LEGAL RIGHTS - PROPERTY, CIVIL AND CONTRACT RIGHTS

III. JURISPRUDENCE

CERD

- *Habassi v. Denmark* (10/1997), CERD, A/54/18 (17 March 1999) 86 (CERD/C/54/D/10/1997) at paras. 2.1, 2.2, 9.2-9.4 and 10.

...

2.1 On 17 May 1996 the author visited the shop "Scandinavian Car Styling" to purchase an alarm set for his car. When he inquired about procedures for obtaining a loan he was informed that "Scandinavian Car Styling" cooperated with Sparbank Vest, a local bank, and was given a loan application form which he completed and returned immediately to the shop. The application form included, *inter alia*, a standard provision according to which the person applying for the loan declared himself or herself to be a Danish citizen. The author, who had a permanent residence permit in Denmark and was married to a Danish citizen, signed the form in spite of this provision.

2.2 Subsequently, Sparbank Vest informed the author that it would approve the loan only if he could produce a Danish passport or if his wife was indicated as applicant. The author was also informed that it was the general policy of the bank not to approve loans to non-Danish citizens.

...

9.2 Financial means are often needed to facilitate integration in society. To have access to the credit market and be allowed to apply for a financial loan on the same conditions as those which are valid for the majority in the society is, therefore, an important issue.

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. In the opinion of the Committee, however, nationality is not the most appropriate requisite when investigating a person's will or capacity to reimburse a loan. The applicant's permanent residence or the place where his employment, property or family ties are to be found may be more relevant in this context. A citizen may move abroad or have all his property in another country and thus evade all attempts to enforce a claim of repayment. Accordingly, the Committee finds that, on the basis of article 2, paragraph (d), of the Convention, it is appropriate to initiate a proper investigation into the real reasons behind the bank's loan policy *vis à vis* foreign residents, in order to ascertain whether or not criteria involving racial discrimination, within the meaning of article 1 of the Convention, are being applied.

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).

- *L. R. et al. v. Slovakia* (31/2003), CERD, A/60/18 (7 March 2005) 119 at paras. 2.1-2.4, 10.2-10.10, 11 and 12.

...
2.1 On 20 March 2002, the councillors of the Dobšiná municipality adopted resolution No. 251-20/III-2002-MsZ, whereby they approved what the petitioners describe as a plan to construct low-cost housing for the Roma inhabitants of the town.a/ About 1,800 Roma live in the town in what are described as "appalling" conditions, with most dwellings comprising thatched huts or houses made of cardboard and without drinking water, toilets, or drainage or sewage systems. The councillors instructed the local mayor to prepare a project aimed at securing finance from a government fund set up expressly to alleviate Roma housing problems in the State party.

2.2 Thereupon, certain inhabitants of Dobšiná and surrounding villages established a five-member "petition committee", led by the Dobšiná chairman of the Real Slovak National Party. The committee drafted a petition with the following text:

> "I do not agree with the building of low-cost houses for people of Gypsy origin on the territory of Dobšiná, as it will lead to an influx of inadaptable citizens of Gypsy origin from the surrounding villages, even from other districts and regions."b/

The petition was signed by some 2,700 inhabitants of Dobšiná and deposited with the municipal council on 30 July 2002. On 5 August 2002, the council considered the petition and unanimously voted, "having considered the factual circumstances", to cancel the earlier resolution by means of a second resolution which included an explicit reference to the petition.c/

2.3 On 16 September 2002, in the light of the relevant law,d/ the petitioners' counsel requested the Rožňava District Prosecutor to investigate and prosecute the authors of the discriminatory petition, and to reverse the council's second resolution as it was based on a discriminatory petition. On 7 November 2002, the District Prosecutor rejected the request on the basis of purported absence of jurisdiction over the matter. The Prosecutor found that

"...the resolution in question was passed by the Dobšiná Town Council exercising its self-governing powers; it does not constitute an administrative act performed by public administration and, as a result, the prosecution office does not have the competence to review the legality of this act or to take prosecutorial supervision measures in non-penal area".

2.4 On 18 September 2002, the petitioners' counsel applied to the Constitutional Court for an order determining that articles 12 and 33 of the Constitution, the Act on the Right of Petition and the Framework Convention for the Protection of National Minorities (Council of Europe) had been violated, cancelling the second resolution of the council and examining the legality of the petition. Further information was provided on two occasions at the request of the Court. On 5 February 2003, the Court, in closed session, held that the petitioners had provided no evidence that any fundamental rights had been violated by the petition or by the council's second decision. It stated that as neither the petition nor the second resolution constituted legal acts, they were permissible under domestic law. It further stated that citizens have a right to petition regardless of its content.

...

10.2 The Committee observes, at the outset, that it must determine whether an act of racial discrimination, as defined in article 1 of the Convention, has occurred before it can decide which, if any, substantive obligations in the Convention to prevent, protect against and remedy such acts have been breached by the State party.

10.3 The Committee recalls that, subject to certain limitations not applicable in the present case, article 1 of the Convention defines racial discrimination as follows: "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field".

10.4 The State party argues firstly that the challenged resolutions of the municipal council make no reference to Roma, and must thus be distinguished from the resolutions at issue in, for example, the *Koptova* y/ case that were racially discriminatory on their face. The Committee recalls that the definition of racial discrimination in article 1 expressly extends beyond measures which are explicitly discriminatory to encompass measures that are not discriminatory at face value but are discriminatory in fact and effect, that is, if they amount to indirect discrimination. In assessing such indirect discrimination, the Committee must take full account of the particular context and circumstances of the petition, as by definition indirect discrimination can only be demonstrated circumstantially.

10.5 In the present case, the circumstances surrounding the adoption of the two resolutions by the municipal council of Dobšiná and the intervening petition presented to the council following its first resolution make abundantly clear that the petition was advanced by its

proponents on the basis of ethnicity and was understood as such by the council as the primary, if not the exclusive basis for revoking its first resolution. As a result, the Committee considers that the petitioners have established a distinction, exclusion or restriction based on ethnicity, and dismisses this element of the State party's objection.

10.6 The State party argues, in the second instance, that the municipal council's resolution did not confer a direct and/or enforceable right to housing, but rather amounted to but one step in a complex process of policy development in the field of housing. The implication is that the second resolution of the council, even if motivated by ethnic grounds, thus did not amount to a measure "nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field", within the meaning of article 1, paragraph 1 *in fine*. The Committee observes that in complex contemporary societies the practical realization of, in particular, many economic, social and cultural rights, including those related to housing, will initially depend on and indeed require a series of administrative and policymaking steps by the State party's competent relevant authorities. In the present case, the council resolution clearly adopted a positive development policy for housing and tasked the mayor with pursuing subsequent measures by way of implementation.

10.7 In the Committee's view, it would be inconsistent with the purpose of the Convention, and elevate formalism over substance, to consider that the final step in the actual implementation of a particular human right or fundamental freedom must occur in a non-discriminatory manner, while the necessary preliminary decision-making elements directly connected to that implementation were to be severed and be free from scrutiny. As a result, the Committee considers that the council resolutions in question, taking initially an important policy and practical step towards realization of the right to housing, followed by its revocation and replacement with a weaker measure, taken together, do indeed amount to the impairment of the recognition or exercise on an equal basis of the human right to housing, protected by article 5, paragraph (e) (iii), of the Convention and further in article 11 of the International Covenant on Economic, Social and Cultural Rights. The Committee thus dismisses the State party's objection on this point.

10.8 In light of this finding that an act of racial discrimination has occurred, the Committee recalls its jurisprudence [n/]...to the effect that acts of municipal councils, including the adoption of public resolutions of legal character such as in the present case, amount to acts of public authorities within the meaning of Convention provisions. It follows that the racial discrimination in question is attributable to the State party.

10.9 Accordingly, the Committee finds that the State party is in breach of its obligation under article 2, paragraph 1 (a), of the Convention to engage in no act of racial discrimination and to ensure that all public authorities act in conformity with this obligation. The

Committee also finds that the State party is in breach of its obligation to guarantee the right of everyone to equality before the law in the enjoyment of the right to housing, contrary to article 5, paragraph (e) (iii), of the Convention.

10.10 With respect to the claim under article 6, the Committee observes that, at a minimum, this obligation requires the State party's legal system to afford a remedy in cases where an act of racial discrimination within the meaning of the Convention has been made out, whether before the national courts or, in this case, the Committee. The Committee having established the existence of an act of racial discrimination, it must follow that the failure of the State party's courts to provide an effective remedy discloses a consequential violation of article 6 of the Convention.

...

11. The Committee on the Elimination of Racial Discrimination...is of the view that the facts before it disclose violations of article 2, paragraph 1 (a), article 5, paragraph (e) (iii), and article 6 of the Convention.

12. In accordance with article 6 of the Convention, the State party is under an obligation to provide the petitioners with an effective remedy. In particular, the State party should take measures to ensure that the petitioners are placed in the same position that they were in upon adoption of the first resolution by the municipal council. The State party is also under an obligation to ensure that similar violations do not occur in the future.

Notes

a/ The State party provides, with its submissions on the merits of the petition, the following full text of the resolution:

> "On its 25th extraordinary session held on 20 March 2002 the Town Council of the town of Dobšiná adopted the following resolution from discussed reports and points:
>
> RESOLUTION 251-20/III-2002-MsZ
>
> After discussing the proposal by Lord Mayor Ing. Ján Vozár concerning the building of low-cost housing the Town Council of Dobšiná
>
> Approves
>
> the low-cost housing - family houses or apartment houses - development policy and
>
> Recommends

the Lord Mayor to deal with the preparation of project documentation and acquisition of funds for this development from State subsidies."

b/ Petitioners' translation, which reflects exactly the text of the petition set out in the translated judgement of the Constitutional Court provided by the State party annexed to its submissions on the merits. The State party suggests in its submissions on the merits that a more appropriate translation would be: "I do not agree with the construction of flats for the citizens of Gypsy nationality (ethnicity) within the territory of the town of Dobšiná, as there is a danger of influx of citizens of Gypsy nationality from surrounding area [sic] and even from other districts and regions."

c/ The State party provides, with its submissions on the merits of the petition, the following full text of the resolution:

"RESOLUTION 288/5/VIII-2002-MsZ

I. After discussing the petition of 30 July 2002 and after determining the facts, the Town Council of Dobšiná, through the Resolution of the Town Council is in compliance with the law, on the basis of the citizens' petition

Cancels

Resolution 251-20/III-2002-MsZ approving the low-cost housing - family houses or apartment houses - development policy.

II. Tasks

The Town Council commissions with elaborating a proposal for solving the existence of inadaptable citizens in the town of Dobšiná and then to discuss it in the bodies of the town and at a public meeting of the citizens.

Deadline: November 2002
Responsible: Chairpersons of commissions."

d/ The petitioners refer to:

(i) Article 1 of the Act on the Right of Petition, which provides:
"A petition cannot call for a violation of the Constitution of the Slovak Republic and its laws, nor deny or restrict individual rights";

(ii) Article 12 of the Constitution, which provides:

> (1) All human beings are free and equal in dignity and in rights. Their fundamental rights and freedoms are sanctioned; inalienable, imprescriptible and irreversible.
> (2) Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favoured on any of these grounds.
> (3) Everyone has the right to decide freely which national group he or she is a member of. Any influence and all manners of pressure that may affect or lead to a denial of a person's original nationality shall be prohibited.
> (4) No injury may be inflicted on anyone, because of exercising his or her fundamental rights and freedoms;

(iii) Article 33 of the Constitution, which provides:

> "Membership in any national minority or ethnic group may not be used to the detriment of any individual"; and

(iv) The Act on the Public Prosecution Office, which provides that the Prosecutor has a duty to oversee compliance by public administration bodies with laws and regulations, and to review the legality of binding regulations issued by public administration bodies.

...

n/ [See *Koptova v. Slovak Republic*, case No. 13/1998, Opinion of 8 August 2000], at para. 6.6.

...

y/ [*Koptova v. Slovak Republic*, case No. 13/1998, Opinion of 8 August 2000].

ICCPR

- *Avellanal v. Peru* (202/1986), ICCPR, A/44/40 (28 October 1988) 196 at paras. 2.1, 10.1, 10.2 and 11.

...

2.1 The author is the owner of two apartment buildings in Lima, which she acquired in 1974. It appears that a number of tenants took advantage of the change in ownership to cease paying rent for their apartments. After unsuccessful attempts to collect the overdue rent, the author sued the tenants on 13 September 1978. The court of first instance found in her favour and ordered the tenants to pay her the rent due since 1974. The Superior Court reversed the judgement on 21 November 1980 on the procedural ground that the author was not entitled to sue, because, according to article 168 of the Peruvian Civil Code, when a

woman is married only the husband is entitled to represent matrimonial property before the Courts ("*El marido es el representante de la sociedad conyugal*"). On 10 December 1980 the author appealed to the Peruvian Supreme Court, submitting, *inter alia*, that the Peruvian Constitution now in force abolished discrimination against women and that article 2 (2) of the Peruvian Magna Carta provides that "the law grants rights to women which are not less than those granted to men". However, on 15 February 1984 the Supreme Court upheld the decision of the Superior Court. Thereupon, the author interposed the recourse of *amparo* on 6 May 1984, claiming that in her case article 2 (2) of the Constitution had been violated by denying her the right to litigate before the courts only because she is a woman. The Supreme Court rejected he recourse of *amparo* on 10 April 1985.

...

10.1 With respect to the requirement set forth in article 14, paragraph 1, of the Covenant that "all persons shall be equal before the courts and tribunals", the Committee notes that the court of first instance decided in favour of the author, but the Superior Court reversed that decision on the sole ground that according to article 168 of the Peruvian Civil Code only the husband is entitled to represent matrimonial property, i.e. that the wife was not equal to her husband for purposes of suing in Court.

10.2 With regard to discrimination on the ground of sex the Committee notes further that under article 3 of the Covenant State parties undertake "to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant" and that article 26 provides that all persons are equal before the law and are entitled to the equal protection of the law. The Committee finds that the facts before it reveal that the application of article 168 of the Peruvian Civil Code to the author resulted in denying her equality before the courts and constituted discrimination on the ground of sex.

...

11. The Human Rights Committee...is of the view that the events of this case...disclose violations of articles 3, 14, paragraph 1 and 26 of the Covenant.

- *Somers v. Hungary* (566/1993), ICCPR, A/51/40 vol. II (23 July 1996) 144 (CCPR/C/57/D/566/1993) at paras. 9.2-9.4, 9.6, 9.8 and 10.

...

9.2 ...[T]he right to property as such is not protected under the Covenant. However, confiscation of private property or 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.

9.3 ...The Committee notes that the confiscation itself is not at issue here, but rather the alleged discriminatory effect of the compensation law on the author and his mother.

9.4 ...[T]he only issue is whether the award of less than full compensation for the loss of the author's property, under Act XXV of 1991, is contrary to article 26 of the Covenant. The Committee observes that Act XXV contains objective compensation criteria, which are applied equally and without discrimination to individuals in the author's situation.

...

9.6 The corollary of the fact that the Covenant does not protect the right to property is that there is no right, as such, to have (expropriated or nationalized) property restituted. If a State party to the Covenant provided compensation for nationalization or expropriation on equal terms, it does not discriminate against those whose property was appropriated or nationalized. The Committee is of the opinion that section 7 of Act XXV of 1991 provides for compensation on equal terms...

...

9.8 ...As in the case of Act XXV, the criteria for the privatization of former State-owned property in Act LXXVIII of 1993 are objective. The State party has justified the (exclusionary) requirement that current tenants of former State-owned residential property have a "buy first option" even *vis-à-vis* the former owner of the property with the argument that tenants contribute to the maintenance of the property through improvements of their own. The Committee does not consider that the fact of giving the current tenants of former State-owned property priority in the privatization sale of such property is in itself unreasonable; the interests of the "current tenants", who may have been occupying the property for years, are deserving of protection. If the former owners are, moreover, compensated on equal and non-discriminatory terms (paragraph 9.6), the interplay between Act XXV of 1991 and of Act LXVIII of 1993 can be deemed compatible with article 26 of the Covenant; with respect to the application of the privatization legislation to the author's case, the Committee does not dispose of sufficient elements to conclude that its criteria were applied in a discriminatory manner.

...

10. The Human Rights Committee...is of the view that the facts as founds by the Committee do not reveal a breach of article 26 or of any other provision of the Covenant.

- *Adam v. The Czech Republic* (586/1994), ICCPR, A/51/40 vol. II (23 July 1996) 165 at paras. 2.1, 12.2, 12.4-12.7, 13.1 and Individual Opinion by Nisuke Ando (concurring), 173.

...

2.1 The author's father, Vlatislav Adam, was a Czech citizen, whose property and business were confiscated by the Czechoslovak Government in 1949. Mr. Adam fled the country and eventually moved to Australia, where his three sons, including the author of the communication, were born. In 1985, Vlatislav Adam died and, in his last will and testament, left his Czech property to his sons. Since then, the sons have been trying in vain to have their property returned to them.

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...

12.2 ...[T]he right to property, as such, is not protected under the Covenant. However, a confiscation of private property or the failure of 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.

...

12.4 In the instant case, the author has been affected by the exclusionary effect of the requirement in Act 87/1991 that claimants be Czech citizens. The question before the Committee, therefore, is whether the precondition to restitution or compensation is 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. 2/ 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.

12.5 In examining whether the conditions for restitution or compensation are compatible with the Covenant, the Committee must consider all relevant factors, including the original entitlement of the author's father to the property in question and the nature of the confiscation. The State party itself has acknowledged that the confiscations under the Communist governments were injurious and that is 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 author's original entitlement to his property by virtue of inheritance was not predicated on citizenship, the Committee finds that the condition of citizenship in Act 87/1991 is unreasonable.

12.6 In this context, the Committee recalls its rationale in its views on communication No. 516/1992 (*Simunek et al. v. the Czech Republic*), adopted on 19 July 1995, 3/ in which it considered that the authors in that case and many others in analogous situations had left Czechoslovakia because of their political opinions and had sought refuge from political persecution in other countries, where they eventually established permanent residence and obtained a new citizenship. Taking into account that the State party itself is responsible for the departure of the author's parents in 1949, it would be incompatible with the Covenant to require the author and his brothers to obtain Czech citizenship as a prerequisite for the restitution of their property or, alternatively, for the payment of appropriate compensation.

12.7 The State party contends that there is no violation of the Covenant because the Czech and Slovak legislators had no discriminatory intent at the time of the adoption of Act 87/1991. The Committee is of the view, however, that the intent of the legislature is not dispositive in determining a breach of article 26 of the Covenant, but rather the consequences of the enacted legislation. Whatever the motivation or intent of the legislature, a law may still

contravene article 26 of the Covenant if its effects are discriminatory.

...

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

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Notes

...

2/ See Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40), annex VIII.D, communication No. 182/1994, (*Zwaan-de Vries v. the Netherlands*), views adopted on 9 April 1987, para. 13.

3/ *Ibid*., Fiftieth Session, Supplement No. 40 (A/50/40), vol. II, annex X.K.

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Individual Opinion by Nisuke Ando

Considering the Human Rights Committee's views on communication No. 516/1992, I do not oppose the adoption by the Committee of the views in the instant case. However, I would like to point to the following:

First, under current rules of general international law, States are free to choose their economic system. As a matter of fact, when the United Nations adopted the International Covenant on Civil and Political Rights in 1966, the then Socialist States were managing planned economies under which private ownership was largely restricted or prohibited in principle. Even nowadays not a few States parties to the Covenant, including those adopting marked-oriented economies, restrict or prohibit foreigners from private ownership of immovable properties in their territories.

Second, consequently, it is not impossible for a State party to limit the ownership of immovable properties in its territory to its nationals or citizens, thereby precluding their wives or children of different nationality or citizenship from inheriting or succeeding to those properties. Such inheritance or succession is regulated by rules of private international law of the States concerned, and I am not aware of any universally recognized "absolute right of inheritance or of succession to private property".

Third, while the International Covenant on Civil and Political Rights enshrines the principle of non-discrimination and equality before the law, it does not prohibit "legitimate distinctions" based on objective and reasonable criteria. Nor does the Covenant define or protect economic rights as such. This means that the Human Rights Committee should exercise utmost caution in dealing with questions of discrimination in the economic field.

For example, restrictions or prohibitions of certain economic rights, including the right of inheritance or succession, which are based on nationality or citizenship, may well be justified as legitimate distinctions.

See also:

- *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, 11.5-11.7 and 12.1.
- *Blazek et al. v. The Czech Republic* (857/1999), ICCPR, A/56/40 vol. II (12 July 2001) 168 at paras. 2.1, 5.4, 5.6, 5.8, 6 and Individual Opinion by Nisuke Ando (concurring), 174.
- *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, 2.4, 2.6, 2.7 and 8.2.

- *Drobek v. Slovakia* (643/1995), ICCPR, A/52/40 vol. II (14 July 1997) 300 (CCPR/C/60/C/643/1995) at paras. 6.3-6.5 and 7.

...

6.3 Although the author's claim relates to property rights, which are not as such protected by the Covenant, he contends that the 1991 law violates his rights under articles 2 and 26 of the Covenant in that it applies only to individuals whose property was confiscated after 1948 and thus excludes from compensation in respect of property taken from ethnic Germans by a 1945 decree of the pre-Communist regime. The Committee has already had occasion to hold that laws relating to property rights may violate articles 2 and 26 of the Covenant if they are discriminatory in character. The question the Committee must therefore resolve in the instant case is whether the 1991 law applied to the claimant falls into this category.

6.4 In its views on Communication 516/1992 (*Simunek v. Czech Republic*), the Committee held that the 1991 law violated the Covenant because it excluded from its application individuals whose property was confiscated after 1948 simply because they were not nationals or residents of the country after the fall of the Communist regime in 1989. The instant case differs from the views in the above case, in that the author in the present case does not allege discriminatory treatment in respect of confiscation of property after 1948. Instead, he contends that the 1991 law is discriminatory because it does not also compensate victims of the 1945 seizures decreed by the pre-Communist regime.

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 the 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 allegedly committed by earlier regimes. The author has failed to substantiate such a claim with regard to articles 2 and 26.

...

7. The Human Rights Committee therefore decides:

(a) the communication is inadmissible...

- *Malik v. Czech Republic* (669/1995), ICCPR, A/54/40 vol. II (21 October 1998) 291 at paras. 3.3, 3.4 and 6.5.

...

3.3 Mr. Malik specifically complains of the denial of equality before the courts, in violation of article 14, and of discrimination, in violation of article 26. He points out that the enforced expatriation in 1945, the expropriations and the expulsions were carried out in a collective way, and were not based on conduct but rather on status. All members of the German minority, including Social Democrats and other antifascists were expelled and their property was confiscated, just because they were German. In this context he refers to the policy of ethnic cleansing in the former Yugoslavia, which has been recognized to be in violation of international law. He also refers to the Nazi expatriation and expropriation of German Jews, which were arbitrary and discriminatory. He points out that while Nazi laws have been abrogated and restitution or compensation has been effected for Nazi confiscations, neither Czechoslovakia nor the Czech Republic has offered restitution or compensation to the expatriated, expropriated and expelled German minority.

3.4 Mr. Malik notes that by virtue of Law No. 87/1991 Czech citizens with Czech residence may obtain restitution or compensation for properties that were confiscated by the Government of Czechoslovakia in the period from 1948 to 1989. Mr. Malik and his family do not qualify for compensation under this law, because their properties were confiscated in 1945, and because they lost their Czech citizenship as a result of Benes Decree No. 33 and their residence because of their expulsion. Moreover, he points out that whereas there is a restitution and compensation law for Czechs, none has been enacted to allow any form of restitution or compensation for the German minority. This is said to constitute a violation of article 26 of the Covenant.

...

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. 128/ 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

...

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

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See also:

- *Schlosser v. Czech Republic* (670/1995), ICCPR, A/54/40 vol. II (21 October 1998) 298 at paras. 3.4, 3.5 and 6.5.

- *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.

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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.

- *Lestourneaud v. France* (861/1999), ICCPR, A/55/40 vol. II (3 November 1999) 234 at paras. 4.2 and 5.

...

4.2 The Committee notes that the author's claim is based upon the difference in remuneration between legal aid services performed by counsel for the civil claimant and those performed by counsel for the defendant. The Committee recalls that differences in treatment do not constitute discrimination, when they are based on objective and reasonable criteria. In the present case, the Committee considers that representation of a person presenting a civil claim in a criminal case cannot be equalled to representing the accused. The arguments advanced by the author and the material he provided do not substantiate, for purposes of admissibility, the author's claim that he is a victim of discrimination.

...

5. Accordingly, the Human Rights Committee decides:

(a) that the communication is inadmissible ...

- *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, 4.11, 7.2-7.7, 8.1, 8.2, Individual Opinion by Prafullachandra N. Bhagwati (concurring), 129 and Individual Opinion by Abdelfattah Amor, Nisuke Ando, Christine Chanet, Eckart Klein, Ivan Shearer and Max Yalden (partly dissenting), 130.

...

2.1 The authors are reindeer breeders of Sami ethnic origin and members of the Sallivaara

Reindeer Herding Co-operative. The Co-operative has 286,000 hectares of State-owned land available for reindeer husbandry. On 23 March 1994, the Committee declared a previous communication, brought by the authors among others and which alleged that logging and road-construction activities in certain reindeer husbandry areas violated article 27 of the Covenant, inadmissible for non-exhaustion of domestic remedies. 1/ In particular, the Committee considered that the State party had shown that article 27 could be invoked in the relevant domestic proceedings, which the authors should have engaged before coming to the Committee. Thereafter, following unsuccessful negotiations, the authors brought a suit in the Lappi District Court of first instance against the National Forestry and Park Service (Forestry Service). The suit sought the enjoinder, on the basis *inter alia* of article 27 of the Covenant, of any logging or road-construction in the Mirhaminmaa-Kariselkä area. This area is said to be amongst the best winter herding lands of the Sallivara 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/ The Court applied a test of "whether the harmful effects of felling are so great that they can be deemed to deny to the Sami a possibility of reindeer herding that is part of their culture, is adapted to modern developments, and is profitable and rational". The Court considered that logging in the Mirhaminmaa area would be of long-term benefit to reindeer herding in the area and would be convergent with those interests. In the Kariselkä area, differing environmental conditions meant that there would be a considerable long-term decrease in lichen reserves. Relying *inter alia* on the decisions of the Committee, 3/ the Court found that these effects of logging, combined with the fact that the area was an emergency feeding ground, would prevent reindeer herding in that area. A factor in the decision was the disclosure that an expert testifying for the Forestry Service disclosed he had not visited the forest in question. After the decision, logging duly proceeded in the Mirhaminmaa area.

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. The expert witness, having in the meanwhile examined the forest, repeated his first instance testimony for the Forestry Service. Another expert witness for the Forestry Service testified that the authors' herding co-operative would not suffer greatly in the reduction of herding land through the logging in question, however the Court was not informed that the witness already had proposed to the authorities that the authors' herd should be reduced by 500 owing to serious overgrazing.

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/ The Court took a different view of the expert evidence. It found that the small area of logging

proposed (which would not involve further roadworks) would have minimal effects on the quantities of arboreal lichen and, over time, increase the amounts of ground lichen. In light of the finding that the area was not the main winter pasture and in recent years had not been used as a back-up area, the Court concluded it had not been shown that there would be adverse effects on reindeer in the long run and even the immediate effects would be small. The authors were not made aware by the Appeal Court or the Forestry Service that the latter had presented allegedly distorted arguments to the Court based on the Committee's finding of no violation of article 27 of the Covenant in the separate case of *Jouni Länsman et al. v. Finland*. 5/ The authors learned of this brief only upon receiving the Appeal Court's judgement, in which it stated that the material had been taken into account, but that an opportunity for the authors to comment was "manifestly unnecessary". On 29 October 1997, the Supreme Court decided, in its discretion and without giving reasons, not to grant leave to appeal. Thereafter, logging took place in the Kariselkä area, but no roads were constructed.

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.

...

4.11 As to the imposition of costs, the State party points out that under its law there is an obligation for the losing party to pay, when sought, the reasonable legal costs of the successful party. 15/ The law does not alter this situation when the parties are a private individual and public authority, or when the case involves human rights issues. These principles are the same in many other States, including Austria, Germany, Norway and Sweden, and are justified as a means of avoiding unnecessary legal proceedings and delays. The State party argues this mechanism, along with free legal aid for lawyers' expenses, ensures equality in the courts between plaintiffs and defendants. The State party notes however that, from 1 June 1999, an amendment to the law will permit a court *ex officio* to reduce a costs order that would otherwise be manifestly unreasonable or inequitable with regard to the facts resulting in the proceedings, the position of the parties and the significance of the matter.

...

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.

7.3 As to the authors' claims under article 14 that the procedure applied by the Court of Appeal was unfair in that an oral hearing was granted and an on-site inspection was denied, the Committee considers that, as a general rule, the procedural practice applied by domestic courts is a matter for the courts to determine in the interests of justice. The onus is on the authors to show that a particular practice has given rise to unfairness in the particular proceedings. In the present case, an oral hearing was granted as the Court found it necessary to determine the reliability and weight to be accorded to oral testimony. The authors have not shown that this decision was manifestly arbitrary or otherwise amounted to a denial of justice. As to the decision not to pursue an on-site inspection, the Committee considers that the authors have failed to show that the Court of Appeal's decision to rely on the District Court's inspection of the area and the records of those proceedings injected unfairness into the hearing or demonstrably altered the outcome of the case. Accordingly, the Committee is unable to find a violation of article 14 in the procedure applied by the Court of Appeal in these respects.

7.4 As to the author's contention that the Court of Appeal violated the authors' right to a fair trial contained in article 14, paragraph 1, by failing to afford the authors an opportunity to comment on the brief containing legal argument submitted by the Forestry Authority after expiry of filing limits, the Committee notes that it is a fundamental duty of the courts to ensure equality between the parties, including the ability to contest all the argument and evidence adduced by the other party.17/ The Court of Appeal states that it had "special reason" to take account of these particular submissions made by the one party, while finding it "manifestly unnecessary" to invite a response from the other party. In so doing, the authors were precluded from responding to a brief submitted by the other party that the Court took account of in reaching a decision favourable to the party submitting those observations. The Committee considers that these circumstances disclose a failure of the Court of Appeal to provide full opportunity to each party to challenge the submissions of the other, thereby violating the principles of equality before the courts and of fair trial contained in article 14, paragraph 1, of the Covenant.

7.5 Turning to the claim of a violation of article 27 in that logging was permitted in the Kariselkä area, the Committee notes that it is undisputed that the authors are members of a minority culture and that reindeer husbandry is an essential element of their culture. The Committee's approach in the past has been to inquire whether interference by the State party in that husbandry is so substantial that it has failed to properly protect the authors' right to enjoy their culture. The question therefore before the Committee is whether the logging of the 92 hectares of the Kariselkä area rises to such a threshold.

7.6 The Committee notes that the authors, and other key stakeholder groups, were consulted in the evolution of the logging plans drawn up by the Forestry Service, and that the plans were partially altered in response to criticisms from those quarters. The District Court's evaluation of the partly conflicting expert evidence, coupled with an on-site inspection, determined that the Kariselkä area was necessary for the authors to enjoy their cultural rights under article 27 of the Covenant. The appellate court finding took a different view of the evidence, finding also from the point of view of article 27, that the proposed logging would partially contribute to the long-term sustainability of reindeer husbandry by allowing regeneration of ground lichen in particular, and moreover that the area in question was of secondary importance to husbandry in the overall context of the Collective's lands. The Committee, basing itself on the submissions before it from both the authors and the State party, considers that it does not have sufficient information before it in order to be able to draw independent conclusions on the factual importance of the area to husbandry and the long-term impacts on the sustainability of husbandry, and the consequences under article 27 of the Covenant. Therefore, the Committee is unable to conclude that the logging of 92 hectares, in these circumstances, amounts to a failure on the part of the State party to properly protect the authors' right to enjoy Sami culture, in violation of article 27 of the Covenant.

7.7 In the light of the Committee's findings above, it is not necessary to consider the authors' additional claims brought under article 2 of the Covenant.

8.1 The Human Rights Committee...is of the view that the facts before it reveal 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. As to the violation of article 14, paragraph 1, arising from the process

applied by the Court of Appeal in handling the brief submitted late by the Forestry Service (para. 7.4), the Committee considers that, as the decision of the Court of Appeal was tainted by a substantive violation of fair trial provisions, the State party is under an obligation to reconsider the authors' claims. The State party is also under an obligation to ensure that similar violations do not occur in the future.

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Notes

1/ *Sara et al. v. Finland*, Communication 431/1990.

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.

3/ *Sara v. Finland* (Communication 431/1990), *Kitok v. Sweden* (Communication 197/1985), *Ominayak v. Canada* (Communication 167/1984), *Ilmari Länsman v. Finland* (Communication 511/1992); and moreover the Committee's General Comments 23 (50).

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

5/ Communication 671/1995.

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).

...

15/ Chapter 21, section 1, *Code of Judicial Procedure* 1993.

...

17/ In *Jansen-Gielen v. The Netherlands* (Communication 846/1999), the Committee stated: "Consequently, it was the duty of the Court of Appeal, which was not constrained by any prescribed time limit to ensure that each party could challenge the documentary evidence which the other filed or wished to file and, if need be, to adjourn proceedings. In the absence of the guarantee of equality of arms between the parties in the production of evidence for the purposes of the hearing, the Committee finds a violation of article 14, paragraph 1 of the Covenant."

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...

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

Individual Opinion by Abdelfattah Amor, Nisuke Ando, Christine Chanet, Eckart Klein, Ivan Shearer and Max Yalden (partly dissenting)

While we share the Committee's general approach with regard to the award of costs (see also *Lindon v Australia* (Communication 646/1995), we cannot agree that in the present case it has convincingly been argued and proven that the authors were in fact so seriously affected by the relevant decision taken at the appellate level that access to the court was or would in

future be closed to them. In our view, they have failed to substantiate a claim of financial hardship.

Concerning possible deterrent effects in future on the authors or other potential authors, due note must be given to the amendment of the code of judicial procedure according to which a court has the power to reduce a costs order that would be manifestly unreasonable or inequitable, having regard to the concrete circumstances of a given case (see paragraph 4.11 above).

However, given that we share the view that the Court of Appeal's judgment is vitiated by a violation of article 14, paragraph 1, of the Covenant (see paragraph 7.4 above), its decision relating to the costs is necessarily affected as well. We therefore join the Committee's finding that the State party is under an obligation to refund to the authors that proportion of the costs award already recovered, and to refrain from executing any further portion of the award (see paragraph 8.2 of the Committee's views).

- *Fábryová v. Czech Republic* (765/1997), ICCPR, A/57/40 vol. II (30 October 2001) 103 (CCPR/C/73/D/765/1997) at paras. 2.1-2.5, 4.1, 4.2, 4.4, 9.2, 9.3, 10 and 11.

...

2.1 The author's father Richard Fischmann owned an estate in Puklice in the district of Jihlava, Czechoslovakia. In 1930, at a national census, he and his family registered as Jews. In 1939, after the occupation by the Nazis, the estate was "aryanised" 1/ and a German sequestrator was appointed. Richard Fischmann died in 1942 in Auschwitz. The author is not represented by counsel.

2.2 The rest of the family was interned in concentration camps and only the author and her brother Viteslav returned. In 1945, the estate of Richard Fischmann was confiscated under Benes decree 12/1945 because the district committee decided that he was German as well as a traitor to the Czech Republic 2/, the assumption that he was German being based on the assertion that he had lived "in a German way".

2.3 The author's appeal against the confiscation was dismissed. The decision of the district committee was upheld by a judgment of the highest administrative court in Bratislava on 3 December 1951.

2.4 After the end of communist rule in Czechoslovakia, the author lodged a complaint to the General procurator, on 18 December 1990, for denial of justice with regard to her claim for restitution. Her complaint was dismissed on 21 August 1991 for being out of time, having been lodged more than five years after the confiscation. The author states that under

Communist rule it was not possible to lodge a complaint within the time limit of five years as prescribed by law.

2.5 The author states that on 17 June 1992 she applied for restitution according to the law No. 243/1992 3/. Her application was dismissed on 14 October 1994 by the Land Office of Jihlava.

...

4.1 By submission of 20 October 1997, the State party stated that the author's application for restitution of her father's property was dismissed by the Jihlava Land Office on 14 October 1994, on grounds of non-compliance with the legal requirements. It explained that the confiscated property of persons who were deprived of Czechoslovak citizenship under the Benes decrees in 1945, may be restituated in cases where the claimant has his citizenship renewed through the procedures set by law. However, the law did not expressly address the situation of persons who never lost their citizenship and whose property was confiscated in violation of the laws operative at that time. Since the author's father never lost his Czechoslovak citizenship, he could not be considered to be an entitled person and the property could not be restored.

4.2 The State party further explained that the author's appeal was dismissed for being filed out of time. The author's lawyer then raised the objection that the Land Office's decision had not been served properly, since it had not been served to the lawyer directly, but to a member of his staff, who was not authorized to receive it. The Land Office accepted the objection, and served the decision again. The author subsequently appealed against the decision. The City Court dismissed the appeal by a ruling dated 6 August 1996, on the ground that the decision had been properly served the first time and should not have been served a second time. On 11 October 1996, the author filed a constitutional complaint, which was dismissed by the Constitutional Court as inadmissible *ratione temporis*.

...

4.4 The State party...submitted that, since the present communication had been submitted to the Committee, the Constitutional Court had decided, in cases similar to that of the author's father, that applicants who never lost their citizenship were also entitled to restitution under law no. 243/1992. As a consequence, the Central Land Office, which examined the author's file, decided that the Land Office's decision in the author's case should be reviewed, since it was inconsistent with the Constitutional Court's ruling. On 27 August 1997, the Central Land Office initiated administrative proceedings and on 9 October 1997, it quashed the Land Office's decision of 14 October 1994, and decided that the author should restart her application for restitution *ab initio*. Normal appeal possibilities would be open to the author if she was not satisfied with the outcome of the proceedings. Also for this reason, the State party argued that the communication was inadmissible under article 5, paragraph 2(b), of the Optional Protocol.

...

9.2 The Committee notes that the State Party concedes that under Law No. 243/1992 individuals in a similar situation as that of the author qualify for restitution as a result of the subsequent interpretation given by the Constitutional Court (para. 4.4). The State Party further concedes that the decision of the Jihlava Land Office of 14 October 1994 was wrong and that the author should have had the opportunity to enter a fresh application before the Jihlava Land Office. The author's renewed attempt to obtain redress has, however, been frustrated by the State party itself which, through a letter of the Ministry of Agriculture of 25 May 1998, informed the author that the decision of the Jihlava Land Office of 14 October 1994 had become final on the ground that the decision of the Central Land Office reversing the decision of the Jihlava Land Office had been served out of time.

9.3 Given the above facts, the Committee concludes that, if the service of the decision of the Central Land Office reversing the decision of the Jihlava Land Office was made out of time, this was attributable to the administrative fault of the authorities. The result is that the author was deprived of treatment equal to that of persons having similar entitlement to the restitution of their previously confiscated property, in violation of her rights under article 26 of the Covenant.

10. The Human Rights Committee...is therefore of the view that the facts before it disclose a violation of article 26 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 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.

Notes

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1/ i. e. that the property was taken away from Jews as "non-Aryans" and transferred to the German State or German natural or juridical persons.

2/ The author states that according to the edict Nr. A 4600 9/11 45 VI/2 of the Ministry of the Interior of 13 November 1945 the district committees had the competence to examine the reliability of those persons who in 1930 had registered as Jews.

3/ Law no. 243/1992 provides for the restitution of property which was confiscated as a result of Benes decrees Nos. 12/1945 and 108/1945. One of the conditions to be eligible for restitution is that the claimant must have been granted Czech citizenship by decree 33/1945, Act no. 245/1948, 194/1949 or 34/1953.

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- *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.

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

...

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

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

2.3 In September 1989 the Ministry of Primary and Secondary Education issued an order to reinstate the author in his post in Bujumbura. Accordingly, the author moved back to Burundi in order to fill his post. Subsequently, Mr. Ikolo, who despite his suspension remained in Bujumbura until 20 December 1989, informed the authorities in Zaire that the author was a member of a network of political opponents of the Zairian Government, and

that he therefore had requested the authorities of Burundi to expel him. For this reason, the author maintains, Mr. Ikolo and his successor at the embassy, Vizi Topi, refused to reinstate him in his post, even after confirmation by the Minister of Primary and Secondary Education, or to pay his salary arrears.

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

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

...

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

read in conjunction with article 2 of the Covenant.

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

...

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

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

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Notes

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

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

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

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- *Joslin v. New Zealand* (902/1999), ICCPR, A/57/40 vol. II (17 July 2002) 214 (CCPR/C/75/D/902/1999) at paras. 2.1-2.4, 8.2, 8.3, 9 and Individual Opinion by Mr. Rajsoomer Lallah and Mr. Martin Scheinin (concurring), 226.

...

2.1 Ms. Joslin and Ms. Rowan commenced a lesbian relationship in January 1988. Since that point, they have jointly assumed responsibility for their children out of previous marriages. In living together, they have pooled finances and jointly own their common home. They maintain sexual relations. On 4 December 1995, they applied under the Marriage Act 1955 to the local Registrar of Births, Deaths and Marriages for a marriage licence, by lodging a

notice of intended marriage at the local Registry Office. On 14 December 1995, the Deputy Registrar-General rejected the application.

2.2 Similarly, Ms. Zelf and Ms. Pearl commenced a lesbian relationship in April 1993. They also share responsibility for the children of a previous marriage, pool financial resources and maintain sexual relations. On 22 January 1996, the local Registry Office refused to accept a notice of intended marriage. On 2 February 1996, Ms Zelf and Ms Pearl lodged a notice of intended marriage at another Registry Office. On 12 February 1996, the Registrar-General informed them that the notice could not be processed. The Registrar-General indicated that the Registrar was acting lawfully in interpreting the Marriage Act as confined to marriage between a man and a woman.

2.3 All four authors thereupon applied to the High Court for a declaration that, as lesbian couples, they were lawfully entitled to obtain a marriage licence and to marry pursuant to the Marriage Act 1955. On 28 May 1996, the High Court declined the application. Observing inter alia that the text of article 23, paragraph 2, of the Covenant "does not point to same-sex marriages", the Court held that the statutory language of the Marriage Act was clear in applying to marriage between a man and a woman only.

2.4 On 17 December 1997, a Full Bench of the Court of Appeal rejected the authors' appeal. The Court held unanimously that the Marriage Act, in its terms, clearly applied to marriage between a man and a woman only. A majority of the Court further went on to hold that the restriction in the Marriage Act of marriage to a man and a woman did not constitute discrimination. Justice Keith, expressing the majority's views at length, found no support in the scheme and text of the Covenant, the Committee's prior jurisprudence, the *travaux préparatoires* nor scholarly writing 1/ for the proposition that a limitation of marriage to a man and a woman violated the Covenant.

...

8.2 The authors' essential claim is that the Covenant obligates States parties to confer upon homosexual couples the capacity to marry and that by denying the authors this capacity the State party violates their rights under articles 16, 17, 23, paragraphs 1 and 2, and 26 of the Covenant. The Committee notes that article 23, paragraph 2, of the Covenant expressly addresses the issue of the right to marry.

Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term "men and women", rather than "every human being", "everyone" and "all persons". Use of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23,

paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.

8.3 In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.

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

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1/ Harris, D., Joseph, S.: The International Covenant on Civil and Political Rights and United Kingdom Law, Oxford, Oxford University Press, 1995, p. 507 ("It seems clear that the drafters did not envisage homosexual or lesbian marriages as falling within the terms of article 23 (2).")

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Individual Opinion by Mr. Rajsoomer Lallah and Mr. Martin Scheinin (concurring)

We found no difficulty in joining the Committee's consensus on the interpretation of the right to marry under article 23, paragraph 2. This provision entails an obligation for States to recognize as marriage the union of one adult man and one adult woman who wish to marry each other. The provision in no way limits the liberty of States, pursuant to article 5, paragraph 2, to recognize, in the form of marriage or in some other comparable form, the companionship between two men or between two women. However, no support can be drawn from this provision for practices that violate the human rights or dignity of individuals, such as child marriages or forced marriages.

As to the Committee's unanimous view that it cannot find a violation of article 26, either, in the non-recognition as marriage of the same-sex relationships between the authors, we wish to add a few observations. This conclusion should not be read as a general statement that differential treatment between married couples and same-sex couples not allowed under the law to marry would never amount to a violation of article 26. On the contrary, the Committee's jurisprudence supports the position that such differentiation may very well, depending on the circumstances of a concrete case, amount to prohibited discrimination.

Contrary to what was asserted by the State party (para. 4.12), it is the established view of the Committee that the prohibition against discrimination on grounds of "sex" in article 26 comprises also discrimination based on sexual orientation.a/ And when the Committee has

held that certain differences in the treatment of married couples and unmarried heterosexual couples were based on reasonable and objective criteria and hence not discriminatory, the rationale of this approach was in the ability of the couples in question to choose whether to marry or not to marry, with all the entailing consequences.b/ No such possibility of choice exists for same-sex couples in countries where the law does not allow for same-sex marriage or other type of recognized same-sex partnership with consequences similar to or identical with those of marriage. Therefore, a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26, unless otherwise justified on reasonable and objective criteria.

However, in the current case we find that the authors failed, perhaps intentionally, to demonstrate that they were personally affected in relation to certain rights not necessarily related to the institution of marriage, by any such distinction between married and unmarried persons that would amount to discrimination under article 26. Their references to differences in treatment between married couples and same-sex unions were either repetitious of the refusal of the State party to recognize same-sex unions in the specific form of "marriage" (para. 3.1), an issue decided by the Committee under article 23, or remained unsubstantiated as to if and how the authors were so personally affected (para. 3.5). Taking into account the assertion by the State party that it does recognize the authors, with and without their children, as families (para. 4.8), we are confident in joining the Committee's consensus that there was no violation of article 26.

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a/ *Toonen v. Australia*, Communication No. 488/1992.

b/ *Danning v. the Netherlands*, Communication No. 180/1984.

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- *Patera v. Czech Republic* (946/2000), ICCPR, A/57/40 vol. II (25 July 2002) 294 CCPR/C/75/D/946/2000 at paras. 2.2-2.6, 7.2-7.4 and 8.

...

2.2 In a preliminary court decision from the Regional Court Prague West of 12 July 1993, confirmed in a further preliminary court decision of 2 October 1995, the author was granted the right to see his son every second weekend from Saturday morning until Sunday evening. However, Ms. R.P. did not comply with the decisions and has refused the author regular access ever since. Only during 1994 and 1995 was the author allowed to see his son on an irregular basis, but then under the surveillance of a family member of Ms. R.P. or armed security officers. Ms. R.P. has been repeatedly fined for her refusal to comply with the courts'

decisions.

2.3 In 1994, the author initiated criminal proceedings against her for not complying with the said court decisions, in accordance with the Criminal Code No. 140/1961 Coll., paragraph 171, section 3. The case was dealt with by the Court of Okresní soud Ústí nad Labem, and had at the time of the author's submission to the Committee on 9 February 2002, not yet been decided.

2.4 Subsequently, the author brought new criminal charges against Ms. R.P. for not complying with further preliminary decisions granting the author access to his son from December 1997 to August 1998. The case was held over for two years, from 11 January 1999 until 14 February 2001, when eventually the judge withdrew from the case. The new judge dismissed the charges against Ms. R.P. (2) However, the author alleges that this decision was not delivered to the parties in accordance with law, and it therefore did not enter into force. The author's complaint to the Constitutional Court was dismissed.

2.5 On 18 November 1993, the Kladno Regional Court convicted Ms. R.P. of three criminal acts relating to the child custody case. The decision was appealed, but shortly before the verdict of the Court of Appeal, Ms. R.P. was granted a pardon for two of the criminal acts, whereas the third remained undecided, and eventually became time-barred. On 20 November 1995, the author submitted a constitutional complaint, which was rejected on the ground that the author had not been a party to the criminal case.

2.6 In a statement of 1 June 1992, a court specialist Dr. J.K., and Dr. J.B., explained that the author's wife suffers from a mental disorder in the development of her personality. In another statement by Dr. J.C. and Mr. H.D. of 11 May 1993, it was stated that the author's wife was damaging the interests of their son by not allowing contact between the father and the son. These statements were supported by statements from a court specialist, Mr. V.F., dated 14 May 1995 and 15 April 1997.

...

7.2 As to the alleged violation of article 17, the Committee notes the State party's contention that there is no documentation of arbitrary or unlawful interference by the State party with the author's family, that the decisions of courts of all instances have complied with the rules of procedure set by law, and that the delay in the resolution of the divorce and custody proceedings is due to the numerous petitions submitted by the author. However, the current communication is not based only on article 17, paragraph 1, of the Covenant, but also on paragraph 2 of the said provision, according to which everyone has the right to the protection of the law against interference or attacks on one's privacy and family life.

7.3 The Committee considers that article 17 generally includes effective protection to the right of a parent to regular contact with his or her minor children. While there may be

exceptional circumstances in which denying contact is required in the interests of the child and cannot be deemed unlawful or arbitrary, in the present case the domestic courts of the State party have ruled that such contact should be maintained. Consequently, the issue before the Committee is whether the State party has afforded effective protection to the author's right to meet his son in accordance with the court decisions of the State party.

7.4 Although the courts repeatedly fined the author's wife for failure to respect their preliminary orders regulating the author's access to his son, these fines were neither fully enforced nor replaced with other measures aimed at ensuring the author's rights. In these circumstances and taking into account the considerable delays at various stages of the proceedings, the Committee takes the view that the author's rights under article 17 of the Covenant, in conjunction with article 2, paragraphs 1 and 2 of the Covenant, did not receive effective protection. Consequently, the Committee is of the view that the facts before it disclose a violation of article 17, in conjunction with article 2 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 author with an effective remedy, which should include measures to ensure prompt implementation of the court's orders regarding contact between the author and his son. The State party is also under an obligation to prevent similar violations in the future.

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2/ This point of the submission is unclear.

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For dissenting opinion in this context, see Patera v. Czech Republic (946/2000), ICCPR, A/57/40 vol. II (25 July 2002) 294 (CCPR/C/75/D/946/2000) at Individual Opinion by Mr. Nisuke Ando and Mr. Prafullachandra Natwarlal Bhagwati, 302.

- *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 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.

LEGAL RIGHTS - PROPERTY, CIVIL AND CONTRACT RIGHTS

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 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.

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.

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.

For dissenting opinion in this context, see Pezoldova v. The 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.

- *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. 1.1, 2.2-2.6, 7.2 and 9.

1.1 The author of the communication is Omar Sharif Baban, born on 3 May 1976 and an Iraqi national of Kurdish ethnicity. He brings the communication on his own behalf and that of his son Bawan Heman Baban, born on 3 November 1997 and also an Iraqi national of Kurdish ethnicity. The author and his son were detained, at the time of presentation of the communication, in Villawood Detention Centre, Sydney, Australia.1/ The author claims that they are victims of violations by Australia of articles 7, 9, paragraph 1, 10, paragraph 1, 19 and 24, paragraph 1, of the Covenant. The author is represented by counsel.

...

2.2 On 15 June 1999, the author and his son arrived in Australia without travel documentation and were detained in immigration detention under section 189(1) Migration Act 1958. On 28 June 1999, they applied for refugee status. On 7 July 1999, the author was interviewed by an officer of the Department of Immigration and Multicultural Affairs (DIMA).

2.3 On 13 July 1999, DIMA rejected the author's claim. On 6 September 1999, the Refugee Review Tribunal (RRT) dismissed the author's appeal against DIMA's decision. On 10 September 1999, DIMA advised the author that his case did not satisfy the requirements for an exercise of the Minister's discretion to allow a person to remain in Australia on humanitarian grounds. On 12 April 2000, Federal Court (Whitlam J) dismissed the author's application for judicial review of the RRT's decision.

2.4 On 24 July 2000, the author, along with other detainees, participated in a hunger strike in a recreation room at Villawood Detention Centre, Sydney. On 26 July 2000, the hunger strikers were allegedly cut off from power and contact with the outside world. Allegedly drugged bottled water was supplied. Guards were alleged to have forcibly deprived the hunger strikers of sleep by making noise. On 27 July 2000, the hunger strikers (and the author's son) were forcibly removed and transferred to another detention centre in Port Hedland, Western Australia. At Port Hedland, the author and his son were detained in an isolation cell without window or toilet. On the fifth day of his detention in isolation (his son

was regularly fed from the day *after* arrival), the author discontinued his hunger strike, and, eight days later, he was removed from the cell. During the period of isolation, the author contends that access to his legal adviser was denied. On 15 August 2000, the author and his son were returned to the Villawood detention centre in Sydney to attend their hearing in the Full Federal Court.

2.5 On 21 September 2000, the Full Court of the Federal Court dismissed the authors' further appeal against the Federal Court's decision. The same day, the authors lodged an application for special leave to appeal in the High Court of Australia.

2.6 In June 2001, the author and his son escaped from Villawood Detention Centre. Their current precise whereabouts are unknown. On 16 July 2001, the Registry of the High Court of Australia listed the author's case for hearing on 12 October 2001. On 15 October 2001, the High Court adjourned the hearing of the author's appeal until the author and his son were located.

...

7.2 As to the claims under article 9, 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.14/ 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 justified the author's continued detention in the light of the passage of time and intervening circumstances such as the hardship of prolonged detention for his son or the fact that during the period under review the State Party apparently did not remove Iraqis from Australia... 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. The Committee also notes that in the present case the author was unable to challenge his continued detention in court. Judicial review of detention would have been restricted to an assessment of whether the author was a non-citizen without valid entry documentation, and, by direct operation of the relevant legislation, the relevant courts would not have been able to consider arguments that the individual detention was unlawful in terms of the Covenant. Judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1.15/ In the present case, the author and his son were held in immigration detention for almost two years without individual justification and without any chance of substantive judicial review of the continued compatibility of their detention with the Covenant. Accordingly, the rights of both the author and his son under article 9,

paragraphs 1 and 4, of the Covenant were violated.

...

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, including compensation.

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Notes

1/ See, however, paragraph 2.6.

...

14/ *A. v. Australia* [Case No. 560/1993, Views adopted on 3 April 1997] and *C. v. Australia* [Case No. 900/1999, Views adopted on 28 October 2002].

15/ Ibid.

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For dissenting opinion in this context, see Baban et al. v. Australia (1014/2001), ICCPR, A/58/40 vol. II (6 August 2003) 331 (CCPR/C/78/D/1014/2001) at Individual Opinion by Ms. Ruth Wedgwood, 344.

- *Kazantzis v. Cyprus* (972/2001), ICCPR, A/58/40 vol. II (7 August 2003) 499 (CCPR/C/78/D/972/2001) at paras. 2.1-2.4 and 6.5.

...

2.1 On 23 June 1997, the Supreme Council of Judicature invited applications from qualified advocates for two vacancies of the post of District Judge and one vacancy of the post of Judge of the Industrial Disputes Tribunal. The author applied for both posts on 30 July 1997. He was interviewed by the Supreme Council of Judicature for both posts on 9 September and 11 September 1997, respectively.

2.2 On 18 September 1997, the Supreme Council of Judicature decided that a candidate other than the author was most suitable for the post of Judge of the Industrial Disputes Tribunal. The Council also ascertained that there were four additional vacancies for the post of District Judge, in addition to the two vacancies in relation to which applications had already been invited. It decided not to fill two vacancies at the time, but rather to invite also applications for the four additional vacancies. It was decided that, concerning the four additional vacancies, candidates who had already submitted applications for the two vacant posts would be considered for all six vacancies. On 15 and 18 October 1997, all candidates, including the author, were interviewed.

2.3 On 21 October 1997, the Council evaluated the candidates, taking into account the

reports on the abilities of each, by the President of the District Court in which the candidate was practicing as a lawyer, and decided to appoint the six candidates considered the most suitable for the post of District Judge. The author was not among those selected for appointment. Notice of the appointments decided by the Council was published in the Official Gazette of the Republic on 14 November 1997. The author was not personally notified of his non-appointment, nor the reasons therefor.

2.4 The author did not contest this issue before the local courts, as previous jurisprudence of the Supreme Court had held that no Cypriot court had jurisdiction over the decisions of the Supreme Council of Judicature. In *Kourris v. Supreme Council of Judicature*,1/ the Supreme Court held, by a majority of three judges to two, that "...it follows that the Court has no jurisdiction to entertain a recourse against any act, decision or omission of the said Council (of Judicature) because the functions of such Council *are very closely connected with the exercise of judicial power.*" (Emphasis original)

...

6.5 As to the author's claim under article 14, paragraph 1, the Committee observes that, in contrast to the situation in *Casanovas v. France*6/ and *Chira Vargas v. Peru*7/ concerning removal from public employment, the issue in dispute concerns the denial by a body exercising a non-judicial task of an application for employment in the judiciary. The Committee recalls that the concept of "suit at law" under article 14, paragraph 1, is based on the nature of the right in question rather than the status of one of the parties.8/ It considers that the procedure of appointing judges, albeit subject to the right in article 25(c) to access to public service on general terms of equality as well as the right in article 2, paragraph 3, to an effective remedy, does not additionally come within the purview of a determination of rights and obligations in a suit at law, within the meaning of article 14, paragraph 1, of the Covenant. This part of the communication is therefore inadmissible *ratione materiae*, under Article 3 of the Optional Protocol.

Notes

1/ (1972) 3 CLR 390.

...

6/ Case No. 441/1990, Views adopted on 19 July 1994.

7/ Case No. 906/2000, Views adopted on 22 July 2002.

8/ *Y. L. v Canada* Case No. 112/81, Decision adopted on 8 April 1986, at paragraph 9.2; and *Casanovas v. France* [Case No. 441/1990], at paragraph 5.2.

LEGAL RIGHTS - PROPERTY, CIVIL AND CONTRACT RIGHTS

- *Hruska v. Czech Republic* (1191/2003), ICCPR, A/59/40 vol. II (30 October 2003) 565 (CCPR/C/79/D/1191/2003) at paras. 2.1-2.4, 4.2 and 5.

...

2.1 On 3 March 2001, the State Social Security Administration, Prague Office, (Ceska sprava socialniho zabezpeceni Praha) issued a decision regarding the calculation of the author's disability benefits.

2.2 On 13 April 2001, the author appealed this decision in the Regional Court at Brno requesting a review of the decision to the effect that it include an additional insurance period for purposes of calculating her disability benefits. The Regional Court at Brno, by judgement of 12 September 2002, upheld the decision of the Social Security Administration, considering the author's claim to be unreasonable.

2.3 The author appealed to the High Court at Olomouc on 24 October 2002, claiming that the decision of the Regional Court violated the ICCPR, the International Covenant on Economic, Social and Cultural Rights, and article 95, paragraph 1, of the Czech Constitution.

2.4 On 16 December 2002, the High Court halted the proceedings and informed the author that as a consequence of an amendment of the law and the resulting expiry of the Court's jurisdiction in the matter, the author would need to submit her appeal to the Supreme Administrative Court. The author was also informed that complainants before the Supreme Administrative Court are required to have a representative who is a lawyer or has at least higher legal education.

...

4.2 The Committee recalls its jurisprudence to the effect that it does not consider that the requirement of legal representation before the highest national judicial instance is not based on objective and reasonable criteria.2/ The author has not advanced any arguments in support of her claim, beyond the mere assertion that this requirement was discriminatory. The Committee accordingly considers that she has not substantiated her claim, for purposes of admissibility.

5. Accordingly, the Committee decides:

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

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Notes

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2/ See decision on case no. 866/1999, decision of 31 August 2001, *Marina Torregrosa Lafuente et al. v. Spain*, para. 6.3.

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- *Lovell v. Australia* (920/2000), ICCPR, A/59/40 vol. II (24 March 2004) 101 at paras. 2.1-2.3 and 9.2-9.4.

...
2.1 The author was retained as an industrial advocate by a trade union, the Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Workers' Union of Australia, Engineering and Electric Division, Western Australia Branch (CEPU), when it became involved in industrial action against Hamersley Iron PTY Ltd (Hamersley) in 1992. Hamersley, represented by the law firm Freehill, Hollingdale and Page (Freehill), commenced civil proceedings in the Supreme Court of Western Australia against the CEPU and a number of its officials, seeking injunctions and compensatory damages on a number of grounds. During these proceedings, Hamersley was required to make available for discovery by the CEPU and its officials all relevant documents for which privilege could not be claimed. These documents were obtained and inspected by the author and the CEPU. Included in these documents were five documents, in relation to which Hamersley alleged that the author and the CEPU, by revealing their contents publicly in a radio interview, in newspaper articles and in a series of briefings prepared for distribution to members of the CEPU and other unions, and by using them contrary to the rules of discovery, had committed contempt of court.

2.2 On 22 May 1998, the author and the CEPU were convicted at first instance in the Full Court of the Supreme Court of Western Australia (three judges) on two accounts of contempt of court. The first was the misuse of the five discovered documents, in that the author had used them contrary to the implied undertaking not to use discovered documents which had been obtained from the other party in the civil action in the process of discovery, or to communicate their contents other than for the purposes of the litigation for which the documents were discovered. The second was the interference with due administration of justice, in that the author's conduct, by disclosing the contents of the discovered documents, was intended and placed improper pressure on Hamersley, in regard to the main proceedings, it invited public prejudgement of the issues, and had the tendency to frighten off potential witnesses.

2.3 The author's defence with regard to the first contempt charge, had been, *inter alia*, that the documents in question, once referred to in open court, had become part of the public domain and there was no limitation any longer on their use; that Hamersley, by responding to the allegations made by the author in reliance on material contained in the discovered documents, had waived its right to confidentiality of the discovered documents; and that publication and use of the documents was consistent with his freedom of political

communication protected by the Australian Constitution. On 22 July 1998, the Court fined the author $A 40,000 (plus costs), and the union $A 55,000 (plus costs).

...

9.2 With regard to the author's claim under article 19, paragraph 2, that he was convicted and fined for publishing documents that had been referred to in an open court, the Committee recalls that article 19, paragraph 2, guarantees the right to freedom of expression and includes the "*freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media*". It considers that the author, by publishing documents that were referred to in an open court, by virtue of different media, was exercising his right to impart information within the meaning of article 19, paragraph 2.

9.3 The Committee observes that any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3 (a) and (b) of article 19, and must be necessary to achieve the legitimate purpose.

9.4 The Committee notes that the institution of contempt of court is an institution provided by law restricting freedom of expression for achieving the aim of protecting the right of confidentiality of a party to the litigation or the integrity of the court or public order. Here in the present case, though the five documents were directed to be discovered on the application of the author and CEPU, they were not allowed to be adduced in evidence with the result that they did not become part of the published record of the case. It may be noted that these five documents were not read aloud in court and their contents were not made known to anyone except the parties to the litigation and their lawyers. There was clearly, in the circumstances, a restriction on the publication of these five documents, implied from the refusal of the court to allow them to be adduced in evidence and not taking them as part of the public record of the case. This restriction was provided by the law of contempt of court and it was necessary for achieving the aim of protecting the rights of others, i.e. Hamersley, or for the protection of public order (*ordre public*). The Committee accordingly concludes that the author's conviction for contempt was a permissible restriction of his freedom of expression, in accordance with article 19, paragraph 3, and that there has been no violation of article 19, paragraph 2, of the Covenant.

- *Hoyos v. Spain* (1008/2001), ICCPR, A/59/40 vol. II (30 March 2004) 472 at paras. 2.1-2.5, 6.5, 7 and Individual Opinion of Ruth Wedgwood (concurring), at 487-488.

...

2.1 The author was the firstborn daughter of Mr. Alfonso de Hoyos y Sánchez, who died on 15 July 1995. Subsequently, she applied to the King for succession to the ranks and titles

held by her father, including the *Dukedom of Almodóvar del Río*, with the rank of *Grandee of Spain*. She asserts that she made a formal application with the intention of placing on record her greater right to succession to the title in question.

2.2 In an Order published in the *Boletín Oficial del Estado* of 21 June 1996, succession to the title of *Duke of Almodóvar del Río* was granted to the author's brother, Isidoro Hoyos y Martínez de Irujo.

2.3 The author asserts that, although as firstborn daughter she had the greater right, she had agreed to renounce the title under an agreement she had made with her brothers on the distribution of their father's titles of nobility. She asserts that at the time this took place, the criterion established by the judgement of the Supreme Court of 20 June 1987, pronouncing the precedence for males in succession to titles of nobility discriminatory and unconstitutional, was in force. However, the Constitutional Court's judgement of 3 July 1997 abrogated that decision; it stated that male primacy in the order of succession to the titles provided for in the Acts of 4 May 1948 and 11 October 1820, was neither discriminatory nor unconstitutional, given that article 14 of the Spanish Constitution, which guaranteed equality before the law, was not applicable in view of the historical and symbolic nature of the institution. 1/ The author argues that this led to her brothers initiating legal proceedings to strip her of her titles.

2.4 As a result, in June 1999, the author instituted legal proceedings against her brother Isidoro in Majadahonda Court of First Instance No. 6, asserting her greater right to the title.

2.5 In its judgement of 11 May 2000, the Majadahonda Court dismissed the claim, in accordance with the Constitutional Court's judgement of 3 July 1997. The judge said, however, that she sympathized with the author's position but she could not deviate from the interpretation the Constitutional Court had given to the laws and provisions of the legal regime.

...

6.5 The Committee notes that while the State party has argued that hereditary titles of nobility are devoid of any legal and material effect, they are nevertheless recognized by the State party's laws and authorities, including its judicial authorities. Recalling its established jurisprudence, 7/ the Committee reiterates that article 26 of the Covenant is a free-standing provision which prohibits all discrimination in any sphere regulated by a State party to the Covenant. However, the Committee considers that article 26 cannot be invoked in support of claiming a hereditary title of nobility, an institution that, due to its indivisible and exclusive nature, lies outside the underlying values behind the principles of equality before the law and non-discrimination protected by article 26. It therefore concludes that the author's communication is incompatible *ratione materiae* with the provisions of the Covenant, and thus inadmissible pursuant to article 3 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 3 of the Optional Protocol;
...

_____

Notes

1/ Two individual votes by three judges dissented from the content of the judgement; they considered that the provision in question should have been declared unconstitutional.
...
7/ See e.g. Views on communication No. 182/1984 (*Zwaan de Vries v. The Netherlands*), Views adopted 9 April 1987.

_____

Individual Opinion of Ruth Wedgwood (concurring)

In its review of country reports, as well as in its views on individual communications, the Human Rights Committee has upheld the rights of women to equal protection of the law, even in circumstances where compliance will require significant changes in local practice. It is thus troubling to see the Committee dismiss so cavalierly the communication of Isabel Hoyos Martínez de Irujo.

The distribution of family titles in Spain is regulated by public law. Decisions on succession to titles of honour or nobility are published as official acts of State in the *Boletin Oficial del Estado*. The order of succession is not a matter of private preference of the current titleholder. Rather, female descendants are statutorily barred from any senior claim to a title, pursuant to the preference for males, regardless of the wishes of the ascendant titleholder. Such a statutory rule, see statute of 4 June 1948, would seem to be a public act of discrimination.

The Committee's stated reasons for dismissing the communication of Ms. Hoyos Martínez de Iraujo, in her claim to inheritance of the title of the Duchy of Almodovar de Rio, can give no comfort to the State party. In rejecting her petition, as inadmissible *ratione materiae*, the Committee writes that hereditary titles of nobility are "an institution that…lies outside the underlying values behind the principles of equality before the law and non-discrimination protected by article 26". This cryptic sentence could be read to suggest that the continuation of hereditary titles is itself incompatible with the Covenant. One hopes that the future jurisprudence of the Committee will give appropriate weight to the desire of many countries to preserve the memory of individuals and families who figured prominently in the building of the national State.

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The use of titles can be adapted to take account of the legal equality of women. Even within the tradition of a title, a change of facts may warrant a change in discriminatory rules. For example, in an age of national armies, it is no longer expected that a titleholder must have the ability to fight on the battlefield. (Admittedly, Jeanne d'Arc might suggest a wider range of reference as well.)

In its accession to modern human rights treaties, Spain recognized the difficulties posed by automatic male preference. Spain ratified the International Covenant on Civil and Political Rights on 27 July 1977. Spain also approved the Convention on the Elimination of All Forms of Discrimination against Women on 16 December 1983. In the latter accession, Spain made a single reservation that has importance here. Spain noted that the Convention shall not affect the constitutional provisions concerning succession to the Spanish crown. This unique protection for royal succession was not accompanied by any other similar reservation concerning lesser titles.

Spain did not make any similar reservation to the International Covenant on Civil and Political Rights in 1977. Still, good practice would suggest that Spain should be given the benefit of the same reservation in the application of the Covenant, in light of the Committee's later interpretation of article 26 as an independent guarantee of equal protection of the law. But the bottom line is that, even with this reservation, Spain did not attempt to carve out any special protection to perpetuate gender discrimination in the distribution of other aristocratic titles.

It is not surprising that a State party should see the inheritance of the throne as posing a unique question, without intending to perpetuate any broader practice of placing women last in line. Indeed, we have been reminded by the incumbent King of Spain that even a singular and traditional institution such as royalty may be adapted to norms of equality. King Juan Carlos recently suggested that succession to the throne of Spain should be recast. Under Juan Carlos' proposal, after his eldest son completes his reign, the son's first child would succeed to the throne, regardless of whether the child is a male or a female. In an age when many women have served as heads of State, this suggestion should seem commendable and unremarkable.

In its judgement of 20 June 1987, upholding the equal claim of female heirs to non-royal titles, the Supreme Court of Spain referenced the Convention on the Elimination of All Forms of Discrimination against Women, as well as article 14 of the 1978 Spanish Constitution. In its future deliberations, Spain may also wish to reference general comment No. 18 of the Human Rights Committee, which states that article 2 of the Covenant "prohibits discrimination in law or in fact in any field regulated and protected by public authorities". And it is worth recalling that under the rules of the Committee, the disposition of any particular communication does not constitute a formal precedent in regard to any other

communication or review of country reports.

The hereditary title in question here has been represented by the State party as "devoid of any material or legal content" and purely *nomen honoris*... Thus, it is important to note the limits of the Committee's instant decision. The Committee's Views should not be taken as sheltering any discriminatory rules of inheritance where real or chattel property is at stake. In addition, these views do not protect discrimination concerning traditional heritable offices that may, in some societies, still carry significant powers of political or judicial decision-making. We sit as a monitoring committee for an international covenant, and cannot settle broad rules in disregard of these local facts.

For dissenting opinions in this context see Hoyos v. Spain (1008/2001), ICCPR, A/59/40 vol. II (30 March 2004) 472 at Individual Opinion of Rafael Rivas Posada, 481-482 and Individual Opinion of Mr. Hipólito Solari Yrigoyen, 483-486.

See also:

- *Barcaiztegui v. Spain* (1019/2001), ICCPR, A/59/40 vol. II (30 March 2004) 489 at paras. 2.1, 2.2, 2.4, 6.4 and individual opinion of Ruth Wedgwood (concurring), at 503-504.

- *Palandjian v. Hungary* (1106/2002), ICCPR, A/59/40 vol. II (31 March 2004) 534 at paras. 2.1-2.4, 3.2, 6.3 and 7.

...

2.1 In 1952, the property of the authors' father in Budapest, which he co-owned with his brother, was nationalized by the former communist regime. In the same year, the family went to live in Austria. In 1960, the authors' father, an Armenian/Iranian citizen, died and the authors emigrated to the United States.

2.2 In 1991, the Hungarian authorities adopted Act No. XXV of 1991 (hereafter referred to as the "Compensation Act"), providing partial compensation for property that had been nationalized during the communist regime. According to paragraph 2 of this law, the following persons were entitled to compensation: (1) Hungarian citizens; (2) former Hungarian citizens; and (3) foreign citizens who were residents of Hungary on 31 December 1990.

2.3 On 11 December 1992 and 30 April 1993, the Hungarian consulate in New York replied to inquiries from Ms. Palandjian about her entitlement to compensation, explaining that she was ineligible, as her father was not a person entitled under the Compensation Act, since he was not a Hungarian citizen at the time of nationalization.

2.4 On 16 March 1993, the Budapest Loss Settlement Office rejected Ms. Palandjian's request for compensation, as her father did not meet the criteria established in the Compensation Act. On 29 April 1993, she filed an appeal against this decision. On 2 May 1996, the National Loss Settlement and Compensation Office affirmed the decision of the Budapest Loss Settlement Office. On 1 April 1998, the Pest District Court confirmed the decision of the Budapest Loss Settlement Office.

...

3.2 The authors claim that their right to property was violated, as the Hungarian authorities failed to return their father's property to them or to compensate them for the nationalization of his property in 1952.

...

6.3 Concerning the authors' claim relating to the confiscation of their father's property, the Committee observes that the right to property is not expressly protected under the Covenant. The allegation concerning a violation of the authors' right to property *per se* is thus inadmissible *ratione materiae*, under article 3 of the Optional Protocol.

...

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 3, and 5, paragraph 2 (b), of the Optional Protocol;

...

- *Petersen v. Germany* (1115/2002), A/59/40 vol. II (1 April 2004) 538 at paras. 2.1-2.5, 6.6-6.8, 6.10 and 7.

...

2.1 The author is the father of a child born out of wedlock on 3 May 1985. He lived with the child's mother, Ms. B, from May 1980 to November 1985. They agreed that the son would bear the mother's surname. After separation from the mother, the author continued to pay maintenance and had regular contact with his son until autumn 1993. In August 1993, the mother married Mr. K., and took her husband's name in conjunction with her own surname, i.e. B.-K.

2.2 In November 1993, the author asked the Youth Office of Bremen whether the mother had applied for a change of his son's surname. By letter of 20 December 1993, he was advised that she had enquired about the possibility, but that no request had been filed yet. In his letter, the competent Youth Office official informed the author that, should such a request be lodged, he would agree to a change of surname, as the stepfather had been living together with the mother and the son for more than one year and since the child fully accepted him. On 30 December 1993, the mother and her husband recorded statements at

the Bremen Registry Office, to the effect that they gave their family name (K.) to the author's son. They also filed a document issued by the Bremen Youth Office, on 29 December 1993, on behalf of the son (then 8 years old), according to which he agreed to the change of his surname. The Bremen Registry Office informed the Helmstedt Registry Office accordingly, following which the registrar of the Helmstedt Registry Office added the change of the child's surname to his birth record.

2.3 On 6 April 1994, the author filed an action with the Administrative Court of Bremen against the Bremen Municipality, complaining that the Bremen Youth Office had failed to hear him about the envisaged change of his son's surname. On 19 May 1994, the Administrative Court of Bremen declared itself incompetent to deal with the action and transferred the case to the District Court of Braunschweig.

2.4 On 21 October 1994, the Braunschweig District Court dismissed the author's claim for rectification of his son's birth record, insofar as the change of his surname was concerned. The Court found that the entry was correct because the child's surname had been changed in accordance with s. 1618 2/ of the Civil Code. It considered that this section did not amount to a violation of the non-discrimination provision of the German Constitution or of article 8 of the European Convention on Human Rights. On balance, s. 1618 of the Civil Code did not affect the equality between children born out of wedlock and children born in wedlock. Rather, in providing for the possibility of having the same surname, s. 1618 ensured that the child's status - born out of wedlock - was not disclosed to the public. As far as procedural matters were concerned, the proceedings for a change of surname in which the natural father did not participate could not be objected to on constitutional grounds. In particular, there was no breach of the author's rights as a natural parent, since his son had never borne the father's surname. The change of surname served the best interests of the child. A right of the natural father to be heard in the proceedings, as argued by the author, without the possibility to block a change of surname would not be effective, as mother and stepfather would have the final say in any event.

2.5 On 4 January 1995, the Regional Court of Braunschweig dismissed the author's appeal, confirming the reasoning of the District Court and holding that there were no indications that the legal provisions applied in the present case were unconstitutional. The change of surname served the interests of the child's well-being, which prevailed over the interests of the natural father.

...

6.6 To the extent that the author claims, under article 26 of the Covenant, that he was discriminated against, in comparison with the child's mother or to fathers of children born in wedlock, the Committee notes that the European Court declared similar claims by the author inadmissible *ratione materiae*, since there was no room for the application of article 14 of the European Convention, as his right to respect to family life was not affected by the

decisions in the change of name as well as the compensation proceedings. The Committee recalls its jurisprudence 17/ that, if the rights invoked before the European Court of Human Rights differ in substance from the corresponding Covenant rights, a matter that has been declared inadmissible *ratione materiae* has not, in the meaning of the respective reservations to article 5, paragraph 2 (a), been considered in such a way that the Committee is precluded from examining it.

6.7 The Committee recalls that the independent right to equality and non-discrimination in article 26 of the Covenant provides greater protection than the accessory right to non-discrimination contained in article 14 of the European Convention. 18/ It notes that, in the absence of any independent claim made under the Convention or its relevant Protocols, the European Court could not have examined whether the author's accessory rights under article 14 of the Convention had been breached. Consequently, the author's claims in relation to article 26 of the Covenant have not been considered by the European Court. It follows that the Committee is not precluded by the State party's reservation to article 5, paragraph 2 (a), of the Optional Protocol from examining this part of the communication.

6.8 The Committee recalls that not every distinction made by the laws of a State party amounts to a discrimination in the sense of article 26 but only those that are not based on objective and reasonable criteria. The author has not substantiated, for purpose of admissibility, that reasons for introducing s. 1618 into the German Civil Code (para. 2.4 above) were not objective and reasonable. Likewise, the author has not substantiated that the denial of compensation for lost travel expenses amounted to a discrimination within the meaning of article 26. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol to the International Covenant on Civil and Political Rights.

...

6.10 Insofar as the author alleges that he has been denied access to the German courts, in violation of article 14 of the Covenant, because, unlike fathers of children born in wedlock, he could not contest the decision to change his son's surname, nor claim compensation for the mother's failure to comply with his right of access to his son, the Committee notes that the author had access to the German courts, in relation to both matters, but that these courts dismissed his claims. It considers that he has not sufficiently substantiated, for purposes of admissibility, that his claims raise issues under article 14, paragraph 1, of the Covenant, which could be raised independently from article 26 and do not relate to matters that have already been "considered", within the meaning of the State party's reservation, by the European Court...

7. The Human Rights Committee therefore decides:

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

LEGAL RIGHTS - PROPERTY, CIVIL AND CONTRACT RIGHTS

...

Notes

...

2/ Pursuant to section 1617 of the German Civil Code in force at the material time, a child born out of wedlock received the surname that the mother was bearing at the time of the child's birth. A subsequent change of the mother's surname as a result of marriage did not affect the child's surname.

Section 1618 of the same Code provided that the mother of a child born out of wedlock and her husband could declare, for the record of a registrar, that the child, who was bearing a surname in accordance with section 1617 and was not yet married, should in future bear their family name. Similarly, the father of the child could declare, for the record of a registrar, that the child should bear his surname. The child and the mother had to agree to the change of the surname, in case that the father wanted to give his surname to the child.

...

17/ See e.g. communication No. 441/1990, *Casanovas v. France*, at para. 5.1.

18/ See communication No. 998/2001, *Althammer v. Austria*, at para. 8.4.

- *G. Pohl et al. v. Austria* (1160/2003), ICCPR, A/59/40 vol. II (9 July 2004) 378 at paras. 2.1-2.6 and 9.2-9.8.

...

2.1 The first and second authors jointly own, and reside on, property measuring some 1,600 square metres located in the community of Aigen (part of the Municipality of Salzburg). The third author formerly owned a plot of land of some 2,300 square metres, also located in Aigen, adjacent to the plot owned by the first and second authors. On 15 June 1998, the fourth author purchased the plot formerly owned by the third author from a company, which had acquired it at a public auction. As the current owner of the plot, on which he also resides, the fourth author is contractually obliged to reimburse the third author for any expenses associated with that plot.

2.2 Both plots of land are designated as "rural areas", in accordance with the 1998 Salzburg Provincial Zoning Law, which divides real estate located in the Province of Salzburg into "building land", "traffic/transportation areas" and "rural areas".

2.3 On 1 December 1998, the Municipality of Salzburg informed the first, second and third authors of a preliminary assessment of the financial implications of the construction, in 1997, of a residential sewerage adjacent to their plots and gave them an opportunity to comment

on the assessment.

2.4 According to Section 11 of the Salzburg Provincial Landowners' Contributions Act (1976), which regulates financial contributions of landowners to certain public services in the Municipality of Salzburg, owners of plots of land located adjacent to a newly constructed sewerage must contribute to the construction costs; the contribution is calculated pursuant to a formula based on the square measure of a plot, from which an abstract "length" is deducted. Contributions of landowners in all other municipalities of the Province of Salzburg are regulated by the Provincial Act on Landowners' Contributions to the Construction of Municipal Sewerages in all Municipalities of the Province of Salzburg with the Exception of the City of Salzburg (1962), which provides that owners of land, from which wastewater is dumped into the sewerage, are required to pay contributions for newly constructed sewerages, calculated on the basis of a formula that links the construction costs to the living space of the dwellings built on the plots. The number of "points", calculated on the basis of living space (in square metres), are multiplied by the amount to be paid per point to arrive at an individual landowner's contribution.

2.5 In their observations on the preliminary assessment, the authors argued that the envisaged calculation of their contributions based on the length of the plot was discriminatory, if compared to the calculation of contributions of owners of plots in areas designated as "building land", as it disregarded the special situation of plots in rural areas, which were significantly larger than average parcels in areas designated as "building land". The calculation method in all other municipalities in the Province of Salzburg was therefore based on available living space instead of the abstract length criterion so as to take such special circumstances into account. The authors also stated that the existing waste-water disposal facilities were adequate.

2.6 On 22 February 1999, the Municipality of the City of Salzburg issued two administrative acts, requiring the first and second authors to pay ATS 193,494.20 (€14,061.77) and the third author to contribute ATS 262,838.70 (€19,101.23), pursuant to Section 11 of the Landowners' Contribution Act. It rejected the third author's objection to his treatment as a party to the proceedings despite the fact that he was no longer the registered owner of the plot, stating that the owner registered at the time of the construction of the sewerage was to be considered the obligated party.

...

9.2 The Committee begins by noting that, pursuant to article 50 of the Covenant, the delegation of competence for the construction and management of sewage disposal plants to Austrian provinces and municipalities does not relieve the State party of its obligations under the Covenant.11/ Accordingly, the State party's responsibility may be engaged by virtue of the impugned decisions of the Municipality of Salzburg based on provincial legislation, which have, moreover, been confirmed by the Austrian courts.

9.3 The question before the Committee is whether the relevant legislation regarding the financial contributions of landowners in the Municipality of Salzburg to the construction of municipal sewerages violates article 26 of the Covenant by first not distinguishing between plots of an urban character designated as "building land" and "rural" plots of land with a building site, and second by using the size of plots of land (so called "length") as basis for the calculation of the contributions instead of linking them to the size of living space as is done in all other municipalities of the Province of Salzburg.

9.4 The Committee recalls that under article 26, discrimination in the equal protection of the law is prohibited on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.12/ It notes that an indirect discrimination may result from a failure to treat different situations differently, if the negative results of such failure exclusively or disproportionally affect persons of a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.13/ While the Committee does not exclude that "residence" may be a "status" that prohibits discrimination, it notes that the alleged failure to distinguish between "urban" and "rural" plots of land is not linked to a particular place of residence within the municipality of Salzburg but depends on their assignment to a particular zoning area. The Committee also takes note of the State party's explanation that the degree of contributions for "rural" parcels does depend on how much of the plot its owner sought to have designated as an area where a building may be constructed. The Committee concludes that the failure to distinguish between urban "building land" and "rural" plots of land with a building site is neither discriminatory by reference to any of the grounds mentioned in article 26 of the Covenant, nor arbitrary.

9.5 With regard to the claim that the different treatment of landowners in the City of Salzburg and landowners elsewhere in the Province of Salzburg, concerning the calculation of their landowners' contributions for the construction of new sewer systems for their plots of land, is not based on objective and reasonable criteria, as required by article 26 of the Covenant, the Committee considers that the authors' argument relating to the perceived more dynamic increases in population and incidence of construction in other parts of the Province of Salzburg does not exclude that the construction costs for the sewer network in the more densely populated Municipality of Salzburg may still be higher than in the rest of the Province, as claimed by the State party.

9.6 In this connection, the Committee notes that the authors admit that their landowners' contributions would still be three to four times higher, if compared to the rest of the Province, even if the calculation was based on the size of the living space of the dwelling situated on the plot of land. It cannot therefore be concluded that the different levels of contributions in and outside the City of Salzburg result exclusively from the different calculation methods applied under the 1976 Salzburg Provincial Landowners' Contributions

Act and the 1962 Act applicable to the other municipalities in the Province of Salzburg. The Committee therefore considers that the authors have failed to demonstrate that their different treatment was not based on objective and reasonable criteria.

9.7 The Committee, moreover, considers that nothing in the decisions of the Appeals Commission in Building Matters of the Municipality of the City of Salzburg, dated 28 May and 2 July 1999, or in the decision of the Administrative Court of 28 April 2003 indicates that the application by these tribunals of the relevant provisions of the Landowners' Contributions Act (1976) was based on manifestly arbitrary considerations.

9.8 The Human Rights Committee...is of the view that the facts before it do not disclose a violation of article 26 of the Covenant.

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Notes

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11/ See, e.g., communications Nos. 298/1988 and 299/1988, *Lindgren et al. v. Sweden* and *Lindquist et al. v. Sweden*, Views adopted on 9 November 1990, at para. 10.4.

12/ Communication No. 196/1983, *Gueye v. France,* Views adopted on 3 April 1989, at para. 9.4.

13/ See, e.g., communication No. 998/2001, *Althammer v. Austria*, Views adopted on 8 August 2003, at para. 10.2.

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- *Deisl v. Austria* (1060/2002), ICCPR, A/59/40 vol. II (27 July 2004) 283 at paras. 11.1-11.6.

...

11.1 The Committee recalls, at the outset, that the concept of a "suit at law" in article 14, paragraph 1, of the Covenant is based on the nature of the right and obligations in question rather than on the status of the parties 24/. It notes that the proceedings concerning the authors' request for an exemption from the zoning regulations, as well as the orders to demolish their buildings, relate to the determination of their rights and obligations in a suit at law, in particular their right to freedom from unlawful interference with their privacy and home, their rights and interests relating to their property, and their obligation to comply with the demolition orders. It follows that article 14, paragraph 1, is applicable to these proceedings.

11.2 The Committee further recalls that the right to a fair hearing under article 14, paragraph 1, entails a number of requirements, including the condition that the procedure before the

national tribunals must be conducted expeditiously 25/. The issue before the Committee is therefore whether the delays complained of violated this requirement, to the extent that they occurred or continued after the entry into force of the Optional Protocol for the State party.

11.3 As to the alleged delay in examining the authors' appeal of 18 February 1987, the Committee notes that the authors themselves requested a postponement of the decision until November 1987. Although it thereafter took the Provincial Government another two years to set aside the impugned decision, of which 20 months coincide with the period of time following the entry into force of the Optional Protocol for the State party, the Committee considers that the authors have not demonstrated that this delay was so unreasonable, as to amount to a violation of article 14, paragraph 1, taking into account that: (a) the delay had no detrimental effect on their legal position; (b) the authors chose not to avail themselves of available remedies to accelerate the proceedings; and (c) the outcome of the appellate proceedings was beneficial to them.

11.4 Regarding the alleged delays in the proceedings before the Constitutional Court (16 November 1993 to 29 November 1994 and 15 January 1996 to 29 September 1998), the Committee observes that, while the first set of these proceedings were conducted expeditiously, the second may have exceeded the ordinary length of proceedings resulting in a complaint's dismissal and referral to another court. However, in the Committee's view, the second delay is not so long as to constitute, in proceedings before a constitutional court in a property-related matter, a violation of the concept of fairness enshrined in article 14, paragraph 1, of the Covenant.

11.5 As to the alleged delays in the proceedings before the Administrative Court (29 November 1994 to 12 October 1995 and 29 September 1998 to 3 November 1999), the Committee has noted the State party's uncontested argument that the authors could have filed their complaints simultaneously with the Constitutional and Administrative Courts, to avoid a loss of time. In the light of the complexity of the matter complained of, as well as the Court's detailed legal reasoning in its decisions of 12 October 1995 and 3 November 1999, the Committee does not consider that the delays complained of amount to a violation of article 14, paragraph 1, of the Covenant.

11.6 The Committee notes that the length of the proceedings as a whole, counted from the date of entry into force of the Optional Protocol for Austria (10 March 1988) to the date of the Administrative Court's final decision (3 November 1999), totalled 11 years and 8 months. In assessing the reasonableness of this delay, the Committee bases itself on the following considerations: (a) the length of each individual stage of the proceedings; 26/ (b) the fact that the suspensive effect of the proceedings *vis-à-vis* the demolition orders was beneficial, rather than detrimental, to the authors' legal position; (c) the fact that the authors did not avail themselves of possibilities to accelerate administrative proceedings or to file

complaints simultaneously; (d) the considerable complexity of the matter; and (e) the fact that, during this time, the Provincial Government twice, and the Administrative Court once, set aside negative decisions on appeal by the authors. The Committee considers that these factors outweigh any detrimental effects which the legal uncertainty during the protracted proceedings may have caused to the authors. It concludes, having regard to all the circumstances of the case, that their right to have their case determined without undue delay has not been violated.

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24/ See communication No. 207/1986, *Yves Morael v. France*, Views adopted on 28 July 1989, at para. 9.3.

25/ See communication No. 441/1990, *Robert Casanovas v. France*, at para. 7.3; communication No. 238/1987, *Floresmilo Bolaños v. Ecuador*, at para. 8.4; communication No. 207/1986, *Yves Morael v. France*, at para. 9.3.

26/ See above paras. 11.4-11.6.

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- *Czernin v. Czech Republic* (No. 823/1998), ICCPR, A/60/40 vol II (29 March 2005) 1 at paras. 2.1-2.7, 7.2-7.5, 8, 9 and Individual Opinion of Ms. Ruth Wedgwood (concurring), at 10.

...

2.1 After the German occupation of the border area of Czechoslovakia in 1939, and the establishment of the "protectorate", Eugen and Josefa Czernin, the now deceased parents of the author, were automatically given German citizenship, under a German decree of 20 April 1939. After the Second World War, their property was confiscated on the ground that they were German nationals, under the Benes decrees Nos. 12/1945 and 108/1945. Furthermore, Benes decree No. 33/1945 of 2 August 1945 deprived them of their Czechoslovak citizenship, on the same ground. However, this decree allowed persons who satisfied certain requirements of faithfulness to the Czechoslovak Republic2/ to apply for retention of Czechoslovak citizenship.

2.2 On 13 November 1945, Eugen and Josefa Czernin applied for retention of Czechoslovak citizenship, in accordance with Presidential Decree No. 33/1945, and within the stipulated time frame. A "Committee of Inquiry" in the District National Committee of Jindřichův Hradec, which examined their application, found that Eugen Czernin had proven his "anti-Nazi attitude". The Committee then forwarded the application to the Ministry of the

Interior for a final decision. In December 1945, after being released from prison where he was subjected to forced labour and interrogated by the Soviet secret services NKVD and GPÚ, he moved to Austria with his wife. The Ministry did not decide on their applications, nor did it reply to a letter sent by Eugen Czernin on 19 March 1946, urging the authorities to rule on his application. A note in each of their files from 1947 states that the application was to be regarded as irrelevant as the applicants had voluntarily left for Austria, and their files were closed.

2.3 After the regime change in Czechoslovakia in late 1989, the author, only son and heir of Eugen and Josefa Czernin, lodged a claim for restitution of their property under Act No. 87/1991 and Act No. 243/1992. According to him, the principal precondition for the restitution of his property is the Czechoslovak citizenship of his parents after the war.

2.4 On 19 January and 9 May 1995 respectively, the author applied for the resumption of proceedings relating to his father's and his mother's application for retention of Czechoslovak citizenship. In the case of Eugen Czernin, a reply dated 27 January 1995 from the Jindřichův Hradec District Office informed the author that the proceedings could not be resumed because the case had been definitely settled by Act 34/1953, conferring Czechoslovak citizenship on German nationals who had lost their Czechoslovak citizenship under Decree 33/1945 but who were domiciled in the Czechoslovak Republic.3/ In a letter dated 13 February 1995, the author insisted that a determination on his application for resumption of proceedings be made. In a communication dated 22 February 1995, he was notified that it was not possible to proceed with the citizenship case of a deceased person and that the case was regarded as closed. On 3 March 1995, the author applied to the Ministry of Interior for a decision to be taken on his case. After the Ministry informed him that his letter had not arrived, he sent the same application again on 13 October 1995. On 24 and 31 January 1996, the author again wrote to the Minister of Interior. Meanwhile, in a meeting between the second author and the Minister of Interior, the latter indicated that there were not only legal but also political and personal reasons for not deciding on the case, and that "in any other case but [his], such an application for determination of nationality would have been decided favourably within two days". The Minister also promised that he would convene an ad hoc committee composed of independent lawyers, which would consult with the author's lawyers, but this committee never met.

2.5 On 22 February 1996, the Minister of Interior wrote to the author stating that "the decision on [his] application was not favourable to [him]". On 8 March 1996, the author appealed the Minister's letter to the Ministry of Interior. In a reply from the Ministry dated 24 April 1996, the author was informed that the Minister's letter was not a decision within the meaning of section 47 of Act No. 71/1967 on administrative proceedings and that it was not possible to appeal against a non-existent decision. On the same day, the author appealed the letter of the Minister to the Supreme Court which on 16 July 1996 ruled that the letter

was not a decision by an administrative body, that the absence of such a decision was an insurmountable procedural obstacle, and that domestic administrative law did not give the courts any power to intervene against any failure to act by an official body.

2.6 After yet another unsuccessful appeal to the Ministry of Interior, the author filed a complaint for denial of justice in the Constitutional Court which, by judgement of 25 September 1997, ordered the Ministry of Interior to cease its continuing inaction which violated the complainant's rights. Further to this decision, the author withdrew his communication before the Human Rights Committee.

2.7 According to the author, the Jindřichův Hradec District Office (District Office), by decision of 6 March 1998, reinterpreted the essence of the author's application and, arbitrarily characterized it as an application for confirmation of citizenship. The District Office denied the application on the ground that Eugen Czernin had not retained Czech citizenship after being deprived of it, in accordance with the Citizenship Act of 1993, which stipulates that a decision in favour of the plaintiff requires, as a prerequisite, the favourable conclusion of a citizenship procedure. The District Office did not process the author's initial application for resumption of proceedings on retention of citizenship. Further to this decision, the author resubmitted and updated his communication to the Committee in March 1998.

....

7.2 The main issue before the Committee is whether the administrative authorities (the District Office in Jindřichův Hradec and the Ministry of Interior) acted in a way that violated the authors' right, under article 14, paragraph 1, to a fair hearing by a competent, independent and impartial tribunal, in conjunction with the right to effective remedy as provided under article 2, paragraph 3.

7.3 The Committee notes the statement of the authors that the District Office and Ministry of Interior, in their decisions of 6 March and 17 June 1998, arbitrarily reinterpreted his application on resumption of proceedings on retention of citizenship and applied the State party's current citizenship laws rather than Decree No. 33/1945, on which the initial application had been based. The Committee further notes that the latter decision was quashed by the Prague High Court and yet referred back for a rehearing. In its second assessment of the case, the Ministry of Interior applied Decree No. 33/1945, and denied the application.

7.4 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 the pursuit of a claim under domestic law, the individual must have access to effective remedies, which implies that the administrative authorities must act in conformity with the binding decisions of national courts, as admitted by the State party itself.

The Committee notes that the decision of the Ministry of Interior of 31 May 2002, as well as its confirmation by the Minister on 1 January 2003, were both quashed by the Prague Town Court on 5 May 2004. According to the authors, the Town Court ruled that the authorities had taken these decisions without the required reasoning and arbitrarily, and that they had ignored substantive evidence provided by the applicants, including the author's father, Eugen Czernin. The Committee notes that the State party has not contested this part of the authors' account.

7.5 The Committee further notes that since the authors' application for resumption of proceedings in 1995, they have repeatedly been confronted with the frustration arising from the administrative authorities' refusal to implement the relevant decisions of the courts. The Committee considers that the inaction of the administrative authorities and the excessive delays in implementing the relevant courts' decisions are in violation of article 14, paragraph 1, in conjunction with article 2, paragraph 3, which provides for the right to an effective remedy.

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 14, paragraph 1, of the Covenant. With regard to the above finding, the Committee considers that it not necessary to examine the claim under article 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, including the requirement that its administrative authorities act in conformity with the decisions of the courts.

Notes

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2/ Decree 33/1945, paragraph 2 (1) stipulates that persons "who can prove that they remained true to the Republic of Czechoslovakia, never committed any acts against the Czech and Slovak peoples and were actively involved in the struggle for its liberation or suffered under the National Socialist or Fascist terror shall retain Czechoslovak citizenship."

3/ Act 34/1953 of 24 April 1953 "Whereby certain persons acquire Czech citizenship rights", paragraph 1 (1) stipulates that "Persons of German nationality, who lost Czechoslovak citizenship rights under Decree 33/1945 and have on the day on which this law comes into effect domicile in the territory of the Czechoslovak Republic shall become Czech citizens, unless they have already acquired Czech citizenship rights".

Individual Opinion of Ms. Ruth Wedgwood (concurring)

In the first case of this series, *Simunek v. The Czech Republic*, No. 516/1992, the

Committee invoked the norm of "equal protection of the law" as recognized under article 26 of the Covenant. The Committee held that a state cannot impose arbitrary conditions for the restitution of confiscated property. In particular, the Committee held that restoration of private property must be available even to persons who no longer enjoy national citizenship and are no longer permanent residents - at least when the state party, under its prior communist regime, was "responsible for the departure" of the claimants. See Views of the Committee, No. 516/1992, paragraph 11.6.

The Committee has followed these views in subsequent cases, including *Adam v. The Czech Republic,* No. 586/1994; *Blazek et al. v. The Czech Republic*, No. 857/1999; and *Des Fours Walderode v. The Czech Republic*, No. 747/1997.

Committee member Nisuke Ando, writing individually in *Adam v. The Czech Republic*, No. 586/1994, properly pointed out that traditionally, private international law has permitted states to restrict the ownership of immovable properties to citizens. But a totalitarian regime that forces its political opponents to flee, presents special circumstances. And there is no showing that the Czech Republic has, in regard to new purchasers of real property, required either citizenship or permanent residence.

It is against this background that the Committee is brought to consider the case of *Czernin v. The Czech Republic*, No. 823/1998. Here, the Committee has challenged the state party not on the grounds of denial of equal treatment, but on a question of process - finding that the administrative authorities of the state party had "refuse[d] to carry out the relevant decisions of the courts" of the state party concerning property restoration.

The author's father, accompanied by his wife, left for Austria in December 1945, after interrogation in prison by the Soviet secret services NKVD and GPU. In 1989, after the fall of the communist regime in former Czechoslovakia, the author, as sole heir, sought restitution of his father's property, and in 1995, sought to renew his parents' applications for restoration of Czech citizenship. Since that time, the Czech Constitutional Court, the Prague High Court, and the Prague Town Court have, respectively, chastised the Czech Interior Ministry for failure to act upon the author's application, erroneous reliance on a 1993 citizenship law, and the absence of "necessary argumentation" concerning his father's asserted anti-Nazi posture (required for retention of Czech citizenship, under the post-war decree No. 33/1945 of Czech president Eduard Benes, in the case of ethnic Germans).

In one sense, this case is simpler than the previous cases, since the issue is process, rather than the limits of permissible substantive grounds. Nonetheless, one should note that the courts of the Czech Republic have, ultimately, sought to provide an effective remedy to the authors, in the consideration of their claims. Many democracies have seen administrative agencies that are reluctant to reach certain results, and the question is whether there is a

remedy within the system for a subordinate agency's failure to impartially handle a claim. One could not adopt any per se rule that three rounds of appellate litigation amounts to proof that an applicant has been deprived of a right to a fair hearing by a competent, independent and impartial tribunal, especially since here the appellate courts have acted to restrain the administrative agency in question on its various grounds of denial of the author's claims. The Committee has not held that administrative proceedings fall within the full compass of article 14.

Equally, this case does not touch upon the post-war circumstances of the mandatory transfer of the Sudeten German population, a policy undertaken after the National Socialists' catastrophic misuse of the idea of German self-determination. Though population transfers, even as part of a peace settlement, would not be easily accepted under modern human rights law, the wreckage of post-war Europe brought a different conclusion. Nor has the author challenged, and the Committee does not question, the authority of the 1945 presidential decree, which required that ethnic Germans from the Sudetenland who wished to remain in Czechoslovakia, had to demonstrate their wartime opposition to Germany's fascist regime. A new democracy, with an emerging economy, may also face some practical difficulties in unravelling the violations of private ownership of property that lasted for 50 years. In all of these respects, the State party is bound to act with fidelity to the Covenant, yet the Committee must also act with a sense of its limits.

- *Fernando v. Sri Lanka* (1189/2003), ICCPR, A/60/40 vol. II (31 March 2005) 226 at paras. 2.1, 2.2, 3.1, 9.2, 10 and 11.

...

2.1 The author filed a workers compensation claim with the Deputy Commissioner of Worker's Compensation, for redress in respect of injuries he had suffered. According to the Court proceedings, the author was an employee of the Young Men's' Christian Association (Y.M.C.A). While engaged in that employment he suffered injuries as a result of a fall. The Deputy Commissioner of Workmen's Compensation held an inquiry into the incident. The author and the Y.M.C.A were represented by lawyers. A settlement was arrived at but when the matter was called before the Deputy Commissioner on 9 January 1998, the author refused to accept the settlement. The author's claim was thereafter dismissed and following the rejection of his claim, the author filed four successive motions in the Supreme Court. The first two motions concerned alleged violations of his constitutional rights by the Deputy Commissioner of Worker's Compensation. On 27 November 2002, the Supreme Court considered these two motions jointly and dismissed them. Thereafter, on 30 January 2003, the author filed a third motion, claiming that the first two motions should not have been heard jointly, and that their consolidation violated his constitutional right to a "fair trial". On 14 January 2003, this motion was similarly dismissed.

2.2 On 5 February 2003, the author filed a fourth motion, claiming that the Chief Justice of Sri Lanka and the two other judges who had considered his third motion should not have done so, as they were the same judges who had consolidated and considered the first two motions. During the hearing of this motion on 6 February 2003, the author was summarily convicted of contempt of court and sentenced to one year's "rigorous imprisonment" (meaning that he would be compelled to perform hard labour). He was imprisoned on the same day. According to the author, approximately two weeks later, a "second" contempt order was issued by the Chief Justice, clarifying that, despite earlier warnings, the author had persisted in disturbing court proceedings. The operative part of the Order stated as follows: "The petitioner was informed that he cannot abuse the process of Court and keep filing applications without any basis. At this stage he raised his voice and insisted on his right to pursue the application. He was then warned that he would be dealt with for contempt of Court if he persists in disturbing the proceedings of Court. In spite of the warning, he persists in disturbing the proceedings of Court. In the circumstances, we find him guilty of the offence of contempt of Court and sentence him to one year rigorous imprisonment. The Registrar is directed to remove the Petitioner from Court and commit him to prison on the sentence that is imposed". The Order was based on article 105 (3) of the Sri Lankan Constitution, which confers on the Supreme Court "the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit…"1/. According to the author, neither the Constitution nor any other statutory provisions regulate the procedure for informing the person in contempt of the charges against him, so as to enable him to consult a lawyer or appeal against the order of the Supreme Court, nor does it specify the sentence that may be imposed in cases of contempt.

...

3.1 The author claims violations of his rights under article 14, paragraphs 1, 2, and 3 (a), (b), (c) and (e), and 5, in that: he was denied a hearing on the question of contempt, having been convicted summarily; conviction and sentence were handed down by the same judges who had considered his previous three motions,2/ he had not been informed of the charges against him, nor given adequate time for the preparation of his defence,3/ the appeal was heard by the same Supreme Court judges who had previously considered the matter; there was no proof that he had committed contempt of court or that "a deliberate intention" to commit contempt, required under domestic law, had been established; the term of one year imprisonment was grossly disproportionate to the offence which he was found to have committed.

...

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.

Notes

1/ "Article 105 (3), provides that "The Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each be a superior court of record and shall have all the powers of such court including the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit. The power of the Court of Appeal shall include the power to punish for contempt of any other court, tribunal or institution referred to in paragraph (1) (c) of this article, whether committed in the presence of such court or elsewhere: Provided that the preceding provisions of this article shall not prejudice or affect the rights now or hereafter vested by any law in such other court, tribunal or institution or punishment for contempt of itself."

2/ The author refers to *Karttunen v. Finland*, case No. 387/1989 and *Gonzalez del Rio v. Peru*, case No. 263/1987. He also distinguishes the current case from that of *Rogerson v. Australia*, case No. 802/1998 and *Collins v. Jamaica*, case No. 240/1987.

3/ He refers to a press release of 17 February 2003, in which it is stated that the United

Nations Special Rapporteur on the independence of the judges and lawyers and the Sri Lankan Legal Profession, are of the view that contempt of court cases are not an exception to the right of an accused to present a defence.

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

...

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

2.2 On 14 July 2000, acting on instructions from the Supreme Court, the Chief Registrar communicated with the author. After the author had accepted the conditions of appointment, including his prior resignation from the post of Family Court judge, the Chief registrar sent him an offer of appointment to the post of District Court judge (with the starting salary of the scale for District Court judges) and advertised the author's post of Family Court judge. By letter of 19 July 2000, the author accepted the written offer of appointment, which did not contain a proviso on his resignation from the post as Family Court judge.

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

> "Further to the letter offering appointment dated 13 July 2000 and its acceptance by you by your letter dated 19 July 2000, I forward to you the relevant document of your appointment to the post of temporary district judge.
>
> 1. It is noted that, as you have been informed, a prerequisite to your appointment is your resignation from the post of judge of the Family Court before the assumption of your duties.

> 2. Provided the above [is] observed, you will take the judicial oath and will give the affirmation to the Republic for the post of temporary district judge next Monday, 2 October 2000, at 8.00 a.m. at the Supreme Court."

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

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

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

...

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

...

6.3 As to the author's claim under article 14, paragraph 1, the Committee observes that, in

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

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

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

LEGAL RIGHTS - PROPERTY, CIVIL AND CONTRACT RIGHTS

Notes

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

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

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

...

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

...

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

- *Calvet v. Spain* (1333/2004), ICCPR, A/60/40 vol. II (25 July 2005) 459 at paras. 2.1, 2.2 and 6.4.

...

2.1 The author and his wife concluded an agreement dissolving their marriage, and this was approved by the court in February 1990. Following submission of an application for divorce by the author's ex-wife, court No. 4 in Vilanova i la Geltrú, in a ruling dated 7 March 1992, awarded the mother care and custody of the couple's minor daughter and ordered the author to pay his ex-wife the sum of 25,000 pesetas (150.28 euros) per month in maintenance. On 27 October 1995, the author's ex-wife submitted to examining magistrate No. 6 in Vilanova i la Geltrú a claim for recovery of three monthly payments outstanding from 1993, two from 1994 and all payments from 1995.

2.2 On 14 March 2001, criminal court No. 12 in Barcelona found the author guilty of the offence of abandonment of the family under article 227 of the Spanish Criminal Code and sentenced him to eight weekends' imprisonment and reimbursement of the sums owed to his ex-wife.

...

6.4 With regard to the alleged violation of article 11 of the Covenant by the imposition of a custodial sentence for failure to pay maintenance, the Committee notes that the case concerns a failure to meet not a contractual obligation but a legal obligation, as provided in article 227 of the Spanish Criminal Code. The obligation to pay maintenance is one deriving from Spanish law and not from the separation or divorce agreement signed by the author and his ex-wife. Consequently, the Committee finds the communication incompatible *ratione materiae* with article 11 of the Covenant and thus inadmissible under article 3 of the Optional Protocol.

- *Marik v. Czech Republic* (945/2000), ICCPR, A/60/40 vol. II (26 July 2005) 54 at paras. 2.1-2.4, 6.2-6.5, 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.

2.3 On 1 February 1991, Act 87/1991 on Extra-Judicial Rehabilitation was adopted. Under it, a person claiming restitution of property had to (a) be a Czech-Slovak citizen and (b) be a permanent resident in the Czech Republic to claim entitlement to regain his or her property. In addition, according to the Act, (c) the claimant has a burden for proving the unlawfulness of the acquisition by the current owner of the property in question. The first two requirements had to be fulfilled during the time period in which restitution claims could be filed, between 1 April and 1 October 1991. A judgement of the Czech Constitutional Court of 12 July 1994 (No. 164/1994), however, annulled the condition of permanent residence and established a new time frame for the submission of restitution claims by persons who had thereby become entitled persons, running from 1 November 1994 to 1 May 1995. According to the author, this judgement established a right to restitution which could be exercised by

those who did not have permanent residence in the country and met the citizenship condition in the new time period. However, the Supreme Court and the Constitutional Court supported an interpretation to the effect that the newly entitled persons were persons who, during the original period of time (1 April to 1 October 1991), had met all the other conditions, including the citizenship condition, with the exception of permanent residence. Although the author claims that he never lost Czech citizenship, he formally became Czech citizen again in May 1993.

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.

6.3 The Committee reiterates its jurisprudence that not all differentiations in treatment can be deemed to be discriminatory under article 26. A differentiation which is compatible with the provisions of the Covenant and is based on objective and reasonable grounds does not amount to prohibited discrimination within the meaning of article 26 6/. Whereas the citizenship criterion is objective, the Committee must determine whether its application to the author was reasonable in the circumstances of the case.

6.4 The Committee recalls its Views in the cases of *Simunek*, *Adam*, *Blazek* and *Des Fours Walderode*,7/ where it held that article 26 of the Covenant had been violated: "the authors in that case and many others in analogous situations had left Czechoslovakia because of their political opinions and had sought refuge from political persecution in other countries, where they eventually established permanent residence and obtained a new citizenship. Taking into account that the State party itself is responsible for the author's...departure, it would be incompatible with the Covenant to require the author…to obtain Czech citizenship as a prerequisite for the restitution of [his] property or, alternatively, for the payment of appropriate compensation" 8/. The Committee further recalls its jurisprudence 9/ that the

citizenship requirement in these circumstances is unreasonable. In addition, the State party's argument that the citizenship condition was included in the law to incite owners to take good care of the property after the privatization process has not been substantiated.

6.5 The Committee considers that the precedent established in the above cases also applies to the author of the present communication. The Committee notes that in the case of the Letkov property, the State party argues that the author did not fulfil the third requirement, i.e. proving that the property was acquired unlawfully by the present owners. However, the Committee further notes that although the lower courts took this element into consideration, the Supreme Court based its decision only on the non-fulfilment of the citizenship precondition. In the light of these considerations, the Committee concludes that the application to the author of Act 87/1991, which lays down a citizenship requirement for the restitution of confiscated property, violated his rights under 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.

Notes

...

6/ See communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, para. 13.

7/ See footnote 8.

8/ See communication No. 586/1994, *Adam v. The Czech Republic*, Views adopted on 23 July 1996, para. 12.6 and communication No. 857/1999, *Blazek v. The Czech Republic*, Views adopted on 12 July 2001, para. 5.8.

9/ See communication No. 516/1992, *Simunek v. The Czech Republic*, Views adopted on 19 July 1995, para. 11.6.

LEGAL RIGHTS - PROPERTY, CIVIL AND CONTRACT RIGHTS

- *Fijalkovska v. Poland* (1061/2002), ICCPR, A/60/40 vol. II (26 July 2005) 103 at paras. 2.1-2.6, 4.4, 4.5, 8.2-8.5, 9 and 10.

...

2.1 The author has been suffering from schizophrenic paranoia since 1986. On 12 February 1998, she was committed to the Provincial Psychiatric Therapeutic Centre (hereinafter the "psychiatric institution") in Torun. She was committed under article 29 of the Law on Psychiatric Health Protection, by order of the Torun District Court of 5 February 1998.

2.2 On 29 April 1998, the author was permitted to leave the psychiatric institution, but continued her treatment as an outpatient; treatment was completed on 22 July 1998.

2.3 On 1 June 1998, the author went to the court registry to examine her case file and requested copies of the transcript of the court hearing and decision of 5 February 1998. She received a copy of the decision on 18 June 1998 at the psychiatric institution. On 24 June 1998, she lodged an appeal against the Torun District Court's decision of 5 February 1998. On 26 June 1998, the Regional Court dismissed her appeal as she had missed the statutory deadline.1/

2.4 On 1 July 1998, the author applied to the Regional Court to establish a new time limit for lodging her appeal. On 16 September 1998, the Regional Court refused her request. On 19 October 1998, the Torun Provincial Court similarly rejected the author's appeal against the decision of the Regional Court. The decision contained instructions on how to appeal to the Supreme Court.

2.5 On 24 November 1998 and following a decision of the Provincial Court of 20 October 1998, the author was assigned a legal aid lawyer to prepare her appeal to the Supreme Court. On 21 April 1999, the Supreme Court rejected the author's appeal.

2.6 On 1 September 1999, the Supreme Court rejected, for lack of competence, the author's request to review the constitutionality of the provisions of the Law on Psychiatric Health Protection.

...

4.4 On 17 December 1997, and in order to corroborate the evidence submitted by the author's sister, the Torun District Court ordered that the author be independently examined. On 22 December 1997, the court-appointed medical expert informed the court that the author had not appeared when summoned for the examination. On the same day, the court ordered the author to appear for an examination on 30 December 1997. The author again ignored the summons. The court scheduled another psychiatric examination for 12 January 1998; on that day, the author was escorted to the examination by the police.

4.5 The expert who conducted the examination concluded that the author needed treatment in a psychiatric institution. On 5 February 1998 and on the basis of this evidence, the Torun District Court ordered the author's committal. The author failed to appear in court. Thus, the State party argued that there were serious grounds for subjecting the author to compulsory treatment and the decision was taken in accordance with the relevant provisions of Polish law. It concluded that the author has not submitted any reliable arguments in support of her submission concerning allegedly cruel, inhuman or degrading treatment.

...

8.2 As to whether the State party violated article 9 of the Covenant by committing the author to a psychiatric institution, the Committee notes its prior jurisprudence that treatment in a psychiatric institution against the will of the patient constitutes a form of deprivation of liberty that falls under the terms of article 9 of the Covenant. 5/ As to whether the committal was lawful, the Committee notes that it was carried out in accordance with the relevant articles of the Mental Health Protection Act and was, thus, lawfully carried out.

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.

8.5 In light of a finding of a violation of article 9, the Committee need not consider whether there was also a violation of article 14 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.

_____

Notes

1/ According to the decision, dated 26 June 1998, of the Regional Court, the statutory deadline was 26 February 1998.

...

5/ Communication No. 754/1997, *A. v. New Zealand*, Views adopted on 15 July 1999.

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CEDAW

- *A. T. v. Hungary* (2/2003), CEDAW, A/60/38 part I (26 January 2005) 80 at paras. 2.1, 2.2, 2.4, 2.5, 3.1, 9.2-9.4 and 9.6.

...

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

2.2 In March 1999, L. F. moved out of the family apartment. His subsequent visits allegedly typically included battering and/or loud shouting, aggravated by his being in a drunken state. In March 2000, L. F. reportedly moved in with a new female partner and left the family home, taking most of the furniture and household items with him. The author claims that he did not pay child support for three years, which forced her to claim the support by going to

the court and to the police, and that he has used this form of financial abuse as a violent tactic in addition to continuing to threaten her physically. Hoping to protect herself and the children, the author states that she changed the lock on the door of the family's apartment on 11 March 2000. On 14 and 26 March 2000, L. F. filled the lock with glue and on 28 March 2000, he kicked in a part of the door when the author refused to allow him to enter the apartment. The author further states that, on 27 July 2001, L. F. broke into the apartment using violence.

...

2.4 The author states that there have been civil proceedings regarding L. F.'s access to the family's residence, a 2 and a half room apartment (of 54 by 56 square metres) jointly owned by L. F. and the author. Decisions by the court of the first instance, the Pest Central District Court (*Pesti Központi Kerületi Bíróság*), were rendered on 9 March 2001 and 13 September 2002 (supplementary decision). On 4 September 2003, the Budapest Regional Court (*Fővărosi Bíróság*) issued a final decision authorizing L. F. to return and use the apartment. The judges reportedly based their decision on the following grounds: (a) lack of substantiation of the claim that L. F. regularly battered the author; and (b) that L. F.'s right to the property, including possession, could not be restricted. Since that date, and on the basis of the earlier attacks and verbal threats by her former partner, the author claims that her physical integrity, physical and mental health and life have been at serious risk and that she lives in constant fear. The author reportedly submitted to the Supreme Court a petition for review of the 4 September 2003 decision, which was pending at the time of her submission of supplementary information to the Committee on 2 January 2004.

2.5 The author states that she also initiated civil proceedings regarding division of the property, which have been suspended. She claims that L. F. refused her offer to be compensated for half of the value of the apartment and turn over ownership to her. In these proceedings the author reportedly submitted a motion for injunctive relief (for her exclusive right to use the apartment), which was rejected on 25 July 2000.

...

3.1 The author alleges that she is a victim of violations by Hungary of articles 2 (a), (b) and (e), 5 (a) and 16 of the Convention on the Elimination of All Forms of Discrimination against Women for its failure to provide effective protection from her former common law husband. She claims that the State party passively neglected its "positive" obligations under the Convention and supported the continuation of a situation of domestic violence against her.

...

9.2 The Committee recalls its general recommendation No. 19 on violence against women, which states that "...[T]he definition of discrimination includes gender-based violence" and that "[G]ender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence". Furthermore, the general recommendation addresses the question of whether States parties can be held accountable for the conduct of non-State actors in stating that "...discrimination under the Convention is

not restricted to action by or on behalf of Governments..." and "[U]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation". Against this backdrop, the immediate issue facing the Committee is whether the author of the communication is the victim of a violation of articles 2 (a), (b) and (e), 5 (a) and 16 of the Convention because, as she alleges, for the past four years the State party has failed in its duty to provide her with effective protection from the serious risk to her physical integrity, physical and mental health and her life from her former common law husband.

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

9.4 The Committee addressed articles 5 and 16 together in its general recommendation No. 19 in dealing with family violence. In its general recommendation No. 21, the Committee

stressed that "the provisions of general recommendation 19...concerning violence against women have great significance for women's abilities to enjoy rights and freedoms on an equal basis with men". It has stated on many occasions that traditional attitudes by which women are regarded as subordinate to men contribute to violence against them. The Committee recognized those very attitudes when it considered the combined fourth and fifth periodic report of Hungary in 2002. At that time it was concerned about the "persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family...". In respect of the case now before the Committee, the facts of the communication reveal aspects of the relationships between the sexes and attitudes towards women that the Committee recognized *vis-à-vis* the country as a whole. For four years and continuing to the present day, the author has felt threatened by her former common law husband, the father of her two children. The author has been battered by this same man, her former common law husband. She has been unsuccessful, either through civil or criminal proceedings, to temporarily or permanently bar L. F. from the apartment where she and her children have continued to reside. The author could not have asked for a restraining or protection order since neither option currently exists in the State party. She has been unable to flee to a shelter because none are equipped to accept her together with her children, one of whom is fully disabled. None of these facts have been disputed by the State party and, considered together, they indicate that the rights of the author under articles 5 (a) and 16 of the Convention have been violated.

...

9.6 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Committee is of the view that the State party has failed to fulfil its obligations and has thereby violated the rights of the author under article 2 (a), (b) and (e) and article 5 (a) in conjunction with article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, and makes the following recommendations to the State party:

I. Concerning the author of the communication

(a) Take immediate and effective measures to guarantee the physical and mental integrity of A. T. and her family;

(b) Ensure that A. T. is given a safe home in which to live with her children, receives appropriate child support and legal assistance as well as reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights;

II. General

(a) Respect, protect, promote and fulfil women's human rights, including their right to be free from all forms of domestic violence, including intimidation and threats of violence;

(b) Assure victims of domestic violence the maximum protection of the law by acting with due diligence to prevent and respond to such violence against women;

...

(e) Implement expeditiously and without delay the Committee's concluding comments of August 2002 on the combined fourth and fifth periodic report of Hungary in respect of violence against women and girls, in particular the Committee's recommendation that a specific law be introduced prohibiting domestic violence against women, which would provide for protection and exclusion orders as well as support services, including shelters;

(f) Investigate promptly, thoroughly, impartially and seriously all allegations of domestic violence and bring the offenders to justice in accordance with international standards;

(g) Provide victims of domestic violence with safe and prompt access to justice, including free legal aid where necessary, in order to ensure them available, effective and sufficient remedies and rehabilitation;

...

CAT

- *Hajrizi Dzemajl et al. v. Serbia and Montenegro* (161/2000), CAT, A/58/44 (21 November 2002) 85 (CAT/C/29/D/161/2000) at paras. 2.1-2.24, 9.2-9.6, 10, 11 and Individual Opinion by Mr. Fernando Mariño and Mr. Alejandro González Poblete (concurring), 97.

...

2.1 On 14 April 1995 at around 10 p.m., the Danilovgrad Police Department received a report indicating that two Romani minors had raped S.B., a minor ethnic Montenegrin girl. In response to this report, around midnight, the police entered and searched a number of houses in the Bozova Glavica Roma settlement and brought into custody all of the young male Romani men present in the settlement (all of them presently among the complainants to this Committee).

2.2 The same day, around midnight, two hundred ethnic Montenegrins, led by relatives and neighbours of the raped girl, assembled in front of the police station and publicly demanded that the Municipal Assembly adopt a decision expelling all Roma from Danilovgrad. The crowd shouted slogans addressed to the Roma, threatening to "exterminate" them and "burn down" their houses.

2.3 Later, two Romani minors confessed under duress. On 15 April, between 4 and 5 a.m., all of the detainees except those who confessed were released from police custody. Before their release, they were warned by the police to leave Danilovgrad immediately with their

families because they would be at risk of being lynched by their non-Roma neighbours.

2.4 At the same time, police officer Ljubo Radovic came to the Bozova Glavica Roma settlement and told the Romani residents of the settlement that they must evacuate the settlement immediately. The officer's announcement caused panic. Most residents of the settlement fled towards a nearby highway, where they could take buses for Podgorica. Only a few men and women remained in the settlement to safeguard their homes and livestock. At approximately 5 a.m., police officer Ljubo Radovic returned to the settlement, accompanied by police inspector Branko Micanovic. The officers told the remaining Roma still in their homes (including some of the complainants) to leave Danilovgrad immediately, as no one could guarantee their safety or provide them with protection.

2.5 At around 8 a.m. the same day, a group of non-Roma residents of Danilovgrad entered the Bozova Glavica Roma settlement, hurling stones and breaking windows of houses owned by the complainants. Those Roma who had still not left the settlement (all of them presently among the complainants) hid in the cellar of one of the houses from which they eventually managed to flee through the fields and woods towards Podgorica.

2.6 In the course of the morning of 15 April, a police car repeatedly patrolled the deserted Bozova Glavica settlement. Groups of non-Roma residents of Danilovgrad gathered in different locations in the town and in the surrounding villages. Around 2 p.m. the non-Roma crowd arrived in the Bozova Glavica settlement - in cars and on foot. Soon a crowd of at least several hundred non-Roma (according to different sources, between 400 and 3,000 persons were present) assembled in the then deserted Roma settlement.

2.7 ...Shortly after 3 p.m., the demolition of the settlement began. The mob, with stones and other objects, first broke windows of cars and houses belonging to Roma and then set them on fire. The crowd also destroyed and set fire to the haystacks, farming and other machines, animal feed sheds, stables, as well as all other objects belonging to the Roma. They hurled explosive devices and "Molotov" cocktails that they had prepared beforehand, and threw burning cloths and foam rubbers into houses through the broken windows. Shots and explosions could be heard amid the sounds of destruction. At the same time, valuables were looted and cattle slaughtered. The devastation endured unhindered for hours.

2.8 Throughout the course of the destruction, the police officers present failed to act in accordance with their legal obligations. Shortly after the attack began, rather than intervening to halt the violence, these officers simply moved their police car to a safe distance and reported to their superior officer. As the violence and destruction unfolded, police officers did no more than feebly seek to persuade some of the attackers to calm down pending a final decision of the Municipal Assembly with respect to a popular request to evict Roma from the Bozova Glavica settlement.

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2.9 The outcome of the anti-Roma rage was the levelling of the entire settlement and the burning or complete destruction of all properties belonging to its Roma residents. Although the police did nothing to halt the destruction of the Roma settlement, they did ensure that the fire did not spread to any of the surrounding buildings, which belonged to the non-Roma.

2.10 The police and the investigating magistrate of the Basic Court in Danilovgrad subsequently drew up an on-site investigation report regarding the damage caused by those who took part in the attack.

2.11 Official police documents, as well as statements given by a number of police officers and other witnesses alike, both before the court and in the initial stage of the investigation, indicate that the following non-Roma residents of Danilovgrad were among those who took part in the destruction of the Bozova Glavica Roma settlement: Veselin Popovic, Dragisa Makocevic, Gojko Popovic, Bosko Mitrovic, Joksim Bobicic, Darko Janjusevic, Vlatko Cacic, Radojica Makocevic.

2.12 Moreover, there is evidence that police officers Miladin Dragas, Rajko Radulovic, Dragan Buric, Djordjije Stankovic and Vuk Radovic were all present as the violence unfolded and did nothing or not enough to protect the Roma residents of Bozova Glavica or their property.

2.13 Several days following the incident, the debris of the Roma settlement was completely cleared away by heavy construction machines of the Public Utility Company. All traces of the existence of the Roma in Danilovgrad were obliterated.

2.14 Following the attack, and pursuant to the relevant domestic legislation, on 17 April 1995, the Podgorica Police Department filed a criminal complaint with the Basic Public Prosecutor's Office in Podgorica. The complaint alleged that a number of unknown perpetrators had committed the criminal offence of causing public danger under article 164 of the Montenegrin Criminal Code and, *inter alia*, explicitly stated that there are "reasonable grounds to believe that, in an organized manner and by using open flames … they caused a fire to break out ... on 15 April 1995 … which completely consumed dwellings … and other propert[ies] belonging to persons who used to reside in … [the Bozova Glavica] settlement".

2.15 On 17 April 1995 the police brought in 20 individuals for questioning. On 18 April 1995, a memorandum was drawn up by the Podgorica Police Department which quoted the statement of Veselin Popovic as follows: "... I noticed flames in a hut which led me to conclude that the crowd had started setting fire to huts so I found several pieces of foam rubber which I lit with a lighter I had on me and threw them, alight, into two huts, one of which caught fire."

2.16 On the basis of this testimony and the official police memorandum, the Podgorica Police Department ordered, on 18 April 1995, that Veselin Popovic be remanded into custody, on the grounds that there were reasons to believe that he had committed the criminal offence of causing public danger in the sense of article 164 of the Montenegrin Criminal Code.

2.17 On 25 April 1995, and with respect to the incident at the origin of this complaint, the Public Prosecutor instituted proceedings against one person only - Veselin Popovic.

2.18 Veselin Popovic was charged under article 164 of the Montenegrin Criminal Code. The same indictment charged Dragisa Makocevic with illegally obtaining firearms in 1993 - an offence unrelated to the incident at issue notwithstanding the evidence implicating him in the destruction of the Roma Bozova Glavica settlement.

2.19 Throughout the investigation, the investigating magistrate of the Basic Court of Danilovgrad heard a number of witnesses all of whom stated that they had been present as the violence unfolded but were not able to identify a single perpetrator. On 22 June 1995, the investigating magistrate of the Basic Court of Danilovgrad heard officer Miladin Dragas. Contrary to the official memorandum he had personally drawn up on 16 April 1995, officer Dragas now stated that he had not seen anyone throwing an inflammable device, nor could he identify any of the individuals involved.

2.20 On 25 October 1995, the Basic Public Prosecutor in Podgorica requested that the investigating magistrate of the Basic Court of Danilovgrad undertake additional investigation into the facts of the case. Specifically, the prosecutor proposed that new witnesses be heard, including officers from the Danilovgrad Police Department who had been entrusted with protecting the Bozova Glavica Roma settlement. The investigating magistrate of the Basic Court of Danilovgrad then heard the additional witnesses, all of whom stated that they had seen none of the individuals who had caused the fire. The investigating magistrate took no further action.

2.21 Due to the "lack of evidence", the Basic Public Prosecutor in Podgorica dropped all charges against Veselin Popovic on 23 January 1996. On 8 February 1996, the investigating magistrate of the Basic Court of Danilovgrad issued a decision to discontinue the investigation. From February 1996 up to and including the date of filing of this complaint, the authorities took no further steps to identify and/or punish those individuals responsible for the incident at issue - "civilians" and police officers alike.

2.22 In violation of domestic legislation, the complainants were not served with the court decision of 8 February 1996 to discontinue the investigation. They were thus prevented from assuming the capacity of a private prosecutor and to continue with the prosecution of the

case.

2.23 Even prior to the closing of the proceedings, on 18 and 21 September 1995, the investigating magistrate, while hearing witnesses (among them a number of the complainants), failed to advise them of their right to assume the prosecution of the case in the event that the Public Prosecutor should decide to drop the charges. This contravened domestic legislation which explicitly provides that the Court is under an obligation to advise ignorant parties of avenues of legal redress available for the protection of their interests.

2.24 On 6 September 1996, all 71 complainants filed a civil claim for damages, pecuniary and non-pecuniary, with the first instance court in Podgorica - each plaintiff claiming approximately US$ 100,000. The pecuniary damages claim was based on the complete destruction of all properties belonging to the plaintiffs, while the non-pecuniary damages claim was based on the pain and suffering of the plaintiffs associated with the fear they were subjected to, and the violation of their honour, reputation, freedom of movement and the right to choose their own place of residence. The plaintiffs addressed these claims against the Republic of Montenegro and cited articles 154, 180 (1), 200, and 203 of the Federal Law on Obligations. More than five years after the submission of their claim, the civil proceedings for damages are still pending.

...

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.

9.3 Having considered that the facts described by the complainants constitute acts within the meaning of article 16, paragraph 1 of the Convention, the Committee will analyse other

alleged violations in the light of that finding.

9.4 Concerning the alleged violation of article 12 of the Convention, the Committee, as it has underlined in previous cases (see *inter alia, Encarnacion Blanco Abad v. Spain*, Case No. 59/1996, decided on 14 May 1998), is of the opinion that a criminal investigation must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any person who might have been involved therein. In the present case, the Committee notes that, despite the participation of at least several hundred non-Roma in the events of 15 April 1995 and the presence of a number of police officers both at the time and at the scene of those events, no person nor any member of the police forces has been tried by the courts of the State party. In these circumstances, the Committee is of the view that the investigation conducted by the authorities of the State party did not satisfy the requirements of article 12 of the Convention.

9.5 Concerning the alleged violation of article 13 of the Convention, the Committee considers that the absence of an investigation as described in the previous paragraph also constitutes a violation of article 13 of the Convention. Moreover, the Committee is of the view that the State party's failure to inform the complainants of the results of the investigation by, *inter alia*, not serving on them the decision to discontinue the investigation, effectively prevented them from assuming "private prosecution" of their case. In the circumstances, the Committee finds that this constitutes a further violation of article 13 of the Convention.

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.

Individual Opinion by Mr. Fernando Mariño and Mr. Alejandro González Poblete

We are issuing this opinion to emphasize that, in our judgement, the illegal incidents for which the Yugoslav State is responsible constitute "torture" within the meaning of article 1, paragraph 1, of the Convention, not merely "cruel, inhuman or degrading treatment" as covered by article 16. The failure of the State authorities to react to violent evictions, forced displacement and the destruction of homes and property by individuals amounts to unlawful acquiescence which, in our judgement, violates article 1, paragraph 1, particularly when read in conjunction with article 2, paragraph 1, of the Convention.

We believe that, in fact, the suffering visited upon the victims was severe enough to qualify as "torture", because:

(a) The inhabitants of the Bozova Glavica settlement were forced to abandon their homes in haste given the risk of severe personal and material harm;

(b) Their settlement and homes were completely destroyed. Basic necessities were also destroyed;

(c) Not only did the resulting forced displacement prevent them from returning to their original settlement, but many members of the group were forced to live poorly, without jobs or fixed places of abode;

(d) Thus displaced and wronged, these Yugoslav nationals have still not received any compensation, seven years after the fact, although they have approached the domestic authorities;

(e) All the inhabitants who were violently displaced belong to the Romani ethnic group, which is known to be especially vulnerable in many parts of Europe. In view of this, States must afford them greater protection;

The above amounts to a presumption of "severe suffering", certainly "mental" but also inescapably "physical" in nature even if the victims were not subjected to direct physical aggression.

We thus consider that the incidents at issue should have been categorized as "torture".