his trial, since almost five years elapsed between the date of the incident and the hearing. The Committee notes that the circumstances of the case involved a flagrant offence, and that the evidence required little police investigation and, as the author points out, the low level of complexity of the proceedings did not justify the delay. The Committee recalls its constant jurisprudence that exceptional reasons must be shown to justify delays - in this case, five years - until trial. In the absence of any justification advanced by the State party for the delay, the Committee concludes that there has been a violation of article 14, paragraph 3 (c), of the Covenant.

  7.2 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate compensation. The State party is also under an obligation to take the necessary measures to ensure that similar violations do not occur in the future.
  ...

- *Kurbanova v. Tajikistan* (1096/2002), ICCPR, A/59/40 vol. II (6 November 2003) 354 (CCPR/C/79/D/1096/2002) at paras. 8 and 9.

  ...
  8. The Human Rights Committee...is of the view that the facts before it disclose a violation of the rights of Mr. Kurbanov under article 7, article 9, paragraphs 2 and 3, article 10, article 14, paragraph 1 and paragraph 3 (a) and (g), and of article 6 of the Covenant.

  9. Under article 2, paragraph 3 (a), of the Covenant, the author's son is entitled to an effective remedy entailing compensation and a new trial before an ordinary court and with all the guarantees of article 14, or, should this not be possible, release. The State party is under an obligation to take measures to prevent similar violations in the future.

For dissenting opinions in this context generally, see:

- *Hendricks v. Guyana* (838/1998), ICCPR, A/58/40 vol. II (28 October 2002) 113 (CCPR/C/76/D/838/1998) at Individual Opinion by Mr. Hipólito Solari Yrigoyen.

EFFECTIVE REMEDIES - COMPENSATION

- *Pryce v. Jamaica* (793/1998), ICCPR, A/59/40 vol. II (15 March 2004)10 at paras. 6.2 and 8.

...

6.2 The Committee notes that the author has made specific and detailed allegations concerning his punishment. The State party has not responded to these allegations. The Committee notes that the author was sentenced to six strokes of the tamarind switch and recalls its jurisprudence3/, that, irrespective of the nature of the crime that is to be punished, however brutal it may be, corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant. The Committee finds that the imposition of a sentence of whipping with the tamarind switch on the author constituted a violation of the author's rights under article 7, as did the manner in which the sentence was executed.

...

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. The State party is under an obligation to ensure that similar violations do not occur in the future and to repeal domestic legislative provisions that allow for corporal punishment.

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Notes

...

3/ See *Malcolm Higginson v. Jamaica*, communication No. 792/1998, where the author was subjected to receive 6 strokes of the tamarind switch, and see also *George Osbourne v. Jamaica*, communication No. 759/1997, where the author was sentenced to 15 years' imprisonment with hard labour and was subjected to receive 10 strokes of the tamarind switch.

_____

- *Lobban v. Jamaica* (797/1998), ICCPR, A/59/40 vol. II (16 March 2004) 15 at paras. 8.1-8.3 and 10.

...

8.1 The author has claimed a violation of articles 7 and 10, paragraph 1, on the ground of the conditions of detention to which he was subjected while detained on death row at St. Catherine's District Prison. In substantiation of his claim, the author has invoked reports of several non-governmental organizations. The Committee notes that the author refers to the inhuman and degrading prison conditions in general, such as the complete lack of mattresses and very poor quality of food and drink, the lack of integral sanitation in the cells and open sewers and piles of refuse, as well as the absence of a doctor. In addition, he has made specific allegations, stating that he is detained 23 hours a day in a cell with no mattress, other

bedding or furniture, that his cell has no natural light, that sanitation is inadequate, and that his food is poor. He is not permitted to work or to undertake education. In addition, he claims that there is a general lack of medical assistance, and that from 1996 he suffered from ulcers, gastro-enteritis, and haemorrhoids, for which he received no treatment.

8.2 The Committee notes that with regard to these allegations, the State party has disputed only that there are inadequate medical facilities, that the author received regular medical treatment from 1997 and that now he has a mattress, receives nutritious food, and that the sewage disposal system works satisfactorily. The Committee notes, however, that the author was detained in 1987 and transferred to death row in June 1988, and from there to the General Penitentiary after commutation of his death sentence, and that it does not transpire from the State party's submission that his conditions of detention were compatible with article 10 prior to January 1997. The rest of the author's allegations stand undisputed and, in these circumstances, the Committee finds that article 10, paragraph 1, has been violated. In light of this finding, in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary separately to consider the claims under article 7 of the Covenant.

8.3 The author has claimed a violation of article 9, paragraph 3, of the Covenant, on account of a delay of 11 days between the time of his arrest and the time when he was brought before a judge or judicial officers. After its investigation, the State party did not refute that the author was detained for 11 days, though denying that this delay constitutes a violation of the Covenant. In the absence of any plausible justification for a delay of 11 days between arrest and production of the author before a judge or judicial officer, the Committee finds that this delay constituted a violation of article 9, paragraph 3, of the Covenant.

...

10. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an appropriate remedy, which should include compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

- *Shin v. Republic of Korea* (926/2000), ICCPR, A/59/40 vol. II (16 March 2004) 118 at paras. 2.1, 2.4, 7.2, 8 and 9.

...

2.1 Between July 1986 and 10 August 1987, the author, a professional artist, painted a canvas-mounted picture sized 130 cm by 160 cm. The painting, entitled "Rice Planting (Monaeki)" was subsequently described by the Supreme Court in the following terms:

> "The painting as a whole portrays the Korean peninsula in that its upper right part

> sketches Baek-Doo-San, while its lower part portrays the southern sea with waves. It is divided into lower and upper parts each of which portrays a different scene. The lower part of the painting describes a rice-planting farmer ploughing a field using a bull which tramps down on E. T. [the movie character 'Extraterrestial'], symbolizing foreign power such as the so-called American and Japanese imperialism, Rambo, imported tobacco, Coca Cola, Mad Hunter, Japanese samurai, Japanese singing and dancing girls, the then [United States'] President Ronald Reagan, the then [Japanese] Prime Minister Nakasone, the then President [of the Republic of Korea] Doo Hwan Chun who symbolizes a fascist military power, tanks and nuclear weapons which symbolize the U.S. armed forces, as well as men symbolizing the landed class and comprador capitalist class. The farmer, while ploughing a field, sweeps them out into the southern sea and brings up wire-entanglements of the 38th parallel. The upper part of the painting portrays a peach in a forest of leafy trees in the upper left part of which two pigeons roost affectionately. In the lower right part of the forest is drawn Bak-Doo-San, reputed to be the Sacred Mountain of Rebellion [located in the Democratic People's Republic of Korea (DPRK)], on the left lower part of which flowers are in full blossom and a straw-roofed house as well as a lake is portrayed. Right below the house are shown farmers setting up a feast in celebration of fully-ripened grains and a fruitful year and either sitting around a table or dancing, and children with an insect net leaping about."

The author states that as soon as the picture was completed, it was distributed in various forms and was widely publicized.

...

2.4 On 13 August 1999, the author was convicted and sentenced to probation, with the court ordering confiscation of the picture. On 26 November 1999, the Supreme Court dismissed the author's appeal against conviction, holding simply that "the lower court decision [convicting the author] was reasonable because it followed the previous ruling of the Supreme Court overturning the lower court's original decision". With the conclusion of proceedings against the author, the painting was thus ready for destruction following its earlier seizure.

...

7.2 The Committee observes that the picture painted by the author plainly falls within the scope of the right of freedom of expression protected by article 19, paragraph 2; it recalls that this provision specifically refers to ideas imparted "in the form of art". Even if the infringement of the author's right to freedom of expression, through confiscation of his painting and his conviction for a criminal offence, was in the application of the law, the Committee observes that the State party must demonstrate the necessity of these measures for one of the purposes enumerated in article 19 (3). As a consequence, any restriction on that right must be justified in terms of article 19 (3), i.e. besides being provided by law it also must be necessary for respect of the right or reputations of others, or for the protection of

national security or public order (*ordre public*) or of public health and morals ("the enumerated purposes").

...

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 19, paragraph 2, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation for his conviction, annulment of his conviction, and legal costs. In addition, as the State party has not shown that any infringement on the author's freedom of expression, as expressed through the painting, is justified, it should return the painting to him in its original condition, bearing any necessary expenses incurred thereby. The State party is under an obligation to avoid similar violations in the future.

- *Telitsin v. Russian Federation* (888/1999), ICCPR, A/59/40 vol. II (29 March 2004) 60 at paras. 7.6, 7.7 and 9.

...

7.6 ...[T]he Committee cannot do otherwise than accord due weight to the author's arguments in respect of her son's body as it was handed over to the family, which raise questions about the circumstances of his death. The Committee notes that the authorities of the State party have not carried out a proper investigation into Mr. Telitsin's death, in violation of article 6, paragraph 1, of the Covenant.

7.7 In view of the findings under article 6, paragraph 1, of the Covenant, the Committee finds that there was a violation of article 7, as well as of the provisions of article 10, paragraph 1, of the Covenant.

...

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author, who has lost her son, is entitled to an effective remedy. The Committee invites the State party to take effective measures (a) to conduct an appropriate, thorough and transparent inquiry into the circumstances of the death of Mr. Vladimir Nikolayevich Telitsin; and (b) to grant the author appropriate compensation. The State party is, moreover, under an obligation to take effective measures to ensure that similar violations do not occur again.

EFFECTIVE REMEDIES - COMPENSATION

- *Arutyunyan v. Uzbekistan* (917/2000), ICCPR, A/59/40 vol. II (29 March 2004) 96 at paras. 6.2, 6.3 and 8.

...

6.2 The Committee notes the allegation that Mr. Arutyunyan was kept *incommunicado* for two weeks after his transfer to Tashkent. In substantiation, the author claims that the family tried, unsuccessfully, to obtain information in this regard from the Office of the Attorney-General. In these circumstances, and taking into account the particular nature of the case and the fact that no information was provided by the State party on this issue, the Committee concludes that Mr. Arutyunyan's rights under article 10, paragraph 1, of the Covenant have been violated. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary to separately consider the claims arising under article 7.

6.3 The author alleges that her brother's right to defence was violated, because once counsel of his choice was allowed to represent him, the latter was prevented from seeing him confidentially; counsel was allowed to examine the Tashkent City Court's records only shortly before the hearing in the Supreme Court... In the absence of any pertinent observations from the State party on this claim, the Committee considers that article 14, paragraph 3 (d) has been violated in the instant case.

...

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Arutyunyan with an effective remedy, which could include consideration of a further reduction of his sentence and compensation. The State party is also under an obligation to prevent similar violations in the future.

- *Ahani v. Canada* (1051/2002), ICCPR, A/59/40 vol. II (29 March 2004) 260 at paras. 1.1, 2.1, 2.2, 11 and 12.

1.1 The author of the communication, initially dated 10 January 2002, is Mansour Ahani, a citizen of the Islamic Republic of Iran ("Iran") and born on 31 December 1964. At the time of submission, he was detained in Hamilton Wentworth Detention Centre, Hamilton Ontario, pending conclusion of legal proceedings in the Supreme Court of Canada concerning his deportation. He claims to be a victim of violations by Canada of articles 2, 6, 7, 9, 13 and 14 of the International Covenant on Civil and Political Rights. The author is represented by counsel.

...

2.1 On 14 October 1991, the author arrived in Canada from Iran and claimed protection under the Convention on the Status of Refugees and its Protocol, based on his political

opinion and membership in a particular social group. He contended, on various occasions, (i) that he had been beaten by members of the Islamic Revolutionary Committee in Iran for being intoxicated, (ii) that his return to Iran would endanger his life due to his knowledge of Iranian covert operations and personnel, knowledge which he had acquired as a forced conscript in the foreign assassins branch of the Iranian Foreign Ministry, (iii) that he had been jailed for four years as a result of refusing to carry out a drug raid which was in fact a raid on the home of an Iranian dissident, with women and children, in Pakistan, and (iv) that he had been released after pretending to repent. On 1 April 1992, the Immigration and Refugee Board determined that the author was a Convention refugee based on his political opinion and membership in a particular social group.

2.2 On 17 June 1993, the Solicitor-General of Canada and the Minister of Employment and Immigration, having considered security intelligence reports stating that the author was trained to be an assassin by the Iranian Ministry of Intelligence and Security ("MIS"), both certified, under section 40 (1) of the *Immigration Act* ("the Act"), that they were of the opinion that the author was inadmissible to Canada under section 19 (1) of the Act as there were reasonable grounds to believe that he would engage in terrorism, that he was a member of an organization that would engage in terrorism and that he had engaged in terrorism. On the same date, the certificate was filed with the Federal Court, while the author was served with a copy of the certificate and, pursuant to section 40 (1) (2) (b) of the Act, he was taken into mandatory detention, where he remained until his deportation nine years later.

...

11. The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by Canada of article 9, paragraph 4, and article 13, in conjunction with article 7, of the Covenant. The Committee reiterates its conclusion that the State party breached its obligations under the Optional Protocol by deporting the author before the Committee's determination of his claim.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. In the light of the circumstances of the case, the State party, having failed to determine appropriately whether a substantial risk of torture existed such as to foreclose the author's deportation, is under an obligation (a) to make reparation to the author if it comes to light that torture was in fact suffered subsequent to deportation, and (b) to take such steps as may be appropriate to ensure that the author is not, in the future, subjected to torture as a result of the events of his presence in, and removal from, the State party...

EFFECTIVE REMEDIES - COMPENSATION

- *Smirnova v. Russian Federation* (712/1996), ICCPR, A/59/40 vol. II (5 July 2004) 1 at paras. 10.1, 10.5, 11 and 12.

...

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

...

10.5 The author's original communication raised issues under articles 7 and 10, paragraph 1, of the Covenant insofar as she claims that the physical circumstances of her detention amounted to cruel, inhuman or degrading treatment or punishment. The author has provided a detailed account of the circumstances of her detention. In response, the State party submitted that the author was provided with medical assistance during her detention. It did not provide details of the physical conditions in which the author was detained. Accordingly, the Committee cannot do otherwise than afford due weight to the author's claims. The Committee, in accordance with its jurisprudence, considers that the burden of proof cannot rest solely with the author of the communication, considering that the author and the State party do not always have equal access to the evidence. In the circumstances, the Committee is of the view that the conditions of the author's detention as described in her complaint were incompatible with the State party's obligations under article 10, paragraph 1, of the Convention. In light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary separately to consider the claims arising under article 7 of the Covenant.

11. The Human Rights Committee...finds that the State party violated article 9, paragraphs

3 and 4, and article 10 (1) of the Covenant.

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

- *Dugin v. Russian Federation* (815/1998), ICCPR, A/59/40 vol. II (5 July 2004) 34 at paras. 9.3 and 11.

...
9.3 The author claims that his rights under article 14 were violated because he did not have the opportunity to cross-examine Chikin on his evidence, summon the expert and call additional witnesses. While efforts to locate Chikin proved to be ineffective for reasons not explained by the State party, very considerable weight was given to his statement, although the author was unable to cross-examine this witness. Furthermore, the Orlov Court did not give any reasons as to why it refused the author's request to summon the expert and call additional witnesses. These factors, taken together, lead the Committee to the conclusion that the courts did not respect the requirement of equality between prosecution and defence in producing evidence and that this amounted to a denial of justice. Consequently, the Committee concludes that the author's rights under article 14 have been violated.
...
11. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee considers that the author is entitled to an appropriate remedy, including compensation and his immediate release.

- *Mulezi v. Democratic Republic of the Congo* (962/2001), ICCPR, A/59/40 vol. II (6 July 2004) 159 at paras. 5.2-5.4, 6 and 7.

...
5.2 With regard to the complaint of a violation of article 9, paragraphs 1, 2 and 4, of the Covenant, the Committee notes the author's statement that no warrant was issued for his arrest and that he was taken to the Gemena military camp under false pretences. Mr. Mulezi also maintains that he was arbitrarily detained without charge from 27 December 1997 onwards, first at Gemena, for two weeks, and then at the Mbandaka military camp, for 16 months. It is clear from the author's statements that he was unable to appeal to a court for a prompt determination of the lawfulness of his detention. The Committee considers that these statements, which the State party has not contested and which the author has sufficiently substantiated, warrant the finding that there has been a violation of article 9,

paragraphs 1, 2 and 4, of the Covenant. On the same basis, the Committee concludes, however, that there has been no violation of article 9, paragraph 5, as it does not appear that the author has in fact claimed compensation for unlawful arrest or detention.

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

5.4 With regard to alleged violations of articles 6, paragraph 1, and 23, paragraph 1, of the Covenant, the Committee notes the author's statement that his wife was beaten by soldiers, that Commander Mortos refused her request to travel to Bangui to receive medical attention, and that she died three days later. The Committee considers that these statements, which the State party has not contested although it had the opportunity to do so, and which the author has sufficiently substantiated, warrant the finding that there have been violations of articles 6, paragraph 1, and 23, paragraph 1, of the Covenant as to the author and his wife.

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

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

- *Svetik v. Belarus* (911/2000), ICCPR, A/59/40 vol. II (8 July 2004) at paras. 7.2, 7.3 and 9.

...
7.2 The author claims that his right under article 19 has been violated, as he was subjected to an administrative penalty for the sole expression of his political opinion. The State party

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

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

...

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

Notes

...

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

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

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

EFFECTIVE REMEDIES - COMPENSATION

- *Perterer v. Austria* (1015/2001), ICCPR, A/59/40 vol. II (8 July 2004) 231 at paras. 10.2-10.4, 10.7 and 12.

...

10.2 With regard to the author's claim that several members of the trial senate in the third set of proceedings were biased against him, either because of their previous participation in the proceedings, the fact that they had already been challenged by the author, or because of their continued employment with the municipality of Saalfelden, the Committee recalls that "impartiality" within the meaning of article 14, paragraph 1, implies that judges must not harbour preconceptions about the matter put before them, and that a trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair and impartial 18/. The Committee notes that the fact that Mr. Cecon resumed chairmanship of the trial senate after having been challenged by the author during the same set of proceedings, pursuant to section 124, paragraph 3, of the Federal Civil Servants Act, raises doubts about the impartial character of the third trial senate. These doubts are corroborated by the fact that Mr. Maier was appointed substitute chairman and temporarily even chaired the senate, despite the fact that the author had previously brought criminal charges against him.

10.3 The Committee observes that, if the domestic law of a State party provides for a right of a party to challenge, without stating reasons, members of the body competent to adjudicate disciplinary charges against him or her, this procedural guarantee may not be rendered meaningless by the reappointment of a chairperson who, during the same stage of proceedings, had already relinquished chairmanship, based on the exercise by the party concerned of its right to challenge senate members.

10.4 The Committee also notes that, in its decision of 6 March 2000, the Appeals Commission failed to address the question of whether the decision of the Disciplinary Commission of 23 September 1999 had been influenced by the above procedural flaw, and to that extent merely endorsed the findings of the Disciplinary Commission 19/. Moreover, while the Administrative Court examined this question, it only did so summarily 20/. In the light of the above, the Committee considers that the third trial senate of the Disciplinary Commission did not possess the impartial character required by article 14, paragraph 1, of the Covenant and that the appellate instances failed to correct this procedural irregularity. It concludes that the author's right under article 14, paragraph 1, to an impartial tribunal has been violated.

...

10.7 Regarding the length of the disciplinary proceedings, the Committee considers that the right to equality before the courts, as guaranteed by article 14, paragraph 1, entails a number of requirements, including the condition that the procedure before the national tribunals must be conducted expeditiously enough so as not to compromise the principles of fairness and

equality of arms. The Committee observes that responsibility for the delay of 57 months to adjudicate a matter of minor complexity lies with the authorities of Austria. It also observes that non-fulfilment of this responsibility is neither excused by the absence of a request for the transfer of competence (*Devolutionsantrag*), nor by the author's failure to lodge a complaint about undue delay of proceedings (*Säumnisbeschwerde*), as it was primarily caused by the State party's failure to conduct the first two sets of proceedings in accordance with domestic procedural law. The Committee concludes that the author's right to equality before the courts and tribunals has been violated.

...

12. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including payment of adequate compensation. The State party is also under an obligation to prevent similar violations in the future.

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Notes

...

18/ See communication No. 387/1989, *Arvo O. Karttunen v. Finland*, Views adopted on 23 October 1992, at para. 7.2.

19/ See page 3 of the decision of 6 March 2000 of the Appeals Commission, No. 11-12294/94-2000.

20/ See pages 7 *et seq*. of the decision of 29 November 2000 of the Administrative Court, No. Zl. 2000/09/0079-6.

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- *Nallaratnam v. Sri Lanka* (1033/2001), ICCPR, A/59/40 vol. II (21 July 2004) 246 at paras. 7.2-7.6.

...

7.2 As to the claim of a violation of article 14, paragraph 3 (f), due to the absence of an external interpreter during the author's alleged confession, the Committee notes that this provision provides for the right to an interpreter during the court hearing only, a right which was granted to the author 15/. However, as clearly appears from the court proceedings, the confession took place in the sole presence of the two investigating officers - the Assistant Superintendent of Police and the Police Constable; the latter typed the statement and provided interpretation between Tamil and Sinhalese. The Committee concludes that the author was denied a fair trial in accordance with article 14, paragraph 1, of the Covenant by solely relying on a confession obtained in such circumstances.

EFFECTIVE REMEDIES - COMPENSATION

7.3 As to the delay between conviction and the final dismissal of the author's appeal by the Supreme Court (29 September 1995 to 28 January 2000) in case No. 6825/1994, which has remained unexplained by the State party, the Committee notes with reference to its *ratione temporis* decision in paragraph 6.3 above, that more than two years of this period, from 3 January 1998 to 28 January 2000, relate to the time after the entry into force of the Optional Protocol. The Committee recalls its jurisprudence that the rights contained in article 14, paragraphs 3 (c), and 5, read together, confer a right to review of a decision at trial without delay 16/. In the circumstances, the Committee considers that the delay in the instant case violates the author's right to review without delay and consequently finds a violation of article 14, paragraphs 3 (c), and 5 of the Covenant.

7.4 On the claim of a violation of the author's rights under article 14, paragraph 3 (g), in that he was forced to sign a confession and subsequently had to assume the burden of proof that it was extracted under duress and was not voluntary, the Committee must consider the principles underlying the right protected in this provision. It refers to its previous jurisprudence that the wording, in article 14, paragraph 3 (g), that no one shall "be compelled to testify against himself or confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological coercion from the investigating authorities on the accused with a view to obtaining a confession of guilt 17/. The Committee considers that it is implicit in this principle that the prosecution prove that the confession was made without duress... The Committee concludes that by placing the burden of proof that his confession was made under duress on the author, the State party violated article 14, paragraphs 2, and 3 (g), read together with article 2, paragraph 3, and 7 of the Covenant.

7.5 The Human Rights Committee...is of the view that the facts before it disclose violations of articles 14, paragraphs 1, 2, 3, (c), and 14, paragraph (g), read together with articles 2, paragraph 3, and 7 of the Covenant.

7.6 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy, including release or retrial and compensation. The State party is under an obligation to avoid similar violations in the future and should ensure that the impugned sections of the PTA are made compatible with the provisions of the Covenant.

Notes

...

15/ *B.d.B. v. Netherlands*, case No. 273/1988, decision of 30 March 1989, and *Yves Cadoret v. France*, case No. 221/1987, decision of 11 April 1991 and *Herve Le Bihan v. France*, case No. 323/1988, decision of 9 November 1989.

16/ *Lubuto v. Zambia*, case No. 390/1990, Views adopted on 31 October 1995; *Neptune v.*

Trinidad and Tobago, case No. 523/1992, Views adopted on 16 July 1996; *Sam Thomas v. Jamaica*, case No. 614/95, Views adopted on 31 March 1999; *Clifford McLawrence v. Jamaica*, case No. 702/96, Views adopted on 18 July 1997; *Johnson v. Jamaica*, case No. 588/1994, Views adopted on 22 March 1996.

17/ *Berry v. Jamaica*, case No. 330/1988, Views adopted on 4 July 1994.

- *Kankanamge v. Sri Lanka* (909/2000), ICCPR, A/59/40 vol. II (29 July 2004) 71 at paras. 9.2, 9.4, 10 and 11.

...

9.2 On the merits, the Committee first notes that, according to the material submitted by the parties, three indictments were served on the author on 26 June 1996, 31 March 1997 and 30 September 1997 respectively. At the time of the final submissions made by the parties, none of these indictments had been finally adjudicated by the High Court. The indictments were thus pending for a period of several years from the entry into force of the Optional Protocol. In the absence of any explanation by the State party that would justify the procedural delays and although the author has not raised such a claim in his initial communication, the Committee, consistent with its previous jurisprudence, is of the opinion that the proceedings have been unreasonably prolonged, and are therefore in violation of article 14, paragraph 3 (c), of the Covenant.

...

9.4 So far as a violation of article 19 is concerned, the Committee considers that the indictments against Mr. Kankanamge all related to articles in which he allegedly defamed high State party officials and are directly attributable to the exercise of his profession of journalist and, therefore, to the exercise of his right to freedom of expression. Having regard to the nature of the author's profession and in the circumstances of the present case, including the fact that previous indictments against the author were either withdrawn or discontinued, the Committee considers that to keep pending, in violation of article 14, paragraph 3 (c), the indictments for the criminal offence of defamation for a period of several years after the entry into force of the Optional Protocol for the State party left the author in a situation of uncertainty and intimidation, despite the author's efforts to have them terminated, and thus had a chilling effect which unduly restricted the author's exercise of his right to freedom of expression. The Committee concludes that the facts before it reveal a violation of article 19 of the Covenant, read together with article 2(3).

...

10. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 14, paragraph 3 (c), and article 19 read together with article 2 (3) of the International Covenant on Civil and Political Rights.

EFFECTIVE REMEDIES - COMPENSATION

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy including appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.

- *Girjadat Siewpersaud et al. v. Trinidad and Tobago* (938/2000), ICCPR, A/59/40 vol. II (29 July 2004) 132 at paras. 6.1-6.3, 7 and 8.

...

6.1 With regard to the authors' claims under article 9, paragraph 3, the Committee notes the authors were arrested in April 1985, that their trial began on 4 January 1988, and that the authors were kept in pre-trial detention throughout this period. That their pre-trial detention lasted 34 months is uncontested. The Committee recalls that pursuant to article 9, paragraph 3, anyone arrested or detained on a criminal charge shall be entitled to trial within a reasonable time or to release. What period constitutes a "reasonable time" within the meaning of article 9, paragraph 3, must be assessed on a case-by-case basis. A delay of almost three years, during which the authors were kept in custody cannot be deemed compatible with article 9, paragraph 3, in the absence of special circumstances justifying such delay. The Committee finds that, in the absence of any explanation from the State party, a delay of over 34 months in bringing the author to trial is incompatible with article 9, paragraph 3.

6.2 As to the claim of a delay of 4 years and 10 months between conviction and dismissal of the appeal, counsel has invoked article 9, paragraph 3, but as the issues raised clearly relate to article 14, paragraph 3 (c)a and 5, the Committee will examine them under that article. The Committee considers that a delay of 4 years and 10 months between the conclusion of the trial on 19 January 1988 and the dismissal of the authors' appeal on 29 March 1993 is incompatible with the provisions of the Covenant, in the absence of any explanation from the State party justifying the delay. The Committee accordingly concludes that there has been a violation of article 14, paragraph 5 in conjunction with paragraph 3 (c), of the Covenant.

6.3 As to the authors' claim that their conditions during each stage of their imprisonment violated articles 7 and 10, paragraph 1, the Committee must give due consideration to them in the absence of any pertinent State party observation in this respect. The Committee considers that the authors' conditions of detention...violate their right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to article 10, paragraph 1, of the Covenant. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally

in article 7, it is not necessary separately to consider the claims arising under article 7 of the Covenant.

7. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 9, paragraph 3, 10, paragraph 1, and article 14, paragraph 5 in conjunction with paragraph 3 (c), of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including adequate compensation. In the light of the long period spent by the authors in deplorable conditions of detention that violate article 10 of the Covenant, the State party should consider release of the authors. The State party should, in any event, improve the conditions of detention in its prisons without delay.

- *Khomidov v. Tajikistan* (1117/2002), ICCPR, A/59/40 vol. II (29 July 2004) 363 at paras. 6.2-6.6, 7 and 8.

...
6.2 The Committee has noted the author's detailed description of the acts of torture to which her son was subjected to make him confess guilt. She has identified by name several of the individuals alleged to have participated in the above events. In the circumstances, and in the absence of any explanations from the State party in this respect, due weight must be given to her allegations. As the author has provided detailed information of specific forms of physical and psychological torture inflicted upon her son during pre-trial detention...the Committee considers that the facts as submitted disclose a violation of article 7 of the Covenant.

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

6.4 The Committee has noted the author's claims that her son was legally represented only one month after being charged with several crimes and all meetings between him and the lawyer subsequently assigned by the investigation were held in investigators' presence, in violation of article 14, paragraph 3 (b). The Committee considers that the author's submissions concerning the time and conditions in which her son was assisted by a lawyer

before the trial adversely affected the possibilities of the author's son to prepare his defence. In the absence of any explanations by the State party, the Committee is of the view that the facts before it reveal a violation of Mr. Khomidov's rights under article 14, paragraph 3 (b), of the Covenant.

6.5 The Committee has noted the author's claim that the trial of Mr. Khomidov was unfair, as the court did not fulfil its obligation of impartiality and independence... It has noted also the author's contention that her son's lawyer requested the court to call witnesses on his behalf, and to have Mr. Khomidov examined by a doctor to evaluate his injuries sustained as a result of the torture to which he was subjected to make him confess guilt. The judge denied his request without providing any reason. In the absence of any pertinent State party information on this claim, the Committee concludes that the facts before it disclose a violation of article 14, paragraphs 1, and 3 (e) and (g), of the Covenant.

7. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 7; 9, paragraphs 1 and 2; 14, paragraphs 1, and 3 (b), (e) and (g), read together with article 6, of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Khomidov with an effective remedy, entailing commutation of his sentence to death, compensation, and a new trial with all the guarantees of article 14, or, should this not be possible, release. The State party is under an obligation to take measures to prevent similar violations in the future.

- *El Ghar v. Libyan Arab Jamahiriya* (1107/2002), ICCPR, A/60/40 vol. II (2 November 2004) 156 at paras. 2.1, 2.2, 8 and 9.

...

2.1 The author, of Libyan nationality, has lived all her life in Morocco with her divorced mother and holds a residence permit for that country. As a student of French law at the Hassan II University faculty of law in Casablanca, she wished to continue her studies in France and to specialize in international law. To that end, she has been applying to the Libyan Consulate in Morocco for a passport since 1998.

2.2 The author claims that all her applications have been denied, without any lawful or legitimate grounds. She notes that although she is an adult, she attached to her application form an authorization from her father, who is resident in the Libyan Arab Jamahiriya, that was certified by the Libyan Ministry of Foreign Affairs in order to obtain any official document required. She adds that in September 2002 the Libyan consul stated, without giving any details, that on the basis of the pertinent regulations he could not issue her a

passport, but could only provide her with a temporary travel document allowing her to travel to the Libyan Arab Jamahiriya.

...

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 12, paragraph 2, of the Covenant insofar as the author was denied a passport without any valid justification and subjected to an unreasonable delay, and as a result was prevented from travelling abroad to continue her studies.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to ensure that the author has an effective remedy, including compensation. The Committee urges the State party to issue the author with a passport without further delay. The State party is also under an obligation to take effective measures to ensure that similar violations do not recur in future.

- *Terrón v. Spain* (1073/2002), ICCPR, A/60/40 vol. II (5 November 2004) 111 at paras. 2.1, 7.1, 7.4, 8 and 9.

...

2.1 The author was a member of the Regional Assembly (*Cortes*) of Castilla-La Mancha. He was tried by the Supreme Court for forging of a private document and sentenced on 6 October 1994 to two years' imprisonment and 100,000 pesetas in compensation.

...

7.1 The Committee must decide whether the author's conviction at first instance by the Supreme Court with no possibility of review of the conviction and sentence constitutes a violation of article 14, paragraph 5, of the Covenant.

...

7.4 The State party contends that in situations such as the author's, if an individual is tried by the highest ordinary criminal court, the guarantee set out in article 14, paragraph 5, of the Covenant does not apply; the absence of a right to review by a higher tribunal is offset by the fact of being tried by the highest court, and this situation is common in many States parties to the Covenant. Article 14, paragraph 5, of the Covenant stipulates that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. The Committee points out that "according to law" is not intended to mean that the very existence of a right to review is left to the discretion of the States parties. Although the State party's legislation provides in certain circumstances for the trial of an individual, because of his position, by a higher court than would normally be the case, this circumstance alone cannot impair the defendant's right to review of his conviction and sentence by a court. The Committee accordingly concludes that there has been a violation of article 14, paragraph 5, of the Covenant with regard to the facts submitted in the communication.

EFFECTIVE REMEDIES - COMPENSATION

...
8. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy, including adequate compensation.

- *Gorji-Dinka v. Cameroon* (1134/2002), ICCPR, A/60/40 vol. II (17 March 2005) 194 at paras. 5.1-5.6, 6 and 7.

...
5.1 The first issue before the Committee is whether the author's detention from 31 May 1985 to 3 February 1986 was arbitrary. In accordance with the Committee's constant jurisprudence,10/ "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. This means that remand in custody must not only be lawful but reasonable and necessary in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime 11/. The State party has not invoked any such elements in the instant case. The Committee further recalls the author's uncontested claim that it was only after his arrest on 31 May 1985 and his rearrest on 9 June 1985 that President Biya filed criminal charges against him, allegedly without any legal basis and with the intention to influence the outcome of the trial before the Military Tribunal. Against this background, the Committee finds that the author's detention between 31 May 1985 and 3 February 1986 was neither reasonable nor necessary in the circumstances of the case, and thus in violation of article 9, paragraph 1, of the Covenant.

5.2 With regard to the conditions of detention, the Committee takes note of the author's uncontested allegation that he was kept in a wet and dirty cell without a bed, table or any sanitary facilities. It reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated in accordance with, *inter alia*, the Standard Minimum Rules for the Treatment of Prisoners (1957) 12/. In the absence of State party information on the conditions of the author's detention, the Committee concludes that the author's rights under article 10, paragraph 1, were violated during his detention between 31 May 1985 and the day of his hospitalization.

5.3 The Committee notes that the author's claim that he was initially kept in a cell with 20 murder convicts at the headquarters of the *Brigade mixte mobile* has not been challenged by the State party, which has not adduced any exceptional circumstances which would have justified its failure to segregate the author from such convicts in order to emphasize his status

as an unconvicted person. The Committee therefore finds that the author's rights under article 10, paragraph 2 (a), of the Covenant were breached during his detention at the BMM headquarters.

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

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

5.6 As regards the author's claim that the removal of his name from the voters' register violates his rights under article 25 (b) of the Covenant, the Committee observes that the exercise of the right to vote and to be elected may not be suspended or excluded except on grounds established by law which are objective and reasonable... In the absence of any objective and reasonable grounds to justify the author's deprivation of his right to vote and to be elected, the Committee concludes, on the basis of the material before it, that the removal of the author's name from the voters' register amounts to a violation of his rights under article 25 (b) of the Covenant.

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

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

Notes

...

10/ See communication No. 305/1988, *Van Alphen v. The Netherlands*, Views adopted on

23 July 1990, para. 5.8; communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.8.

11/ See *ibid*.

12/ General comment No. 21 [44] on art. 10, paras. 3 and 5.

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

- *Marques v. Angola* (1128/2002), ICCPR, A/60/40 vol. II (29 March 2005) 181 at paras. 6.6, 6.8, 6.9, 7 and 8.

...
6.6 With respect to the author's claim under article 9, paragraph 5, the Committee recalls that this provision governs the granting of compensation for arrest or detention that is "unlawful" either under domestic law or within the meaning of the Covenant. 18/ It recalls that the circumstances of the author's arrest and detention gave rise to violations of article 9, paragraphs 1 to 4, of the Covenant, and notes the author's uncontested argument that the State party's failure to bring him before a judge during his 40-day detention also violated article 38 of the Angolan Constitution. Against this background, the Committee deems it appropriate to deal with the issue of compensation in the remedial paragraph.
...
6.8 The Committee refers to its jurisprudence that any restriction on the right to freedom of expression must cumulatively meet the following conditions set out in paragraph 3 of article 19: it must be provided for by law, it must serve one of the aims enumerated in article 19, paragraph 3 (a) and (b), and it must be necessary to achieve one of these purposes. The Committee notes that the author's final conviction was based on article 43 of the Press Law, in conjunction with section 410 of the Criminal Code. Even if it were assumed that his arrest and detention, or the restrictions on his travel, had a basis in Angolan law, and that these measures, as well as his conviction, pursued a legitimate aim, such as protecting the President's rights and reputation or public order, it cannot be said that the restrictions were necessary to achieve one of these aims. The Committee observes that the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. Given the paramount importance, in a democratic society, of the right to freedom of expression and of a free and uncensored press or other media, 20/ the severity of the sanctions imposed on the author cannot be considered as a proportionate measure to protect public order or the honour and the reputation of the President, a public figure who, as such, is subject to criticism and opposition. In addition, the Committee considers it an

aggravating factor that the author's proposed truth defence against the libel charge was ruled out by the courts. In the circumstances, the Committee concludes that there has been a violation of article 19.

6.9 The last issue before the Committee is whether the author's prevention from leaving Angola on 12 December 2000 and the subsequent confiscation of his passport were in violation of article 12 of the Covenant. It notes the author's contention that his passport was confiscated without justification or legal basis, as his bail restrictions no longer applied, and that he was denied access to information about his entitlement to travel. In the absence of any justification advanced by the State party, the Committee finds that the author's rights under article 12, paragraph 1, have been violated.

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

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

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

...

20/ See Human Rights Committee, general comment No. 25 [57], 12 July 1996, at para. 25.

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- *Arutyuniantz v. Uzbekistan* (971/2001), ICCPR, A/60/40 vol. II (30 March 2005) 68 at paras. 6.4-6.6, 7 and 8.

...

6.4 The Committee...recalls its general comment No. 13, which reiterates that by reason of the principle of presumption of innocence, the burden of proof for any criminal charge is on the prosecution, and the accused must have the benefit of the doubt. His guilt cannot be presumed until the charge has been proved beyond reasonable doubt. From the information before the Committee, which has not been challenged in substance by the State party, it transpires that the charges and the evidence against the author left room for considerable doubt. Incriminating evidence against a person provided by an accomplice charged with the same crime should, in the Committee's opinion, be treated with caution, particularly in

circumstances where the accomplice has changed his account of the facts on several occasions. There is no information before the Committee that, despite their having being raised by the author's son, the trial court or the Supreme Court took these matters into account.

6.5 The Committee is mindful of its jurisprudence that it is generally not for itself, but for the courts of States parties, to review or to evaluate facts and evidence, or to examine the interpretation of domestic legislation by national courts and tribunals, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence or interpretation of legislation was manifestly arbitrary or amounted to a denial of justice.3/ For the reasons set out above, the Committee considers that the author's trial in the present case suffered from such defects.

6.6 In the absence of any explanation from the State party, the above concerns raise considerable doubt as to the author's son's guilt in relation to the murders for which he was convicted. From the material available to it, the Committee considers that Mr. Arutyuniantz was not afforded the benefit of this doubt in the criminal proceedings against him. In the circumstances, the Committee concludes that the author's trial did not respect the principle of presumption of innocence, in violation of article 14 (2).

7. The Human Rights Committee...is of the view that the facts before it disclose violations of article 14 (2) of the Covenant.

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 and either his retrial or his release.

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3/ See communication No. 842/1998, *Romanov v. Ukraine*, inadmissibility decision of 30 October 2003.

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- *Khalilov v. Tajikistan* (973/2001), ICCPR, A/60/40 vol. II (30 March 2005) 74 at paras. 7.7, 8 and 9.

...

7.7 The Committee has noted the author's claim that the Tajik authorities, including the Supreme Court, have consistently ignored her requests for information and systematically refused to reveal any detail about her son's situation or whereabouts. The Committee

understands the continued anguish and mental stress caused to the author, as the mother of a condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his gravesite. The secrecy surrounding the date of execution, and the place of burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee considers that the authorities' initial failure to notify the author of the execution of her son amounts to inhuman treatment of the author, in violation of article 7 of the Covenant.10/

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of Mr. Khalilov's rights under articles 6, paragraph 1; 7; 10, paragraph 1; and 14, paragraphs 2, 3 (g) and 5, of the Covenant, and a violation of article 7 in the author's own respect.

9. Under article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including information on the location where her son is buried, and compensation for the anguish suffered. The State party is also under an obligation to prevent similar violations in the future.

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10/ See communications Nos. 886/1999, *Bondarenko v. Belarus*, and 887/1999, *Lyashkevich v. Belarus*, Views adopted on April 2003.

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

...

9.2 The Committee notes that courts notably in Common Law jurisdictions have traditionally enjoyed authority to maintain order and dignity in court debates by the exercise of a summary power to impose penalties for "contempt of court." But here, the only disruption indicated by the State party is the repetitious filing of motions by the author, for which an imposition of financial penalties would have evidently been sufficient, and one instance of "rais[ing] his voice" in the presence of the court and refusing thereafter to apologize. The penalty imposed was a one year term of "Rigorous Imprisonment". No reasoned explanation has been provided by the court or the State party as to why such a severe and summary penalty was warranted, in the exercise of a court's power to maintain orderly proceedings. Article 9, paragraph 1, of the Covenant forbids any "arbitrary" deprivation of liberty. The imposition of a draconian penalty without adequate explanation and without independent procedural safeguards falls within that prohibition. The fact that an act constituting a violation of article 9, paragraph 1 is committed by the judicial branch

of government cannot prevent the engagement of the responsibility of the State party as a whole. The Committee concludes that the author's detention was arbitrary, in violation of article 9, paragraph 1. In the light of this finding in the present case, the Committee does not need to consider the question whether provisions of article 14 may have any application to the exercise of the power of criminal contempt. Similarly, the Committee does not need to consider whether or not there was a violation of article 19.

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

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an adequate remedy, including compensation, and to make such legislative changes as are necessary to avoid similar violations in the future. The State party is under an obligation to avoid similar violations in the future.

- *Lee v. Republic of Korea* (1119/2002), ICCPR, A/60/40 vol. II (20 July 2005) 174 at paras. 7.2, 7.3, 8 and 9.

...
7.2 The issue before the Committee is whether the author's conviction for his membership in *Hanchongnyeon* unreasonably restricted his freedom of association, thereby violating article 22 of the Covenant. The Committee observes that, in accordance with article 22, paragraph 2, any restriction on the right to freedom of association to be valid must cumulatively meet the following conditions: (a) it must be provided by law; (b) it may only be imposed for one of the purposes set out in paragraph 2; and (c) it must be "necessary in a democratic society" for achieving one of these purposes. The reference to a "democratic society" indicates, in the Committee's view, that the existence and functioning of a plurality of associations, including those which peacefully promote ideas not favourably received by the government or the majority of the population, is one of the foundations of a democratic society. Therefore, the existence of any reasonable and objective justification for limiting the freedom of association is not sufficient. The State party must further demonstrate that the prohibition of the association and the criminal prosecution of individuals for membership in such organizations are in fact necessary to avert a real, and not only hypothetical danger to the national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose.

7.3 The author's conviction was based on article 7, paragraphs 1 and 3, of the National Security Law. The decisive question which must therefore be considered is whether this measure was necessary for achieving one of the purposes set out in article 22, paragraph 2. The Committee notes that the State party has invoked the need to protect national security

and its democratic order against the threat posed by the DPRK. However, it has not specified the precise nature of the threat allegedly posed by the author's becoming a member of *Hanchongnyeon*. The Committee notes that the decision of the Supreme Court of the Republic of Korea, declaring this association an "enemy-benefiting group" in 1997, was based on article 7, paragraph 1, of the National Security Law which prohibits support for associations which "may" endanger the existence and security of the State or its democratic order. It also notes that the State party and its courts have not shown that punishing the author for his membership in *Hanchongnyeon*, in particular after its endorsement of the "June 15 North-South Joint Declaration" (2000), was necessary to avert a real danger to the national security and democratic order of the Republic of Korea. The Committee therefore considers that the State party has not shown that the author's conviction was necessary to protect national security or any other purpose set out in article 22, paragraph 2. It concludes that the restriction on the author's right to freedom of association was incompatible with the requirements of article 22, paragraph 2, and thus violated article 22, paragraph 1, of the Covenant.

...

8. The Human Rights Committee...is of the view that the facts before it reveal a violation of article 22, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3, of the Covenant, the author is entitled to an effective remedy, including appropriate compensation. The Committee recommends that the State party amend article 7 of the National Security Law, with a view to making it compatible with the Covenant. The State party is under an obligation to ensure that similar violations do not occur in the future.

- *Ratiani v. Georgia* (975/2001), ICCPR, A/60/40 vol. II (21 July 2005) 82 at paras. 11.2, 11.3, 12 and 13.

11.2 As to the claim that the author was unable to appeal his conviction by the Supreme Court, the Committee recalls its jurisprudence that article 14, paragraph 5, requires there to be an available appellate procedure which should entail a full review of the conviction and sentence, together with a due consideration of the case at first instance... The Committee notes that the State party itself does not refer to this process as being equivalent to a right of appeal; rather, it is referred to merely as a "supervisory complaint". The Committee recalls its previous jurisprudence that a request for a "supervisory" review which amounts to a discretionary review, and which offers only the possibility of an extraordinary remedy, does not constitute a right to have one's conviction and sentence reviewed by a higher tribunal according to law. From the material before the Committee, it appears that the supervisory complaint process in this instance is of such a nature. Accordingly, based on the information before it, the Committee considers that this process does not amount to a right of appeal for

the purpose of article 14, paragraph 5, of the Covenant 6/.

11.3 Secondly, the State party submits that the author could apply to the Supreme Court for a review of his case, through the Prosecutor General, if he could identify new circumstances which called into question the correctness of the original decision. However, the Committee does not consider that such a process meets the requirements of article 14, paragraph 5; the right of appeal entails a full review by a higher tribunal of the existing conviction and sentence at first instance. The possibility of applying to a Court to review a conviction on the basis of new evidence is by definition something other than a review of an existing conviction, as an existing conviction is based on evidence which existed at the time it was handed down. Similarly, the Committee considers that the possibility of applying for rehabilitation cannot in principle be considered an appeal of an earlier conviction, for the purposes of article 14, paragraph 5. Accordingly, the Committee considers that the review mechanisms invoked in this case do not meet the requirements of article 14, paragraph 5, and that the State party violated the author's right to have his conviction and sentence reviewed by a higher tribunal according to law.

12. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

13. Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an appropriate remedy. The State party is under an obligation to grant the author appropriate compensation, and to take effective measures to ensure that similar violations do not reoccur in the future.

Notes

...

6/ See communication No. 836/1998, *Gelazauskas v. Lithuania*, Views adopted 17 March 2003. Note also that the European Court of Human Rights has determined that a 'supervisory' appeal of this nature does not constitute an 'effective remedy' for its admissibility requirements, due to its discretionary nature; see *Tumilovich v. Russia*, No. 47033/99, 22 June 1999 (dec); and *Pitkevich v. Russia*, No. 47936/99, 8 February 2001 (dec).

- *Rouse v. The Philippines* (1089/2002), ICCPR, A/60/40 vol. II (25 July 2005) 123 at paras. 7.2, 7.4, 7.7, 7.8, 8 and 9.

...

7.2 The Committee recalls its jurisprudence that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be

ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice. In the present case, the Committee notes that the judge convicted the author *inter alia* on evidence that the accounts made by the alleged victim, although made out of court, were not simple hearsay. In addition, the judge did not admit the affidavit of desistance of the alleged victim as evidence while she admitted his first statement, although both were equally confirmed by witnesses who did not have a personal knowledge of the facts. Finally, the author had to overcome doubtful evidence, and even evidence that was not presented in court (the youthful looks of the 21-year-old witness, as well as the minor age of the alleged victim). In the circumstances, the Committee finds that the court's choice of admissible evidence, in particular in the absence of any evidence confirmed by the alleged victim, as well as its evaluation thereof, were clearly arbitrary, in violation of article 14, paragraph 1 of the Covenant.

...

7.4 In relation to the alleged undue delays in the proceedings, the Committee notes that the Supreme Court delivered its judgement of 10 February 2003, that is over 41 months after the appeal was lodged on 3 September 1999, complemented by appeal briefs, the last of which is dated 25 May 2000. There was thus a delay of two years and eight months between the last appeal brief and the Supreme Court's judgement. Altogether, there was a delay of six and a half years between the author's arrest and the judgement of the Supreme Court. On the strength of the material before the Committee, these delays cannot be attributed to the author's appeals. In the absence of any pertinent explanation from the State party, the Committee concludes that there has been a violation of article 14, paragraph 3 (c).

...

7.7 In relation to the alleged violation of the right to be free from arbitrary arrest and detention, it is uncontested that the author was arrested without a warrant. The State party has neither contested this allegation nor given any justification for arresting the author without a warrant. The Committee concludes that the author was the victim of a violation of article 9, paragraph 1.

7.8 As to the author's claim under article 7, the Committee recalls that States parties are under an obligation to observe certain minimum standards of detention, which include provision of medical care and treatment for sick prisoners, in accordance with rule 22 (2) of the Standard Minimum Rules for the Treatment of Prisoners.3/ It is apparent from the author's uncontested account that he suffered from severe pain due to aggravated kidney problems, and that he was not able to obtain proper medical treatment from the prison authorities. As the author suffered such pain for a considerable amount of time, from 2001 up to his release in September 2003, the Committee finds that he was the victim of cruel and inhuman treatment in violation of article 7. In the light of this finding, it is unnecessary to consider the author's additional claim under article 7.

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

of articles 14, paragraphs 1 and 3 (c) and (e); 9, paragraph 1; and 7 of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate compensation, *inter alia* for the time of his detention and imprisonment.

Notes

...

3/ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council in its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; see *Human Rights: A Compilation of International Instruments* (United Nations publication, Sales No. E.02.XIV.4), chap. J, sect. 34.

- *Marik v. Czech Republic* (945/2000), ICCPR, A/60/40 vol. II (26 July 2005) 54 at paras. 2.1, 2.2, 2.4, 6.2, 7 and 8.

...

2.1 In 1969, the author emigrated from Czechoslovakia to the United States with his family. He later became a United States citizen. In 1972, he was convicted of fleeing the country by the Plzen District Court; his property was confiscated, *inter alia* his two houses in Letkov and in Plzen.

2.2 On 23 April 1990, the Czech and Slovak Republic passed Act No. 119/1990 Coll. on Judicial Rehabilitation, which rendered null and void all sentences handed down by Communist courts for political reasons. Persons whose property had been confiscated were, under section 23.2 of the Act, eligible to recover their property, subject to conditions to be spelled out in a separate restitution law.

...

2.4 In 1994, the author filed two separate restitution claims with regard to his houses in Letkov and Plzen. In the first case (the Letkov property), the Plzen-mesto District Court refused the restitution claim on 13 November 1995, because the author did not fulfil the citizenship requirement during the initial period open for restitution claims, i.e. 1 October 1991 at the latest. It also found that the third requirement for restitution, concerning the unlawfulness of the current owners acquisition, was not met in the case. This decision was confirmed by the Plzen Regional Court on 25 March 1996. The author's appeal to the Supreme Court was dismissed on 20 August 1997 on the ground that he did not fulfil the precondition of citizenship in 1991. The judgement confirmed that the new established time

frame did not change this original requirement but gave non-residents additional time to lodge their restitution claims. It did not consider the other requirements. A further appeal to the Constitutional Court was rejected on 12 May 1998.

...

6.2 The issue before the Committee is whether the application to the author of Act 87/1991 amounted to a violation of his right to equality before the law and to equal protection of the law, contrary to article 26 of the Covenant.

...

7. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 26 of the International Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, which may be compensation, and in the case of the Plzen property, restitution, or, in the alternative compensation. The Committee reiterates that the State party should review its legislation to ensure that all persons enjoy both equality before the law and equal protection of the law.

- *Fijalkovska v. Poland* (1061/2002), ICCPR, A/60/40 vol. II (26 July 2005) 103 at paras. 8.3, 8.4, 9 and 10.

...

8.3 Concerning the possible arbitrary nature of the author's committal, the Committee finds it difficult to reconcile the State party's view that although the author was recognized, in accordance with the Act, to suffer from deteriorating mental health and inability to provide for her basic needs, she was at the same time considered to be legally capable of acting on her own behalf. As to the State party's argument that "mental illness cannot be equated to a lack of legal capacity", the Committee considers that confinement of an individual to a psychiatric institution amounts to an acknowledgement of that individual's diminished capacity, legal and otherwise. The Committee considers that the State party has a particular obligation to protect vulnerable persons within its jurisdiction, including the mentally impaired. It considers that as the author suffered from diminished capacity that might have affected her ability to take part effectively in the proceedings herself, the court should have been in a position to ensure that she was assisted or represented in a way sufficient to safeguard her rights throughout the proceedings. The Committee considers that the author's sister was not in a position to provide such assistance or representation, as she had herself requested the committal order in the first place. The Committee acknowledges that circumstances may arise in which an individual's mental health is so impaired that so as to avoid harm to the individual or others, the issuance of a committal order, without assistance or representation sufficient to safeguard her rights, may be unavoidable. In the present case, no such special circumstances have been advanced. For these reasons, the Committee finds

that the author's committal was arbitrary under article 9, paragraph 1, of the Covenant.

8.4 The Committee further notes that although a committal order may be appealed to a court, thereby allowing the individual to challenge the order, in this case, the author, who had not even been served with a copy of the order, nor been assisted or represented by anyone during the hearing who could have informed her of such a possibility, had to wait until after her release before becoming aware of the possibility of, and actually pursuing, such an appeal. Her appeal was ultimately dismissed as having been filed outside the statutory deadline. In the Committee's view, the author's right to challenge her detention was rendered ineffective by the State party's failure to serve the committal order on her prior to the deadline to lodge an appeal. Therefore, in the circumstances of the case, the Committee, finds a violation of article 9, paragraph 4, of the Covenant.

...

9. The Human Rights Committee...is of the view that the State party has violated article 9, paragraphs 1 and 4, of the International Covenant on Civil and Political Rights.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an adequate remedy, including compensation, and to make such legislative changes as are necessary to avoid similar violations in the future. The State party is under an obligation to avoid similar violations in the future.

CAT

- *Radivoje Ristic v. Yugoslavia* (113/1998), CAT, A/56/44 (11 May 2001) 115 at paras.2.1, 2.2, 3.1, 9.8 and 9.9.

...

2.1 The author alleges that on 13 February 1995 three policemen (Dragan Riznic, Uglješa Ivanovic and Dragan Novakovic) arrested Milan Ristic in Šabac while looking for a murder suspect. One of the officers struck his son with a blunt object, presumably a pistol or rifle butt, behind the left ear, killing him instantly. The officers moved the body and, with a blunt instrument, broke both thighbones. It was only then that they called an ambulance and the on-duty police investigation team, which included a forensic technician.

2.2 The policemen told the investigators that Milan Ristic had committed suicide by jumping from the roof of a nearby building ...

...

3.1 The author considers that first the police and, subsequently, the judicial authorities failed to ensure a prompt and impartial investigation. All domestic remedies were exhausted without the court ever having ordered or formally instituted proper investigative

proceedings...

...

9.8 In the circumstances, the Committee finds that the State party has violated its obligations under articles 12 and 13 of the Convention to investigate promptly and effectively allegations of torture or severe police brutality.

9.9 With regard to allegations of a violation of article 14, the Committee finds that in the absence of proper criminal investigation, it is not possible to determine whether the rights to compensation of the alleged victim or his family have been violated. Such an assessment can only be made after the conclusion of proper investigations. The Committee therefore urges the State party to carry out such investigations without delay.

- *Hajrizi Dzemajl et al. v. Serbia and Montenegro* (161/2000), CAT, A/58/44 (21 November2002) 85 (CAT/C/29/D/161/2000) at paras. 3.10, 9.2, 9.6, 10 and 11.

...

3.10 The complainants...allege a violation of article 13 read alone and/or taken together with article 16, paragraph 1, because "their right to complain and to have [their] case promptly and impartially examined by [the] competent authorities" was violated. They also allege a violation of article 14 read alone and/or taken together with article 16, paragraph 1, because of the absence of redress and of fair and adequate compensation.

...

9.2 As to the legal qualification of the facts that have occurred on 15 April 1995, as they were described by the complainants, the Committee first considers that the burning and destruction of houses constitute, in the circumstances, acts of cruel, inhuman or degrading treatment or punishment. The nature of these acts is further aggravated by the fact that some of the complainants were still hidden in the settlement when the houses were burnt and destroyed, the particular vulnerability of the alleged victims and the fact that the acts were committed with a significant level of racial motivation. Moreover, the Committee considers that the complainants have sufficiently demonstrated that the police (public officials), although they had been informed of the immediate risk that the complainants were facing and had been present at the scene of the events, did not take any appropriate steps in order to protect the complainants, thus implying "acquiescence" in the sense of article 16 of the Convention. In this respect, the Committee has reiterated on many instances its concerns about "inaction by police and law-enforcement officials who fail to provide adequate protection against racially motivated attacks when such groups have been threatened" ... Although the acts referred to by the complainants were not committed by public officials themselves, the Committee considers that they were committed with their acquiescence and constitute therefore a violation of article 16, paragraph 1, of the Convention by the State party.

...
9.6 Concerning the alleged violation of article 14 of the Convention, the Committee notes that the scope of application of the said provision only refers to torture in the sense of article 1 of the Convention and does not cover other forms of ill-treatment. Moreover, article 16, paragraph 1, of the Convention while specifically referring to articles 10, 11, 12, and 13, does not mention article 14 of the Convention. Nevertheless, article 14 of the Convention does not mean that the State party is not obliged to grant redress and fair and adequate compensation to the victim of an act in breach of article 16 of the Convention. The positive obligations that flow from the first sentence of article 16 of the Convention include an obligation to grant redress and compensate the victims of an act in breach of that provision. The Committee is therefore of the view that the State party has failed to observe its obligations under article 16 of the Convention by failing to enable the complainants to obtain redress and to provide them with fair and adequate compensation.

10. The Committee...is of the view that the facts before it disclose a violation of articles 16, paragraph 1, 12 and 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

11. In pursuance of rule 111, paragraph 5, of its rules of procedure, the Committee urges the State party to conduct a proper investigation into the facts that occurred on 15 April 1995, prosecute and punish the persons responsible for those acts and provide the complainants with redress, including fair and adequate compensation and to inform it, within 90 days from the date of the transmittal of this decision, of the steps it has taken in response to the views expressed above.

- *Brada v. France* (195/2002), CAT, A/60/44 (17 May 2005) 127 at paras. 13.5, 13.6, 14 and 15.

...
13.5 The Committee observes, turning to the issue under article 3 of the Convention, that the Bordeaux Administrative Court of Appeal, following the complainant's expulsion, found upon consideration of the evidence presented that the complainant was at risk of treatment in breach of article 3 of the European Convention, a finding which would/could encompass torture...The decision to expel him was thus, as a matter of domestic law, unlawful.

13.6 The Committee observes that the State party is generally bound by the findings of the Court of Appeal, with the State party observing simply that the Court had not considered the State's brief to the Court, which arrived after the relevant litigation deadlines. The Committee considers, however, that this default on the part of the State party cannot be imputed to the complainant and, moreover, that whether the Court's consideration would

have been different remains speculative. As the State party itself states...and with which the Committee agrees, the judgment of the Court of Appeal, which includes the conclusion that his expulsion occurred in breach of article 3 of the European Convention, cannot, on the basis of the information before the Committee, be regarded as clearly arbitrary or tantamount to a denial of justice. As a result, the Committee also concludes that the complainant has established that his removal was in breach of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

...

14. The Committee against Torture...considers that the deportation of the complainant to Algeria constituted a breach of articles 3 and 22 of the Convention.

15. Pursuant to rule 112, paragraph 5, of its rules of procedure, the Committee wishes to be informed, within 90 days, of the steps the State party has taken in response to the views expressed above, including measures of compensation for the breach of article 3 of the Convention and determination, in consultation with the country (also a State party to the Convention) to which the complainant was returned, of his current whereabouts and state of well-being.

- *Guridi v. Spain* (212/2002), CAT, A/60/44 (17 May 2005) 147 at paras. 2.1-2.4, 2.6, 6.8, 7 and 8.

...

2.1 On 22 January 1992, the Spanish Civil Guard launched a police operation in Vizcaya Province to dismantle the so-called "Bizkaia combat unit" of the organization Euskadi Ta Askatasuna (ETA). In all, 43 people were arrested between then and 2 April 1992; many of them have reportedly been tortured and held *incommunicado*. The complainant was arrested on 22 January 1992 by Civil Guard officers as part of these operations.

2.2 The complainant alleges that, in the course of his transfer to the Civil Guard station, the officers took him to open ground where they subjected him to severe abuse. He was stripped, handcuffed, dragged along the ground and beaten. He states that after six hours of interrogation, he had to be taken to hospital because his pulse rate was very high, he could not speak, he was exhausted and unconscious, and was bleeding from his mouth and nose. The hospital doctors ascertained that he had injuries to his head, face, eyelids, nose, back, stomach, hip, arms and legs. He also had a neck injury which left him unable to move. The complainant maintains that this serious ill-treatment can be categorized as torture within the meaning of article 1 of the Convention.

2.3 The complainant filed suit with the Vizcaya Provincial Court alleging that he had been tortured, and on 7 November 1997 the Court found three Civil Guards guilty of torture. Each

officer received a prison sentence of four years, two months and one day, was disqualified from serving in State security agencies and units for six years and one day, and suspended from duty for the duration of his prison sentence. Under the terms of the sentence, the Civil Guards were ordered to pay compensation of 500,000 pesetas to the complainant. The Court held that the injuries sustained by the complainant had been caused by the Civil Guards in the area of open country where he was taken following his arrest.

2.4 The Public Prosecutor's Office appealed the sentence to the Supreme Court, asking for the charges to be reviewed and the sentences reduced. In its judgement of 30 September 1998, the Supreme Court decided to reduce the Civil Guards' prison sentence to one year. In its judgement, the Court held that the Civil Guards had assaulted the complainant with a view to obtaining a confession about his activities and the identities of other individuals belonging to the Bizkaia combat unit. It took the view that "fact-finding" torture of a degree exceeding cruel or degrading treatment had been established, but held that the injuries suffered by the complainant had not required medical or surgical attention: the first aid the complainant had received was sufficient. The Court considered that a sentence of one year's imprisonment was in proportion to the gravity of the offence.

...

2.6 The Ministry of Justice initiated proceedings to have the three convicted Civil Guards pardoned. The Council of Ministers, at its meeting of 16 July 1999, granted pardons to the three Civil Guards, suspending them from any form of public office for one month and one day. Notwithstanding this suspension, the Ministry of the Interior kept one of the Civil Guards on active duty in a senior post. The pardons were granted by the King in decrees published in Spain's Official Gazette.

...

6.8 As to the alleged violation of article 14, the State party indicates that the complainant received the full amount of compensation ordered by the trial court and claims that the Convention has therefore not been violated. However, article 14 of the Convention not only recognizes the right to fair and adequate compensation but also imposes on States the duty to guarantee compensation for the victim of an act of torture. The Committee considers that compensation should cover all the damages suffered by the victim, which includes, among other measures, restitution, compensation and rehabilitation of the victim, as well as measures to guarantee the non-repetition of the violations, always bearing in mind the circumstances of each case. The Committee concludes that there has been a violation of article 14, paragraph 1, of the Convention.

7. The Committee against Torture...decides that the facts before it constitute a violation of articles 2, 4 and 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

8. In pursuance of rule 112, paragraph 5, of its rules of procedure, the Committee urges the

EFFECTIVE REMEDIES - COMPENSATION

State party to ensure in practice that persons responsible for acts of torture are appropriately punished, to ensure that the complainant receives full redress and to inform it, within 90 days from the date of the transmittal of this decision, of all steps taken in response to the views expressed above.