

SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL

**International Covenant
on Civil and Political Rights**



OFFICE OF THE
UNITED NATIONS
HIGH COMMISSIONER
FOR HUMAN RIGHTS

H u m a n R i g h t s



UNITED NATIONS

Volume

9

**INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS**

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THE HUMAN RIGHTS COMMITTEE
under
THE OPTIONAL PROTOCOL**

Volume 9

*Eighty-fifth to ninety-first sessions
(October 2005 – October 2007)*



UNITED NATIONS

New York and Geneva, 2008

NOTE

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CCPR/C/OP/9

UNITED NATIONS PUBLICATION

Sales No. E.08.XIV.9

ISBN 978-92-1-154186-1

CONTENTS

	<i>Page</i>
Introduction	1
 FINAL DECISIONS	
A. Decisions declaring a communication inadmissible	
(Committee's session indicated in brackets)	
No. 1078/2002 [85] <i>Yurich v. Chile</i>	3
No. 1102/2002 [86] <i>Semey v. Spain</i>	7
No. 1219/2003 [89] <i>Roasaljevic v. Bosnia and Herzegovina</i>	10
No. 1315/2004 [86] <i>Singh v. Canada</i>	15
No. 1341/2005 [89] <i>Zundel v. Canada</i>	20
No. 1355/2005 [89] <i>X v. Serbia</i>	29
No. 1424/2005 [88] <i>Anton v. Algeria</i>	35
No. 1434/2005 [86] <i>Fillacier v. France</i>	45
No. 1452/2006 [90] <i>Chytil v. Czech Republic</i>	47
 B. Views under article 5 (4) of the Optional Protocol	
No. 812/1998 [86] <i>Persaud v. Guyana</i>	51
No. 915/2000 [86] <i>Ruzmetov v. Uzbekistan</i>	53
No. 992/2001 [86] <i>Bousroual v. Algeria</i>	59
No. 1016/2001 [86] <i>Hinostroza Solis v. Peru</i>	65
No. 1036/2001 [85] <i>Faure v. Australia</i>	68
No. 1052/2002 [89] <i>J.T. v. Canada</i>	74
No. 1100/2002 [86] <i>Bandajevsky v. Belarus</i>	84
Nos. 1108-1121/2002 [89] <i>Karimov and Nursatov v. Tajikistan</i>	92
No. 1123/2002 [86] <i>Correia de Matos v. Portugal</i>	98
No. 1126/2002 [85] <i>Carranza Alegre v. Peru</i>	102
No. 1153/2003 [85] <i>K.N.L.H. v. Peru</i>	108
No. 1156/2003 [86] <i>Pérez Escolar v. Spain</i>	113
No. 1159/2003 [86] <i>Sankara v. Burkina Faso</i>	120
No. 1172/2003 [89] <i>Madani v. Algeria</i>	134
No. 1173/2003 [90] <i>Benhadj v. Algeria</i>	143
No. 1180/2003 [85] <i>Bodrožić v. Serbia and Montenegro</i>	151
No. 1184/2003 [86] <i>Brough v. Australia</i>	154
No. 1223/2003 [91] <i>Tsarjov v. Estonia</i>	164
No. 1249/2003 [85] <i>Joseph et al. v. Sri Lanka</i>	172
No. 1296/2004 [90] <i>Belyatsky et al. v. Belarus</i>	177
No. 1297/2003 [87] <i>Medjnoune v. Algeria</i>	182
No. 1298/2004 [87] <i>Becerra v. Colombia</i>	188
No. 1306/2004 [91] <i>Haraldsson and Sveinsson v. Iceland</i>	192
No. 1314/2004 [87] <i>O'Neill and Quinn v. Ireland</i>	205
No. 1320/2004 [89] <i>Pimentel v. Philippines</i>	215
Nos. 1321-1322/2004 [88] <i>Yoon and Choi v. Republic of Korea</i>	218
No. 1325/2004 [88] <i>Conde Conde v. Spain</i>	226
No. 1327/2004 [90] <i>Grioua v. Algeria</i>	229
No. 1361/2005 [89] <i>X v. Colombia</i>	237
No. 1416/2005 [88] <i>Alzery v. Sweden</i>	243
No. 1421/2005 [87] <i>Larrañaga v. Philippines</i>	266
No. 1454/2006 [90] <i>Lederbauer v. Austria</i>	280

ANNEX

Summary of States parties' replies pursuant to the adoption of Views by the Human Rights Committee.... 301

INDEXES

Index by article of the Covenant.....	303
Index by article of the Optional Protocol	306
Subject index	307
Author and victim index	312

INTRODUCTION

1. The International Covenant on Civil and Political Rights and the Optional Protocol thereto were adopted by the General Assembly on 16 December 1966 and entered into force on 23 March 1976.

2. In accordance with article 28 of the Covenant, the States parties established the Human Rights Committee on 20 September 1976.

3. Under the Optional Protocol, individuals who claim that any of their rights set forth in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Human Rights Committee for consideration. No communication can be received by the Committee if it concerns a State party to the Covenant that is not also a party to the Optional Protocol. As of 31 December 2007, 110 of the 156 States that had acceded to or ratified the Covenant had accepted the competence of the Committee to receive and consider individual complaints by ratifying or acceding to the Optional Protocol.

4. Under the terms of the Optional Protocol, the Committee may consider a communication only if certain conditions of admissibility are satisfied. These conditions are set out in articles 1, 2, 3 and 5 of the Optional Protocol and restated in rule 96 of the Committee's rules of procedure (CCPR/C/3/Rev.9), pursuant to which the Committee shall ascertain:

(a) That the communication is not anonymous and that it emanates from an individual, or individuals, subject to the jurisdiction of a State party to the Protocol;

(b) That the individual claims, in a manner sufficiently substantiated, to be a victim of a violation by that State party of any of the rights set forth in the Covenant. Normally, the communication should be submitted by the individual himself or by his representative; a communication submitted on behalf of an alleged victim may, however, be accepted when it appears that he is unable to submit the communication himself;

(c) That the communication is not an abuse of the right to submit a communication under the Protocol;

(d) That the communication is not incompatible with the provisions of the Covenant;

(e) That the same matter is not being examined under another procedure of international investigation or settlement;

(f) That the individual has exhausted all available domestic remedies.

5. Under rule 92 (old rule 86) of its rules of procedure, the Committee may, prior to the forwarding of its final Views on a communication, inform the State party of whether "interim measures" of protection are desirable to avoid irreparable damage to the victim of the alleged violation. The request for interim measures, however, does not imply the determination of the merits of the communication. The Committee has requested such interim measures in numerous cases, for example where the carrying out of a death sentence or the expulsion or extradition of a person appeared to be imminent. Pursuant to rule 94 (2), the Committee may deal jointly with two or more communications, if deemed appropriate.

6. With respect to the question of burden of proof, the Committee has established that such burden cannot rest on the author of a communication alone, especially since the author and the State party do not always have equal access to the evidence and the State party frequently has sole possession of the relevant information. It is implicit in article 4 (2) of the Optional Protocol that the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and its authorities.

7. The Committee started work under the Optional Protocol at its second session in 1977. From then until its ninety-first session in October 2007, 1745 communications relating to alleged violations by 82 States parties were placed before it for consideration. By the end of December 2007, the status of these communications was as follows:

(a) Concluded by the adoption of Views under article 5 (4) of the Optional Protocol: 605

(b) Declared inadmissible: 483

(c) Discontinued or withdrawn: 242

(d) Declared admissible but not yet concluded: 16

(e) Pending at pre-admissibility stage: 399

8. Since 1976, the Committee has received many more than the 1745 registered communications mentioned above. The secretariat regularly receives inquiries from individuals who intend to submit a communication to the Committee. Such inquiries are not immediately registered as cases. In fact, the number of authors who eventually submit cases for consideration by the Committee under the Optional Protocol is relatively small,

partly because the authors discover that their cases do not satisfy certain basic criteria of admissibility, such as the required exhaustion of domestic remedies, and partly because they realize that a reservation or a declaration by the State party concerned may operate to preclude the Committee's competence to consider the case. These observations notwithstanding, the number of communications before the Committee is increasing steadily, and the Committee's work is becoming better known to lawyers, researchers and the general public. The purpose of the *Selected Decisions* series is to contribute to the dissemination of its work.

9. The first step towards wider dissemination of the Committee's work was the decision taken during the seventh session to publish its Views: publication was desirable in the interests of the most effective exercise of the Committee's functions under the Protocol, and publication in full was preferable to the publication of brief summaries. From the Annual Report of the Human Rights Committee in 1979 up to the 2007 report incorporating the ninetieth session in July 2007, all of the Committee's Views and decisions declaring communications inadmissible have been published in full.

10. At its fifteenth session, the Committee decided to proceed with a separate project, the periodical publication of a selection of its decisions under the Optional Protocol, including certain important decisions declaring communications admissible and other decisions of an interlocutory nature. Volume 1 of this series, covering decisions taken from the second to the sixteenth session inclusive, was published in 1985 in English.¹ Volume 2 covers decisions taken from the seventeenth to the thirty-second session and includes all decisions declaring communications admissible, two interim decisions requesting additional information from the author and State party, and two decisions under rule 86 of the Committee's rules of procedure, requesting interim measures of

¹ *Human Rights Committee, Selected Decisions under the Optional Protocol (Second to sixteenth sessions)*, New York, 1985 (United Nations publication, Sales No. E.84.XIV.2), hereinafter referred to as *Selected Decisions*, vol. 1. French and Spanish versions were published in June 1988 (CCPR/C/OP/1).

For an introduction to the Committee's jurisprudence from the second to the twenty-eighth sessions, see A. de Zayas, J. Möller, T. Opsahl, "Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee" in *German Yearbook of International Law*, vol. 28, 1985, pp. 9-64. Reproduced by the United Nations Centre for Human Rights as Reprint No. 1, 1989.

For a more recent discussion, see Manfred Nowak, *ICCPR Commentary*, 2nd edition (Engel Verlag, 2005).

protection.² Volume 3 contains a selection of decisions adopted from the thirty-third to thirty-ninth session, Volume 4 a selection of decisions adopted from the fortieth to the forty-sixth session, Volume 5 covers the forty-seventh to fifty-fifth session, Volume 6 covers the fifty-sixth to sixty-fifth session, Volume 7 covers the sixty-sixth to the seventy-fourth session and Volume 8 covers the seventy-fifth to eighty-fourth sessions.

11. During the period covered by the present volume, there has again been an increase in the number of communications submitted to the Committee. The Special Rapporteur for New Communications of the Committee, whose mandate had been amended in 1991 to cope with the increasing caseload, has continued to further review and fine-tune his working methods. During the period covered by the present volume, the Special Rapporteur requested interim measures of protection in cases.

12. The Special Rapporteur on Follow-Up on Views also continued to review his working methods during this period. In 1997, his mandate was formally reviewed and changes to the mandate incorporated into the Committee's rules of procedure. Under the revised follow-up procedure, the Committee in principle no longer considers follow-up information on a confidential basis but in public session.

13. The format of decisions on admissibility and final Views adopted at the Committee's thirty-seventh session in 1989, which was designed to achieve greater precision and brevity, continued to be followed during the period covered by the present volume.

14. An important development in terms of jurisprudence was the steady increase in the number of individual opinions appended by members of the Committee to decisions on admissibility or final Views (rule 104 of the rules of procedure). It is particularly noteworthy that many members have appended joint individual opinions, whether concurring or dissenting. Readers will find numerous examples of this practice in the present volume.

² *International Covenant on Civil and Political Rights. Selected Decisions under the Optional Protocol (Seventeenth to thirty-second sessions)*, New York, 1990. French and Spanish versions were published in 1991.

FINAL DECISIONS

A. Decisions declaring a communication inadmissible

Communication No. 1078/2002

Submitted by: Norma Yurich (not represented by counsel)

Alleged victim: The author and her daughter, Jacqueline Drouilly Yurich

State party: Chile

Declared inadmissible: 2 November 2005

Subject matter: Enforced disappearance of the author's daughter

Procedural issues: Inadmissibility *ratione temporis*; non-exhaustion of domestic remedies

Substantive issues: In respect of the author, violation of the right to physical safety and family life; in respect of her daughter, violation *inter alia* of the right to life and denial of justice

Articles of the Covenant: 5; 6, paras. 1 and 3; 7; 9, paras. 1 to 4; 10, paras. 1 and 2; 12, para. 4; 13; 14, paras. 1 to 3 and 5; 16; 17, paras. 1 and 2; 18, para. 1; and 26

Articles of the Optional Protocol: 1 and 5, para. 2 (b)

1.1 The author of the communication is Ms. Norma Yurich, a Chilean national, who submits it on her own behalf and that of her missing daughter, Jacqueline Drouilly Yurich, a student, born in 1949. She alleges violations by Chile of articles 5; 6, paragraphs 1 and 3; 7; 9, paragraphs 1 to 4; 10, paragraphs 1 and 2; 12, paragraph 4; 13; 14, paragraphs 1 to 3 and 5; 16; 17, paragraphs 1 and 2; 18, paragraph 1; and 26 of the Covenant. The author is not represented by counsel.

1.2 The International Covenant on Civil and Political Rights entered into force for the State party on 23 March 1976, and the Optional Protocol on 28 August 1992.

The facts as presented by the author

2.1 According to the author, on 30 October 1974 eight individuals, armed and dressed in plain clothes, who identified themselves verbally as agents of the National Intelligence Directorate (DINA), came to the house of the sister of Marcelo Salinas, the husband of Jacqueline Drouilly, in Santiago, and asked her where Salinas lived. The agents then went to Marcelo Salinas' home and, on discovering that he was not there, arrested Jacqueline Drouilly, who was pregnant at the time. She has been missing since

then. Jacqueline Drouilly and her husband, who was himself arrested the following day, were members of the Movimiento de Izquierda Revolucionaria (MIR).

2.2 Two days later the same individuals went back to the house together with Marcelo Salinas, who was handcuffed, and took away various items belonging to the couple. A few days later, two men in plain clothes who identified themselves as military intelligence officers, came to the house and took away clothing, supposedly for the couple.

2.3 The author annexes copies of the testimony of two individuals who state that they were detained in late October and early November 1974 in a DINA detention centre in the calle José Domingo Cañas, in the municipality of Ñuñoa, Santiago. They also state that Jacqueline Drouilly and her husband were being held there and being subjected to torture, and that they were all transferred on or around 10 November 1974 to the Cuatro Alamos detention centre.

2.4 The author also provides a statement made on 16 August 1999 by a person who had been arrested in November 1974 by DINA agents, and who claims to have spent a period of detention in the *Cuatro Alamos* detention centre (Vicuña Mackenna and Departamental sector) in Santiago. During that period, between November and December 1974, this person shared a cell with Jacqueline Drouilly and testifies to having seen the author and her husband being taken out of their cells by DINA agents one night in late December 1974; the person never saw them again. Other witnesses stated that they saw Jacqueline Drouilly after 20 November 1974 in the detention centre known as the Villa Grimaldi, after which she was said to have returned to Cuatro Alamos.

2.5 On 11 November 1974 the author filed an application for *amparo* with the Santiago Appeal Court (case No. 1390). On 29 November 1974 the Court declared the case out of order and referred it to the 11th Criminal Court for investigation.

2.6 On 9 December 1974, proceedings for presumed misadventure were brought in the 11th Criminal Court, Santiago (case No. 796-2), but the investigations failed to establish Jacqueline Drouilly's whereabouts. On 31 January 1975 the case was dismissed. That decision was upheld on appeal by the Santiago Appeal Court.

2.7 On 26 February 1975 the author filed a further application for *amparo* with the Santiago Appeal Court (case No. 294). By memorandum of 17 March 1975 the Ministry of the Interior informed the Court that that person was not being held on Ministry orders. The same information was provided once more in June 1975. On 13 June 1975 the Court rejected the application and referred the case to the relevant criminal court for investigation. On 19 June 1975 presumed misadventure proceedings were brought in the 11th Criminal Court, Santiago (case No. 2681). After some months the case was dismissed. On 16 July 1975, while the above proceedings were ongoing, the author brought a complaint for the abduction of Jacqueline Drouilly and Marcelo Salinas before the same court. This complaint was initially registered as No. 2994 but was later joined to the presumed misadventure case as No. 2681-4. The case was dismissed on 31 March 1976, since no offence could be shown to have been committed. On appeal, on 18 June 1976, the Appeal Court upheld the dismissal. On 3 October 1975 the author again filed an application for *amparo* with the Appeal Court (case No. 1263), citing the fact that Jacqueline Drouilly had been pregnant at the time of her arrest. The application was declared out of order on 20 October 1975 and this decision was upheld on appeal by the Supreme Court on 27 October 1975.

2.8 Jacqueline Drouilly was among those named in a complaint for mass abduction filed on 28 May 1975 with the Santiago Appeal Court in respect of 163 disappeared persons and containing a request for an inspecting magistrate to be appointed to take charge of the investigations. The request was rejected. It was resubmitted in July and August 1975, this time to the Supreme Court, but was again rejected.

2.9 The author also states that a criminal complaint was filed with the Santiago Appeal Court on 29 March 2001, for the disappearance of more than 500 members of MIR, including Jacqueline Drouilly. The author alleges unreasonably lengthy proceedings.

The complaint

3.1 The author alleges that her daughter was a victim of violations of articles 5; 6, paragraphs 1 and 3; 7; 9, paragraphs 1 to 4; 10, paragraphs 1 and 2; 12, paragraph 4; 13; 14, paragraphs 1 to 3 and 5; 16;

17, paragraphs 1 and 2; 18, paragraph 1; and 26 of the Covenant.

3.2 In her own case, she states that the search for her daughter, missing for so many years, has affected her physical and mental health, and that as a result she suffers from depressions and cardiac problems which have necessitated the insertion of a pacemaker. Her family situation has also been affected, her husband and her other two children having been obliged to leave the country out of fear. The author states that this amounts to constant torture (art. 7).

3.3 As to the investigation into her daughter's disappearance, the author alleges a denial of justice. Moreover, the continuing applicability of Decree-Law No. 2191 on Amnesty, of 1978, has prevented those responsible from being brought to trial.

State party's submissions on admissibility and on the merits; author's comments

4.1 In its comments of 25 May 2004, the State party maintains that, although the author has submitted the communication on her own and her daughter's behalf, the allegations upon which it is based relate to violations of Covenant rights only in respect of the daughter. Consequently, the State party takes the view that the communication has in fact been submitted on behalf of Jacqueline Drouilly. The information collected over a period of years by State bodies, human rights organizations and the courts shows that she was last seen alive in or around January or March 1975, when being held incommunicado in the Cuatro Alamos compound, for which the now defunct DINA was responsible. Consequently, the communication submitted by the author should be declared inadmissible *ratione temporis*, since the events on which it is based occurred or commenced prior to the entry into force for Chile of the Optional Protocol.

4.2 Upon ratification of the Protocol, Chile made the following declaration: "In recognizing the competence of the Human Rights Committee to receive and consider communications from individuals, it is the understanding of the Government of Chile that this competence applies in respect of acts occurring after the entry into force for that State of the Optional Protocol or, in any event, to acts which began after 11 March 1990." This declaration applies notwithstanding the argument that the denial of justice continues to be perpetrated by court rulings handed down after 11 March 1990, since the events giving rise to the communication commenced on 30 October 1974 and therefore took place prior to 23 March 1976, the date of the international entry into force of the Covenant.

4.3 As to the complaint brought by the author on her own behalf, this is of a general nature. The

author fails to demonstrate how her rights under the Covenant have been violated by the State or to show that available domestic remedies have been exhausted.

4.4 The State party recalls the Committee's decisions on communications Nos. 717/1996 (Acuña Inostroza), 718/1996 (Vargas), 740/1997 (Barzana Yutronic) and 746/1997 (Menanteau and Vásquez), in respect of Chile, which it found inadmissible for those reasons.

4.5 As to the merits, the State party argues that there has been no violation of the Covenant. On 17 July 1996, the National Reparation and Reconciliation Board asked for the investigation to be reopened but this inquiry, too, was closed in December 1997. At the time of submission of the State party's comments, the trial of three former DINA agents was ongoing in the Santiago Appeal Court in respect of a criminal complaint filed by the father of Jacqueline Drouilly for aggravated abduction. Also ongoing in the same Court were proceedings in respect of a criminal complaint filed by the College of Social Work for the abduction of several of its members, including Jacqueline Drouilly.

4.6 The National Truth and Reconciliation Commission found that Jacqueline Drouilly and her husband Marcelo Salinas were victims of serious human rights violations by agents of the State. The State party explains the policies of Chile's democratic Governments on human rights violations, including enforced disappearances, committed under the previous regime. It states, inter alia, that the Ministry of the Interior's Human Rights Programme is cooperating in investigations into some 300 cases of human rights violations, including the disappearance of Jacqueline Drouilly.

4.7 The Decree-Law on Amnesty, of 1978, extinguishes the criminal responsibility of perpetrators and of accessories to or after the fact, in respect of offences committed in Chile during the state of siege in force between 11 September 1973 and 10 March 1978. For many years the Supreme Court used to confirm lower court judgements dismissing cases under this Decree-Law, applying case law which held that the court was not in a position to investigate the facts and identify those responsible for the offence. A substantive shift could be seen in judicial practice beginning in 1998, since when the Supreme Court, applying article 413 of the Code of Criminal Procedure, has repeatedly ruled that a case can be dismissed only on completion of the investigation to establish whether a crime has been committed and identify the perpetrator.

4.8 In the case of detainees who disappeared or were executed and whose remains were not

recovered, the Supreme Court has accepted the opinion that such persons should be deemed to have been abducted within the meaning of article 141 of the Criminal Code. Since case law holds that abduction is an ongoing offence or an offence with ongoing effect, i.e., one that continues over time until the victim is found alive or dead, any application or decision on amnesty is deemed untimely unless one of those conditions is met. Until the date of the person's release or death is established, it cannot be established in law up to what precise date they were deprived of their liberty. If such deprivation of liberty continues beyond the period covered by the Decree-Law, i.e., 11 September 1973 to 10 March 1978, amnesty cannot be granted in the case in question.

4.9 On this basis, the Supreme Court has revoked the dismissal rulings applying the Decree-Law on Amnesty, resumed investigations into human rights violations and brought those involved to trial. Moreover, the Supreme Court has ruled that a final sentence dismissing a case of illegal detention cannot be exempted as *res judicata*.

4.10 In parallel, the Ministry of the Interior's Human Rights Programme has taken the position that, in applying the Decree-Law, it should be interpreted in such a way that it will cease to present an insurmountable obstacle to attempts to establish the truth and identify criminal responsibility for the offences under investigation. The Programme's position is that amnesty is not applicable to crimes which are not open to amnesty in international humanitarian law, such as crimes against humanity, war crimes and enforced disappearance.

5. In her comments of 22 September 2004, the author points out that she named her daughter's abductor in her statements to the National Truth and Reconciliation Commission but no proceedings were brought under President Aylwin's Government. Not until President Lagos took office were cases of human rights violations reopened. The offence committed against her daughter is an ongoing crime, not subject to amnesty or the statute of limitations. Under the rules as currently applied, the trial court needs the very people responsible to state the presumed exact date of the victim's death, whereupon the abduction becomes homicide, a crime prescriptible after 15 years. This amounts to giving the court itself the right to decide the presumed date of death, despite the absence of a body. The author is critical of this state of affairs, which in her view favours the perpetrators and does not ensure justice for the victims.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must,

in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The author claims that her daughter's detention in October 1974 and her subsequent disappearance violate several provisions of the Covenant. The State party argues that the communication should be declared inadmissible *ratione temporis*, since the events upon which it is based occurred or commenced prior to the entry into force for Chile of the Optional Protocol. The State party also recalls that upon ratifying the Optional Protocol it made a declaration to the effect that the Committee's competence applied only in respect of acts occurring after the entry into force for Chile of the Optional Protocol or, in any event, acts which began after 11 March 1990.

6.3 The Committee notes that the facts complained of by the author in connection with her daughter's disappearance occurred prior to the entry into force not only of the Optional Protocol but also of the Covenant. The Committee recalls the definition of enforced disappearance contained in article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court: "*Enforced disappearance of persons*" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time. In the present case, the original acts of arrest, detention or abduction, as well as the refusal to give information about the deprivation of freedom—both key elements of the offence or violation—occurred before the entry into force of the Covenant for the State party.

6.4 Furthermore, upon the submission of the communication, the State party, far from refusing to acknowledge the detention, admitted and assumed responsibility for it. In addition, the author makes no reference to any action of the State party after 28 August 1992 (the date on which the Optional Protocol entered into force for the State party) that would constitute a confirmation of the enforced disappearance. Accordingly, the Committee considers that even if the Chilean courts, like the Committee, regard enforced disappearance as a continuing offence, the State party's declaration *ratione temporis* is also relevant in the present case. In the light of the foregoing, the Committee finds that the communication is inadmissible *ratione temporis* under article 1 of the Optional Protocol. The Committee does not deem it necessary,

therefore, to address the question of the exhaustion of domestic remedies.

6.5 The author argues that the search for her missing daughter has had an adverse effect on her physical and mental health and her family life, which amounts to a violation of her rights under the Covenant, notably article 7. The State party considers these claims to be of a general nature and that domestic remedies have not been exhausted in this regard. The Committee notes that the author has not demonstrated that she has availed herself of such remedies. The Committee therefore finds this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7. Consequently, the Human Rights Committee decides:

(a) That the communication is inadmissible under articles 1 and 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author of the communication.

APPENDIX

*Individual, Dissenting, Opinion of Committee members
Ms. Christine Chanet, Mr. Rajsoomer Lallah,
Mr. Michael O'Flaherty, Ms. Elisabeth Palm and
Mr. Hipólito Solari-Yrigoyen*

In order to shed new light on the question of enforced disappearances, the Human Rights Committee bases itself (para. 6.3) on the definition given in the Rome Statute of the International Criminal Court, a definition that differs from the one contained in the draft international convention for the protection of all persons from enforced disappearances.

According to the Committee, this definition includes two fundamental elements of the violation: the initial act of arrest, detention or abduction, and a refusal to acknowledge that deprivation of freedom.

By endorsing these criteria, which pertain to another international treaty, the Committee overlooks the fact that it must apply the Covenant, the whole Covenant and nothing but the Covenant.

Article 9, paragraph 1, of the Covenant provides that "everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". Furthermore, article 16 of the Covenant stipulates that "everyone shall have the right to recognition everywhere as a person before the law".

In the present case, the acts of arrest, detention or abduction were committed without the State, which does not contest them, being in a position, consistent with article 16, to determine the actual situation of the disappeared person.

Disappearance, as the Committee itself indicates in paragraph 6.4 of its decision, constitutes a *continuing violation*. The continuing nature of this violation precludes the application of the exception *ratione temporis* and of the reservation of Chile, in so far as the latter cannot exclude the competence of the Committee with regard to ongoing violations.

The solution adopted by the Committee entails discharging the State of its responsibility for the sole reason that the State does not deny the criminal acts, as demonstrated by the fact that it has taken no action to

“confirm” the enforced disappearance. This analysis could be applied to acts that fall within the scope of the Rome Statute, but it cannot prevail in the framework of articles 9 and 16 of the Covenant, since the issue involves continuing violations of those two provisions.

Indeed, to evade its responsibility, the State cannot limit itself to adopting an attitude of passive consent: it must provide evidence that it has used all available means to determine the whereabouts of the disappeared person. This was not done in the present case, and the undersigned cannot agree that there has been no violation of the Covenant.

Communication No. 1102/2002

Submitted by: Semey Joe Johnson (not represented by counsel)

Alleged victim: The author

State party: Spain

Declared inadmissible: 27 March 2006

Subject matter: Establishment of guilt of involuntary manslaughter by trial, right to a second hearing

Procedural issues: Insufficient substantiation of the alleged violations

Substantive issues: Right to due process, right to a second hearing, equality before the law

Articles of the Covenant: 14 and 26

Article of the Optional Protocol: 2

1.1 The author of this communication of 15 August 2001 is Semey Joe Johnson,¹ a Canadian and Cameroonian citizen born in 1969, currently being held at the Torrendondo Penitentiary Centre in Madrid. The author claims to be a victim of violations by Spain of article 14, paragraphs 1, 2, 3 (e), and 5, and article 26 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

1.2 The Optional Protocol entered into force for Spain on 25 April 1985.

The facts as presented by the author

2.1 The author was tried for allegedly causing a traffic accident that took place on 21 February 1998, which resulted in one person’s death. The driver of the vehicle that caused the accident had a false

number plate and a false driving licence with the author’s personal details. The driving licence was withheld by the police and the driver was allowed to recover his vehicle. During the trial, the author constantly denied any connection with the aforementioned events, alleging that his driving licence had been mislaid, and that someone had used his personal details to falsify the driving licence now in the court’s possession.

2.2 On 19 June 2000, the Madrid Criminal Court No. 27 sentenced the author to three and one-half years’ imprisonment for involuntary manslaughter, with a specific disqualification from the right to be elected during the time of his sentence and loss of driving licence for four years, and for two offences of falsification, with two years’ imprisonment for each offence, with specific disqualification from the exercise of the right to be elected during the time of his sentence, and a 12-month fine to be paid in daily quotas of 200 pesetas (€1.20), subject to deprivation of liberty of one day for every two unpaid quotas.

2.3 The author lodged an appeal with the Madrid Provincial High Court alleging a violation of the right to presumption of innocence, an error in assessing the evidence—which allegedly contradicted the report based on the identity parade—and the absence of grounds for the sentence passed. On 5 October 2000, the Provincial High Court dismissed the appeal and upheld the sentence of the Criminal Court, on the grounds that both the evidence of the witnesses and the handwriting expert’s report produced in the lower court were valid and sufficient to prove that the author was

¹ Also known by the name “Joseph Semey”, by which he identifies himself in communication No. 986/2001, submitted on an earlier occasion to the Committee with regard to his sentence for another crime.

guilty of the offence with which he had been charged.

2.4 The author applied for special review by the Supreme Court, alleging new evidence in his favour, which he had obtained through a private investigation service he had hired subsequently to the judgements of the courts of first and second instance. The evidence consisted in a witness who could supposedly declare that at the approximate time of the accident the author was expected to take part in a radio programme. On 17 May 2001, the Supreme Court dismissed the application for judicial review considering that the proposed evidence did not reveal new facts or evidence that proved the author's innocence, and moreover referred to probative material that could have been available before the trial had taken place and the appeal had been lodged.

2.5 The author filed an application for *amparo* with the Constitutional Court, alleging a violation of the right to effective judicial remedy and due process. On 4 June 2001, the Constitutional Court dismissed the application, after considering that the sentences challenged contained sufficient grounds for the inadmissibility of the author's complaints and sufficient evidence against him on which to base the sentence.

The complaint

3.1 The author alleges that there was a violation of article 14, paragraph 1, arguing that the sentence was arbitrary since it was based merely on the identification procedure conducted during the oral proceedings, which contradicted the report based on the identity parade.

3.2 The author contends that the sentence was based merely on circumstantial evidence, and that there was not sufficient evidence against him to invalidate the presumption of innocence. The right to presumption of innocence enshrined in article 14, paragraph 2, was therefore allegedly violated.

3.3 He further alleges that the Supreme Court did not allow the witness proposed by him to appear during the application for review, which violated article 14, paragraph 3 (e).

3.4 The author adds that there was a violation of article 14, paragraph 5, since the Provincial High Court did not reassess the circumstantial evidence on the basis of which he had been sentenced by the court of first instance.

3.5 Lastly, the author considers that there is a violation of the right to equality before the law under article 26, since he was not offered due process, and the taking of evidence during the oral proceedings was not in keeping with the principles of a fair hearing and adversarial procedure.

State party's observations and author's comments

4.1 In its observations of 10 September 2002, the State party contests the admissibility and merits of the communication, noting that both the Provincial High Court and the Constitutional Court had examined the author's allegations and had dismissed them, stating their reasons and motives. The State party adds that the author cannot seek to replace the logical and reasoned assessment of evidence arrived at by the judicial bodies by his own assessment.

4.2 The State party also observes that the Supreme Court gave clear reasons for dismissing the application for special review, noting that the appellant did not reveal new facts or evidence which would prove his innocence and which moreover he could have obtained before the trial was held.

5. On 25 March 2003, the author contested the State party's arguments, reiterating his initial allegations. He points out that his criminal record is not sufficient grounds for justifying the inadmissibility of his communication or as evidence of his responsibility for the offences with which he was charged in the case at hand.

Issues and proceedings before the Committee

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

6.2 In accordance with article 5, paragraph 2 (a), the Committee has ascertained that the matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee has also ascertained that the author has exhausted all domestic remedies, pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

6.4 With regard to the alleged violation of article 14, paragraphs 1 and 2, the Committee recalls its jurisprudence to the effect that it is for the courts of States parties to assess the facts and evidence, unless the assessment is manifestly arbitrary or constitutes a denial of justice.² The Committee considers that the author has failed to substantiate, for purposes of admissibility, that the conduct of the courts of the State party amounted to arbitrariness or a denial of

² Cf., inter alia, communications Nos. 811/1998, *Mula v. Republic of Guyana*, 867/1999, *Smartt v. Republic of Guyana*, 917/2000, *Arutyunyan v. Uzbekistan*, 927/2000, *Svetik v. Belarus*, 1006/2001, *Martínez Muñoz v. Spain*, 1084/2002, *Bochaton v. France*, 1138/2002, *Arenz v. Germany*, 1167/2003, *Ramil Rayos v. The Philippines* and 1399/2005, *Cuartero Casado v. Spain*.

justice and therefore declares both claims inadmissible under article 2 of the Optional Protocol.

6.5 With regard to the author's allegation of a violation of article 14, paragraph 3 (e), on the grounds that the expert opinion presented at the review stage was rejected, the Committee recalls that the right referred to in the above provision is not absolute, in the sense that it does not allow for the submission of evidence at any time or in any manner, but is intended to guarantee "equality of arms" between the parties during the trial. The Committee takes note of the Supreme Court's argument that the author did not avail himself of the right to submit the evidence in question in the courts of first and second instance, although the evidence could have been obtained before the trial was held in the Criminal Court. Consequently, the Committee considers that this part of the communication is insufficiently substantiated for the purposes of admissibility and concludes that it is inadmissible under article 2 of the Optional Protocol.

6.6 With regard to the alleged violation of article 14, paragraph 5, the Committee considers that from the judgement of the Madrid Provincial High Court it is clear that that body carefully examined the Criminal Court's assessment of the evidence. In this respect, the Provincial High Court considered that

the evidence submitted against the author was sufficient to counter the presumption of his innocence. Consequently, this part of the communication is insufficiently substantiated for the purposes of admissibility, and the Committee concludes that it is inadmissible under article 2 of the Optional Protocol.³

6.7 With regard to the violation of article 26 alleged by the author, in the sense that he did not enjoy equal treatment before the law, the Committee considers that the author has not shown any allegedly discriminatory treatment on the part of the domestic courts with respect to the aforementioned article. Consequently, the Committee considers that the allegations in question are insufficiently substantiated for the purposes of admissibility and that the part of the communication in question is inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol; and

(b) That this decision shall be communicated to the author of the communication and the State party.

³ Cf. communications Nos. 1399/2005, *Cuartero Casado v. Spain*, para. 4.4, and 1059/2002, *Carvallo Villar v. Spain*, para. 9.5.

Communication No. 1219/2003

Submitted by: Vladimir Raosavljevic (not represented)

Alleged victim: The author

State party: Bosnia and Herzegovina

Declared inadmissible: 28 March 2007

Subject matter: Non-renewal of appointment of Supreme Court judge for participation in controversial judgements – Alleged lack of an effective remedy to challenge decision of High Judicial and Prosecutorial Council

Substantive issues: Right of equal access to public service – Right to an effective remedy

Procedural issues: Admissibility *ratione materiae* – Level of substantiation of claim – Exhaustion of domestic remedies

Articles of the Covenant: 2, paras. 1 and 3; 17; and 25, para. (c)

Articles of the Optional Protocol: 2, 3 and 5, paras. 2 (a) and (b)

1.1 The author of the communication is Vladimir Raosavljevic, a national of Bosnia and Herzegovina, born on 28 July 1939. He claims to be a victim of violations by Bosnia and Herzegovina¹ of article 25, read alone and in conjunction with article 2, paragraphs 1 and 3, and, indirectly, article 17 of the International Covenant on Civil and Political Rights (the Covenant). He is not represented.

1.2 On 19 January 2004, the State party requested the Committee to examine the admissibility of the communication separately from its merits, in accordance with rule 97, paragraph 3, of the Committee's rules of procedure. On 11 February 2004, the Committee, through its Special Rapporteur on new communications, decided to examine the admissibility of the communication together with the merits.

The facts as presented by the author

2.1 From 1965 to 2003, the author served as a judge on the Municipal Court of Prnjavor (5 years), the District Court (23 years) and, from 1993 to 2003, on the Supreme Court of the Republika Srpska, where he presided over the criminal department.

2.2 In 2002, the High Representative for Bosnia and Herzegovina established High Judicial and Prosecutorial Councils at State level and in both of the Bosnian Entities. All existing judicial posts in the State party were declared vacant and incumbents

were required to reapply for appointment. The High Judicial and Prosecutorial Council of the Republika Srpska (HJPC) conducted the process of selection and appointment in Republika Srpska (RS), in accordance with the criteria set out in article 41² of the Law on the High Judicial and Prosecutorial Council of the Republika Srpska (RS Law on HJPC).

2.3 On 4 November 2002, in extraordinary review proceedings, a chamber of the Supreme Court of RS chaired by the author vacated a final judgement of the Bijeljina Basic and District Courts, which found several defendants guilty of kidnapping and forcible abortion and sentenced them to prison terms of between 4 years and 6 months and 6 years and 6 months. It referred the matter back to the first instance court. In another case, a chamber also chaired by the author, acting as second instance court, upheld a conviction of murder, allegedly despite insufficient evidence and without properly reviewing the verdict. In both cases, complaints were brought against the author by the Office of the UN High Commissioner for Human Rights in Bosnia and Herzegovina and by the father of the murder convict, respectively.

² Article 41 ("Criteria for Appointment") of the RS Law on HJPC (23 May 2002) reads:

"The Council shall assess whether the applicant is able to perform judicial or prosecutorial functions, taking into account the following criteria:

- (1) Professional knowledge and performance;
- (2) Proven capacity through academic written works and activities within professional associations;
- (3) Proven professional ability based on previous career results, including participation in organized forms of continuing training;
- (4) Work capability and capacity for analysing legal problems;
- (5) Ability to perform impartially, conscientiously, diligently, decisively, and responsibly the duties of the office for which he/she is being considered;
- (6) Communication abilities;
- (7) Relations with colleagues, conduct out of office, integrity and reputation; and
- (8) Managerial experience and qualifications (for the positions of president of court and public prosecutor).

The Council shall implement relevant Constitutional provisions regulating the equal rights and representation of constituent peoples and others. Appointments to all levels of the judiciary should also have, as an objective, the achievement of equality between women and men."

¹ The Covenant and the Optional Protocol entered into force for the State party on 6 March 1992 and 1 June 1995, respectively.

2.4 According to the author, in early 2003, the HJPC Field Office in Banja Luka evaluated his application for reappointment to the Supreme Court of RS. Based on an investigation of the two complaints, the investigator found that the above verdicts were unlawful and that they called into question the author's suitability. On 12 March 2003, the HJPC decided not to reappoint the author as a Supreme Court judge. The fact he had not been selected would not prevent his future appointment to the position of judge or prosecutor. The decision was taken on the basis of a complex rating system (see also para. 5.2 below).

2.5 By letter dated 17 March 2003, the author and another Supreme Court judge, whose reappointment was denied because of his participation in the above verdicts, objected to the decision of the HJPC, arguing that in the kidnapping and forcible abortion trial, the lower courts should have ordered an expertise to assess the mental capacity of the main accused at the time of commission of the crime; their evaluation of the medical evidence had been one-sided.

2.6 On 20 March 2003, the author requested the HJPC to reconsider its decision to terminate his appointment, emphasizing his professionalism, the efficiency of the criminal department at the Supreme Court of RS that he presided and the high respect that he enjoyed among his colleagues. On 2 April 2003, the HJPC rejected the request, stating that this decision was not subject to appeal.

The complaint

3.1 The author claims that the non-renewal of his appointment based on his legal assessment in the two above cases was discriminatory, amounted to a denial of his right to equal access to public service, interfered with his independence as a judge and damaged his honour and reputation, in violation of articles 2, paragraph 1, 17 and 25 (c), read in conjunction with article 2, paragraph 3, of the Covenant (in the absence of an effective remedy to challenge the decision of the HJPC).

3.2 The author reiterates that the criminal department of the Supreme Court of RS which he presided over was the most efficient in Bosnia and Herzegovina, with only three unresolved cases as of 12 February 2003. He had participated in several expert teams reviewing and drafting legislation in the RS and Brcko District. Although he had received higher scores in the evaluation process than all the candidates who were appointed to the Supreme Court, the decision to terminate his appointment prior to reaching the retirement age of 70 was based on two controversial judgements only. None of the following criteria were taken into consideration by the HJPC: the efficiency of his department, his professionalism and work experience, the absence of

any irregularities in his previous cases and absence of any disciplinary action against him.

3.3 By reference to Section 258 of the Code of Criminal Procedure, the author argues that the decision of 4 November 2002 to revoke the convictions in the kidnapping and forcible abortion case was lawful, as it was based on the opinion of several forensic psychiatrists that the accused suffered from mental illness when he committed the crime.

3.4 The author claims that, apart from interfering with his independence as a judge, the HJPC was not composed as it should have been when deciding on his application, since one of the members was appointed from among the lowest professional category of attorneys, although he/she should have been appointed by the Attorney General's Office.

3.5 The author submits that he could not appeal the decision of the HJPC to any other instance and that he was denied access to the files after completion of the evaluation process.

State party's observations on admissibility and merits

4. On 19 January 2004, the State party challenged the admissibility of the communication, arguing that the author did not exhaust domestic remedies, as he did not file an application for review of the decision of the HJPC in the Supreme Court of RS, nor any further appeal with the Constitutional Court or the Human Rights Chamber of Bosnia and Herzegovina set up under Annex V of the Dayton Agreement. It requests the Committee to ascertain that the same matter is not being examined by the European Court of Human Rights.

5.1 On 30 April 2004, the State party reiterated its arguments for challenging the admissibility of the communication and commented on its merits, arguing that the facts as presented raise no issues under articles 17 and 25 (a) and (b) of the Covenant.

5.2 On the claim under article 25 (c), the State party submits that the author's application was part of a process for the appointment of 16 judges to the Supreme Court of the RS. Of 98 candidates who applied for the 16 posts, 91 were interviewed. All of them met the legal requirements for appointment to the Supreme Court. The HJPC was competent to select the candidates it considered best suited, on the basis of the criteria prescribed by article 41 of the RS Law on HJPC. Under the State and RS Constitutions, the ethnic composition of the Supreme Court was to reflect the ethnic composition of the RS population, in accordance with the 1991 census conducted in the Former Socialist Republic of Yugoslavia. Thus, the 13 judges proposed by the nomination panel included eight Serbs, two Bosniaks, two Croats and one "Other". The author

received high evaluation marks by the panel but was ranked below the threshold set for the eight judges of Serb ethnicity. The selection process was based on objective criteria rather than political opinion and affiliation and provided the author with “a fair opportunity” to run for the post of judge, in accordance with domestic law and article 25 (c) of the Covenant.

5.3 The State party submits that during the selection process, the HJPC was composed in accordance with articles 5³ and 76⁴ of the RS Law on HJPC. While article 5 defined the composition of the Council in principle, article 76 gave the High Representative a certain margin of discretion to depart from this provision when appointing HJPC members during the transitional period.

Author's comments

6.1 On 22 May 2004, the author commented, arguing that he never contacted the European Court of Human Rights and that the State party had failed to cite a single provision under domestic law which would have enabled him to challenge the decision of the HJPC in another instance. He exhausted the only

³ Article 5 (“Members of the Council”) of the RS Law on the HJPC reads: “The Council shall have members, as follows:

A judge of the Supreme Court of Republika Srpska, elected by all the judges of the Court;

A public prosecutor of the Public Prosecutor’s Office of Republika Srpska elected by the Public Prosecutor of the Republic and deputy public prosecutors in the Office;

One judge, either from a district court or a basic court, elected by the Association of Judges and Prosecutors of Republika Srpska;

One public prosecutor or deputy public prosecutor, either from a district public prosecutor’s office or from a basic public prosecutor’s office, elected by the Association of Judges and Prosecutors of Republika Srpska;

A minor offence court judge elected by the Association of Minor Offence Court Judges of Republika Srpska;

An attorney elected by the Bar Association of Republika Srpska;

A person of high moral character and integrity appointed by the President of Republika Srpska; and

The members of the High Judicial and Prosecutorial Council established under the Constitution and laws of the Federation of Bosnia and Herzegovina.

Members of the Council shall be independent and impartial in the exercise of their functions, shall be persons of high moral standing and integrity, and shall have a reputation for efficiency, competence, and integrity.”

⁴ Article 76 (“Composition, Appointment, and Terms of Office”) of the RS Law on the HJPC reads:

“During the transitional period, the High Representative shall appoint to the Council the members specified in article 5, to the extent possible. During this period the Council shall not include a minor offence court judge. The mandates of the national members shall be for a term of four years as set forth in by article 6 of this law.

The High Representative shall also appoint up to eight (8) international members to the Council. The mandates of the international members shall be confined to the transitional period.”

remedy available to him by filing a request for reconsideration under article 79 (3)⁵ of the RS Law on HJPC. The decision of the HJPC rejecting his request clearly stated that it was not subject to appeal. Furthermore, article 86⁶ of the RS Law on HJPC defined this Law as “lex specialis,” precluding the application of any remedies foreseen in other laws. The recent inclusion of a provision on court protection in the new draft State Law on HJPC only concerned disciplinary proceedings and was without retroactive effect. The Human Rights Chamber had ceased to receive cases at the time he sought to appeal the decision of the HJPC. It was not a domestic remedy. He therefore exhausted all available domestic remedies.

6.2 By reference to statistical reports which show that he exceeded the workload quota by 217.4 per cent in 2000 and by 161.5 per cent in 2001, the author reiterates that his appointment was terminated despite the fact that he obtained the highest evaluation scores of all candidates, based on criteria set out in article 41 of the RS Law on HJPC. In accordance with article 17 of the rules of procedure of the HJPC, the evaluation records are confidential and not to be disclosed to the candidates. The State party failed to present these records to the Committee in order to conceal his and other candidates’ evaluation scores.

6.3 Without challenging the selection of judges on the basis of ethnic quota, the author submits that ethnicity was not an issue in his case, given that the eight judges appointed to the RS Supreme Court’s criminal department were all Serbs. Four of them came from lower instance courts; one had never decided on appeal in his career.

6.4 The author emphasizes that the only reason for not reappointing him to the Supreme Court of RS was his legal assessment in the two verdicts, based on which the HJPC marked him as unsuitable, unlike other candidates who were appointed to the RS Supreme Court or to the Constitutional Court of Bosnia and Herzegovina although they had

⁵ Article 79 (3) of the RS Law on HJPC reads:

“An incumbent judge, public prosecutor, or deputy public prosecutor who is not selected for judicial or public prosecutorial office under this article may file a request for reconsideration:

if the Council failed to consider material facts favorable to the applicant provided that information was submitted to the Council at the time of application, or if the applicant exercised his right to review application material under article 40 prior to the Council’s decision and the Council took adverse decision based upon information not made available to the applicant.”

⁶ Article 86 of the RS Law on HJPC reads:

“[...] Statutory provisions contained in the laws of Republika Srpska shall be brought into harmony with this law and any provisions that are inconsistent with this law are hereby repealed.”

participated in the same judgements. The HJPC deprived him not only of his right to equal access to the RS Supreme Court, but also recommended that his application for any other judicial post be rejected.

6.5 For the author, the fact that the judgements were declared unlawful by the HJPC after it received complaints from dissatisfied parties amounts to a severe interference with his independence as a judge as well as usurpation, by an executive organ, of judicial power that can only be exercised by a higher court. When working on the cases, he faced considerable pressure from HJPC investigators showing a strong interest in both cases. Although the investigators were not qualified to exercise judicial power, they scrutinized the verdicts, which were the result of years of work, in a few days and summarized their analysis of these complex cases in a few sentences. Their findings on both verdicts were arbitrary, incomplete and inaccurate.

6.6 The author argues that the membership of the HJPC is regulated in detail in the RS Law on HJPC to ensure an impartial and transparent appointment procedure. This process was flawed in his case, since one of the members of the HJPC, S.M., a deputy public prosecutor from the basic public prosecutor's office, had not been elected by the Association of Judges and Prosecutors of RS, as required by article 5 of the RS Law on HJPC. The list of elected candidates forwarded to the High Representative for approval did not include S.M. It would, moreover, have been possible to appoint a public prosecutor of the Public Prosecutor's Office of RS, in accordance with article 5. The flexibility clause in article 76, which required the High Representative to appoint members specified in article 5 only "to the extent possible" during a transitional period, was no justification for the unlawful composition of the HJPC at the time when his appointment was terminated. The State party should have disclosed the relevant evidence if it wanted to show that the Council was properly composed.

6.7 The author submits that the State party has not established an effective remedy to review decisions on the appointment of judges, in violation of article 2, paragraph 3, of the Covenant. The rejection by the HJPC of his request for reconsideration was a stereotyped decision designed for mass communication, which did not address a single issue raised by him. The possibility to file such a request was not an effective remedy, as it did not involve review by another instance. The discretion vested in the HJPC to appoint judges cannot be unlimited but must respect applicable domestic and international standards.

6.8 The author claims that he was deprived of an opportunity to present his arguments and to defend his rights. Any allegations against him should have

been dealt with in disciplinary proceedings under article 49 of the RS Law on HJPC. It was only after the State party had received his communication that he was granted access to the files of the HJPC. He claims compensation for the moral and material damage suffered, including damage to his honour and reputation after 38 years of judicial service.

Issues and proceedings before the Committee

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

7.2 As required by article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 With regard to the question of exhaustion of domestic remedies, the Committee takes note of the State party's argument that the author did not file either an application for review of the decision of 12 March 2003 the HJPC in the Supreme Court of RS, nor further appealed to the Constitutional Court or the Human Rights Chamber of Bosnia and Herzegovina. It also notes the author's objection that his request for reconsideration under article 79 (3) of the RS Law on HJPC was the only remedy available to him under domestic law.

7.4 The Committee recalls that it is implicit in rule 97 of its rules of procedure and article 4, paragraph 2, of the Optional Protocol that a State party to the Covenant should make available to the Committee all the information at its disposal, including, at the stage of admissibility of a communication, detailed information about remedies available to the victims of the alleged violation in the circumstances of their case. It considers that, while generally referring to remedies before the Supreme Court, the Constitutional Court and the Human Rights Chamber of Bosnia and Herzegovina, the State party has not provided any detailed information on the availability and effectiveness of these remedies in the circumstances of the author's case. The Committee is therefore satisfied that the author exhausted domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol, by filing a request for reconsideration with the HJPC.

7.5 In so far as the author alleges violations of his rights under article 25 (a) and (b) of the Covenant, the Committee observes that his claims are inadmissible *ratione materiae* under article 3 of the Optional Protocol.

7.6 With regard to the author's claim under article 25 (c) that the decision of the HJPC not to reappoint him as a Supreme Court judge violated his right to

equal access to public service, the Committee notes that article 25 (c) guarantees not only access to public service, but also a right of retention in the public service on general terms of equality. In principle, therefore, the claim falls within the scope of the provision. The principle of access to public service on general terms of equality implies that the State party must not discriminate against anyone, on any of the grounds set out in article 2, paragraph 1, of the Covenant. The author claims that the only reason not to reappoint him was his legal determination of two controversial judgements, and that other judges who participated in the same judgements were appointed to the Supreme Court of RS or the Constitutional Court of Bosnia and Herzegovina. The Committee notes, however, that the rating system used to determine the eligibility and suitability of judges was complex and based on objective criteria (see para. 5.2), and that while the author was given high evaluation marks by the panel, he was ranked below the threshold set for judges of Serb ethnicity. On the basis of the material before it, the Committee considers that the author has failed to substantiate sufficiently, for purposes of admissibility, that his non-inclusion in the appointment list of judges was exclusively based on the two controversial judgements he had delivered, and not on other objective criteria underlying the ranking system. Accordingly, this claim is inadmissible under article 2 of the Optional Protocol.

7.7 As regards the allegation that the HJPC was improperly constituted, interfered with his independence as a judge and violated his honour and reputation, the Committee notes that the author does not explicitly invoke a specific provision of the Covenant in relation to this claim. It considers that he failed to substantiate, for purposes of admissibility, that the appointment of a deputy public prosecutor from the basic public prosecutor's

office, who had not been elected by the Association of Judges and Prosecutors of RS, was not covered by the flexibility clause in article 76 and therefore in breach of article 5 of the RS Law on HJPC. Similarly, the author did not substantiate, for purposes of admissibility, that the evaluation of his suitability by the HJPC based on, inter alia, two judgements, which gave rise to complaints calling into question his integrity and impartiality, interfered with his judicial independence or violated his honour and reputation. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.8 The author has invoked article 2 of the Covenant read together with articles 17 and 25 (c). This raises the question as to whether the fact that he had no possibility to appeal the decision of the HJPC to another instance amounted to a violation of his right to an effective remedy as provided for by article 2, paragraphs 3 (a) and (b), of the Covenant. The Committee recalls that article 2 can only be invoked in conjunction with a substantive right protected by the Covenant,⁷ and only if a violation of that right has been sufficiently well founded to be arguable under the Covenant.⁸ As the author has failed to substantiate, for purposes of admissibility, his claims under articles 17 and 25 (c), his claim of a violation of article 2 of the Covenant accordingly is also inadmissible under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

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

(b) That this decision shall be communicated to the State party and to the author.

⁷ Communication No. 275/1988, *S.E. v. Argentina*, decision on admissibility adopted on 26 March 1990, para. 5.3.

⁸ Communication No. 972/2001, *Kazantzis v. Cyprus*, decision on admissibility adopted on 7 August 2003, para. 6.6.

Communication No. 1315/2004

Submitted by: Mr. Daljit Singh (represented by counsel)

Alleged victims: The author

State party: Canada

Declared inadmissible: 30 March 2006

Subject matter: Deportation to country of origin with risk of torture

Procedural issues: Interim Measures/Request by State party to lift Interim Measures

Substantive issues: Risk of torture and death, review of expulsion order, unfair “suit at law”, and ineffective remedy

Articles of the Covenant: 2, 6, 7, 13 and 14

Articles of the Optional Protocol: 1 and 2

1.1 The author of the communication is Mr. Daljit Singh, an Indian citizen, currently awaiting deportation from Canada. He claims that his deportation would result in violations, by Canada, of his rights under articles 2, 6, 7, 13 and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

1.2 On 5 November 2004, the Human Rights Committee, through its Special Rapporteur on New Communications, requested the State party, pursuant to rule 92 of its rules of procedure, “not to deport the author before it provides the Committee with information as to whether it intends to remove the author to India, and before providing to the Committee its observations on the communication, pursuant to rule 97 (old 91) of the rules of procedure.” On 9 November 2004, following a request for clarification, the Committee requested the State party, “not to deport Mr. Daljit Singh to India before the State party has made its observations either on admissibility or the merits of the author’s allegations and the Committee has acknowledged receipt”.

The facts as presented by the author

2.1 The author lived in the village of Sonet, Ludhiana District, Punjab. He is the owner of a trucking company and owned four trucks. He is married and has two children. His wife and children remain in the village of Sonet. His mother, brother, sister and their respective families all live in British Columbia, Canada. His father died on 1 June 1999 in British Columbia.

2.2 On 15 September 1998, the author’s brother-in-law and the driver of one of the author’s trucks were stopped by police in Jammu and were accused of supporting a militant group. The author was

arrested at 5.00am the following day at his home and detained by police. He claims that while in detention he was beaten and tortured. On 17 September, he was released thanks to the intervention of the mayor (Sarpanch), of the village, the village council and the president of the truckers’ union, on the condition that he would report to the police about the militants’ activities. A bribe was paid for his release. The author claims that his brother-in-law and his driver were detained for one week and tortured. They were released on the same conditions as he. He claims that all three of them had medical treatment after their release.

2.3 In April 1999, the author was arrested again because he was suspected of helping the militants transport arms, munitions and explosives. After two days of detention, during which he claims that he was tortured again, his release was granted upon the intervention of the village mayor (Sarpanch), with the condition that he report monthly to the police station with information regarding his driver and other militants. He claims that he underwent medical treatment following his release and suffers from post traumatic stress disorder as a result. Fearing for his life, he decided to flee India. He claims that his wife and son were tortured in April 2003 after his departure.

2.4 On 3 June 1999, the author applied for and received a tourist visa to enter Canada to attend his father’s funeral. On 6 June 1999, he arrived in Canada and on 30 June 1999, he applied for asylum. On 15 December 2000, his refugee claim was heard by the Refugee Division of the Immigration and Refugee Board (“the Board”), which decided, on 28 February 2001, that the author was not a Convention refugee because his testimony was implausible. His account of events was found not to have been credible.

2.5 On 10 July 2001, the Federal Court denied the author leave to apply for judicial review of the Board’s decision. On 5 November 2003, the author’s Pre-Removal Risk Assessment Application (“PRRA”) was assessed negatively. On 5 November 2003, his application for permanent residence in Canada on humanitarian and compassionate grounds was denied. On 18 December 2003, the author applied for leave to apply for judicial review of the PRRA decision and a motion for stay of removal. On 19 January 2004, the Federal Court granted the stay

of removal until a decision on the leave to apply for judicial review was made. On 3 May 2004, leave to apply for judicial review was denied by the Federal Court.

The complaint

3.1 The author claims that, if he is removed to India, the State party would be in violation of articles 6, and 7 of the Covenant, to the extent that he will be subjected to torture, have no possibility of obtaining medical treatment, and possibly lose his life. In support of his claim, he refers to the torture he allegedly suffered in 1998 and 1999, and the allegation that his family members were beaten and harassed by the police since his departure.

3.2 The author claims that domestic proceedings leading to the removal order also violated articles 13, 14, and 2, of the Covenant. He claims that article 13 was violated by the “procedures” employed in this case and that the PRRA procedure is contrary to the Canadian Charter for Rights and Freedoms. He claims a violation of article 14, as the domestic authorities failed to consider carefully the evidence submitted in support of his case. Medical reports and photographs establishing that he and some of his family members are victims of torture, affidavits from the mayors of the surrounding villages about the problems he had had with the police, and a report following an investigation from the Sikh Human Rights Group into the incidents in question were not considered by the domestic authorities. In addition, information from other sources on the general human rights situation in India was not considered including, a Human Rights Watch Report of 10 June 2003, and an academic journal. The Board’s and the PRRA’s analysis of the human rights situation in India is said to be inaccurate. The author requests the Committee to review the evidence he submitted to the Federal Court, which in his view is sufficient proof of his current psychological state and the risk he will face if removed.¹

3.3 The author also claims a violation of articles 14 and 2, as the legal remedies available to him are ineffective. He alleges that there is no independent scrutiny in Canada of the risk of torture that asylum seekers may face upon return to their country of

¹ The author provides the following: information on the general human rights situation in India from NGOs; an affidavit from an Indian lawyer corroborating his story; a medical report of 31 May 2000 which concludes “this man’s objective physical findings and his subjective allegations of torture are not incompatible”; a psychological report of 20 June 2000, which concludes that it is plausible that the post traumatic stress disorder suffered by the author results from the traumatic events reported by him, in particular torture in detention; photocopies of photographs of the author’s back (too difficult to assess); and affidavits from mayors of villages in his region corroborating his story.

origin, and that procedures are administrative and result in summary decisions of deportation. PRRA officers are not independent, since they are employees of the Ministry which wishes to deport the applicant, and there is no effective judicial control of their decisions. An applicant must first apply for leave to appeal to the Federal Court and if granted the Court may only review errors of law. The author refers to the judgement of the Federal Court in a separate case, in which the Court set aside the decision of the immigration officer as it was considered to have been unreasonable and sent the matter back for reconsideration, to demonstrate that the PRRA procedure is ineffective. He claims that the effectiveness of the judicial remedies in Canada was severely criticized by the Inter-American Commission of Human Rights, in a report dated 18 September 2001, on the situation of human rights of Asylum Seekers within the Canadian refugee Determination system (2000).

State party’s submission on admissibility and merits

4.1 On 22 December 2004, the State party contested the admissibility and merits of the communication. It submits that although it is of the view that the author has not exhausted domestic remedies, it is not contesting admissibility on this ground, given the lack of merit of the author’s claims and the State party’s wish to have the case dealt with as soon as possible.

4.2 The State party argues that the author has not sufficiently substantiated his claims under articles 6 and 7, for the purposes of admissibility. He confines himself to broad allegations that he would suffer a severe risk of torture based on the same facts and evidence as presented to Canadian tribunals. The State party relies on the findings of the Board and PRRA officer with respect to the author’s lack of credibility, and submits that it is not within the scope of the Committee to re-evaluate findings of credibility or to weigh evidence or reassess findings of fact made by domestic courts or tribunals.

4.3 If the Committee wishes to re-evaluate the findings with respect to the author’s credibility, the State party submits that his testimony about the relevant events contained contradictions, inconsistencies and improbabilities. It provides examples of such contradictions including the following: part of the author’s written account was strikingly similar, in parts identical, to accounts from other unrelated claimants, also from India; the author’s oral and written accounts about his employee, whom police allegedly accused of being involved with the militants, were contradictory; the allegations concerning his brother-in-law were contradictory and lacked credibility, in particular the allegation that although he had been caught with arms, explosives, and fake currency in his truck, he

was released without charge, and continues to live in India; and similarly that the author's son, who was a registered owner of one of the trucks, had also been able to remain in India.

4.4 As to a photo the author provided to support the claim that his wife and son were tortured in April 2003, which was presented for the first time to the PRRA officer, the State party submits that the officer did not accord this photo any weight, considering that it could have been any woman and any young man on a hospital bed covered in bandages. Nor was it proof that even if the photo depicted the author's relations, that they had been tortured. The State party argues that if the author was able to obtain a photo of them in hospital, he could also have obtained a medical report corroborating their injuries, which he failed to do. If they had been tortured, the State party questions why they continue to live in their home town and have neither fled to another part of India nor out of the country altogether.

4.5 As to the medical report submitted to the Board, despite the conclusion that "this man's objective physical findings and his subjective allegations of torture are not incompatible", the Board did not attach probative value to the medical report because of its negative assessment of the credibility of the author and contradictions in his story about the origins of scars on his back. As to the psychological report, although the psychologist concluded that her analysis led her to believe that it was completely plausible that her diagnosis of post traumatic stress disorder is a result of the impact of the traumatizing events the author alleged to have undergone, the Board considered that there was no direct evidence, other than his own allegations, that he was exposed to traumatic events. Since the allegations were not found to be credible by the Board, the psychologist's report which was based on those allegations was not given probative value. The State party submits that doubts about the most important aspects of the author's story so seriously undermine his credibility that his allegations, are insufficient to substantiate his claim that he would be at risk of death or cruel and unusual treatment if returned to India.

4.6 As to the human rights situation in India, the author has not established that he would be at "personal risk" in India. Even if the human rights situation in India on occasion gives rise for concern, it is not sufficient by itself to be the basis of a violation of the Covenant if the author returns there. However, in the event that the Committee wishes to consider the human rights situation in India, the State party submits that the situation does not provide corroboration of the author's allegations. The human rights situation in India pertaining to Sikhs has improved so much that there is negligible risk of torture or any other ill-treatment on the part

of police towards Sikhs. The State party refers to the country reports relied upon by the PRRA officer (Danish Immigration Service Report of 2001 and United States Country Report 2002), stating that the situation of Sikhs in the Punjab is now stable and that only those considered to be high-profile militants may be at risk. The State party submits that it has taken into consideration the other reports submitted by the author including a 1999 report entitled "Lives Under Threat", which describes the present persecution of Sikhs in India, as well as a 2003 report by SikhSpectrum.com monthly which discusses judicial impunity for disappearances in the Punjab. The State party submits that the fact that abuses of human rights occurred in the past and impunity may continue in some cases does not render the author's story credible or substantiate his allegations. As to the judgement of the Federal Court in the case of Singh Shahi, in which the Court set aside the decision of the immigration officer and sent the matter back for reconsideration, the State party argues that this case demonstrates that the process *is* effective, as cases that warrant reconsideration will be reviewed. In this regard, the State party refers to the decision of the Committee against Torture, which having considered the case of *B.S.S.*, did not find a violation of the Convention, and in fact commented on the effectiveness of the judicial remedies in Canada.²

4.7 The State party submits that the author has not substantiated his allegation, even on a prima facie basis, that he would be killed if returned to India. On article 7, the State party submits that the allegations do not establish risk at a level beyond mere "theory or suspicion" and do not establish a real and personal risk of torture or cruel, inhuman or degrading treatment or punishment. In the alternative, if it is suspected that the author was tortured in the past, which the State party denies, it was not in the recent past and is not by itself proof of a risk of torture in the future.

4.8 In the alternative, the State party argues that if the author *does* face a risk of death, torture or cruel, inhuman or degrading treatment or punishment if he returns to the Punjab, he has not shown that he does not have an internal flight alternative. Even though he may face hardship should he not be able to return home, that hardship would not amount to any treatment in violation of the Covenant.³ Finally, even

² *B.S.S. v. Canada*, communication No. 183/2001, Views adopted on 12 May 2004.

³ In this regard, it refers to the decision of the Committee against Torture, in *B.S.S. v. Canada*, communication No. 183/201, Views adopted on 12 May 2004, in which it found that although resettlement outside the Punjab would constitute a considerable hardship for the complainant the mere fact that he may not be able to return to his family

if all the contradictions in his story were overlooked and his evidence were regarded as credible, the fact that he allegedly fears mistreatment by the police if returned to India, and documentary evidence shows that at the present time this type of abuse is only directed against high profile militants. As the author is not a high profile militant, he is not someone who is likely to be targeted by the police.

4.9 As to the claims under articles 2, 13 and 14, the State party submits that these claims are inadmissible on the grounds of incompatibility with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol. It invokes the Committee's jurisprudence to demonstrate that article 2 does not recognize an independent right to a remedy but arises only after a violation of a Covenant right has been established. In the alternative, the Covenant rights alleged to have been violated therein are rights protected in the Canadian Charter of Rights and Freedoms. It is argued that article 13 does not apply to the author, as he was determined not to be at risk in India, is subject to a lawful removal order and is not thus "lawfully in the territory" in Canada. The State party invokes the Committee's general comment 15 and its finding in *Maroufidou v. Sweden*,⁴ in which article 13 is considered to regulate only the procedure and not the substantive grounds for expulsion, and its purpose is to prevent arbitrary expulsions. The author has not established that the proceedings leading to the removal order against him were not in accordance with lawful procedures, or that the Canadian Government abused its power.

4.10 The State party submits that refugee and protection determination proceedings do not fall within the scope of article 14. They are in the nature of public law, the fairness of which is guaranteed by article 13.⁵ In the alternative, if the immigration proceedings are considered to be the subject of article 14, the State party argues that they satisfy the guarantees contained therein. The author's case was heard by the Refugee Division of the Immigration and Refugee Board, an independent tribunal. He knew the case he had to meet, was represented by counsel, and had a full opportunity to participate, including testifying orally and making written submissions. He had access to judicial review, as

and his home village does not amount to torture within the meaning of article 1 of the Convention.

⁴ Communication No. 58/1979, Views adopted on 9 April 1981.

⁵ In this regard, it refers to *Y.L. v. Canada*, communication No. 112/1981 (1986), decision adopted on 8 April 1986, *V.M.R.B. v. Canada*, communication No. 236/1987, decision adopted on 18 July 1988, and *Ahani v. Canada*, communication No. 1051/2002, Views adopted on 29 March 2004.

well as the right to make a humanitarian and compassionate application.

4.11 As to the author's general claims relating to the scope of judicial review by the Federal Court and the PRRA procedures, the State party notes that it is not within the scope of the Committee to evaluate the Canadian system in general, but only to examine whether in the present case Canada complied with its obligations under the Covenant. In any event, there are previous decisions of international tribunals, including this Committee, which considered the impugned processes to be effective remedies.⁶ While the Committee against Torture recently questioned whether the PRRA process could be effective in the case of one complainant,⁷ due to its assumption that the risk assessment would be limited to new evidence in that case, in the current case, the PRRA officer considered all of the submissions and evidence presented by the author, including new evidence as well as that previously submitted to the Board, in her assessment of the risk he might face upon return.

4.12 If the Committee were to find the communication admissible, the State party requests the Committee to find the case without merit.

Author's comments

5.1 On 20 March and 3 September 2005, the author commented on the State party's submission. He sets out the historical situation in the Punjab from the 1980s onwards in great detail to demonstrate that the author would be at risk of torture if returned there. On the alleged contradictions in his story, the author submits that it is not unusual that his story might resemble the stories of other Sikh truck drivers, as there is a high number of Sikhs in the trucking industry and many of them have been detained and tortured for giving rides to militants, or because of suspicion that they were carrying

⁶ Inter-American Commission on Human Rights, Organization of American States, Report on the Situation of Human Rights of Asylum Seekers within the Canadian refugee determination system (2000). Human Rights Committee Views: *Abu v. Canada*, communication No. 654/1995, Views adopted on 18 July 1997; *Badu v. Canada*, communication No. 603/1994, Views adopted on 18 July 1997, *Nartey v. Canada*, communication No. 604/1994, Views adopted on 18 July 1997. Committee against Torture decisions: *P.S.S. v. Canada*, communication No. 66/1997, Views adopted on 13 November 1998; *P.S. v. Canada*, communication No. 86/1997, Views adopted on 18 November 1999; *R.K. v. Canada*, communication No. 42/1996, Views adopted on 20 November 1997; *L.O. v. Canada*, communication No. 95/1997, Views adopted on 19 May 2000; *M.A. v. Canada*, communication No. 22/1995, Views adopted on 3 May 1995. European Court of Human Rights: *Vilvarajah and Others v. United Kingdom*, 14 E.H.R.R.- 218 (1991), para. 126.

⁷ See *Falcon Rios v. Canada*, communication No. 133/1999, Views adopted on 23 November 2004.

ammunition for the militants. He denies that he provided contradictory evidence on his employee and submits that his brother-in-law is in hiding and that his son has faced severe harassment. Despite the State party's claim to the contrary, the author insists that the pictures of the marks on his back were presented to the Board. He denies that no new evidence was presented to the PRRA and refers to the affidavits of the four local mayors (Sarpanch) relating to the danger he would suffer on return and the detention of his wife and son.

5.2 As to his claims of torture, the author submits that according to the evidence presented before the Indian Human Rights Commission, the Indian courts and international human rights organizations, the detention and torture he has described is consistent with the modus operandi of the Punjab police. The author notes that quotations from the Danish Immigration Service report referred to by the domestic authorities do not reflect the true conclusions of the report. Arbitrary arrests continue to take place, individuals other than those who are high-profile *are* at risk, and there is no clear internal flight alternative. Other reports, including the Amnesty International Report of 2003, attest to this claim. The author provides further information to demonstrate the inadequacy of the system of review of asylum claims under the PRRA and the Federal Court.

Issues and proceedings before the Committee

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

6.2 As to the author's allegation that he was not afforded an effective remedy to contest his deportation, the Committee observes that the author has not substantiated how the Canadian authorities' decisions failed in this case thoroughly and fairly to consider his claim that he would be at risk of violations of articles 6 and 7 if returned to India. In

these circumstances, the Committee need not determine whether the proceedings relating to the author's deportation fell within the scope of application of articles 13 (as a decision upon which an alien lawfully present is expelled) or 14 (determination of rights and duties in a suit at law).⁸ This part accordingly is inadmissible under article 2 of the Optional Protocol.

6.3 The Committee recalls that States parties have the obligation not to expose individuals to a real risk of being killed or subjected to torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.⁹ The Committee must therefore decide whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his removal to India, the author would be subjected to treatment prohibited by articles 6 and 7.¹⁰ The Committee notes that the Refugee Division of the Immigration and Refugee Board, after thorough examination, rejected the asylum application of the author on the basis of lack of credibility the implausibility of his testimony and supporting evidence (para. 2.4 above) and that the rejection of this Pre-Removal Risk Assessment application was based on similar grounds. It further notes that in both cases applications for leave to appeal were rejected by the Federal Court (para. 2.5 above). The author has not shown sufficiently why these decisions were contrary to the standard set out above, nor has he adduced sufficient evidence in support of a claim to the effect that he would be exposed to a real and imminent risk of violations of articles 6 and 7 of the Covenant if deported to India. The Committee accordingly concludes that his claim is also inadmissible as insufficiently substantiated under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

⁸ See Committee's Views on communication No. 1051/2002, *Ahani v. Canada*, para 10.5.

⁹ See general comment No. 20 [47], 1992, para. 9.

¹⁰ See Views on communications 706/1996, *T. v. Australia*, 4 November 1997, paras. 8.1 and 8.2; No. 692/1996, *A.R.J. v. Australia*, 28 July 1997, para. 6.9.

Communication No. 1341/2005

Submitted by: Ernst Zundel (represented by counsel, Barbara Kulaszka)

Alleged victim: The author

State party: Canada

Declared inadmissible: 20 March 2007

Subject matter: Holocaust denial, deportation of persons representing a threat to national security

Procedural issues: Exhaustion of domestic remedies, abuse of the right of submission, inadmissibility *ratione materiae*

Substantive issues: Arbitrary detention, detention conditions, fair hearing by a competent and impartial tribunal, presumption of innocence, undue delay, freedom of opinion and expression, discrimination, notion of “suit at law”

Articles of the Covenant: 7; 9, paras. 1 and 3; 10; 14, paras. 1, 2 and 3; 18; 19; and 26

Articles of the Optional Protocol: 3 and 5, para. 2 (b)

1.1 The author of the communication is Ernst Zundel, a German citizen born in 1939, currently imprisoned in Germany after his deportation from Canada to Germany. He claims to be a victim of violations by Canada¹ of article 7; article 9, paragraphs 1 and 3; article 10; article 14, paragraphs 1, 2 and 3; article 18; article 19 and article 26 of the International Covenant on Civil and Political Rights. He is represented by counsel, Barbara Kulaszka.

1.2 On 10 January and 1 March 2005, the Special Rapporteur on New Communications and Interim Measures denied the author’s requests for interim measures to prevent his deportation from Canada to Germany.

1.3 On 11 March 2005, the Committee’s Special Rapporteur on New Communications decided to separate the consideration of the admissibility and merits of the communication.

The facts as presented by the author

2.1 The author lived in Canada for 42 years, from 1958 to 2000, as a permanent resident. In 1959 he married a Canadian and has two sons in Canada and several grandchildren. Towards the end of the 1960s, the author’s application for Canadian citizenship was refused by the Minister for Immigration, without any reason being given to him. He has written and published materials from his own publishing

company on what he describes as anti-German propaganda. In the 1980s, he published a booklet entitled “Did six million really die?”, exploring the historical issue of the treatment of Jews during World War II by Germany, and expressing doubt that six million Jews were killed by the Nazis. It also questioned whether gas chambers ever existed in concentration camps such as Auschwitz and Birkenau. In 1984, he was privately charged by Sabina Citron, the head of the Canadian Holocaust Remembrance Association, with the criminal offence of spreading false news in this booklet. These proceedings were taken over by the Crown as a public prosecution.

2.2 According to the author in 1984, shortly before his trial began, a bomb exploded outside his house, damaging his garage. No one was charged with this offence. He was beaten on the steps of the courthouse allegedly by members of a violent Jewish group when he appeared for court dates. No one was convicted for these attacks.

2.3 The author was convicted as charged and sentenced to fifteen months’ imprisonment, plus three years’ probation with the condition that he “not publish in writing or by speaking in public by word of mouth, directly or indirectly, in his name or in any other name, corporate or personal, anything on the subject of the Holocaust or on any subject related directly or indirectly to the Holocaust”. The author appealed his conviction and was granted a new trial. In May 1988, he was convicted on the charge of spreading false news in the above-mentioned booklet and sentenced to nine months imprisonment. An appeal to the Ontario Court of Appeal was dismissed on 5 February 1990. However, on appeal to the Supreme Court of Canada, the author was acquitted in 1992, on the ground that the “false news” law was in violation of the author’s guarantees to freedom of expression.

2.4 In 1993, the author applied for Canadian citizenship again. When this was revealed by the press, various newspaper stories and editorials demanded that he not be given citizenship because of his revisionist views. According to the author, in the spring 1994, several Marxist street groups attempted to drive him out of his neighbourhood. Pamphlets were distributed calling him a “hatemonger” and “white supremacist”. Posters were put up across Toronto with his face in a “rifle sight”,

¹ The Covenant and the Optional Protocol entered into force for Canada on 19 August 1976.

giving directions to his home and instructions on how to make Molotov cocktails. The author lodged complaints with the police but no investigation took place. On 14 April 1995, he received a razorblade attached to a mousetrap in his mail from the group called “Anti-Fascist Militia”. The group warned that a bomb would be next. No one was charged in this context.

2.5 At the end of May 1995, a pipe bomb was mailed to the author. Suspicious of the parcel, he took it unopened to the police. Toronto police determined that it would have killed the person who opened it and anyone else within 90 metres of the blast. The author implies that the Canadian Security Intelligence Service knew about the bomb. Although two men were charged in March 1998, they were not charged with attempted murder of the author. In 2000, all charges against the two men were stayed.

2.6 In August 1995, the author was given notice that his application for citizenship had been suspended as the Minister for Citizenship and Immigration was of the view that reasonable grounds existed to believe that he was a threat to Canada’s national security. In October 1995, he received a Statement of Circumstances outlining why he was a threat to security. While he had never committed any violence himself, his status in the “right wing” meant that he might advocate others to do so in the future. In December 2000, the author withdrew his application for citizenship.

2.7 In 2000 the author left Canada, to live with his wife in the United States. He was deported from the United States to Canada on 19 February 2003, on grounds of irregularities in immigration proceedings. He claimed refugee status and was initially detained under section 55² of the Immigration and Refugee Protection Act (the Act). On 24 February 2003, the Refugee Protection Division was notified by the Citizenship and Immigration Canada that pursuant to section 103 (1) of the Act, the Division was required to suspend consideration of the refugee claim on the grounds that the author’s case had been referred to the Immigration Division for a determination on inadmissibility on grounds of national security.

2.8 The author has had a series of detention review hearings pursuant to section 58 of the Act. In each of these hearings, it was held that the Minister was taking steps to inquire whether reasonable grounds existed that the author was a threat to national security.

² Section 55 (1) states: An officer may issue a warrant for the arrest and detention of a permanent resident or a foreign national who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.

2.9 On 1 May 2003, the Minister of Citizenship and Immigration and the Solicitor General of Canada (the Ministers) issued a certificate finding the author to be inadmissible to Canada on grounds of security, under section 77 of the Act.³ He was served with an arrest warrant, under section 82 of the Act,⁴ while detained at Niagara Detention Centre. The matter was referred to the Federal Court of Canada for a review of the reasonableness of the security certificate and a review of the need for the author’s continued detention, pending the outcome of security certificate reasonableness determination. Pursuant to section 77 of the Act, the Court reviewed the information presented by the Ministers *in camera* and determined that portions of the information should not be disclosed, as its disclosure would harm national security. On 5 May 2003, the Court ordered that the author be provided with a “Statement Summarizing the Information and Evidence” (the Summary), outlining the author’s position in the white supremacist movement and his contact with its members and other right-wing extremists. In addition to the Summary, the Ministers provided the author with a Reference Index containing more than 1600 pages of unclassified documents that support the information provided in the Summary.

2.10 On 6 May 2003, the author filed a Notice of Constitutional Question with the Federal Court of Canada. The Notice indicated that he would challenge the constitutionality of the security certificate scheme for non-compliance with the Canadian Charter of Rights and Freedoms (the Charter). In 2003, he also challenged his detention before the Ontario Superior Court of Justice for a writ of habeas corpus, at the same time as he challenged the constitutional validity of the Act. On 14 October 2003, he foreclosed the Federal Court’s consideration of his constitutional challenge by withdrawing his Notice of Constitutional Question. On 25 November 2003, the Superior Court declined to hear the application on grounds that it was an attempt to bypass the comprehensive statutory scheme and usurp a process already underway, and that the constitutional arguments were already before the Federal Court. This decision was confirmed on

³ Section 77 (1): “The Minister and the Solicitor General of Canada shall sign a certificate stating that a permanent resident or a foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality and refer it to the Federal Court, which shall make a determination under section 80.”

⁴ Section 82 (1): “The Minister and the Solicitor General of Canada may issue a warrant for the arrest and detention of a permanent resident who is named in a certificate described in subsection 77 (1) if they have reasonable grounds to believe that the permanent resident is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal.”

appeal on 10 May 2004 by the Ontario Court of Appeal and 21 October 2004 by the Supreme Court.

2.11 With reference to the review of the certificate proceedings, the author submits that “secret” evidence was submitted against him, to which neither he nor his lawyer had access. No witnesses were called against him during the hearing and the only evidence against him consisted of 5 volumes mainly of newspaper articles, other media articles, website printouts, extracts from books and similar materials written by people who the Ministers failed to call as witnesses. Unsuccessful motions were brought to have the Presiding Judge of the Federal Court (the Presiding Judge) step down from the case because of bias, including the fact that he was the former Solicitor General who was in charge of the Canadian Security Intelligence Service (CSIS), the organization providing all the evidence against the author during the time period in question. On the last of these motions, the Federal Court of Appeal held, on 23 November 2004, that he had fallen short of meeting the high threshold required to establish a reasonable apprehension of bias. At the time of the author’s and State party’s submissions, the author was still awaiting a decision of the Supreme Court of Canada as to whether it would hear an appeal of this decision (see para. 4.18 below on the Supreme Court’s decision).

2.12 On 21 January 2004, the judge presiding at the security certificate and detention review hearing ordered the author’s detention to continue, as he was found to present a danger to national security. The Court found that the author was directly involved with and had consulted a number of individuals who were within “the violent racist and extremist movement.” Despite the author’s contention that his involvement was limited to a general interest in their ideas, the Court found the author had dealt with these individuals to a great extent and in some cases, had funded their activities. The Court determined that the Ministers had met the test for establishing reasonable grounds to believe that the author was a danger to national security, warranting his continued detention. The Presiding Judge refused to grant bail although the author is not violent. The author contends that he is not entitled under the Act to any appeal against the decision of the Presiding Judge to deny him bail.

2.13 On 24 November 2004, the author filed a Statement of Claim in the Federal Court, claiming that the provisions of the Act under which he was detained violated sections 7, 9 and 10 (c)⁵ of the

⁵ Section 7 of the Charter: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

Charter, and that his detention in solitary confinement, while the Federal Court was reviewing the reasonableness of the security certificate, was unlawful and unconstitutional.

2.14 The hearing of the reasonableness of the security certificate was completed on 4 November 2004. The Federal Court upheld the reasonableness of the security certificate in reasons issued on 24 February 2005. It found that the evidence in support of the certificate conclusively established that the author was a danger to the security of Canada. The author took no further legal steps to prevent the deportation made possible by the Federal Court’s decision, and was deported from Canada to Germany on 1 March 2005, where he was promptly arrested on charges of publicly denying the Holocaust. On 14 February 2007, the Regional Court of Mannheim convicted the author of incitement to racial hatred and for denial of the Shoah, and sentenced him to five years imprisonment.

The complaint

3.1 The author claims violation of articles 7 and 10 due to his prolonged detention from February 2003 to March 2005 and his conditions of detention. He complains that he suffers from depression as a result of his prolonged detention in solitary confinement. He also complains that: he is not allowed to have a chair in his cell; he is not allowed to wear shoes; lights are on 24 hours a day in his cell and only dimmed slightly at night; he is not allowed to use a pen, only a pencil stub; he is not allowed to take his herbal medicines for his arthritis and high blood pressure; his request to see a dentist was ignored for one year; he is only allowed ten minutes a day outside and has no access to any gym or other facilities for walking or exercising; the cell in winter is cold, so that he has to wrap himself in sheets and blankets; the food is always cold and of poor quality; mail is often withheld for weeks; there are numerous unnecessary strip searches; he suffers from a “mass” in his chest which “may or may not be” cancerous. Despite being aware of this condition for over a year, the authorities refused to grant him bail.

3.2 The author claims a violation of article 9, paragraph 1, because of the failure of the State party to ensure the security of his person, in particular, because of the failure to investigate and prosecute

Section 9: “Everyone has the right not to be arbitrarily detained or imprisoned.”

Section 10: “Everyone has the right on arrest or detention (a) to be informed promptly of the reasons therefore; (b) to retain and instruct counsel without delay and to be informed of that right; and (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.”

the numerous threats and attacks on his person and property outlined above.

3.3 He claims a violation of article 9, paragraph 3, because of his alleged arbitrary and prolonged detention and because of the denial of bail. Although he was detained under national security legislation, he has never been informed of the “real” case against him. According to counsel, the Government has admitted that the case against him does not prove that he is a threat to national security. Thus, it is in the secret proceedings that the real case against him is being presented to the judge without the author being privy to this information or given an opportunity to contest it. The detention hearing was not considered in a timely manner and it took eight months to decide to refuse bail. Bail was refused even though he is not violent, has no criminal record in Canada and has a record of fulfilling all bail conditions imposed on him from 1985 to 1992 during criminal proceedings then in process. There is no appeal procedure to question the denial of bail.

3.4 The author claims a violation of article 14, paragraph 1, as he was denied a prompt and fair hearing before a competent and impartial tribunal. He further claims a violation of article 14, paragraph 2, because he was not presumed innocent. The proceedings against him are not criminal but are under national security legislation. He is charged with no offence but classified as “engaging in terrorism”, “being a danger to the security of Canada”, “engaging in acts of violence that would or might endanger the lives or safety of person in Canada”, and “being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage” in the above-noted acts. He faces deportation to Germany, where he may face further prosecution for offences not applicable in Canada. He claims that he should be presumed innocent and afforded due process and that the Government should be required to prove its case beyond mere reasonableness. Finally the author claims a violation of article 14, paragraph 3, because of undue delay in bringing the case to trial, and a violation of all rights of due process and fair hearing as he reasonably assumes that the Presiding Judge of the Federal Court is biased against him, as the former Solicitor General of Canada and had direct ministerial responsibility for CSIS in 1989, within the time frame during which the author became an alleged security threat.

3.5 The author claims a violation of articles 18 and 19, because in his view his detention is based on his opinions on historical matters and because of his expression of such opinions. He is classified as a national security threat because of what he allegedly might say in the future and what others might do who listen to him and read his materials. He has never been violent. Although the State party may not

like his historical views, he has never been charged with inciting hatred against Jews or any other group in Canada, notwithstanding the efforts by many groups to have such charges laid against him. He claims that he is being held under national security allegations based solely on his belief that there are numerous aspects of the established historiography on the fate of the Jews during World War II that require further research and revision, and on his work in sharing that information with others. He argues that this is the type of activity that articles 18 and 19 are designed to protect, and that the national security charges against him are politically motivated and arbitrary, in violation of these articles.

3.6 Finally, he claims a violation of article 26, because over the years he has not been treated equally by the Canadian authorities, and has been subjected to discrimination and denied citizenship because of his historical and political opinions. Repeated complaints and prosecutions were made regarding the same publications including “Did Six Million Really Die?” These prosecutions were conducted under various statutes dealing with mail, crimes, human rights and national security, but all had the purpose of persecuting the author for his lawful opinions regarding World War II. The State party allegedly used the claim that he was a threat to the security of Canada to refuse his application for citizenship, thereby applying national security provisions in a discriminatory manner.

3.7 On the issue of exhaustion of domestic remedies, with reference to the proceedings pending in the Federal Court challenging his detention and the constitutionality of the legislation, the author claims that the case could take up to five years to be heard and argues that the pursuit of domestic remedies would be unreasonably prolonged. He adds that his detention is unlimited, because in the event the certificate was quashed as unreasonable, the Crown may issue a new certificate and start the entire process again.

3.8 The author claims not to have submitted his complaint to any other international procedure of investigation or settlement.

The State party's observations

4.1 On 9 March 2005, the State party challenged the admissibility of the communication on three grounds: non-exhaustion of domestic remedies, inadmissibility *ratione materiae* with respect to the claims under articles 9 and 14, and abuse of the right to submission with respect to the claims under article 9, paragraph 1.

4.2 The State party submits that the author is a leader of the white supremacist movement, with a long and notorious history in Canada. He has had associations with, and exercises influence over,

influential and violent individuals and organizations within the white supremacist movement, both nationally and internationally, who have propagated violent messages of hate and advocated the destruction of Governments and multicultural societies. His status in the white supremacist movement is such that adherents are inspired to actuate his ideology. The State party believes that the author is engaged in the propagation of serious political violence to a degree commensurate with those who execute the acts. On this basis, it contends that the author is indeed a danger to the State party's national security and a threat to the international community, which justifies his deportation.

4.3 The State party points out that the hearing of evidence into the reasonableness of the security certificate and the need for ongoing detention occurred on various dates in 2003 and 2004. In 2003 in particular, the hearing was prolonged due to the repeated unavailability of author's counsel. The hearing was also interrupted several times by the author's last minute motions, including to have the presiding judge recuse himself for alleged bias, which all failed.

4.4 On admissibility, the State party submits that the author has failed to show that the availability of any domestic remedies would be unreasonably prolonged. The State party refers to the Committee's jurisprudence that seeking redress for alleged violations of rights and freedoms, like those guaranteed under the Charter and other public law remedies, via the normal judicial process would not be unreasonably prolonged within the meaning of article 5 (2) (b) of the Optional Protocol.⁶ It further submits that the author has failed to exhaust available remedies and that he has implicitly admitted that he has not done so.

4.5 On the claims under article 7 and 10, the State party indicates that the Charter guarantees that conditions of detention respect the dignity of detainees. The author could have challenged his conditions of detention under any of Sections 2, 7, 8, 10 and 12 of the Charter. In addition, other more particular legal rules governed the author's detention, the enforcement of which by a domestic court through judicial review could have provided a remedy to the type of complaints made by the author.⁷

⁶ The State party refers to communication No. 67/1980, *E.H.P. v. Canada*, decision of 27 October 1982, para. 8; communication No. 358/1989, *R.L. et al. v. Canada*, decision of 5 November 1991, para. 6.4; communication No. 228/1987, *C.L.D. v. France*, decision of 18 July 1988, para. 5.3; and communication No. 296/1988, *J.R.C. v. Costa Rica*, decision of 30 March 1989, para. 8.3.

⁷ See sections 28 and 33-34 of the *Ministry of Correctional Services Act*, R.R.O. 1990 Reg. 778, which

4.6 On the author's claims under article 9, paragraphs 1 and 3, relating to his detention, the State party submits that the author has initiated domestic legal proceeding based on the Charter, alleging essentially the same complaints that he raises under article 9 in the present communication. The author's constitutional action before the Federal Court of Canada alleges that the national security certificate process as applied to the author violates sections 7, 9 and 10 (c) of the Charter. As in this communication, the author alleges Charter violations based on the non-disclosure of all of the evidence against him, the duration of his detention, and the promptness and fairness of the hearing. In light of available domestic remedies, which are actually being pursued by the author, the State party submits that this portion of the communication is inadmissible for failure to exhaust domestic remedies.

4.7 On the author's claim under article 9, paragraph 1, relating to alleged violations arising from incidents dating from 1984 to 1995, the State party contends that the author has failed to demonstrate that he ever attempted to pursue domestic remedies that would have been available to redress any proven misconduct by law enforcement officials and/or Crown prosecutors. Various judicial remedies were and are potentially available to the author, including judicial review for *mala fides*, bias, flagrant impropriety, abuse of power, etc., and actions based on the Charter. Additionally, administrative complaint procedures could have provided effective remedies, but the author has not apparently pursued such remedies either. The author makes no claim to have pursued such remedies in relation to the law enforcement agencies that he seeks to impugn. Still in relation to the claim under article 9, paragraph 1, the State party adds that the author did not act diligently in presenting his claims that it failed to protect his security by not investigating and prosecuting alleged attacks made against him and his property between 1984 and 1995. For the State party, a delay of ten to twenty years without reasonable justification renders this claim inadmissible as an abuse of the right of submission.⁸

4.8 On the author's claims under article 14, paragraphs 1 to 3, the State party indicates that the author has initiated domestic proceedings before the Federal Court of Canada alleging essentially the same complaints that he raises in this

provides an avenue for inmates held in Ontario facilities, as was the author, to complain about their treatment.

⁸ See communication No. 787/1997, *Gobin v. Mauritius*, Views adopted on 16 July 2001, para. 6.3.

communication pursuant to article 14.⁹ One action relates to the alleged bias of the judge presiding over the reasonableness of the national security certificate and the ongoing reviews of his detention,¹⁰ while the other challenges the constitutionality of the national security certificate process as it applies to the author. In this constitutional challenge, the author makes claims under sections 7, 9 and 10 (c) of the Charter, in relation to the promptness and fairness of the hearing, including matters of standard of proof, disclosure of evidence and procedural rights, and in relation to the duration and lawfulness of his continued detention. Given available domestic remedies, which are actually and still being pursued by the author, the State party considers that this portion of the case is inadmissible for failure to exhaust domestic remedies.

4.9 As to the author's claims under articles 18 and 19 of the Covenant, the State party argues that section 2 of the Charter protects freedom of conscience, thought, opinion and expression, limited consistently with the terms of articles 18 and 19 of the Covenant where the needs of a free and democratic society so require. The author has failed to pursue this potential domestic remedy, and so this portion of his claim is also inadmissible.

4.10 On the discrimination claim under article 26, the State party indicates that section 15 of the Charter guarantees to everyone the right to equality without discrimination. It refers to the Committee's earlier decision in a case about the author¹¹, and recalls that failure to pursue a section 15 claim domestically in relation to a particular discrimination complaint makes that complaint inadmissible before the Committee.

4.11 The State party argues that the author has failed to substantiate his claims. In relation to his claim under article 9, it points out that it relates to his detention as a threat to national security and refers to the Committee's jurisprudence that there is nothing arbitrary, *ipso facto*, about detention of an alien based on the issuance of a security certificate

⁹ Although the author has now been deported from Canada, this fact does not preclude him in law from continuing with his action, nor does it necessarily deprive him of a meaningful remedy if he ultimately proves successful. Pursuant to s. 24(1) of the Charter and s. 52 of the Constitution Act, 1982, Canadian courts have robust powers to remedy any constitutional wrongs.

¹⁰ At the time of the State party's submissions, the author's latest attempt to have the Presiding Judge removed for bias was still pending before the Supreme Court of Canada, which was to decide whether to grant leave to appeal. Leave to appeal was denied on 25 August 2005.

¹¹ Communication No. 953/2000, *Zündel v. Canada*, inadmissibility decision of 27 July 2003, para. 8.6.

provided for by law.¹² For the State party, the communication clearly discloses that the author knows why he was detained pursuant to the Act, and knows the applicable legal standards that governed his detention and ultimate deportation. He had ample opportunity to make arguments before various courts and judges concerning the lawfulness of his continued detention, and to make arguments against the finding by the Ministers that he represents a threat to national security. By the express terms of the Act, as a permanent resident of Canada the author was entitled to have his detention reviewed at least every six months.¹³ In the author's case, reviews did not lead to his release because he was repeatedly found to be a danger to national security. However, reviews are meaningful and can help to secure release from detention. The State party thus argues that this claim is incompatible *ratione materiae* with the Covenant.

4.12 On the claims under article 14, the State party submits that deportation proceedings do not involve either the determination of a criminal charge or rights and obligations in a suit at law, but are in the nature of the administration of public law. With respect to the "criminal charge" aspect of article 14, it claims that deportation proceedings are even less connected to the determination of a criminal charge than extradition proceedings, which the Committee has viewed as not falling within the scope of article 14.¹⁴ Consequently, the State party submits that those of the author's claims that relate specifically to paragraphs 2 and 3 of article 14 are inadmissible as incompatible *ratione materiae* with the Covenant.

4.13 With respect to the "suit at law" aspect of article 14, the State party reiterates its arguments in *V.R.M.B. v. Canada*,¹⁵ that deportation proceedings are neither a determination of a "criminal charge" nor the determination of "rights or obligations in a suit at law". Rather, deportation proceedings are in the realm of public law and involve the State's ability to regulate citizenship and immigration. The Committee declined to express its view as to whether a deportation proceeding is a "suit at law" in that case, as well as in *Ahani v. Canada*, another case involving deportation proceedings of a person representing a threat to national security.¹⁶

¹² Communication No. 1051/2002, *Ahani v. Canada*, Views adopted on 29 March 2004, para. 10.2. See also communication No. 236/1987, *V.M.R.B. v. Canada*, inadmissibility decision of 18 July 1988, para. 6.3.

¹³ See Immigration and Refugee Protection Act, section 83(2).

¹⁴ Communication No. 1020/2001, *Cabal and Bertran v. Australia*, Views adopted on 7 August 2003, para. 7.6; and communication No. 961/2000, *Everett v. Spain*, para. 6.4.

¹⁵ Communication No. 236/1987, *V.M.R.B. v. Canada*, Views adopted on 18 July 1988.

¹⁶ Communication No. 1051/2002, *Ahani v. Canada*, Views adopted on 29 March 2004, para. 10.5.

4.14 The State party argues that, given the equivalence of article 6 of the *European Convention* and article 14 of the *Covenant*, the European Court's case law is persuasive that the deportation proceedings challenged by the author are not encompassed by article 14 of the *Covenant*. In this respect, it refers to the case of *Maaouia v. France*,¹⁷ where the European Court held that the decision of whether or not to authorize an alien to stay in a country of which he is not a national does not entail any determination of his civil rights or obligations or of any criminal charge against him, within the meaning of article 6, paragraph 1, of the European Convention.¹⁸

4.15 Subsidiarily, the State party submits that the author has failed to substantiate that the security certificate and detention reviews were conducted other than in full accordance with article 14. The author's deportation, predicated on Canada's reasonable belief that he is a threat to national security, proceeded according to Canadian law in a fair and impartial manner affording the author the assistance of legal counsel and the opportunity to challenge evidence, including by way of examination of a representative of the CSIS. To the extent that the author was restricted in his ability to challenge all the evidence against him, this was done for national security reasons,¹⁹ in accordance with Canadian law which the Committee has viewed as satisfactory,²⁰ and which is consistent with the *Covenant* (article 13).

4.16 The State party submits that there was no bias with respect to the author's deportation proceedings. The domestic courts properly weighed the factual record and the applicable legal principles in rejecting the author's bias allegations. The State party invokes the Committee's established jurisprudence in this regard.²¹ No case of arbitrariness and bias in evaluation of evidence can be made out by the author, let alone in a *prima facie* way. The State party submits that any article 14 claim based on

allegations of bias is inadmissible pursuant to article 3 of the Optional Protocol.

4.17 On 16 September 2005, the State party informed the Committee that on 25 August 2005, the Supreme Court of Canada denied the author leave to appeal from the decision of the Federal Court of Appeal of 23 November 2004. The State party indicates that this decision does not affect its position that the communication is inadmissible, in particular with regard to the alleged bias of the judge presiding at the security certificate review hearing.

Author's comments

5. On 3 November 2005, the author indicated that he wished to maintain his communication, but did not comment on the State party's observations.

Issues and proceedings before the Committee

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

6.2 The Committee notes that the State party challenges the totality of the communication. In respect of the author's claims under article 7 and 10 related to his conditions and length of detention, the State party contends that the author could have pursued remedies for violations of the Canadian Charter, in particular under section 12, according to which "Everyone has the right not to be subjected to any cruel or unusual treatment or punishment". In addition, the author could have complained about his detention conditions under the Ministry of Correctional Services Act, in particular under sections 28 on inmate complaints²² and section 34 relating to segregation. In the absence of any comments or objection from the author, who filed a constitutional action under other sections of the Charter, the Committee concludes that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, for failure to exhaust domestic remedies.

6.3 With regard to the author's claims under article 9, paragraphs 1 and 3, because of his alleged arbitrary and prolonged detention and the denial of bail, the Committee notes that the author has introduced a constitutional action in the Federal Court of Canada, claiming that the national security certificate process applied to him violates sections 7, 9 and 10 (c) of the Charter. The Committee further notes that these sections, which deal with liberty, arbitrary detention and review of the validity of

¹⁷ *Maaouia v. France*, application No. 39652/98, decision rendered by the European Court of Human Rights on 5 October 2000.

¹⁸ The State party refers to more than ten decisions of the European court supporting this statement, and provides copies of all of them in its annexes. These include the cases of *Elvis Jakupovic v. Austria*, application No. 36757/97, judgement of the European Court of Human Rights on 15 November 2001; and *Veselin Marinkovic v. Austria*, application No. 46548/99, judgement of the European Court of Human Rights of 23 October 2001.

¹⁹ See Immigration and Refugee Protection Act, Division 9: "Protection of Information".

²⁰ Communication No. 1051/2002, *Ahani v. Canada*, Views adopted on 29 March 2004, para. 10.5.

²¹ See, e.g., communication No. 1188/2003, *Riedl-Riedstein et al. v. Germany*, decision of 2 November 2004, para. 7.3.

²² Section 28: "Where an inmate alleges that the inmate's privileges have been infringed or otherwise has a complaint against another inmate or employee, the inmate may make a complaint in writing to the Superintendent."

detention, cover in substance the author's claims of arbitrary and prolonged detention and denial of bail under article 9 of the Covenant. It observes that these proceedings remain pending. The Committee has taken note of the author's contention that the application of this remedy would be unduly prolonged. It observes that the author filed this action on 24 November 2004. At the time of the consideration of the communication, a little over two years had lapsed since the initial action. The author has not demonstrated why he believes that a constitutional challenge could take up to five years to be considered. In the circumstances, the Committee does not find that a delay of two years to consider a constitutional action is unduly prolonged. In view of the pending constitutional challenge, the Committee concludes that the author has failed to exhaust domestic remedies on these claims. Accordingly, this part of the communication is inadmissible pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

6.4 The claim under the same article that the author was not informed of the "real case" against him, with reference to the *in camera* hearings, appears to relate to, and is more appropriately dealt jointly with, the author's claims under article 14.

6.5 On the claim under article 9, paragraph 1, of an alleged failure of the State party to ensure the security of the author, the State party claims that this part of the communication constitutes an abuse of the right of submission. The Committee recalls that there are no fixed time limits for submission of communications under the Optional Protocol and that mere delay in submission does not of itself involve abuse of the right of communication.²³ However, in certain circumstances, the Committee expects a reasonable justification for such a delay. The alleged attacks against the author occurred between 1984 and 1995, i.e., 12 to 23 years ago. The Committee notes that the author has availed himself of the procedure under the Optional Protocol twice before, but that he did not take this opportunity to file such a claim before. In the absence of any justification of such a delay, the Committee considers that submitting the communication after such a time lapse should be regarded as an abuse of the right of submission. It finds that this part of the communication is inadmissible under article 3 of the Optional Protocol.

6.6 With regard to the author's claims under article 14, the Committee has noted the State party's contention that a constitutional action based on sections 7, 9 and 10 (c) of the Charter was still pending in the Federal Court. However, as noted above, those sections of the Charter relate to

²³ Communication No. 787/1997, *Gobin v. Mauritius*, inadmissibility decision of 16 July 2001, para. 6.3.

detention issues, and not to issues of fairness and impartiality of hearings, which are covered by article 14 of the Covenant. The Committee observes that, in his Statement of Claim for constitutional action, the author challenged not only his detention, but also the entire process governing the determination of whether the security certificate is reasonable. However, the Committee considers that the guarantees under article 14 of the Covenant are substantively different from those protected by article 9 of the Covenant, which in turn provides similar protection to the one provided by sections 7, 9 and 10 (c) of the Charter. It concludes that a pending constitutional action under articles 7, 9 and 10 (c) of the Charter does not preclude the Committee from examining claims under article 14 of the Covenant. In addition the proceedings relating to the alleged bias of the Presiding Judge were concluded on 25 August 2005, when the Supreme Court denied the author's leave to appeal from the Federal Court of Appeal's decision. The State party has not mentioned other remedies which could have been pursued by the author with respect to his claims under article 14. The Committee concludes that the author has exhausted domestic remedies in relation to claims under article 14, and that the communication is not inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.7 The Committee has noted the State party's argument that deportation proceedings do not involve either "the determination of any criminal charge" or "rights and obligations in a suit at law". It observes that the author has not been charged or convicted for any crime in the State party, and that his deportation is not a sanction imposed as a result of criminal proceedings. The Committee concludes that proceedings relating to the determination of whether a person constitutes a threat to national security, and his or her resulting deportation, do not relate to the determination of a "criminal charge" within the meaning of article 14.

6.8 The Committee recalls, in addition, that the concept of a "suit at law" under article 14, paragraph 1, of the Covenant is based on the nature of the right in question rather than on the status of one of the parties.²⁴ In the present case, the proceedings relate to the right of the author, who was a lawful permanent resident, to continue residing in the State party's territory. The Committee considers that proceedings relating to an alien's expulsion, the guarantees of which are governed by article 13 of the

²⁴ Communication No. 112/1981, *Y.L. v. Canada*, inadmissibility decision adopted on 8 April 1986, para. 9.1 and 9.2; communication No. 441/1990, *Casanovas v. France*, Views adopted on 19 July 1994, para. 5.2; communication No. 1030/2001, *Dimitrov v. Bulgaria*, decision on admissibility adopted on 28 October 2005, para. 8.3.

Covenant, do not also fall within the ambit of a determination of “rights and obligations in a suit at law”, within the meaning of article 14, paragraph 1. It concludes that the deportation proceedings of the author, who was found to represent a threat to national security, do not fall within the scope of article 14, paragraph 1, and are inadmissible *ratione materiae*, pursuant to article 3 of the Optional Protocol.

6.9 As regards the claim under articles 18 and 19, the Committee observes that the author has not availed himself of the remedy offered by the Canadian Charter, under section 2, according to which “Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.” This part of the communication is thus inadmissible under article 5, paragraph 2 (b), for failure to exhaust domestic remedies.

6.10 The Committee reaches the same conclusion with respect to the author’s claim under article 26, as

he has failed to pursue any remedy under section 15 of the Charter, which reads: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Although “discrimination on political or other opinion”, which is explicitly referred to in article 26 of the Covenant, is not listed in Section 15 of the Charter,²⁵ the list is preceded and qualified by the terms “in particular”, which suggests that the list is not exhaustive. The author could therefore have availed himself of this remedy and once more has failed to fulfil the requirements under article 5, paragraph 2 (b), of the Optional Protocol.

7. The Committee therefore decides:

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

(b) That this decision shall be communicated to the State party and to the author, through counsel.

²⁵ Section 15, of the Charter: “15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

Communication No. 1355/2005

Submitted by: Humanitarian Law Center

Alleged victim: X

State party: Serbia

Declared inadmissible: 26 March 2007

Subject matter: Sexual abuse of a minor

Procedural issues: Standing to represent the victim

Substantive issues: Cruel, inhuman or degrading treatment; arbitrary or unlawful interference with privacy; rights of the child

Articles of the Covenant: 7, 17 and 24, para. 1, taken alone and read in conjunction with article 2, paras. 1 and 3

Article of the Optional Protocol: 1

1.1 The author of the communication, dated 23 December 2004, is the Humanitarian Law Center, a non-governmental organization which monitors and investigates human rights violations in Serbia. It submits the complaint on behalf of X, a minor, born in 1992, a citizen of Serbia. The author claims violations of articles 7, 17, and 24, paragraph 1, each taken alone and read in conjunction with article 2, paragraphs 1 and 3, of the Covenant by Serbia. The Optional Protocol entered into force for Serbia on 6 December 2001.

1.2 On 31 January 2005, the Special Rapporteur on New Communications and Interim Measures rejected the requests for interim measures to urge the State party to offer protection to the witnesses named in the complaint, to encourage the State party to prevent further interaction between the perpetrators of the sexual abuse and the victim, and to urge the State party to provide to the victim adequate counselling and continued supervision, as may be necessary.

1.3 On 27 September 2005, the State party requested that the admissibility of the communication be examined separately from the merits of the communication. On 27 September 2005, the Special Rapporteur on New Communications, on behalf of the Committee, determined that the admissibility and the merits of this case should be considered together.

The facts as presented by the author

2.1 On 15 November 2002, X, a Roma boy aged 10, entered a bar in the village of A, where he met Vladimir Petrašković and Miodrag Radović. Petrašković invited X to drink beer, as a result of which he became intoxicated. Both men then obliged X to perform fellatio on them. Shortly afterwards,

three other men named Aleksandar Janković, Maksim Petrović and Vojislav Brajković joined the table and the child was obliged to perform fellatio on all five men. The men and the child then left the bar and went to a discotheque where Radović urinated on the child's head. Thereafter, the men took the child to another bar where they obliged him to perform fellatio on all of them and urinated in his mouth. They threatened him not to say a word to anyone.

2.2 W, a public health nurse working in A, learnt about the incident two days later. She met with X who recounted the events described above. The nurse noticed that the boy's mouth was swollen. The following day, she persuaded X to report the incident to the police. In early December 2002, Miroslav Lukic, President of the Municipal Court of A, mentioned X's case to the Public Prosecutor who had not yet been approached by the police.

2.3 On 27 December 2002, the victim submitted a complaint against the five men to the police. As a result, on 9 January 2003, the Office of the Požarevac District Public Prosecutor requested that the Požarevac District Court investigate the case. From 13 January 2003 onwards, the Humanitarian Law Center (hereinafter the HLC) acted as X's counsel. On 14 January 2003, the District Court decided to investigate Vladimir Petrašković and Miodrag Radović. By then, both men had already fled the country. Miodrag Radović was arrested in Austria and extradited to Serbia. On 24 January 2003, the District Court heard 13 witnesses amongst whom only X's parents confirmed his story. After the victim changed his testimony on 5 February 2003, the District Public Prosecutor dropped the charges on 5 March 2003 and the District Court cancelled its investigation on 10 March 2003.

2.4 According to the State party, the charges were dropped because of insufficient evidence: the victim had entirely changed his original statement to the police, telling the investigative magistrate that the accused had in fact not committed any offence. Moreover, the witnesses either gave accounts based on hearsay from local residents whose names they did not know, or denied the allegations altogether. Finally, no witness, including W, requested protection from the Office of the Public Prosecutor. According to the author, W testified before the investigating judge on 5 February 2003. She also

told the HLC that during the same hearing, X first confirmed that he had been sexually abused, and then, after a break, denied the accusations. Only the retractions were reflected in the court's records. A few weeks later, X contacted W and told her that his parents had forced him to modify his testimony.

2.5 X's story of sexual abuse received extensive media coverage. From January 2003 to June 2004, many articles appeared in the national printed media, focusing among other things, on the public outrage concerning the incident, the closure of criminal proceedings, the intimidation of witnesses and the suspected collusion between the alleged perpetrators and Government officers.

2.6 According to the author, from November 2002 onwards, eyewitnesses and other A residents were threatened and bribed to keep silent about the sexual abuse of X by a group of local criminals. In December 2002, X's father received a telephone call from Miodrag Radović who offered him money if the boy changed his story. W, the nurse who testified on two occasions, received many threats. On 28 October 2004, the author submitted a request to the Chief of Public Security at the Ministry of Internal Affairs for police protection for W. This request went unanswered and the threats continued. W then also sought protection from the Chief of Police in Pozarevac, a nearby town. This request was denied.

2.7 In separate legal proceedings, X's parents were convicted of severe neglect of parental responsibility on 27 March 2002 and stripped of their parental rights by the Municipal Court of A on 28 January 2003. X and his five underage siblings were taken into care on 3 February 2003 and Vera Miscevic, a social worker at the Centre for Social Work of A, was appointed as their legal guardian.

2.8 After the charges were dropped by the Office of the Public Prosecutor on 10 March 2003, the victim was given eight days to initiate a private prosecution. The author did so, on his behalf, on 18 March 2003. At a hearing before the investigating judge on 1 April 2003, four additional witnesses were heard. Three of them confirmed that X had been sexually abused. On 9 April 2003, X's parents sought to withdraw the power of attorney from the HLC and abandon the private prosecution. However, by then, they had lost their parental rights over X. The HLC believes that X's parents have received some benefit in exchange for convincing their child not to pursue criminal proceedings against his abusers: the child's father spoke publicly about having been offered something if the child dropped his accusations. Shortly afterwards, the family home contained new furnishings which the parents were formerly unable to acquire.

2.9 On 7 May 2003, the Office of the Public Prosecutor rejected the HLC's request to investigate

Aleksandar Janković, Maksim Petrović and Vojislav Brajković who were the three other men involved in the sexual abuse. It also informed Vera Miscevic, the child's guardian, that she could take over the criminal prosecution within eight days. On 16 May 2003, Vera Miscevic gave a power of attorney to the HLC which made another request for a more comprehensive investigation which would cover all five men. On 10 June 2003, she revoked it. As a result, the HLC's request was rejected on 18 June 2003 on the ground that it was not authorized to make such a request. The author filed an appeal with the Court of Appeal Section of the Pozarevac District Court which annulled on 27 June 2003 the decision to terminate the investigation and ordered that it be extended to include all five men. On 29 July 2003, Vera Miscevic granted again a power of attorney to the HLC. On 12 August 2003, she revoked it again and for the last time. From then on, the HLC was barred from participating in the court proceedings and denied access to the case file. On 19 November 2003, the District Court suspended the investigation because the Centre for Social Work, citing the victim's state of health, decided not to pursue the case any further.

2.10 The HLC continued to monitor X's situation after August 2003, but had no information as to the timing or the conditions, if any, attached to the reinstatement of parental authority or whether the Centre for Social Work in A or Pozarevac continued to exercise some supervisory responsibility over the child. According to the State party, the Municipal Court of A reinstated parental authority on 17 September 2004.

The complaint

3.1 The author claims a violation of article 7, taken alone and read in conjunction with article 2, paragraphs 1 and 3, of the Covenant. It submits that rape and other forms of sexual assault constitute treatment in violation of article 7.¹ In the present case, the treatment suffered by the victim clearly constitutes a cruel, inhuman and degrading treatment, especially in the light of his personal circumstances such as his age, his membership of the Roma group, his low mental ability and unstable emotional state. The State party should have investigated the incident promptly and impartially, and identified and prosecuted the perpetrators.

3.2 In addition or in the alternative, the author alleges a violation of the victim's right to privacy as protected by article 17, taken alone and read in conjunction with article 2, paragraphs 1 and 3. It recalls that the Committee's jurisprudence

¹ See communication No. 981/2001, *Casafranca de Gómez v. Peru*, Views adopted on 23 July 2003, paras. 2.2 and 7.1.

establishes that “privacy” includes attacks on dignity² and covers an individual’s interactions with other persons,³ including consensual and non-consensual sexual activity.⁴ It considers that the treatment suffered by the victim constitutes an arbitrary and unlawful interference with his privacy.

3.3 The author alleges a violation of article 24, paragraph 1, taken alone and read in conjunction with article 2, paragraphs 1 and 3. It argues that States parties are required to adopt such measures of protection as are required by each child’s status as a minor. The best interest of the child is the foremost consideration in assessing and addressing the needs of children. The author submits that through its acts and omissions the State party violated article 24, paragraph 1, because the national authorities were clearly not guided by the best interest of the child in making the decisions that affected him.

3.4 The author submits that the victim’s abuse occurred against a backdrop of widespread discrimination against members of the Roma community. This factor contributed to the very occurrence of the abuse and the public manner in which it was played out.

3.5 With regard to the lack of express authorization to represent the victim, the author recalls the Committee allows a communication to be submitted on behalf of an alleged victim when the victim is unable to submit the communication personally, especially in cases concerning children. In its jurisprudence, the Committee had been guided not solely by the rules of domestic procedure in matters of standing and representation, but also by “the best interests of the child.”⁵ The author also refers to the test applied by the European Commission of Human Rights. When deciding over the standing of a solicitor who had represented minor children in domestic custody proceedings, the Commission examined (1) whether other or more appropriate representation existed or was available; (2) the nature of the links between the author and the child; (3) the object and scope of the application introduced on the victim’s behalf; and (4) whether there were any conflicts of interest.⁶ The author

² See communication No.721/1996, *Boodoo v. Trinidad and Tobago*, Views adopted on 2 April 2002, para. 6.7.

³ See communication No. 453/1991, *Coeriel and Aurik v. The Netherlands*, Views adopted on 31 October 1994, para. 10.2.

⁴ See communication No. 488/1992, *Toonen v. Australia*, Views adopted on 31 March 1994, para. 8.2.

⁵ See communication No. 417/1990, *Balaguer Santacana v. Spain*, Views adopted on 15 July 1994, paras. 6.1 and 9.2; and communication No. 901/1009, *Laing v. Australia*, Inadmissibility decision adopted on 9 July 2004, para. 7.3.

⁶ See *S.P., D.P. and A.T. v. United Kingdom*, Admissibility decision, application No. 23715/94 (20 May 1996). See also *P., C. and S. v. United Kingdom*, application No. 56547/00, Admissibility decision (11

submits that no alternative legal representation exists for the victim in this case, since neither the parents, nor the guardian were willing to initiate a private prosecution. It recalls that it was the child’s former legal counsel in the domestic proceedings. As to the object and scope of the application, it notes that the present communication is confined to complaints that the domestic criminal investigation did not comply with standards enshrined in the Covenant. Finally, there are no possible conflicts of interest between the author and the victim in the pursuit of this communication since it addresses matters in which the author was duly authorized to represent the victim at the domestic level.

3.6 The author claims that all effective and adequate domestic remedies have been exhausted and that the State party failed to provide the victim with a legal or any other remedy for the violations he suffered. The HLC alleges that the authorities had sufficient information about the abuse to investigate and prosecute the offenders, but failed to do so. Local and prosecutorial authorities showed no willingness to investigate the case properly, and witnesses were threatened by the alleged perpetrators, with impunity. The Centre for Social Work in A granted and withdrew the power of attorney from the author several times in the span of three months, thereby sabotaging the author’s efforts to move the prosecution forward, while the investigating judge granted the author’s request to broaden the investigation only after the appeal (having rejected it twice before) and cancelled the investigation on three occasions before the final cancellation in November 2003.

3.7 The author requests the Committee to urge the State party to reopen the criminal investigation, to interview witnesses in a confidential manner, to protect such witnesses, to punish those responsible for abusing the victim and to provide appropriate psychological support to him. It also requests that adequate compensation be paid to the victim.

State party’s submissions on admissibility and merits

4.1 By note verbale of 8 August 2005, the State party challenged the admissibility of the communication on the ground that the author has no standing before the Committee and that the communication is insufficiently substantiated. It argues that the author’s submission does not make clear whether a violation of article 2 of the Covenant taken alone or read in conjunction with articles 7, 17, and 24, is also alleged.

December 2001); and *C. and D. v. United Kingdom and S. and others v. United Kingdom*, applications Nos. 34407/02 and 34593/02, Inadmissibility decision (31 August 2004).

4.2 Referring to former rule 90 (b) of the Committee's rules of procedure and the Committee's past jurisprudence,⁷ the State party argues that the communication is inadmissible under article 2 of the Optional Protocol because the author has not justified its authority to submit the complaint on behalf of the victim. It distinguishes the decisions invoked by the author from the present case. The two Committee's decisions and two of the decisions of the European Court of Human Rights concern the standing of parents to submit complaints on behalf of their children where they were not recognized as their legal representatives.⁸ In the present case, such a "special bond" between parent and child does not exist between the author and the victim. In the two remaining decisions of the European Court of Human Rights cited by the author,⁹ the children were represented by their former counsel. However, counsel had represented the children up to the end of the domestic proceedings. Moreover, counsel's action on behalf of the children was previously or subsequently approved by the children's parents or foster parents. In the present case, the author's power of attorney was revoked before the end of the proceedings, both by the victim's parents and legal guardian. The author's communication to the Committee was never approved by the victim's parents or legal guardian. The author never attempted to obtain such approval. Finally, all decisions invoked by the author involved custody and care procedures, which justified a more extensive interpretation of the criteria for representation, especially since the legal representatives had conflicting interests with the children themselves.

4.3 In any case, the State party submits that the criteria developed by the European Court of Human Rights are not fulfilled in the present case.¹⁰ Firstly, regarding the question of whether other or more appropriate representation exists or is available, it contends that the author got involved with the case only *after* having been alerted by a journalist in

⁷ See, for instance, communication No. 128/1982, *U.R. v. Uruguay*, Inadmissibility decision of 6 April 1983; communication No. 78/1980, *The Mikmaq tribal society v. Canada*, Inadmissibility decision of 29 July 1984.

⁸ See communication No. 417/1990, *Balaguer Santacana v. Spain*, Views adopted on 15 July 1994, paras. 6.1 and 9.2; communication No. 901/1009, *Laing v. Australia*, Inadmissibility decision adopted on 9 July 2004, para. 7.3; *P., C. and S. v. United Kingdom*, application No. 56547/00, Admissibility decision (11 December 2001); and *C. and D. v. United Kingdom*, application No. 34407/02, Inadmissibility decision (31 August 2004).

⁹ See *S.P., D.P. and A.T. v. United Kingdom*, Admissibility decision, application No. 23715/94 (20 May 1996); and *S. and others v. United Kingdom*, application No. 34593/02, Inadmissibility decision (31 August 2004).

¹⁰ See *S.P., D.P. and A.T. v. United Kingdom*, Admissibility decision, application No. 23715/94 (20 May 1996).

January 2003, by which time the initial police investigation was almost completed. The author's power of attorney was revoked for the last time on 12 August 2003, while the investigation continued for another three months until being finally cancelled on 19 November 2003 when the victim denied the allegations for the second time. Appropriate representation other than by the author was thus available at the domestic level. As to the issue of representation before the Committee, the State party submits that other and more appropriate representation is available to the victim through his parents or "any lawyer or NGO in Serbia or in any other country" who has been duly authorized to act on the victim's behalf.

4.4 Secondly, for reasons explained above, regarding the nature of the links between the author and the victim, the State party submits that although the author acted as counsel for the victim for seven months (with interruptions), this link is not such as to allow the author to continue representing the victim before the Committee. It adds that the author's lack of knowledge as to the victim's present circumstances proves that whatever links may have existed between the author and the child, they no longer exist. Thirdly, the State party notes that while the author claims that the object and scope of the communication is confined to complaints about the domestic criminal investigation not complying with the standards contained in the Covenant, it is actually much broader.

4.5 Finally, on the existence of any conflicts of interest, the State party submits that even though the author may believe that it is acting in the victim's best interest, the author is not necessarily the best, nor the only authority to do so. It claims that there were no conflict of interest between the child and the Centre for Social Care which was the victim's legal guardian from 28 January 2003 until his parents' legal rights were restored. The Centre had in fact acted in the victim's best interest by revoking the author's power of attorney because the child's involvement in the proceedings would disturb his present condition.

4.6 By note verbale of 4 July 2006, the State party reiterated its arguments on the admissibility of the communication and commented on its merits. It recalls that article 14, paragraph 2, of the Covenant provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law; and that the District Court of Pozaverac has found insufficient evidence to continue the criminal investigation against the five alleged perpetrators. It refutes the author's claim that the treatment of the alleged victim by the competent authorities was discriminatory because of his Roma ethnic origin or social status.

4.7 The State party concedes that, during the investigation, the parents of the victim had first given and then revoked the power of attorney to a lawyer from the HLC, changed their statements, tried to obtain money from the suspected perpetrators in return for favourable statements and influenced the alleged victim in various ways, thus compromising the credibility of their evidence and prolonging the proceedings. As a result, the authorities have taken prompt measures to have the alleged victim and his five siblings removed from this “unhealthy family environment”. Steps were taken to ensure their rehabilitation and social integration. To that end, financial and material assistance was provided to the parents several times in 2003 and 2004. Following from the above, the State party believes that there is no violation of any of the rights contained in articles 7, 17, 24, paragraph 1, read alone or in conjunction with article 2, paragraphs 1 and 3.

Author’s comments

5.1 By letter dated 11 September 2006, the author argues that it should be allowed standing to represent the victim before the Committee. It recalls that the circumstances of the case clearly demonstrate that the victim is unable to submit the communication personally, which is a situation provided for in rule 96 of the Committee’s rules of procedure. With regard to the State party’s argument that the link between the author and the victim is not as close as to qualify the former to act on the latter’s behalf, the author submits that while there is no biological link between itself and the victim, it acted as legal counsel for the victim and demonstrated a sustained willingness and ability to seek redress for the victim. Neither the parents, nor the legal guardian have acted in the best interests of the victim.

5.2 As for the State party’s argument that the author is neither the sole, nor the most competent authority to determine the best interests of the victim, the author recalls that it has already submitted many communications before several human rights treaty bodies and that this experience cannot be compared with that of any other organization in Serbia. This renders the author qualified to assess the reasons for instigating proceedings from the point of view of any victim. In the present case, the victim’s interests are that those who sexually abused him should be punished.

5.3 With regard to the State party’s observations on the merits of the communication, the author reiterates its earlier arguments. It noted that W is the only person who has been willing to testify about all the circumstances of the incident and that, as a result, she has received many threats. On 13 March 2006, she was even found guilty by the Belgrade Second Municipal Court of defaming Miodrag

Deimbacher (formerly Radović), whom she had accused on national television of having sexually abused the child. By letter dated 19 December 2006, the author informed the Committee that this was upheld by the Belgrade District Court on 7 July 2006.

Issues and proceedings before the Committee

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

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With regard to the author’s standing to represent the victim, the Committee recalls that rule 96 (b) of its rules of procedure provides that a communication should normally be submitted by the individual personally or by that individual’s representative, but that a communication submitted on behalf of an alleged victim may, however, be accepted when it appears that the individual in question is unable to submit the communication personally. Where it is impossible for the victim to authorize the communication, for instance where the victim has been killed, had disappeared or is held incommunicado, the Committee has considered a close family connection to be a sufficient link to justify an author acting on behalf of an alleged victim.¹¹ However, it has not considered that an individual had standing to act on behalf of a personal friend or an employee where no authorization had been obtained from the victim.¹² In this regard, the Committee recalls that it

“has always taken a wide view of the right of alleged victims to be represented by counsel in submitting communications under the Optional Protocol. However, counsel acting on behalf of victims of alleged violations must show that they have real authorization from the victims (or their immediate family) to act on their

¹¹ See for instance communication No. 5/1977, *Valentini de Bazzano v. Uruguay*, Views adopted on 15 August 1979, para. 5; and communication No. 1196/2003, *Bourchef v. Algeria*, Views adopted on 30 March 2006, para. 1.1.

¹² See communication No. 436/1990, *Solis Palma v. Panama*, Inadmissibility decision adopted on 18 July 1994, para. 5.2; and communication No. 16/1977, *Mbenge v. Zaire*, Views adopted on 25 March 1983, para. 5. See also communication No. 565/1993, *R. and M.H. v. Italy*, Inadmissibility decision adopted on 8 April 1994, para. 4.2.

behalf, that there were circumstances which prevented counsel from receiving such authorization, or that given the close relationship in the past between counsel and the alleged victim it is fair to assume that the victim did indeed authorize counsel to proceed with a communication to the Human Rights Committee.”¹³

6.4 The Committee recalls that children must generally rely on other persons to present their claims and represent their interests, and may not be of an age or capacity to authorize any steps to be taken on their behalf. A restrictive approach should thus be avoided. Indeed, it has been the constant practice of the Committee to consider that a parent has standing to act on behalf of his or her children without explicit authorization from them.¹⁴ While a parent is the most appropriate person to act on behalf of a child, the Committee does not exclude that the counsel of the child in the domestic proceedings may continue to present the child’s claims to the Committee. Nonetheless, the Committee must still examine, as mentioned above, whether counsel has authorization from the child (or his or her immediate family) to act on his or her behalf, whether there are circumstances which prevented counsel from receiving such authorization, or that given the close relationship in the past between counsel and the child it is fair to assume that the child did indeed authorize counsel to proceed with a communication to the Committee.

6.5 In the present case, the Committee must decide whether the author which acted as counsel for the child for part of the domestic proceedings has standing to bring a communication to the Committee on his behalf, regardless of the fact that it has no authorization from the child, his legal guardian or his parents. The Committee notes that the author conceded that it was not authorized to act by the child, his legal guardian or his parents (para.3.5 above). Indeed, the question of instructing the author to submit a communication to the Committee on behalf of the child has not been discussed with the child, his legal guardian or the parents. There is no indication either that the child, who was 12 at the time of the submission of the communication in

2004 and thus likely to be able to give his consent to the presentation of the a complaint, the legal guardian or the parents have, at any time, consented to the author’s acting on behalf of the child.

6.6 The Committee also notes the author’s argument that consent from the child, his legal guardian or his parents could not be obtained because all are under the influence of the alleged perpetrators of the sexual abuse. Nevertheless, the Committee also notes that after receiving the initial submission, it had asked the author to submit a power of attorney from the mother if she has regained parental authority or, if the child still has a legal guardian, to at least indicate consent to the examination of the case. On 14 January 2005, the author explained that it was unable to provide such a power of attorney or agreement for the reasons already spelt out above. There is no indication that the author has sought to obtain informal consent from the child, with whom it is no longer in contact.

6.7 In the absence of express authorization, the author should provide evidence that it has a sufficiently close relationship with the child to justify it acting without such authorization. The Committee notes that the author acted as counsel for the child in the domestic proceedings between January and August 2003 with several interruptions. Since the author ceased to represent the child in the domestic proceedings in August 2003, it has not been in contact with him, his legal guardian or his parents. In such circumstances, the Committee cannot even assume that the child does not object, let alone consent, to the author proceeding with a communication to the Committee. Consequently, notwithstanding that the Committee is gravely disturbed by the evidence in this case, it is precluded by the provisions of the Optional Protocol from considering the matter since the author has not shown that it may act on the victim’s behalf in submitting this communication.

7. Accordingly, the Committee decides:

- (a) That the communication is inadmissible under article 1 of the Optional Protocol;
- (b) That this decision be transmitted to the State party and to the author.

¹³ Communication No. 772/1997, *Y. v. Australia*, Inadmissibility decision adopted on 17 July 2000, para. 6.3.

¹⁴ See communication No. 417/1990, *Balaguer Santacana v. Spain*, Views adopted on 15 July 1994, paras. 6.1 and 9.2; communication No. 901/1009, *Laing v. Australia*, Inadmissibility decision adopted on 9 July 2004, para. 7.3.

Communication No. 1424/2005

Submitted by: Armand Anton (represented by counsel, Alan Garay)

Alleged victim: The author

State party: Algeria

Declared inadmissible: 1 November 2006

Subject matter: Dispossession of property following the declaration of independence of the State party

Procedural issues: Inadmissibility *ratione temporis*, inadmissibility *ratione materiae*

Substantive issues: Right of peoples to dispose freely of their natural wealth and resources; freedom to choose one's residence; arbitrary or illegal interference, together with slander and prejudice to reputation; violation of minority rights; discrimination with respect to dispossession and property rights

Articles of the Covenant: 1, 12, 17 and 27; 2, para. 1, and 26, separately or in combination; 26 and 17 in combination; and 5

Articles of the Optional Protocol: 1 and 3

1. The author of the communication, dated 24 November 2004 and supplemented by the comments submitted on 10 January 2005 and 1 September 2005, is Armand Anton.¹ Mr. Anton is a French citizen born at Oran in Algeria on 18 November 1909. He claims to have been the victim of violations by Algeria of articles 1, 12, 17 and 27; article 2, paragraph 1, and article 26, separately or in combination; articles 26 and 17 in combination; and article 5 of the International Covenant on Civil and Political Rights. He is represented by counsel, Alain Garay. The Covenant and the Optional Protocol thereto entered into force for the State party on 12 December 1989. The Special Rapporteur on New Communications and Interim Measures of the Committee decided that the question of admissibility of the communication should be considered separately from the merits.

The facts as presented by the author

2.1 Armand Anton was born and lived in Algeria as a French citizen. There, he set up the companies "Établissements Bastos-Anton" and "Établissements Armand Anton", dealing in spare parts and accessories for cars and tractors, industrial supplies, equipment for cellars and rubber products. In 1956, he became a real estate agent and set up a non-

trading company with the intention of building and putting up for sale two apartment blocks in Oran. The company subsequently purchased several lots in Oran. On 14 July 1962, following the declaration of Algerian independence on 3 July 1962, the author left Algeria for France.

2.2 France adopted legislation providing for compensation for dispossessed French property owners who left the State party following the signing of the "Evian agreements"² by three French ministers and the Algerian representatives on 18 March 1962. Being eligible under the act of 26 December 1961 on the reception and resettlement of French nationals from overseas,³ he filed a petition for the protection of his property in Algeria with the agency responsible for protecting the property and interests of repatriated citizens⁴ on 21 December 1962. On the basis of the ordinance of 12 September 1962,⁵ he filed two powers of attorney with the French authorities authorizing the agency to implement any protective measures that might be required. The first, filed on 4 March 1965 under number 159,232, concerned all the business and office equipment belonging to him. The second, filed on 3 June 1965 under number 172,273/IM, concerned 12 apartments and 10 business premises. Counsel submits that the French authorities ultimately took no protective measures to safeguard the author's property rights.

2.3 The author was also eligible under the Act of 15 July 1970⁶ introducing a national contribution

² See the section entitled "Provisions concerning French citizens of ordinary civil status": "[...] Their property rights will be respected. No measures of dispossession will be taken against them without their being granted fair compensation previously established. They will receive guarantees appropriate to their cultural, linguistic and religious characteristics. [...] A Court of Guarantees, an institution of domestic Algerian law, will be responsible for ensuring that these rights are respected."

³ Act No. 61-1439 of 26 December 1961 on the reception and resettlement of French nationals from overseas.

⁴ Counsel provided copies of letters from 1962 and 1965. The author also wrote to the French Prime Minister on 28 December 1966.

⁵ Ordinance No. 62-1106 of 19 September 1962 establishing an agency responsible for protecting the property and interests of repatriated citizens.

⁶ Act No. 70-632. The compensation was to serve as "an advance on claims against foreign States or beneficiaries of the dispossession" (art. 1), in relation to the expropriation of real property ordered in Algeria prior to 3

¹ Armand Anton died on 12 August 2005. His wife Alice and his children Jacqueline and Martine are maintaining the communication before the Committee as his successors.

towards compensation of dispossessed French property owners. The National Agency for Compensation of French Overseas Nationals (ANIFOM), a French Government institution, assigned the author a case number—34F008811—relating to the property he owned in Algeria. By decision No. 148,099 of 17 June 1977, ANIFOM authorized an advance compensation payment that was considerably lower than the actual value of the property. These measures were taken by France under articles 2⁷ and 12⁸ of Act No. 70-632 of 15 July 1970. Under the acts of 2 January 1978⁹ and 16 July 1987,¹⁰ the author subsequently received additional compensation.

2.4 The intervention by France did not result in the author obtaining fair compensation corresponding to the 1962 value of the confiscated property, even though the State party has been sovereign and independent since 1962. The author recounts the history of the State party's independence and notes that, after the signing of the Evian agreements on 18 March 1962, the State party was unable or unwilling to assume its responsibilities, which include ensuring the safety and protecting the moral and material interests of Algeria's resident populations. In particular, the Evian agreements and the guarantees contained therein were not honoured, although the head of the Algerian delegation had stated that "the Algerian delegation, mandated by the National Council of the Algerian Revolution and on behalf of the Algerian Government, declares its commitment to respect these political and military agreements and to ensure their implementation". Counsel for the author refers, inter alia, to the text of the 1 July 1962 referendum and a work dated 1964¹¹ (*Consultation*), concluding

July 1962 (art. 12). Also see Decree No. 70-1010 of 30 October 1970.

⁷ "Natural persons fulfilling the following conditions are eligible for compensation: (1) they were dispossessed, before 1 June 1970 and as a result of political events, of property mentioned in title II of the present Act and located in a territory previously under the sovereignty, protectorate or trusteeship of France ..."

⁸ "The dispossession mentioned in article 2 must be a consequence of nationalization, confiscation or a similar measure taken in application of a law or regulation or administrative decision, or of measures or circumstances that resulted, de facto or de jure, in the loss of possession and use of the property. The expropriation of real property ordered in Algeria prior to 3 July 1962 ... falls within the meaning of dispossession as described above, if no compensation was awarded."

⁹ Act No. 78-1 of 2 January 1978 on compensation of French nationals repatriated from overseas dispossessed of their property.

¹⁰ Act No. 87-549 of 16 July 1987, which aimed at a final settlement of all cases of lost or "confiscated" overseas property.

¹¹ *Consultation sur les droits des français atteints en Algérie par des mesures de dépossession*, G. Vedel, R.W.

that, as a result of the referendum, the Evian declarations assumed the status of a treaty under international law.

2.5 With regard to the measures taken by the State party concerning the property of persons who had left its territory, counsel distinguishes several periods, based on the analysis contained in *Consultation*. During the first period, from July to September 1962, the dispossessions had no legal basis. They were isolated acts of individuals, groups of individuals, or even local authorities without a mandate, which elicited no clear response from the State party. Later, the ordinance of 24 August 1962¹² governed the fate of vacant properties (not used, occupied or enjoyed by their legal owner for at least two months), placing them under prefectural administration. The ordinance was intended to protect the properties and preserve the owners' rights. In most cases, what it did was to provide a legal justification for the current state of affairs and perpetuate it, thus encouraging further dispossessions, with decisions being left to the discretion of prefects without any safeguards or prior formalities and without any effective avenue of redress. However, according to *Consultation* some restitutions were ordered and actually carried out. The decree of 23 October 1962¹³ prohibited and annulled all contracts for the sale of vacant property, including sale and rental agreements concluded abroad after 1 July 1962. The properties affected by such annulments were reclassified as vacant within the meaning of the ordinance of 24 August 1962. The decree of 18 March 1963¹⁴ established conditions and safeguards for declaring property vacant and provided a legal remedy.¹⁵ Those remedies were ineffective, however, since the judges who heard the cases took a long time to deliver their

Thorp, Ch. De Chaisemartin, P. Lacombe, and A. Ghanassia (1 December 1964).

¹² Ordinance No. 62-020 of 24 August 1962 concerning the protection and administration of vacant property

¹³ Decree No. 62-03 of 23 October 1962 regulating the transaction, sale, rental, concession, lease or sublease of movable or immovable property. Agencies were established to collect rent. *Consultation* indicates that, in response to the owners' protests, certain claims were taken to court, the property was declared vacant or requisitioned. It further states that "apparently instructions were given to allow owners residing outside Algeria to appoint representatives to collect their rent and manage the apartment blocks, but they were never implemented".

¹⁴ Decree No. 63-88 of 18 March 1963 governing vacant properties.

¹⁵ Within two months, before the competent interim relief judge of the prefecture in question. According to *Consultation*, "this was a fast, inexpensive procedure that could constitute [...] an effective means of enforcing the recognition of and respect for their rights. But, again, the implementation of the decree fell short of the expectations raised by its content".

decisions, and new provisions virtually removed all judicial guarantees. In fact, the decree of 9 May 1963¹⁶ excluded any possibility of appeal, except through a departmental commission¹⁷ and added to the notion of vacancy the broad notion of public order and social peace, giving the authorities near sovereign powers of discretion. From a procedural point of view, the presiding judges of courts seized of interim relief applications filed under the 18 March 1963 decree declared themselves not competent, since property management now fell under new legislation that did not provide for applying to an interim relief judge. The discretionary appeal commissions provided for in the decree were never set up.

2.6 The author cites *Consultation*, according to which, in the absence of time limits on the measures prescribed by these provisions, what was happening was a form of disguised expropriation, even if in strictly legal terms the titular owners did not lose their property rights. *Consultation* also states that the legislation concerning the nationalization of farms (decree of 1 October 1963)¹⁸ was silent on the issue of compensation and that all property belonging to foreigners was transferred to the State,¹⁹ contrary to what was stipulated in the Evian agreements, which prohibited any discrimination and stipulated that fair compensation must be awarded prior to any expropriation. Lastly, counsel submits that Opinion No. 16 Z.F. on the transfer of the proceeds of harvests on properties previously owned by French farmers and nationalized by the decree of 1 October 1963²⁰ was the only compensation officially granted to French nationals who had lost their property. The Opinion provided for the payment of 10 million old francs as social compensation to be distributed among market gardeners and growers. However, negotiations concerning vacant property were

¹⁶ Decree No. 63-168 of 9 May 1963 concerning the placement under State protection of movable and immovable property whose acquisition, management, development or use might undermine public order or social peace provided that prefectural decisions placing the property under State protection could only be appealed within one month, before a departmental commission. All previous provisions not in conformity with the decree were repealed.

¹⁷ Established by Decree No. 63-222 of 28 June 1963 regulating appeal against prefectural decisions placing certain properties under State protection. Appeals could be filed with the prefect, who would transmit the application to a departmental and, subsequently, to a national commission set up within the Ministry of the Interior.

¹⁸ Decree No. 63-388 of 1 October 1963 declaring farms belonging to certain natural or legal persons State property.

¹⁹ While there was no transfer of vacant property. According to *Consultation*, six economic sectors were in effect nationalized.

²⁰ Opinion published in the *Official Journal* of the Algerian Republic for 17 March 1964.

unsuccessful.²¹ On 21 December 1962, the author contacted the Directorate of the Centre for Counselling and Rehabilitation of Repatriated Persons in Algiers to obtain information on the steps to be taken to protect his property.

The complaint

3.1 The author complained of violations of six different kinds: (a) deprivation of property and means of subsistence of the French minority through expropriation (art. 1 of the Covenant); (b) loss of the right to choose one's residence freely in Algeria (art. 12); (c) unlawful interference with the applicants' home in Algeria, together with attacks on their honour and reputation (art. 17); (d) violation of the applicants' rights as members of a minority group with a distinct culture (art. 27); (e) discriminatory measures constituting a violation of rights involving differential and unjustified treatment by the State with respect to dispossession of property (arts. 2, para. 1, and 26 separately or in combination and arts. 17 and 26 in combination); and (f) discrimination in respect of the author's property rights (art. 5). The author considers that rights of individuals acquired under the predecessor State must be safeguarded by the successor State, that that principle is part of general international law²² and that the failure to recognize the principle of acquired rights entails the international responsibility of States.²³ In practice, the State party should have upheld and protected the property rights of French nationals repatriated from Algeria, which was not the case.

3.2 In respect of the exhaustion of domestic remedies, the author is of the view that these avenues of recourse have no prospect of success. First, the failure to set up the Court of Guarantees provided for in the Evian agreements has resulted in a procedural deadlock, where it should have ordered investigations, annulled laws incompatible with the Declaration of Guarantees and ruled on all compensation measures. Second, under the regulations authorizing dispossession, certain avenues of redress were opened, but other decrees closed them (see above, para. 2.5). The author refers to a note by the Secretary-General of the

²¹ Decree No. 63-64 of 18 February 1963 fixing compensation for the occupation of residential business premises considered vacant explicitly provided that the owners of vacant property would receive no compensation and deferred consideration of their rights to later provisions.

²² Counsel cites the Permanent Court of International Justice cases *German Settlers in Poland*, Advisory Opinion of 10 September 1923, *P.C.I.J., Series B, No. 6*, pp. 15 and 36; *Certain German Interests in Polish Upper Silesia*, Judgement of 25 May 1926, *P.C.I.J., Series A, No. 7*, pp. 20-21.

²³ Counsel cites the Permanent Court's Judgement of 26 July 1927 in the *Factory at Chorzów* case, *P.C.I.J., Series A, No. 9*, pp. 27-28.

Government of the State party dated 11 March 1964 stating that in adopting the decree of 9 May 1963, “the Government was motivated by the desire to prevent further submission of cases to the courts”, and points out that the departmental commissions therefore limited themselves to hearing the case and issuing an opinion, leaving the final decision to the national commission chaired by the Minister of the Interior. However, this commission was never set up. He also considers that, while avenues of redress do exist (administrative tribunals in the case of farms, for example), their chance of being successful on the merits is negligible.

3.3 *Consultation* indicates that the following remedies were available to the injured owners in theory. First, they could file in the Supreme Court:²⁴ (1) annulment proceedings in respect of the decrees introducing the vacant property regime, the decree of 9 May 1963 and that of 1 October 1963; (2) an appeal against the decisions of the national commission ruling on appeals against measures enforcing the decree of 9 May 1963; (3) an appeal against prefectural decisions taken in application of the decree of 1 October 1963; (4) an appeal against decisions declaring property vacant; (5) an application for judicial review of appeals court judgements rendered under the procedure established by article 7 of the decree of 18 March 1963; or (6) an application for judicial review when the seizure of property is the result of an administrative act. Second, it was possible to appeal to an interim relief judge against possible future decisions declaring property vacant. Lastly, an administrative appeal could be filed with the commissions established by the decree of 9 May 1963 against decisions placing property under State protection or declaring property vacant. Three proceedings were instituted before the president of the Court of Major Jurisdiction of Algiers by virtue of the decree of 18 March 1963²⁵ and were successful in that the Court either declared the decisions null and void or ordered surveys that found the property not to be vacant. Encouraged by these three orders, many other proceedings were instituted, but the favourable judgements could not be implemented. The appeals filed by virtue of the decree of 9 May 1963 never led to a result, because the commissions were never set up. Two decisions were rendered in May 1964 setting aside the order of the president of the Court of Algiers and affirming that the interim relief judge remained competent to hear disputes under the 18 March 1963 decree. Two appeals were also filed with the Court of

²⁴ Established by Act No. 63-218 of 18 June 1963.

²⁵ However, the decrees nationalizing agricultural property, tobacco plantations, flour mills, semolina factories, transport firms, cinemas, etc., did not provide for any amicable settlement procedure or litigation. Only administrative appeals were possible.

Constantine, but decisions have not yet been rendered.

3.4 Thus, according to *Consultation*, all possible proceedings were instituted. Either the Algerian courts declared themselves not competent (lack of remedy owing to refusal to render judgement); or they referred the case to the administrative commission provided for by the decree of 9 May 1963, which was never set up (again, lack of remedy owing to refusal to render judgement); or they granted the appeal, but the decision was not enforced (lack of remedy owing to failure to execute). As for appeals to the Supreme Court, *Consultation* concludes that, while possible, in practice applications for judicial review of administrative decisions stand little chance of success.²⁶ Counsel submits that, since no French citizen exiled from Algeria has obtained satisfaction for the dispossession suffered, the burden of proof is on the State party.²⁷ The author has demonstrated that domestic remedies have no prospects of success.²⁸

3.5 In view of the impossibility of obtaining justice in the State party, a number of French citizens exiled from Algeria turned to France. The Council of State rejected 74 appeals on 25 November 1988, 17 February 1999 and 7 April 1999 (cases *Teytaud and others*).²⁹ They subsequently turned to the European Court of Human Rights,³⁰ which found that “the applicants were dispossessed of their property by the Algerian State, which is not a party to the Convention”.

3.6 With regard to the admissibility of the communication, the author argues that it was submitted by an individual who, when violation of the Covenant first occurred, was subject to the State

²⁶ It mentions a range of legal arguments that could have been used.

²⁷ He cites communication No. 4/1977, *William Torres Ramirez v. Uruguay*, Views adopted on 23 July 1980, para. 9.

²⁸ He cites communication No. 84/1981, *Hugo Gilmet Dermit v. Uruguay*, Views adopted on 21 October 1982, para. 9.4; and communications Nos. 221/1987 and 323/1988, *Cadoret and Le Bihan v. France*, Views adopted on 11 April 1991, para. 5.1.

²⁹ With regard to an appeal filed against the decisions rendered on 11 July 1996 by the Administrative Appeal Court of Paris, the Council of State ruled on 17 February 1999 that the French State was not responsible, since the Evian agreements “included no clauses or promises guaranteeing French citizens residing in Algeria that in case they were deprived of their property by the Algerian State, the French Government would compensate them for their loss”.

³⁰ See applications Nos. 48754/99 and 49721/99; Nos. 49720/99 and 49723/99; Nos. 49724-25/99 and 49729/99; 49726/99 and 49728/99; 49727/99 and 49730/99, *Teytaud and others v. France*, inadmissibility decision of 25 January 2001; and applications Nos. 52240/99 to 52296/99, *Amsellem and others v. France*, inadmissibility decision of 10 July 2001.

party's jurisdiction,³¹ that he is personally the victim of violations that have continued since 1962; and that the matter has not been submitted to another procedure of international investigation or settlement. With regard to the Committee's jurisdiction *ratione temporis*, counsel considers that the effects of the alleged violations of the rights enshrined in the Covenant are continuing and lasting. While the Committee in principle has no jurisdiction *ratione temporis* over acts of a State party prior to its ratification of the Optional Protocol, the Committee becomes competent if the acts in question continue to have effects after the entry into force of the Optional Protocol and continue to violate the Covenant or have effects which in themselves constitute a violation of the Covenant.³² This view has also been upheld by the International Law Commission.³³

3.7 With regard to the fact that the author had to wait until 2004 to submit his case to the Committee, counsel notes that article 3 of the Optional Protocol declares inadmissible "any communication ... which it considers to be an abuse of the right of submission of such communications". According to counsel, since the Covenant and the Optional Protocol set no time limits on submission, and that, in keeping with Committee jurisprudence,³⁴ the author provides explanations to justify the delay, the submission of the communications in 2004 in no way constitutes an abuse of the right of submission. In the first place, the appeals submitted to domestic courts in Algeria since 1962 have been unsuccessful. Second, Algeria

³¹ He cites communication No. 409/1990, *E.M.E.H. v. France*, Views adopted on 2 November 1990, para. 3.2; and communication No. 74/1980, *Miguel Angel Estrella v. Uruguay*, Views adopted on 29 March 1983.

³² Citing communication No. 24/1977, *Sandra Lovelace v. Canada*, Views adopted on 30 July 1981, para. 7.3; communication No. 28/1978, *Weinberger Weisz v. Uruguay*, Views adopted on 29 October 1980, para. 6; communication No. 30/1978, *Bleier v. Uruguay*, Views adopted on 29 March 1982, para. 7; communication No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983; communication No. 196/1985, *Gueye v. France*, Views adopted on 3 April 1989, para. 5.3; and communication No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996.

³³ Article 25.

³⁴ He refers to communication No. 787/1997, *Gobin v. Mauritius*, decision on admissibility adopted on 16 July 2001, relating to a five-year delay (the facts dating from 1991 and the communication being submitted in 1996), in which the Committee ruled that "there are no fixed time limits for submission of communications under the Optional Protocol and that the mere delay in submission does not in itself constitute an abuse of the right of communication. However, in certain circumstances, the Committee expects a reasonable explanation justifying a delay. In the absence of such explanation, the Committee is of the opinion that submitting the communication after such a time lapse should be regarded as an abuse of the right of submission, which renders the communication inadmissible".

only ratified the Covenant and its Optional Protocol in 1989. Third, as a result, the author and the French citizens exiled from Algeria, as French nationals and for reasons of nationality and culture, naturally turned to their national authorities in France, rather than addressing a foreign State. Fourth, the recourse to French and European proceedings (from 1970 to 2001) explains the time elapsed between 1962 and 2004. Fifth, in August 2001 the French citizens exiled from Algeria were informed that all remedies had been exhausted,³⁵ which explains the delay between September 2001 and January 2004, when counsel was asked to look into the case and submit it to the Committee. Sixth, on 5 December 2002 the French President proclaimed the adoption of a fourth piece of legislation providing for national contributions in favour of the repatriated French, which raised hopes for a definitive and comprehensive solution. However, bill No. 1499 of 10 March 2004 did not include a reparation mechanism to ensure compensation for confiscated property. Lastly, counsel refers to the Committee's jurisprudence concerning statutes of limitations in respect of contentious cases: "Further, with regard to time limits, whereas a statute of limitations may be objective and even reasonable *in abstracto*, the Committee cannot accept such a deadline for submitting restitution claims in the case of the authors, since under the explicit terms of the law they were excluded from the restitution scheme from the outset."³⁶ For the Committee, the impossibility of exercising remedy is sufficient to declare the proceedings admissible from the standpoint of time.

3.8 With respect to the alleged violation of article 1, paragraph 2, of the Covenant, the author claims to be an individual victim of a series of serious infringements of the exercise of a collective right: the right of French citizens exiled from Algeria. It is only because of his belonging to this community that he suffered serious infringement of his individual exercise of collective rights, in particular the inability to dispose freely of his natural wealth and resources, including the right to own property and the right to work.

3.9 With regard to the alleged violation of article 12, counsel considers that the conditions of the flight from Algeria are comparable to exile.³⁷ As a result

³⁵ He provides a letter of 20 August 2001 from the former counsel addressed to Mr. Esclapez informing him of the decision of the European Court of Human Rights not to admit the claims in the case of *Amsellem and others v. France*, which was subsequently transmitted to the 57 applicants on 27 August 2001, and which expresses the view that "these decisions put a definite end to all the proceedings instituted".

³⁶ Communication No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, para. 5.9.

³⁷ He refers to the first draft of article 12, which contained the expression "No one shall be subjected to arbitrary

of Algerian legislation on vacant property and confiscations, the author was unable to take up residence in Algeria or remain there. He was unable to choose his residence freely and yet was never officially notified of any restrictions of the kind provided for in article 12, paragraph 3. The author's deprivation of the freedom to choose his residence was incompatible with the rights enshrined in the Covenant.

3.10 With regard to the allegation of violation of article 17, the author submits that the dispossession measures never took legal form.³⁸ The regime instituted by the Algerian State derogated from the principle of lawfulness within the meaning of article 17. The interference with the privacy, family and home of the author had no basis in Algerian law. The State had no legal authority to proceed as it did purely through administrative regulations, and did not provide any legal protection that would have prevented his flight, emigration and exile.³⁹

3.11 On the allegation of violation of article 27, the author identifies himself as a member of a minority whose right to enjoy his own culture, in community with the other members of his group, was destroyed in 1962. General comment No. 23⁴⁰ states that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources" (para. 7) and that "protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole" (para. 9). The question of the legal treatment of the members of the French minority in Algeria before and after 19 March 1962 has never been resolved in practice regarding the exercise of their cultural rights. The author has been deprived of his rights as a result of the lack of effective guarantees for the French minority; having been forced into exile, his right to access his native culture and language in Algeria has been interfered with, within the meaning of *Lovelace*.⁴¹

3.12 On the allegation of violation of articles 2, paragraph 1, and 26, separately or in combination, and of articles 26 and 17 in combination, counsel recalls that the Committee has established a direct correlation between articles 26 and 2. The exercise of rights recognized in the Covenant should be

exile". *Official Records of the General Assembly, tenth session* (1955), annexes, document A/2929, p. 38, para. 50.

³⁸ See general comment No. 16, paras. 2 and 3.

³⁹ See communication No. 760/1997, *Rehoboth Baster Community v. Namibia*, Views adopted on 25 July 2000.

⁴⁰ General comment No. 23, 8 April 1994.

⁴¹ Communication No. 24/1977, *Lovelace v. Canada*, Views adopted on 30 July 1981, para. 15.

protected from discrimination, in other words, without distinction on the basis of different status or situation. Protection under article 26 is autonomous in nature, and "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant".⁴² The author is a victim in this particular case of the continuing confiscation of his property, based on discriminatory legislation that has impeded the exercise of his property rights without any objective, reasonable justification. The Committee has stated that "confiscation of private property or the failure by a State party to pay compensation for such confiscation could still entail a breach of the Covenant if the relevant act or omission was based on discriminatory grounds in violation of article 26 of the Covenant".⁴³ The Algerian act of 26 July 1963⁴⁴ concerning confiscated property established the general principle of selectively and discriminatorily declaring property that had belonged to the "agents of colonization" to be State property. Under certain conditions, nationalized property was then returned, solely to the benefit of "individuals of Algerian nationality"⁴⁵ whose land had been nationalized, contrary to the guarantees under the Covenant and the Committee's jurisprudence.⁴⁶

3.13 Moreover, the compensation mechanism of 17 March 1964⁴⁷ exclusively benefits one particular population group (farmers), thus constituting discrimination of which the author is a victim. The mechanism established an arbitrary distinction in treatment that benefited farmers alone with no justification: the obligation to compensate without discrimination is the corollary of the right to nationalize.⁴⁸ The Committee has on other occasions

⁴² See general comment No. 18, para. 13.

⁴³ Communication No. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, para. 11.3.

⁴⁴ Act No. 63-276 of 26 July 1963 concerning property confiscated and retention by the colonial administration.

⁴⁵ Article 3, Ordinance No. 95-26 of 30 Rabi' al-thani 1416, corresponding to 25 September 1995, amending and supplementing Act No. 90-25 of 18 November 1990 concerning land planning, with reference to Act No. 62-20 of 24 August 1962.

⁴⁶ Communication No. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995; communication No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996.

⁴⁷ Opinion No. 16 Z.F., published 17 March 1964, solely concerned French farmers whose property had been nationalized, and authorized them to transfer "the proceeds from their wine and cereal harvests after deducting operating costs".

⁴⁸ General Assembly resolution 1803 (XVII) of 14 December 1962, entitled "Declaration on permanent sovereignty over natural resources", para. 4: "the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with

decided that “the confiscations themselves are not here at issue, but rather the denial of a remedy to the authors, whereas other claimants have recovered their properties or received compensation therefor”,⁴⁹ and that “legislation must not discriminate among the victims of the prior confiscations, since all victims are entitled to redress without arbitrary distinctions”.⁵⁰ There was therefore a violation of articles 2, paragraph 1, and 26 of the Covenant, separately or in combination, and of articles 26 and 17 in combination.

3.14 The claimed violation of article 5 of the Covenant stems from the destruction of the author’s rights and freedoms in 1962. According to counsel, the scope of article 5, paragraph 2, also enables him to raise the question of implementation of article 17 of the Universal Declaration of Human Rights. Taking into account the above-mentioned claimed violations, article 5 was also violated.

3.15 As for the mental pain and anguish suffered by the author, counsel maintains that the author’s relocation entailed very serious moral damage based on continuing mental suffering and emotional anguish, together constituting a “confiscation” trauma. This calls for an official recognition by the State party of its responsibility in violating the author’s fundamental rights. Counsel expressly requests the Committee to note that the State party, which is in breach of its obligations under the Covenant and under its domestic legislation, is obliged to remedy this series of violations. In the author’s opinion, satisfaction in this case would constitute an appropriate way of compensating the moral damage. There would be a degree of satisfaction in achieving recognition of the fact that there are good grounds for the communication. He does not, however, lose sight of the need for reparation in the form of just and equitable financial compensation⁵¹ for his confiscated property in Algeria.

State party’s observations

4. In its observations of 17 October 2005, the State party argues that the communication should be declared inadmissible. The facts cited relate to a specific period in Algerian history and pre-date the

international law”. Counsel also refers to article 2 of the Charter of Economic Rights and Duties of States adopted on 12 December 1974 (General Assembly resolution 3281 (XXIX)).

⁴⁹ Communication No. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, para. 11.4.

⁵⁰ Para. 11.6. See also communication No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996; and communication No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, para. 5.8.

⁵¹ See communication No. 747/1997, *Des Fours v. Czech Republic*, Views adopted on 30 October 2001, para. 9.2.

adoption of the Covenant (December 1966) and its entry into force (March 1976). Furthermore, the State party became a party to the Covenant only when it ratified it on 12 December 1989. Moreover, according to the rules of procedure, referral to the Committee is only permissible once domestic remedies have been exhausted. This appears not to have been the case for the author who, as a French national, should first address the competent authorities in his own country.

Additional comments by the parties

5.1 In a letter dated 10 January 2006, counsel refers to his previous explanations for the delay in submission of the communication. Owing to the institution of compensatory measures in France, the author believed that the State party was not legally liable for the confiscation. The principle according to which certain factual situations suspend limitation for an action for compensation is recognized in international law. As for the State party’s argument regarding the “specific period in Algerian history”, counsel fails to understand how this reference to history demonstrates the inadmissibility of the communication and asks the State party to explain its remark so that he can respond. The State party does not challenge his repeated affirmation of the continuing effect of the claimed violations⁵² after the entry into force of the Covenant owing to the fact that the State party, contrary to the Evian agreements and domestic law, has not established the Court of Guarantees.

5.2 Regarding exhaustion of domestic remedies, the author reiterates that adequate and effective domestic remedies have never been available to him in Algeria. He recalls the position of the Algerian authorities—which is well known and has been vehemently asserted since the dispossession—which is either to eliminate the legal remedies or not to see them through so that the violations come to an end. The author is not obliged to pursue remedies, given that no French person from Algeria has obtained satisfaction for dispossession.⁵³ In its reply, the State party provides no solution or conclusion to the technical and legal questions raised by the author. As for the State party’s argument that the author should seek redress in his own country (France) regarding a dispute over Algerian Government measures, counsel questions why the author should be obliged to involve France. Counsel refers to his exchange of correspondence with various French authorities in 2005, indicating that the highest French public

⁵² Referring to communication No. 196/1985, *Gueye v. France*, Views adopted on 3 April 1989; communication No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996 (para. 6.3); and communication No. 6/1977, *Sequeira v. Uruguay*, Views adopted on 29 July 1980.

⁵³ Communication No. 4/1977, *William Torres Ramírez v. Uruguay*, Views adopted on 23 July 1980, para. 9.

authorities have barred proceedings. The author explicitly requests that the State party indicate the avenues of recourse available to him in Algeria so that he can satisfy the alleged obligation to have exhausted them.

6.1 In its observations of 3 April 2006, the State party maintains that the communication constitutes a serious violation of international law in that it calls into question the principle of decolonization. The communication is motivated by the definitive loss of the author's residence and property in Algeria, which were guaranteed and protected by the provisions of the Covenant. While the author maintains that domestic remedies have no prospect of success and are therefore unavailable, the Covenant did not enter into force until 23 March 1976 and was not ratified by the State party until 12 December 1989, which was 27 years after the French had voluntarily left Algeria. The Committee cannot therefore admit a retroactive application, since the events on which this communication is based took place in July 1962. The non-retroactivity principle is generally applicable to all international legal instruments, which can only be implemented with respect to events that took place after their entry into force. Moreover, article 28 of the 1969 Vienna Convention on the Law of Treaties codifies international practice as follows: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

6.2 Subsidiarily, the State party argues that it is clear from the communication that the author, far from exhausting the remedies available to him, did not even try to use any of the mechanisms set up by the Evian agreements (Declaration of Principles concerning Economic and Financial Cooperation, articles 12⁵⁴ and 13) or the remedies available through Algerian administrative agencies and courts. The author left Algeria of his own free will, based on an assessment of the situation that, in the event, proved to be wrong. Many other French nationals made the choice to remain and found that no measures were taken against them by the Algerian authorities and that they were allowed to enjoy quiet possession of their property. Those that abandoned their property left it uncared for, creating a situation dangerous to public order. That being the case, the

⁵⁴ "Algeria shall ensure without any discrimination the free and peaceful enjoyment of patrimonial rights acquired on its territory before self-determination. No one will be deprived of these rights without fair compensation previously determined." (Title IV - Guarantee of acquired rights and previous commitments, United Nations, *Treaty Series*, vol. 507, No. 7395, p. 63.)

Algerian authorities were obliged to find solutions. Moreover, the author has not submitted any document or evidence demonstrating that he has exercised the remedies made available in Algeria since 1962. According to rule 76 [now rule 78] of the rules of procedure of the Committee, the author must show that all domestic remedies have been exhausted in order for a communication to be considered. He cannot simply affirm that they are sure to be unsuccessful, ineffective and useless, a statement that demonstrates, moreover, an unjustified prejudice against the Algerian system of justice. The State party has never disputed the author's right to bring his case before its courts. Algerian law allows for that possibility, and the Constitution provides for the independence of the judiciary, which in a good many cases has ordered the Algerian State to pay compensation or to annul its acts when they have been judged to be contrary to international conventions or to domestic law. For the above reasons, the communication is inadmissible.

7. In his letter of 15 June 2006, counsel for the author argues that the State party has not responded to his comments with relevant arguments. In its initial observations, the State party took the view that the author should apply to the authorities of his own country, whereas it now says that the author could have recourse to the Algerian courts, without indicating which tribunals, which rights and which jurisprudence would apply. As to the reference to the author's "voluntary" departure from Algeria and the claim that French nationals who remained in Algeria continued to enjoy quiet possession of their property, counsel notes that the State party has adduced no evidence in support of its view of the facts. Lastly, counsel points out that the State party has not replied in detail to his arguments concerning the exhaustion of domestic remedies or the continued violation of the Covenant. With regard to the continued violation, the distinction between a non-recurring illicit act with continuing effects and a continuing illicit act requires a subtle analysis of the facts and the law. The deciding body will have jurisdiction if the dispute between the parties (claims and responses) arises after entry into force, even if the disputed facts or the situation that led to the dispute are of an earlier date. If, however, the reason for the claim (or the source of the dispute) is a set of facts (subject matter) subsequent to the critical date, the deciding body will have jurisdiction even if the illicit nature of the acts lies in the modification of or failure to maintain a situation created earlier. The effect of temporal conditions therefore necessitates a close study of the facts and the law, and the question should be joined to the examination of the merits.

Issues and proceedings before the Committee

8.1 Before considering any claim contained in a communication, the Human Rights Committee must,

in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant on Civil and Political Rights.

8.2 The Committee notes the author's complaint relating to the status of his family's property in 1962 and observes that, irrespective of the fact that those events occurred prior to the entry into force of the Optional Protocol for the State party, the right to property is not protected under the Covenant. Any allegation concerning a violation of the author's right to property per se is thus inadmissible *ratione materiae* under article 3 of the Optional Protocol.⁵⁵

8.3 The author claims that the violations of his rights under articles 1, 12, 17 and 27; articles 2, paragraph 1, and 26, separately or in combination; articles 26 and 17 in combination; and article 5 continued after the entry into force of the Optional Protocol for the State party on 12 December 1989. The State party argues that all the author's claims are inadmissible *ratione temporis*. The Committee considers that it is precluded from examining violations of the provisions of the Covenant that occurred prior to the entry into force of the Protocol for the State party, unless those violations continued after the entry into force of the Protocol.⁵⁶ A continuing violation is to be interpreted as the affirmation, by act or by clear implication, of previous violations by the State party. The measures taken by the State party prior to the entry into force of the Optional Protocol for the State party must continue to produce effects which, in themselves, would constitute a violation of any of the rights established in the articles invoked subsequent to the Protocol's entry into force.⁵⁷ In the present case the Committee notes that the State party has adopted certain laws since the entry into force of the Covenant and the Protocol regarding the restitution of certain property to persons of Algerian nationality. However, the author has not shown that these laws apply to him, since they concern only persons "whose land has been nationalized or who have given their land as a gift under Ordinance No. 71-73 of 8 November 1971" (see para. 2.2).⁵⁸

⁵⁵ See communication No. 566/1993, *I.S. v. Hungary*, Views adopted on 23 July 1996, para. 6.1, and communication No. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, para. 4.3.

⁵⁶ In accordance with its consistent jurisprudence; see communication No. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, para. 4.5, and communication No. 310/1988, *M.T. v. Spain*, decision on admissibility adopted on 11 April 1991, para. 5.2.

⁵⁷ See communication No. 566/1993, *I.S. v. Hungary*, Views adopted on 23 July 1996, para. 6.1.

⁵⁸ See article 3, Ordinance No. 95-26 of 30 Rabi' al-thani 1416, corresponding to 25 September 1995, amending and supplementing Act No. 90-25 of 18 November 1990 concerning land planning, with reference to Ordinance No. 62-20 of 24 August 1962.

The only remaining issue, which might arise under article 17, is whether there are continuing effects by virtue of the State party's failure to compensate the author for the confiscation of his property. The Committee recalls that the mere fact that the author has still not received compensation since the entry into force of the Optional Protocol does not constitute an affirmation of a prior violation.⁵⁹ The claims are therefore inadmissible *ratione temporis*, under article 1 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 1 of the Optional Protocol and article 93, paragraph 3, of the rules of procedure;

(b) That this decision shall be communicated to the State party and to the author, for their information.

APPENDIX

*Individual (concurring) opinion of Committee members
Ms. Elisabeth Palm, Sir Nigel Rodley and Mr. Nisuke
Ando*

Although we are in agreement with the majority's findings in paragraphs 8.2 and 8.3 we are of the opinion that the communication should have been declared inadmissible for abuse of the right of petition and that paragraphs 8.2 and 8.3 should have been replaced by a new paragraph 8.2 drafted as follows:

8.2 The Committee notes the delay of 15 years in this case between the ratification of the Optional Protocol by the State party in 1989 and the submission of the communication in 2004. It observes that there are no explicit time limits for submission of communications under the Optional Protocol. However, in certain circumstances, the Committee is entitled to expect a reasonable explanation justifying such a delay. In the present case, the Committee notes counsel's various arguments which, in his view, explain why the author was forced to wait until 2004 to submit the communication to the Committee (see para. 3.7). With regard to the argument that the State party only ratified the Covenant and the Optional Protocol in 1989, this does not explain why the author did not begin proceedings in the State party at that stage. The Committee notes counsel's arguments relating to the proceedings lodged by other persons in France and before the European Court of Human Rights, which were concluded by inadmissibility decisions in 2001 before the European Court. However, nothing indicates that the author himself lodged any such proceedings in France or before the European Court. The Committee also notes that the author received

⁵⁹ See communication No. 520/1992, *E. and A.K. v. Hungary*, decision on admissibility adopted on 7 April 1994, para. 6.6.

compensation from France in 1977, 1980 and 1988,⁶⁰ and that it is only after becoming aware of bill No. 1499 of 10 March 2004,⁶¹ in France which did not include a reparation mechanism to ensure further compensation for property confiscated in Algeria, that the author decided to file against the State party, not before its domestic courts and administrative agencies, but directly before the Committee. The Committee is of the view that the author could have had recourse against the State party once the latter had acceded to the Covenant and the Optional Protocol, and that the proceedings in France did not prevent him from instituting proceedings against Algeria before the Committee. No convincing explanation has been provided by the author to justify the decision to wait until 2004 in order to submit his communication to the Committee. The Committee considers that submitting the communication after such a delay without a reasonable explanation amounts to an abuse of the right of submission and finds the communication inadmissible under article 3 of the Optional Protocol.⁶²

Finally we want to point out that this communication can be seen as a pilot case as the Committee has received more than 600 similar communications. It is therefore of a special interest to decide on what ground the communication should be declared inadmissible.

Individual (dissenting) opinion of Committee member Ms. Ruth Wedgwood

The author raises a number of claims concerning property that he argues was taken without compensation in the course of his departure from Algeria. In its prior case law, the Human Rights Committee has concluded that the right to property, and the right to prompt, adequate, and effective compensation for any expropriation of property, is not protected as such by the International Covenant on Civil and Political Rights.⁶³ Nonetheless, under the Committee's case law, unwarranted discrimination in a

seizure of property or in the provision of compensation may violate article 26 of the Covenant.⁶⁴ The Human Rights Committee has held, in a notable series of cases, that a State "responsible for the departure" of its citizens, cannot later rely upon the absence of national residency or citizenship as an adequate reason to exclude an affected claimant from a provision for restitution.⁶⁵

On 25 September 1995, the State party in this case adopted a statute to provide restitution to persons "whose land has been nationalized", so long as they are of Algerian nationality (see decision of the Committee, para. 8.3). The author in this case has stated that he was deprived of 12 apartments and 10 business premises after his flight from Algeria. It would appear that these apartments were built on his land. The author also states that he also owned "several lots" in the town of Oran (see decision of the Committee, paras. 2.1 and 2.2). The State party has not disputed these factual claims. Nor has the State party explained how declaring properties to be "vacant" (while rejecting requests for restitution) in order to facilitate their resale is any different in effect or intention from nationalization.

Thus, there would appear to be a possible claim of discrimination in regard to the State party's statutory scheme for restitution, adopted *after* the State party joined the Covenant and the Optional Protocol. In addition, in at least one case, the Committee has deemed the inability to resume a protected residence by virtue of a Government act to have a continuing effect after the date of its adoption.⁶⁶

It is certainly true that situations of historical transition can present real difficulties in addressing individual claims of right. The State party also has faced parlous circumstances in the intervening years. But we ought to address the issues forthrightly, rather than retreating to an admissibility finding based on *ratione temporis* that does not sit comfortably with the rest of our case law.

⁶⁰ Act No. 87-549 of 16 July 1987, which aimed at a final settlement of all cases of lost or confiscated overseas property.

⁶¹ Act No. 2005-158, on national recognition of, and payment to, repatriated French nationals, was adopted on 23 February 2005. Its two main objectives relate to those repatriated and to harkis. As to those persons repatriated, the law aims to repay the amounts which had been deducted from compensation paid in the 1970s to them, and which related to resettlement loans. These loans had been granted to those who wished to start businesses in France. As to the harkis, the law provides for an *allocation de reconnaissance* (gratitude payments).

⁶² See communication No. 787/1997, *Gobin v. Mauritius*, decision on admissibility adopted on 16 July 2001, para. 6.3, and communication No. 1434/2005, *Fillacier v. France*, decision on admissibility adopted on 27 March 2006, para. 4.3.

⁶³ See communications Nos. 520/1992, *E. and A.K. v. Hungary*, para. 6.6, and 275/1988, *S.E. v. Argentina*.

⁶⁴ See communications Nos. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995; 586/1994, *Adam v. Czech Republic*; 857/1999 *Blazek et al. v. Czech Republic*; and 747/1997 *Des Four Walderode v. Czech Republic*.

⁶⁵ See communication No. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, para. 11.6.

⁶⁶ See communication No. 24/1977, *Lovelace v. Canada*, Views adopted on 30 July 1981, para. 13.1.

Communication No. 1434/2005

Submitted by: Claude Fillacier (represented by counsel)

Alleged victim: The author

State party: France

Declared inadmissible: 27 March 2006

Subject matter: Reincorporation in the French public service following transfer from Algeria, request for compensation

Procedural issues: Abuse of the right of submission, State party's reservation

Substantive issues: Equal access to public employment

Articles of the Covenant: 2; 25, para. (c); and 26

Articles of the Optional Protocol: 3 and 5, para. 2 (a)

1. The author of the communication, dated 24 October 2005, is Claude Fillacier, a French citizen born at Bône in Algeria on 3 March 1927. He claims to have been a victim of violations by France of articles 2, 25 (c) and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel, Alain Garay. The Optional Protocol entered into force for France on 17 May 1984.

The facts as presented by the author

2.1 Between October 1953 and March 1963, the author occupied a variety of senior administrative posts in a number of social agencies in Algeria, during the period when it was part of France. From June 1960 onwards, he was simultaneously Deputy Director of the "Bône Assurances Sociales" regional mutual social insurance fund for farmers and Deputy Director of the "Bône-Assurance" regional mutual insurance fund for farmers.

2.2 The author left Algeria for France in March 1963, following decolonization. On 5 March 1963, he asked to be placed in an equivalent post in a similar social insurance agency for farmers in France. This request was based on article 2 of decree No. 62-941 of 9 August 1962 relating to conditions for the placement of permanent French personnel of the agencies listed in article 3 of order No. 62-401 of 11 April 1962 relating to conditions for the incorporation in the public service in metropolitan France of officials and agents of the public service in Algeria and the Sahara.

2.3 By letter of 11 May 1963, the French Ministry of Agriculture informed the author that he could not be placed because of his "shared" employment between the "Bône Assurances Sociales" regional mutual social insurance fund for farmers, which administered a legally obligatory insurance scheme,

and the "Bône-Assurance" regional mutual insurance fund for farmers, a body not covered by order No. 62-401 of 11 April 1962. The author replied in a letter dated 11 July 1963. The Minister confirmed his decision by letter dated 29 July 1963.

2.4 The author endeavoured unsuccessfully to secure placement from various authorities. Eventually he lodged with the Administrative Court in Toulouse applications for placement and compensation for injury resulting from failure to place him in the corresponding grade in metropolitan France. His applications were denied on 27 June 1986. The author then appealed. On 8 June 1990 the Council of State upheld the ruling of the Toulouse Administrative Court. On 7 January 2004, the author brought the matter to the attention of the European Court of Human Rights, which on 9 November 2004 declared his application to be inadmissible on grounds of late submission.

The complaint

3.1 The author states that his complaint was not "examined" by the European Court of Human Rights because his application was declared inadmissible on purely procedural grounds. He considers that the State party's reservation does not apply to his case. The author goes so far as to challenge the lawfulness of the reservation, which he says infringes the principle of access to justice.

3.2 Although his communication relates to events which took place before the State party ratified the Optional Protocol, the author considers that the Human Rights Committee becomes competent if, after the entry into force of the Optional Protocol, the acts in question continue to produce consequences which themselves constitute violations of the Covenant.¹ He also points out that his application is admissible since the Covenant and the Optional Protocol lay down no deadline for the submission of communications.

3.3 The author considers that the French authorities failed to guarantee or protect the rights enumerated in article 25, paragraph (c), taken together with articles 2 and 26 of the Covenant, thereby fundamentally infringing his right to employment and exercising discrimination based on his circumstances and his nationality. He considers that he suffered discrimination as compared with

¹ See *Lovelace v. Canada*, communication No. 24/1977, Views adopted on 30 July 1981, para. 7.3.

other officials who at that time were simultaneously performing corresponding and identical functions in metropolitan France, in the Mutualité Agricole.² He cites the Human Rights Committee's general comment No. 25 (57), which states that "to ensure access on general terms of equality, the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable". Consequently, the author considers that the criteria used to draw a distinction in his case, namely the nature of the performance of a management function within the regional mutual social insurance fund for farmers, as interpreted by the State party, clearly underlie a difference in treatment which is not based on an objective and reasonable criterion.

3.4 Concerning the exhaustion of domestic remedies, the author states that, following the ruling handed down by the Council of State on 8 June 1990, no further domestic remedies are available to him.

3.5 The author requests the Committee to rule on the granting of just satisfaction to the author, who has suffered serious injury owing to the failures of the French administration. He also asks that the State party should be ordered to pay him the costs he incurred when bringing actions in the French courts.

Issues and proceedings before the Committee

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

4.2 In accordance with article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that a similar complaint lodged by the author was declared inadmissible on grounds of late submission by the European Court of Human Rights on 18 November 2004 (application No. 2188/04). The Committee also points out that at the time of its

accession to the Optional Protocol, the State party entered a reservation with regard to article 5, paragraph 2 (a), of the Optional Protocol indicating that the Committee shall not have competence to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement. However, the Committee finds that the European Court did not "examine" the case in the meaning of article 5, paragraph 2 (a), of the Optional Protocol in so far as its ruling dealt only with a question of procedure. Consequently, no issue arises with regard to article 5, paragraph 2 (a), of the Optional Protocol, as interpreted in the light of the State party's reservation.

4.3 The Committee notes the delay of 15 years in this case and observes that there are no explicit time limits for submission of communications under the Optional Protocol. However, in certain circumstances, the Committee is entitled to expect a reasonable explanation justifying such a delay. In the present case, the Council of State handed down its ruling on 8 June 1990, over 15 years before the communication was submitted to the Committee, but no convincing explanation has been provided to account for such a delay. In the absence of an explanation, the Committee considers that submitting the communication after such a long delay amounts to an abuse of the right of submission, and finds the communication inadmissible under article 3 of the Optional Protocol³ and rule 93 (3) of the rules of procedure.

5. Consequently, the Human Rights Committee decides:

(a) That the communication is inadmissible under article 3 of the Optional Protocol and rule 93 (3) of the rules of procedure;

(b) That this decision shall be communicated to the State party and the author for information.

² See *Gueye v. France*, communication No. 196/1985, Views adopted on 3 April 1989, para. 9.5.

³ See *Gobin v. Mauritius*, communication No. 787/1997, decision on admissibility adopted on 16 July 2001, para. 6.3.

Communication No. 1452/2006

Submitted by: Mr. Renatus J. Chytil (not represented)

Alleged victim: The author

State party: The Czech Republic

Declared inadmissible: 24 July 2007

Subject matter: Discrimination on the basis of citizenship with respect to restitution of property

Procedural issues: Abuse of right of submission

Substantive issues: Equality before the law; equal protection of the law

Article of the Covenant: 26

Article of the Optional Protocol: 3

1. The author of the communication is Mr. Renatus J. Chytil, born in 1925 in the former Czechoslovakia. He claims to be a victim of violations by the Czech Republic of his rights under article 26 of the International Covenant on Civil and Political Rights.¹ He is not represented by counsel.

The facts as presented by the author

2.1 On 13 June 1948, the author escaped from Czechoslovakia. He was recognized as a political refugee in Germany, before emigrating to the United States of America, where he acquired United States citizenship in 1957, thereby losing his Czech citizenship pursuant to a bilateral treaty, the 1928 Naturalization Treaty.² In 1948, the Czechoslovak authorities confiscated his law certificates and professional degree allowing him to practise law. According to the author, the following property was confiscated over time by the Czechoslovak authorities:

- The Vonmiller textile mill at Zamberk, East Bohemia, confiscated in 1945, which was subsequently privatized in 1995;
- About 1,500 kg of gold coins and bars. The author claims that the gold which was confiscated by the Nazis during World War II was recovered in Germany, and taken and stored in the United States. The author further claims that his family gold was commingled

with 18.4 metric tons of the Czech gold labelled as 'monetary restitution gold', and shipped by the United States Government to the regime in Prague in February 1982. The author did not receive compensation from the United States Government;

- The Chytil family villa in 1983, while the author's mother and sister were visiting him in California. Both subsequently obtained political asylum in the United States;
- The LITAS construction businesses, nationalized and confiscated in 1948; and
- Other land, buildings and investments.

2.2 In 1990, pursuant to Act 119/1990, the author's doctorate and professional certificate of *magister juris* were returned to him. He made a statement on 19 January 1994 before the constitutional committee of the Czech parliament. He also sought restitution of the family's former property and gold by lodging a complaint before the Czech Constitutional Court for violation of human rights and other matters on 10 June 1994. On 26 November 1995, and according to the author, the Czech Constitutional Court denied him standing on the ground that he was not an entitled person under law, as required by article 3 of the Act No. 87/1991, since he did not meet the continuous nationality criterion. He claims that this decision is final and no appeal is allowed. He tried to pursue his case, which was denied on 4 March 1996 by an assistant judge of the Czech Constitutional Court.

The complaint

3. The author invokes the Committee's jurisprudence against the Czech Republic (communication No. 516/1992, *Simunek et al. v. Czech Republic*, Views adopted on 19 July 1995)³ and recalls that it has found violations of the Covenant in situations similar to his. He claims that the Czech Government's failure to reconstitute his property to him violates article 26 of the Covenant.

¹ The Covenant was ratified by Czechoslovakia in December 1975 and the Optional Protocol in March 1991. The Czech and Slovak Federal Republic ceased to exist on 31 December 1992. On 22 February 1993, the Czech Republic notified its succession to the Covenant and Optional Protocol.

² Treaty of Naturalization, concluded between Czechoslovakia and the United States of America on 16 July 1928 (date of entry into force: 14 November 1929).

³ The author indicates that he was the first to bring the *Simunek* decision of the Committee to the attention of the United States Government in 1996. The author also includes the text of a submission dated 19 March 1999, addressed to the Chairman of the Commission on Security and Cooperation in Europe, which refers to *Simunek*.

The State party's submission on admissibility and merits

4.1 On 11 August 2006, the State party commented on the admissibility and merits of the communication. On the facts, the State party clarifies that the author apparently did not regain Czech citizenship, and that on 18 April 1994, he applied to the Constitutional Court in a submission designated as “an action against the violation of human rights and submittal of a petition for an amendment of the law”. In this submission, he sought the repeal and amendment of certain provisions of Act No. 87/1991 on Extra-Judicial Rehabilitations, the restitution of his property, and compensation for his rights *in rem* and inheritance rights amounting to more than US\$ 50 million. On 29 November 1995, the Constitutional Court dismissed his application, and on 4 March 1996, the Constitutional Court set aside the author's complaint against the 29 November 1995 decision.

4.2 The State party recalls that Section 1 of Act No. 87/1991 applies to the mitigation of certain property and other injustices which arose in the period from 25 February 1948 to 1 January 1990. The Act lays down preconditions for raising claims relating to forfeiture of property and items, as well as the rules governing compensation, and the scope of such claims. Under Section 2, the forfeited property or item is either surrendered, or financial compensation is provided. Pursuant to Section 3, subsection 1, ‘eligible persons’ are those persons who were rehabilitated under Act No. 119/1990, whose property item passed into State ownership in specified instances, provided the person is a Czech or Slovak citizen. The person liable to surrender the property, as defined by Section 4, must surrender the property item upon a request made in writing by the eligible person, who has proved his entitlement to the property item and who has specified how the State came to have the item. If the item is a movable item, the eligible person must also prove where the movable is situated. Section 5, subsection 2, provides that the eligible person must request the liable person to surrender the property item within six months of the entry into force of the Act. If the liable person fails to surrender the property item, the eligible person may bring his claims to a court within one year. Further, Section 8 of the Act specifies that the eligible person has a right to financial compensation if the property item is not surrendered to him. An application in writing for financial compensation must be filed within one year of the entry into force of the Act, or within one year of the day of the judgement whereby the request for surrender of the item was rejected.

4.3 On admissibility, the State party recalls that the author has not proved in any way, whether at the national level or before the Committee, that he

presented his restitution claim to the ‘liable persons’ or, as applicable, to the ordinary courts of the Czech Republic, nor has he shown that he presented the claim within the time limit specified in Section 5 of Act No. 87/1991. Thus, he has clearly failed to exhaust domestic remedies.

4.4 As regards the proceedings before the Constitutional Court, the author deprived himself of the opportunity for the Court to consider, and decide on, his petition. The author's application to the Court of 18 April 1994 suffered from procedural defects that prevented the Court from considering it.⁴ The author did not submit a copy of the decision on the latest remedy provided by the law for the protection of his rights, and omitted to be represented by a lawyer (a requirement before the Constitutional Court). As a result, he was requested by the Constitutional Court, on 22 June 1994, to remedy these defects. In his reply, he merely presented additional reflections *de lege ferenda* on the issue of Czech restitution legislation, and the defects in his petition were not remedied. Therefore, on 29 November 1995, the Constitutional Court dismissed his application.⁵

⁴ The State party explains that Section 30, subsection 1, of Act No. 182/1993 on the Constitutional Court provides that natural and legal persons, as parties or enjoined parties to proceedings before the Constitutional Court, shall be represented by a barrister, or a commercial lawyer, or a notary public. Section 34, subsection 1, of the Act provides that the petition for the initiation of proceedings shall be lodged with the Constitutional Court in writing. The petition must clearly indicate the person lodging the petition, what matter the petition concerns, and what the petition pursues. The petition must also be signed and dated. It should contain an account of the relevant facts and evidence referred to. Section 43, subsection 1, provides that the judge rapporteur shall dismiss the petition in a Resolution, without holding a hearing and without calling the parties, (a) if the petitioner has failed the remedy the defects in his petition within the time limit given to him for this purpose, or (b) if the petition was lodged after the time limit stipulated in the law, [...] (e) if it is a petition for the consideration of which the Constitutional Court has no competence, or (f) if the petition is inadmissible, unless the law stipulates otherwise. Section 72, subsection 2, provides that a constitutional appeal can be lodged within sixty days. This time limit starts running on the day of the last decision on the latest remedy the law provides for the protection of the right, and if there is no such remedy, on the day on which the fact which is the subject matter of the constitutional appeal arose. Section 75, subsection 1, provides that a constitutional appeal is inadmissible if the appellant has not exhausted all procedural remedies provided by the law for the protection of his rights; a petition for the permission to reopen proceedings is not regarded as such remedy.

⁵ The State party provides a translation into English of the Resolution of the Constitutional Court of the Czech Republic, File Ref. II ŮS 62/94-35: the author “failed to lodge his constitutional appeal through a barrister, he failed to prove his membership of the Czech Bar association, and he failed to submit a copy of the decision

4.5 In addition, the author failed first to approach the ‘liable person’ or, as applicable, seize the ordinary courts with his restitution request (see Section 4 and 5 of Act No. 87/1991). Since the Constitutional Court cannot substitute these authorities’ activities in their decision-making powers in restitution claims, it had to dismiss this part of the author’s application in accordance with section 43, subsection 1 (e).⁶ For the same reason, it dismissed the author’s petition for an amendment to Act No. 87/1991, as only Parliament has the power to do so. For these reasons, the author failed to exhaust domestic remedies and the communication is inadmissible in accordance with articles 2 and 5, paragraph 2 (b), of the Optional Protocol.

4.6 Secondly, the State party argues that the author failed to substantiate his claims related to the discriminatory treatment in the decision-making on his restitution claim. He only lists the property items the surrender of which he seeks. However, under Section 5 of Act No. 87/1991, he should support his restitution titles, document his claim to the surrender of the property or the way in which it was taken by the State, and, in the case of movables, he should indicate the place where these items are located. His communication is therefore inadmissible under article 2 of the Optional Protocol.

4.7 Thirdly, the State party considers that the communication is inadmissible on the ground of abuse of the right of submission (article 3 of the Optional Protocol). While the Optional Protocol does not set fixed time limits for submitting a communication, and a mere delay in submission does not itself involve abuse of the right of submission, the State party recalls the jurisprudence of the Committee which expects a reasonable and objectively understandable explanation to such a time lapse.⁷ In the present case, the author submitted

on the latest remedy provided by the law for the protection of his rights”. It appears that the part of the complaint requesting a review of the constitutionality of Act No. 87/1991 were dismissed as proceedings on this matter where already under way (Pl. ÚS 3/94): “the admission of the petition was prevented by the obstacle of litispendence, i.e., a case instigated under Section 35, subsection 2 of the Act on the Constitutional Court [...] it was not possible to accord to the appellant the status of an enjoined party, because in the light of the defects in his petition he could not be regarded as an eligible petitioner”.

⁶ “Decisions on indemnification and restitution are made by the authorities named in Act No. 87/1991 rather than the Constitutional Court, which is called to review the constitutionality of their decision-making” (see translation provided by the State party).

⁷ The State party refers to communication No. 787/1997, *Gobin v. Mauritius*, Inadmissibility decision of 16 July 2001, which the Committee declared inadmissible as the communication had been submitted five years after the alleged violation of the Covenant, holding that the author

his communication to the Committee on 16 January 2006, while the latest domestic decision in the matter is the Constitutional Court’s decision of 4 March 1996. The author does not explain the ten-year delay, and thus the communication is inadmissible for abuse of the right of petition, within the meaning of article 3 of the Optional Protocol.

4.8 On the merits, the State party argues that the communication contains nothing which would indicate any prohibited discrimination against the author. The author has not documented any decision by the national authorities dismissing his restitution claims, which would be at variance with the requirements of article 26, nor is the State party aware of any such decision. According to the information provided, only two decisions were made in this case, namely the Constitutional Court decisions of 29 November 1995 and 4 March 1996. These decisions do not carry any suspicion of prohibited discrimination. Should the author wish to object that Czech restitution legislation requires, *inter alia*, as a precondition for a valid restitution claim, citizenship of the State party, the State party does not contest this fact. However, the existence *per se* of this precondition does not constitute prohibited discrimination against the author. Prohibited discrimination against the author could only occur where the national authorities adopted a decision rejecting his restitution claim on the ground of his failure to meet this precondition.⁸ Here, no such decision has been adopted. The Constitutional Court dismissed the author’s applications solely on the basis of procedural reasons, not on the basis of applying the precondition of citizenship. Therefore, there has been no violation of article 26 of the Covenant.

Author’s comments

5. On 28 February 2007, and in relation to the State party’s claims that he failed to provide documentary evidence on his properties, the author refers to his initial communication and the list of confiscated properties which he provided. The author invokes the *Simunek* decision⁹ in support of his claim that the citizenship issue is discriminatory and incompatible with the requirements of article 26. As to the argument that he did not exhaust domestic remedies, he argues that even if he had been re-naturalized as a Czech citizen,¹⁰ he would breach the

did not provide “convincing explanation” to justify the delay (para. 6.3).

⁸ The State party refers to communication No. 516/1992, *Simunek et al v. Czech Republic*, Views adopted on 19 July 1995.

⁹ Communication No. 516/1992, *Simunek et al v. Czech Republic*, Views adopted on 19 July 1995.

¹⁰ The author claims he never lost Czech citizenship in light of the law of *ius sanguinis*.

State party's requirement of continued nationality. Only Czechoslovak citizens enjoy restitution rights under Act No. 87/1991, and he is not an 'eligible person' under Section 3 of the Act. Although the residency condition was removed by the State party in 1993, the discriminatory citizenship condition remains. Under these conditions, the author, as a United States citizen and not a continuous Czech citizen, has no standing in Czech courts of law and therefore is unable to exhaust domestic remedies. Under the 'entitled person' definition, his rights to a remedy do not exist. In his view, the State party uses procedural rules to block restitution, and therefore breaches the *Simunek* precedent and article 26.¹¹ He concludes that his communication should be declared admissible.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement.

6.2 As to the State party's argument that the submission of the communication to the Committee amounts to an abuse of the right of submission under

article 3 of the Optional Protocol, the Committee notes that the last decision in the file is the decision of the Constitutional Court of 4 March 1996, rejecting the author's request to appeal the previous decision of 29 November 1995. Thus, a period of almost ten years passed before the author submitted his case to the Committee on 16 January 2006. The Committee notes that there are no fixed time limits for submission of communications under the Optional Protocol and that mere delay in submission does not of itself, except in exceptional circumstances, involve an abuse of the right to submit a communication.¹² In this instance, although the State party raised the issue that the delay amounts to an abuse of the right of petition, the author has not explained or justified why he waited for nearly ten years before bringing his claims to the Committee. Taking into account the fact that the *Simunek* decision of this Committee¹³ was rendered in 1995, and that the file indicates that the author was aware of this decision soon thereafter,¹⁴ the Committee thus regards the delay to be so unreasonable and excessive as to amount to an abuse of the right of submission, and declares the communication inadmissible pursuant to article 3 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

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

(b) That this decision shall be communicated to the State party and to the author.

¹¹ The author also refers to article 46 of the 1907 Hague Convention which states that "private property cannot be confiscated".

¹² See communication No. 787/1997, *Gobin v. Mauritius*, Inadmissibility decision of 16 July 2001, para. 6.3, communication No. 1434/2005, *Claude Fillacier v. France*, Inadmissibility decision of 27 March 2006, para. 4.3 and communication No. 1101/2002, *José María Alba Cabriada v. Spain*, Views adopted on 1 November 2004, para. 6.3.

¹³ Communication No. 516/1992, *Simunek et al v. Czech Republic*, Views adopted on 19 July 1995.

¹⁴ See footnote 3.

B. Views under article 5 (4) of the Optional Protocol

Communication No. 812/1998

Submitted by: Raymond Persaud and Rampersaud (not represented by counsel)

Alleged victim: The authors

State party: Guyana

Date of adoption of Views: 21 March 2006

Subject matter: Death row phenomenon, mandatory imposition of the death penalty

Procedural issues: State party's failure to cooperate

Substantive issues: Arbitrary deprivation of life

Articles of the Covenant: 6 and 7

Articles of the Optional Protocol: 2 and 4, para. 2

Finding: Violation (art. 6, para. 1)

1.1 The authors are Raymond Persaud and Rampersaud, nationals of Guyana.¹ Raymond Persaud is currently detained in Georgetown Prisons and awaiting execution. Rampersaud died on 21 August 1998 (of natural causes) and the Committee has received no notification from any of his heirs that his communication is maintained. Although the authors do not invoke any specific provisions of the International Covenant on Civil and Political Rights, the communication appears to raise issues under

¹ The Covenant and the Optional Protocol entered into force for the State party respectively on 15 May 1977 and 10 August 1993. On 5 January 1999, the State party notified the Secretary-General that it had decided to denounce the Optional Protocol with effect from 5 April 1999, that is, subsequent to the initial submission of the communication. On the same date, the State party reaccepted to the Optional Protocol with the following reservation: "[...] Guyana reaccepts to the Optional Protocol to the International Covenant on Civil and Political Rights with a reservation to article 6 thereof with the result that the Human Rights Committee shall not be competent to receive and consider communications from any person who is under sentence of death for the offences of murder and treason in respect of any matter relating to his prosecution, detention, trial, conviction, sentence or execution of the death sentence and any matter connected therewith.

Accepting the principle that States cannot generally use the Optional Protocol as a vehicle to enter reservations to the International Covenant on Civil and Political Rights itself, the Government of Guyana stresses that its reservation to the Optional Protocol in no way detracts from its obligations and engagements under the Covenant, including its undertaking to respect and ensure to all individuals within the territory of Guyana and subject to its jurisdiction the rights recognized in the Covenant (in so far as not already reserved against) as set out in article 2 thereof, as well as its undertaking to report to the Human Rights Committee under the monitoring mechanism established by article 40 thereof."

articles 6 and 7 of the Covenant. The authors are not represented by counsel.

1.2 In accordance with rule 92 (former rule 86) of the Committee's Rules of Procedure, the Committee, through its Special Rapporteur for New Communications, requested the State party on 9 April 1998 not to carry out the death sentence against the authors, to make it possible for the Committee to examine the communication.

The facts as presented by the author

2.1 On 21 January 1986, the authors were arrested for the murder of Bibi Zorina Alli, who was found buried in a shallow grave at the back of the Hollywood Hotel in Rose Hall, Corentyne. They were found guilty of the murder and were sentenced to death on 11 December 1990. The authors appealed and on 25 May 1994, the Court of Appeal confirmed their death sentences. They applied to have their sentences commuted to life sentences, but their application was dismissed on 31 July 1997. They lodged an appeal against this decision, which was dismissed on 25 February 1998.

2.2 On 16 or 17 July 1998, warrants of execution were mistakenly issued and read to the authors, because the Office of the President had not been notified that interim measures had been granted by the Committee. The warrants were withdrawn and the authors subsequently received letters of apology for the mistake.

The complaint

3. The authors claim that their death sentences should be commuted to life sentences as a result of their long delay on death row. By letter received on 14 January 2004 from the brother and sister of the remaining living author, Raymond Persaud, on his behalf, he claims that his remaining on death row is inhumane and that the delay amounts to a violation of his fundamental rights. The communication therefore raises issues under articles 6 and 7 of the Covenant.

Submission by the State party on the admissibility of the communication

4. By letter of 30 June 1998, the State party conceded that the communication was admissible

since the authors had exhausted all available domestic remedies.

State party's failure to cooperate

5. On 14 December 2000, 24 July 2001, 21 October 2003 and 7 July 2004, the State party was requested to submit to the Committee information on the merits of the communication. The Committee notes that this information has not been received; it regrets the State party's failure to provide any information with regard to the substance of the authors' claims. It recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that States parties examine all the allegations brought against them, and that they make available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the authors' allegations, to the extent that these have been properly substantiated.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol and that the authors have exhausted all domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol. In the present case, the Committee further notes that the State party, in its submission of 30 June 1998, does not contest the admissibility of the communication. Accordingly, the Committee proceeds directly with the examination of the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided under article 5, paragraph 1, of the Optional Protocol.

7.2 As regards the issues under article 6 of the Covenant, and basing itself on the examination of the applicable law in Guyana, the Committee presumes that the death sentence was passed automatically by the trial court, once the jury had rendered its verdict that the authors were guilty of murder, in application of section 101 of the Criminal Law (Offences) Act. This provision requires that "Everyone who commits murder shall be guilty of felony and liable to suffer death as a felon", without regard being able to be paid to the defendant's personal circumstances or the circumstances of the particular offence. The Committee refers to its

jurisprudence that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without regard being able to be paid to the defendant's personal circumstances or the circumstances of the particular offence.² It follows that the automatic imposition of the death penalty on the authors violated their rights under article 6, paragraph 1.

7.3 As regards the issues raised under article 7 of the Covenant, the Committee would be prepared to consider that the prolonged detention of the author on death row constitutes a violation of article 7. However, having also found a violation of article 6, paragraph 1, it does not consider it necessary in the present case to review and reconsider its jurisprudence that prolonged detention on death row, in itself and in the absence of other compelling circumstances, does not constitute a violation of article 7.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of article 6, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the remaining living author with an effective remedy, including commutation of his death sentence. The State party is also under an obligation to take measures to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures

² See communication No. 806/1998, *Thompson v. St. Vincent and The Grenadines*, Views adopted on 18 October 2000, para. 8.2; communication No. 845/1998, *Kennedy v. Trinidad and Tobago*, Views adopted on 26 March 2002, para. 7.3; communication No. 1077/2002, *Carpo et al. v. Philippines*, Views adopted on 28 March 2003, para. 8.3; communication No. 1167/2003, *Ramil Rayos v. Philippines*, Views adopted on 27 July 2004, para. 7.2; communication No. 862/1999, *Hussain et al. v. Guyana*, Views adopted on 25 October 2005, para. 6.2; and communication No. 913/2000, *Chan v. Guyana*, Views adopted on 31 October 2005, para. 6.5.

taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

APPENDIX

Dissenting opinion by Committee members Mr. Hipólito Solari-Yrigoyen and Mr. Edwin Johnson

I disagree with the majority view that it is unnecessary in the present case for the Committee to reconsider its jurisprudence, which has, to date, held—wrongly, in my view—that prolonged detention on death row does not, in itself, constitute a violation of article 7 of the Covenant.

Although the Committee has rightly concluded that there has been a violation of article 6, it is my view that, in a case in which the death sentence was imposed, we have

an obligation not to disregard the specific claim by the author that his prolonged stay on death row amounts to a violation of his fundamental rights; and that we are thus bound to rule on the claim.

Consequently, taking into account the circumstances of this case, in which the author of the communication has spent 15 years on death row, I am of the view that this fact alone constitutes cruel, inhuman and degrading treatment and that article 7 of the Covenant has been violated.

Accordingly, the facts before the Committee reveal violations by the State party both of article 6 and of article 7 of the Covenant.

In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including commutation of his death sentence and the possibility of his being granted his freedom.

Communication No. 915/2000

Submitted by: Mrs. Darmon Sultanova (represented by counsel)

Alleged victims: The author, the author's deceased sons, Mr. Uigun and Oibek Ruzmetov, and author's husband, Mr. Sobir Ruzmetov

State party: Uzbekistan

Date of adoption of Views: 30 March 2006

Subject matter: Death sentence after unfair trial, torture, unavailability of habeas corpus, inhuman treatment in custody, violation of the right to privacy.

Substantive issues: Right to life, torture, degrading treatment or punishment, arbitrary detention, right to be brought promptly before a judge/officer authorized by law to exercise judicial power, right to communicate with counsel, right to examine witnesses, interim measures to avoid irreparable damage to the alleged victim, violation of obligations under the Optional Protocol, unlawful interference with one's privacy.

Procedural issues: —

Articles of the Covenant: 2, para. 3; 6; 7; 9; 10, para. 1; 14, paras. 1, 2, 3 (b), (d), (e) and (g); and 17

Articles of the Optional Protocol: 1, 2 and 5, paras. 2 (a) and (b)

Finding: Violation (arts. 2, 3 (b), (d), (e) and (g); 6; 7; 9, paras. 1 and 3; 14, para. 1; and 17)

1.1 The author of the communication is Darmon Sultanova, an Uzbek national born in 1945. She submits the communication on her own behalf, on behalf of her sons, Uigun and Oibek Ruzmetov, also

Uzbek nationals, born in 1970 and 1965 respectively. Her sons were sentenced to death by the Tashkent Regional Court on 24 July 1999 (Uigun) and 29 July 1999 (Oibek). The sentences were upheld on appeal by the Supreme Court of the Republic of Uzbekistan on 20 September 1999. The whereabouts of her sons was unknown at the time of submission of the communication. Mrs. Sultanova also acts on behalf of her husband, Sobir Ruzmetov, an Uzbek national born in 1935, who at the time of submission of the communication was serving a five-year prison term in colony UYA 64/61 in Karshi, Surkhandarya region, pursuant to a judgement handed down by the Khazorasp District Court on 28 May 1999 and upheld on appeal on 2 November 1999 (title of the court not provided). Mrs. Sultanova claims that she is a victim of violations by Uzbekistan of article 9, and in light of her sons' execution, of article 7 of the International Covenant on Civil and Political Rights.¹ She further claims that her sons are the victims of violations by Uzbekistan of articles 7, 9, 14, paragraphs 1, 2, 3 (b), (d), (e) and (g), and in light of their execution, of article 6. She also claims that her husband is a victim of violations of articles 9, 10, paragraph 1, and 14, paragraphs 1, 2, 3 (b), (d), (e) and (g). The author is represented by counsel.

¹ The Optional Protocol entered into force for the State party on 28 September 1995 (accession).

1.2 On 22 February 2000, in accordance with rule 92 (old rule 86) of its rules of procedure, the Human Rights Committee, acting through its Special Rapporteur for New Communications, requested the State party not to carry out the death sentence against Uigun and Oibek Ruzmetov, pending the determination of their case by the Committee. This request for interim measures for protection was reiterated on 17 December 2002. No reply was received from the State party.

1.3 By letter of 14 October 2003, the author informed the Committee that after several inquiries about the whereabouts of her sons to the authorities, she was informed, by letter of the Tashkent Regional Court dated 13 June 2000, that Uigun and Oibek Ruzmetov had been executed on 29 September 1999 (i.e., prior to the receipt of the communication by the Committee).² She indicates, however, that information provided by the Tashkent Regional Court contradicts information which she received on an unspecified date from the Yunusabad District Bureau of the Civilian Registry Office (ZAGS), an agency responsible for maintaining records of the death of individuals, confirming that no official record about the death of Uigun and Oibek Ruzmetov had been received in 1999-2000.

The facts as presented by the author

2.1 At midnight on 28 December 1998, five officers of the Khazorasp prosecutor's office and District Department of Internal Affairs, accompanied by several militiamen, broke into the author's house in Khazorasp. They conducted a thorough search, without any warrant, in the presence of two witnesses. In response to the author's request to be served a search warrant, an officer of the Department of Internal Affairs began questioning her about religious beliefs and the whereabouts of her sons, who were in Pitnak, around 20 km from Khazorasp. A protocol certifying that the search had produced no results was drawn up in two copies, one of which was given to the author. Six militiamen remained as guards. At 5 a.m. on 29 December 1998, one Mr. Bozbekov entered a room in the house and placed three bullets into a jar. At midnight on 30 December 1998, militiamen armed with machine guns entered the author's house with a prosecutor and a Chief of the militia, and conducted another search, this time with a warrant. The three bullets in the empty jar, banned religious literature and a packet of drugs were found this time. A protocol was drawn up but no copy was given to the author, despite repeated requests. According to the author, subsequent charges against her sons and husband were partly based on what was found during the second search. A number of personal belongings were taken from the house during the searches.

² The communication was received on 7 February 2000.

According to the author, seven militiamen lived in her house from 28 December 1998 to 6 February 1999. Throughout this period, all family members were threatened with being shot, and they were at all times accompanied by a militiaman. No family member was allowed to leave the house or to make phone calls.

2.2 Uigun and Oibek Ruzmetov were arrested on 1 January 1999, and their father, Sobir Ruzmetov was arrested on 2 January 1999 in their apartment in Pitnak, on the basis of the warrants issued by the Prosecutor of Khozarasp. Uigun and Oibek Ruzmetov's charges included: (a) attempt to overthrow the Government, (b) forcefully to change the constitutional regime, (c) to establish an Islamic fundamentalist regime, (d) to organize a "jihad" movement, and (e) murder under aggravating circumstances. Sobir Ruzmetov was charged with illegal possession of weapons and drugs without intent to sell. According to the author, while in detention in the basement of Urgench Office of the Department of Internal Affairs, her sons were subjected to torture by militia officers, with a view to obtaining self-incriminating "confessions". Allegedly, they were punched; beaten with truncheons; kicked; raped; hung up with their hands tied at the back; forcefully dropped on a cement floor; threatened with rape of their wives and with arrest of their parents.

2.3 At 7 p.m. on 5 January 1999, Mrs. Sultanova was allegedly ordered to bring all her clothes and food from the house in order to visit her husband, Sobir Ruzmetov, in a prison in Urgench. She was brought to the Chief of Urgench National Security Service, who insulted her. She then was brought to the basement of Urgench Office of the Department of Internal Affairs, handcuffed and placed in solitary confinement. Her clothes were removed, and she was thus exposed by the National Security Service's Chief to 2-3 young men, among them one of her sons. She allegedly hardly recognized Uigun, whose body was covered with bruises and showed visible marks of torture.

2.4 Early on 6 February 1999, seven militiamen entered the author's house and caused considerable damage to her property. The author submitted close to 100 complaints, requesting an investigation. They were addressed to the Khazorasp prosecutor, the Regional Prosecutor's Office, the President of Uzbekistan, the Minister of Internal Affairs and the President of the Supreme Court. According to the author, none of the above initiated an investigation.

2.5 The author contends that she was not informed of the date of her sons' trial. As a result, she could not hire an independent lawyer to defend them during the trial, and they were represented by an ex officio defence attorney. Having learned by

accident on 12 June 1999 that the trial of her sons, along with that of six other co-defendants, was in process in Tashkent Regional Court, she was allowed into the court room on 12, 13 and 14 June 1999. Thereafter, she allegedly was refused access. The author claims that the trial of her sons was largely held in camera, and that none of the witnesses, not even witnesses for the prosecution, were present in the court room despite numerous requests to this effect by all co-defendants. The author adds that the presiding judge acted in an accusatory manner.

2.6 During the hearing on 13 July 1999, Uigun and Oibek Ruzmetov testified that they were forced to confess and described the torture they had been subjected to. Uigun stated that a pistol, 12 bullets and drugs were placed into his pocket and that he signed a form confessing his "guilt" only after being shown his naked mother and after being told that his wife would be raped unless he signed the form. They also asserted that they were interrogated in the basement of the National Security Service Office in Tashkent in the absence of a lawyer and were subjected to torture. Oibek Ruzmetov was allegedly unable to walk without help after the interrogation. Uigun and Oibek also testified that they did not have access to a lawyer of their choosing during the investigation. Allegedly, the court disregarded all the testimonies and admitted the evidence obtained through torture and in the absence of a counsel of the author's sons' choosing.

2.7 On 24 July 1999, the Tashkent Regional Court sentenced five out of eight co-defendants, including Uigun and Oibek Ruzmetov, to death. The court concluded that Oibek Ruzmetov had created an armed group in 1995, with intent to commit robbery and to collect money for the purchase of weapons and the establishment of an Islamic regime based on the "Wahhabi" ideology. It further found that Oibek Ruzmetov and other members of the group, including Uigun Ruzmetov, established a centre in Burchmullo, Tashkent region, with the intent to blow up a water reservoir. The court found Uigun Ruzmetov guilty of a violation of many provisions of the Criminal Code, including illegal organization of public unions or religious organizations; smuggling; illegal possession of weapons, cartridges, explosive materials or explosive assemblies; premeditated murder; and production or distribution of materials threatening public security and public order. Mr. Oibek Ruzmetov was found guilty of a violation of similar provisions of the Criminal Code, as well as of an attempt against the constitutional order of the Republic of Uzbekistan and sabotage. On appeal, the Supreme Court upheld the death sentence on 20 September 1999. An appeal for review submitted to the Ministry of Justice was refused on 7 October 1999. The author submits that

the appeals for pardon were submitted to the Presidential Office on 20 March and 5 September 2000, respectively.

2.8 On 24 July 1999, in alleged violation of article 137 of the Uzbek Code of Criminal Procedure, relatives of Uigun and Oibek Ruzmetov, including the author, were not allowed to meet them nor to deliver letters. The author claims that while her sons were in custody, she could meet them only twice, on 1 August and 23 September 1999. Their lawyer, hired by the author, was twice refused access to them in custody after the pronouncement of the death sentence.

2.9 The author's husband was sentenced to five years' imprisonment by the Khazorasp Regional Court on 28 May 1999. The author claims that her husband was also subjected to torture in custody, as a result of which he had to be brought to court on a stretcher on 28 May 1999. The author contends that she could not attend her husband's trial that lasted for only two hours; that her husband was not assisted by a lawyer during the hearing and was not given an opportunity to question witnesses or to examine evidence in court. For the author, the evidence against her husband was fabricated. Allegedly, Sobir Ruzmetov was not eligible for amnesty after pronouncement of his sentence because his conduct allegedly violated prison regulations.

2.10 According to the author, regular searches, interrogations and harassment of herself and her family by officers of Khazorasp District Department of Internal Affairs continued throughout 2000 and 2001. On 1 April 2001 the author, her handicapped daughter and three grandchildren relocated to her other apartment in Pitnak, where they were subsequently harassed by officers of the Pitnak Department of Internal Affairs. On 4 April 2001, the Chief of the Pitnak Department of Internal Affairs insulted the author, ordered her to remove her headscarf and threatened to put her in prison.

The complaint

3.1 The author claims that her deprivation of liberty by persons acting in an official capacity between 28 December 1998 and 6 February 1999 without charges, and the subsequent failure of the State party to investigate these acts, constitutes a violation of article 9 of the Covenant. These facts would also appear to raise issues under articles 7 and 17, although these provisions were not invoked by the author.

3.2 The author contends that she is a victim of a violation of article 7, in relation to the execution of her sons of which she was only informed after the event.

3.3 The author claims that the charges against her sons were fabricated, and that her sons' arrest on the

basis of warrants issued by the prosecutor, their detention for seven months without any judicial review, as well as their treatment in custody and during the trial give rise to violations of articles 6, 7, 9, 14, paragraphs 1, 2, 3 (b), (d), (e) and (g).

3.4 The author claims that the charges against her husband were also fabricated, and that her husband's arrest and the treatment he was subjected to in custody and trial amount to violations of articles 9, 10, paragraph 1, and 14, paragraphs 1, 2, 3 (b), (d), (e) and (g).

3.5 Finally, the author claims that the State party executed her sons in spite of a request for interim measures of protection addressed to the State party on behalf of the Committee. She contends that the State party forged official death records, so that the date of execution of her sons would appear to pre-date registration of the communication and the request for interim measures. In this regard she points to the discrepancy between the records of the Tashkent Regional Court and the records of the Yunusabad District Bureau of the Civilian Registry Office (ZAGS) (see paras. 1.3 and 2.9 above). She notes that a letter of the Tashkent Regional Court was sent to her almost 10 months after the date of the alleged execution, but after the request for interim measures of protection had been addressed to the State party. This is said to constitute a breach of the State party's obligations under the Optional Protocol.

State party's observations on admissibility and merits

4. By notes verbales of 22 February 2000, 20 February and 25 July 2001, and 17 December 2002, the State party was requested to submit to the Committee information on the admissibility and merits of the communication. On 19 December 2003, the State party submitted that Uigun and Oibek Ruzmetov had been tried and found guilty by the Tashkent Regional Court on 29 June 1999 of a variety of crimes under the Criminal Code of Uzbekistan. Both were sentenced to death, and their sentences were upheld by decision of the Supreme Court on 20 September 1999. The State party provides a list of all the criminal acts that Uigun and Oibek Ruzmetov were found guilty of. It submits that the court correctly qualified their acts, and imposed the proper sentences by taking into account the "public danger" of their crimes.

Issues and proceedings before the Committee

Alleged breach of the Optional Protocol

5.1 The Committee has noted the author's allegation that the State party violated its obligations under the Optional Protocol by executing her sons, in spite of the fact that a communication was sent to the Committee and a request for the interim

measures had been issued on 22 February 2000. No reply has been received from the State party on the request for interim measures, and no explanations were provided in relation to the allegation (see para. 3.5) that the author's sons were executed after the registration of the communication by the Committee, and after a request for interim measures was issued to the State party. The author has contended that the State party had forged its death records, so that the date of execution of her sons would pre-date the registration of the communication and the interim measures request.

5.2 The Committee recalls³ that by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and article 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in *good faith* so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (art. 5, paras. 1 and 4). The Committee further recalls that interim measures pursuant to rule 92 of the Committee's rules of procedure are essential to the Committee's role under the Protocol. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victims, undermines the protection of Covenant rights through the Optional Protocol.⁴

5.3 In its previous case law, the Committee had addressed the issue of a State party acting in breach of its obligations under the Optional Protocol by executing a person on whose behalf a communication was submitted to the Committee, not only from the perspective whether the Committee had explicitly requested interim measures of protection, but also on the basis of the irreversible nature of capital punishment. In view of the State party's failure to cooperate with the Committee in good faith on the issue of interim measures in spite of the reiterated request, and in the absence of any response to the allegation that the author's sons were executed after the registration of the communication by the Committee, and after a request for interim measures was issued to the State party, the Committee considers that the facts as submitted by the author disclose a breach of the Optional Protocol.

³ *Piandiong v. the Philippines*, communication No. 869/1999, para. 5.1, Views adopted on 19 October 2000, *Khalilov v. Tajikistan*, communication No. 973/2001, Views adopted on 30 March 2005, para. 4.1, *Saidov v. Tajikistan*, communication No. 964/2001, Views adopted on 8 July 2004, para. 4.1.

⁴ *Weiss v. Austria*, communication No. 1086/2002, para. 6.4, *Saidov v. Tajikistan*, communication No. 964/2001, Views adopted on 8 July 2004, para. 4.4.

Consideration of admissibility

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

6.2 The Committee begins by noting that the author has not provided any proof that she is authorized to act on behalf of her husband, despite the fact that by the time of consideration of the communication by the Committee he should have already served his sentence. Neither has she substantiated why it was impossible for the victim to submit a communication on his own behalf. In the circumstances of the case and in the absence of a power of attorney or other documented proof that the author is authorized to act on his behalf, the Committee must conclude that as far as it relates to her husband, the author has no standing under article 1 of the Optional Protocol.⁵

6.3 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. Concerning the exhaustion of domestic remedies, the Committee has noted that according to the information submitted by the author, all available domestic remedies have been exhausted. In the absence of any pertinent information from the State party, the Committee considers that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met with regard to the author and the author's sons.

6.4 The Committee considers that there is no impediment to the admissibility of the author's claims under articles 7; 9 and 17, with regard to herself; articles 6; 7; 9, 14, paragraphs 1, 2, 3 (b), (d), (e) and (g) with regard to the author's sons, and proceeds to consider it on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol. It notes that, while the State party has commented on the author's sons' cases and their conviction, it has not provided any information about the author's claims with regard to herself and her sons. In the absence of any pertinent information from the State party, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.

⁵ *H. v. Italy*, communication No. 565/1993, inadmissibility decision of 8 April 1994, para. 4.2.

7.2 The Committee has noted the author's description of the torture to which her sons were subjected to make them confess guilt (paras. 2.2, 2.3 and 2.6 above). She has identified the individuals alleged to have participated in these acts. The material submitted by the author also states that the allegations of torture were brought to the attention of the authorities by the victims themselves, and that they were ignored. In these circumstances, and in the absence of any pertinent explanation from the State party, due weight must be given to her allegations, in particular that the State party authorities did not properly discharge their obligation effectively to investigate complaints about incidents of torture. The Committee considers that the facts as submitted disclose a violation of article 7 in relation of the author's sons.

7.3 On the claim of a violation of the author's sons' rights under article 14, paragraph 3 (g), in that they were forced to sign a confession, the Committee must consider the principles that underlie this guarantee. It refers to its previous jurisprudence that the wording, in article 14, paragraph 3 (g), that no one shall "be compelled to testify against himself or confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological coercion by the investigating authorities on the accused with a view to obtaining a confession of guilt.⁶ The Committee considers that it is implicit in this principle that the burden of proof that the confession was made without duress is on the prosecution. However, the Committee notes that in this case, the burden of proof whether the confession was voluntary was on the accused. The Committee notes that both the Tashkent Regional Court and the Supreme Court ignored the allegations of torture made by the author's sons. Therefore, the Committee concludes that the State party has violated article 14, paragraphs 2, and 3 (g).

7.4 As to the author's claim that her sons were denied access to a lawyer of their choosing during the pretrial investigation and the trial, the Committee also notes the author's contention that she was not informed of the date of her sons' trial and thus could not hire an independent lawyer to defend them at the trial. Their lawyer, subsequently hired by the author, was twice refused permission to see his clients after they were sentenced to death. The Committee recalls its jurisprudence that, particularly in cases involving capital punishment, it is axiomatic that the accused is effectively assisted by a lawyer at all stages of the

⁶ *Berry v. Jamaica*, communication No. 330/1988, Views adopted on 4 July 1994, para. 11.7, *Nallaratnam Singarasa v. Sri Lanka*, communication No. 1033/2001, Views adopted on 21 July 2004, para. 7.4, and *Deollal v. Guyana*, communication No. 912/2000, Views adopted on 1 November 2004, para. 5.1.

proceedings.⁷ In the circumstances of the case, and in the absence of pertinent explanations from the State party, the Committee considers that the legal assistance did not meet the required threshold of effectiveness. Therefore, the information before the Committee discloses a violation of article 14, paragraph 3 (b) and (d).

7.5 The Committee has noted the author's claim that the trial of her sons was unfair, since the court did not act impartially and independently (paras. 2.5 and 2.6 above). It also notes the author's contention that the trial of her sons was largely held in camera and that none of the witnesses were present in the court room despite numerous requests to this effect from all eight co-defendants, including Uigun and Oibek Ruzmetov. The judge denied these requests, without giving any reasons. In the absence of any pertinent State party information, the Committee concludes that the facts before it disclose a violation of article 14, paragraphs 1 and 3 (e), of the Covenant.

7.6 The Committee recalls⁸ that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant. In the present case, the death sentences on Uigun and Oibek Ruzmetov was passed in violation of the right to a fair trial set out in article 14 of the Covenant, and was thus also in breach of article 6.

7.7 The Committee notes that the author's sons' pretrial detention was approved by the public prosecutor, and that there was no subsequent judicial review of the lawfulness of detention until they were brought before a court and sentenced on 24 July 1999 (Uigun) and 29 July 1999 (Oibek). The Committee observes that article 9, paragraph 3, is intended to bring the detention of a person charged with a criminal offence under judicial control and recalls that it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with.⁹ In the circumstances of the present case, the Committee is not satisfied that the public prosecutor may be

characterized as having the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3. The Committee therefore concludes that there has been a violation of this provision.

7.8 The Committee has considered the author's claim, which is made out in detail, that her deprivation of liberty by persons acting in an official capacity from 28 December 1998 to 6 February 1999 without charges and the subsequent failure of the State party to investigate these acts. It recalls that article 9, paragraph 1, is applicable to all forms of deprivation of liberty,¹⁰ and considers that in the above circumstances and in the absence of pertinent explanation from the State party, the facts as submitted amount to an unlawful deprivation of liberty in violation of article 9, paragraph 1.

7.9 The Committee considers that in the absence of any explanation from the State party, the search of the author's house without warrant on 28 December 1998 (para. 2.1 above), amounts to a violation of article 17.

7.10 The Committee has noted the author's claim that the State party authorities ignored her requests for information and systematically refused to reveal her sons' situation or whereabouts. The Committee understands the continued anguish and mental stress caused to the author, as the mother of the condemned prisoners, by the persisting uncertainty of the circumstances that led to their execution, as well as the location of their gravesite. The secrecy surrounding the date of execution, and failure to disclose the place of burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee considers that the authorities' failure to notify the author of the execution of her sons, amounts to inhuman treatment, in violation of article 7.¹¹

7.11 The Committee considers that in the absence of any explanation from the State party, the author's exposure, handcuffed and naked, to her son, Uigun, on 5 January 1999 (para. 2.3 above), in itself amounts to inhuman and degrading treatment, contrary to article 7 and constitutes a violation thereof.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights,

⁷ *Aliev v. Ukraine*, communication No. 781/1997, Views adopted on 7 August 2003, para. 7.3, *Robinson v. Jamaica*, communication No. 223/1987, Views adopted on 30 March 1989, para. 10.3, and *Brown v. Jamaica*, communication No. 775/1997, Views adopted on 23 March 1999, para. 6.6.

⁸ *Levy v. Jamaica*, communication No. 719/1996, Views adopted on 3 November 1998, para. 7.3, *Marshall v. Jamaica*, communication No. 730/1996, Views adopted on 3 November 1998, para. 6.6. See also general comment No. 6 on article 6, para. 7.

⁹ Communication No. 521/1992, *Kulomin v. Hungary*, Views adopted on 22 March 1996, para. 11.3, *Platonov v. Russian Federation*, communication No. 1218/2003, Views adopted on 1 November 2005, para. 7.2.

¹⁰ General comment No. 8 on article 9, para. 1.

¹¹ Communication No. 886/1999, *Bondarenko v. Belarus*, Views adopted on 3 April 2003, para. 9.4, communication No. 887/1999, *Lyashkevich v. Belarus*, Views adopted on April 2003, para. 9.2, communication No. 973/2001, *Khalilov v. Tajikistan*, Views adopted on 30 March 2005, para. 7.7.

is of the view that the facts before it disclose violations of:

(a) The rights of Uigun and Oibek Ruzmetov, under articles 6; 7; 9, paragraph 3; 14, paragraphs 1, 2, 3 (b), (d), (e) and (g);

(b) The author's rights under articles 7, 9, paragraph 1; and 17.

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 information on the location where her sons are buried, and compensation for the anguish she has suffered. The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

Communication No. 992/2001

Submitted by: Louisa Bousroual (represented by counsel)

Alleged victim: Salah Saker

State party: Algeria

Date of adoption of Views: 30 March 2006

Subject matter: Disappearances, incommunicado detention, trial in absentia

Procedural issues: ---

Substantive issues: Right to liberty and security of person; arbitrary arrest and detention; right to be brought promptly before a judge; right to counsel; right to life; prohibition of cruel, inhuman and degrading treatment and punishment; trial in absentia leading to the death penalty

Articles of the Covenant: 2, para. 3; 6, para. 1; 7; 9, paras. 1, 3 and 4; 10, para. 1; and 14, para. 3

Articles of the Optional Protocol: 2 and 5, para. 2 (a)

Finding: Violation (arts. 2, para. 3; 6, para. 1; 7; and 9, paras. 1, 3 and 4)

1. The author of the communication, dated 9 February 2000, is Mrs. Louisa Bousroual, an Algerian national residing in Constantine (Algeria). She submits the communication on behalf of her husband, Mr. Salah Saker, an Algerian national born on 10 January 1957 in Constantine (Algeria) who has been missing since 29 May 1994. The author claims that her husband is a victim of violations by Algeria of articles 2, paragraph 3; 6, paragraph 1; 9, paragraphs 1, 3 and 4; 10, paragraph 1; and 14, paragraph 3, of the International Covenant on Civil

and Political Rights (the "Covenant"). The author is represented by counsel. The Covenant and the Optional Protocol to the Covenant entered into force for the State party on 12 December 1989.

The facts as presented by the author

2.1 Mr. Saker, a teacher, was arrested without a warrant on 29 May 1994 at 18.45 at his home, as part of a police operation carried out by agents of the Wilaya of Constantine (administrative division of the town of Constantine). At the time of his arrest, Mr. Saker was a member of the Front Islamiste de Salut (Islamic Salvation Front), a prohibited political party for which he had been elected in the annulled legislative elections of 1991.

2.2 In July 1994 the author wrote to the Director of Public Prosecutions (Procureur de la République) and requested to be informed about the reasons for her husband's arrest and continued detention. At the time of his arrest, the longest pretrial detention authorized by Algerian law was 12 days, for persons suspected of the most serious offences provided for in the Algerian criminal code, namely terrorist or subversive acts.¹ Further, the law required that the police officer responsible for the questioning of the suspect allow him contact with his family.²

¹ Article 22 of the law of 30 September 1992 relating to the fight against terrorism.

² Article 21, paragraph 3, of the Criminal Procedure Code.

2.3 The author did not receive a satisfactory reply from the Director of Public Prosecutions and, on 29 October 1994, wrote to the President of the Republic, the Minister of Justice, the Minister of the Interior, the Security Officer of the President of the Republic (*Délégué à la Sécurité auprès du Président de la République*), and the Head of Military Area No. 5.

2.4 As none of these persons replied, the author lodged a complaint with the Director of Public Prosecutions of the Tribunal of Constantine on 20 January 1996 against the security services of Constantine for the arbitrary arrest and detention of Mr. Saker. She requested that the persons responsible be brought to justice, pursuant to article 113, paragraph 2, of the Criminal Procedure Code. By letter of 25 January 1996, the author alerted the Ombudsman of the Republic (*Médiateur de la République*). She also requested information about her husband from the Director General of National Security on 28 January 1996.

2.5 As none of these bodies replied, the author wrote to the President of the National Observatory for Human Rights (*Observatoire National des Droits de l'Homme*) on 27 September 1996 to inform him of the difficulties which she was facing in obtaining information about her husband. She also requested legal aid and assistance.

2.6 On 27 February 1997 the author received a letter from the judicial Police section of the Security of Constantine (*Service de la Police judiciaire de la Sûreté de la Wilaya de Constantine*), forwarding a copy of Decision No. 16536/96 of the Director of Public Prosecutions of the Tribunal of Constantine dated 4 September 1996. This decision relates to the complaint which the author had lodged a year earlier; it informed her that her husband was wanted and had been arrested by the judicial police section of the Security of Constantine, then transferred to the Territorial Centre for Research and Investigation (*Centre Territorial de Recherches et d'Investigation*, the "Territorial Centre") of Military Area No. 5 on 3 July 1994, as evidenced by a receipt of handover No. 848 of 10 July 1994. The author highlights that this decision does not indicate the reasons for her husband's arrest, nor does it clarify what steps, if any, were taken pursuant to her complaint of 20 January 1996, such as investigating the actions of the Territorial Centre.

2.7 On 10 December 1998 the National Observatory for Human Rights informed the author that, according to information received from the security services, Mr. Saker had been kidnapped by a non-identified armed group while in the custody of the Territorial Centre, and that the authorities did not have any other information as to his whereabouts. The letter from the Observatory does not clarify the

grounds on which her husband was arrested and detained. The author understood the letter as informing her of her husband's death.

2.8 Lastly, the author states, on the one hand, that she has not been informed of either her husband's fate or his whereabouts and, on the other, that he underwent prolonged incommunicado detention; these allegations could raise issues under article 7 of the Covenant.

The complaint

3.1 The author claims that Mr. Saker is a victim of a violation of articles 2, paragraph 3; 6, paragraph 1; 9, paragraphs 1, 3 and 4; 10, paragraph 1; and 14, paragraph 3, of the Covenant, in view of his alleged arbitrary arrest and detention; because the Algerian authorities did not conduct a thorough and in-depth investigation; nor instigate any proceedings, despite the author's numerous requests. The author's husband was not promptly brought before a judge, nor was he granted contact with his family, nor was he granted rights associated with detention (in particular access to a lawyer, the right to be informed promptly of the reasons for his arrest, and trial without undue delay). The author also claims that the authorities failed to protect Mr. Saker's right to life.

3.2 The author claims to have exhausted all domestic remedies: remedies before judicial authorities, before independent administrative bodies responsible for human rights (the Ombudsman and the National Observatory for Human Rights), as well as the highest State authorities. She argues that her request for an investigation into the arrest, detention and disappearance of her husband was not acceded to. She claims that the judicial remedies which she initiated are manifestly unavailable and ineffective as, to her knowledge, no steps have been taken against the security services (police or Territorial Centre), which in her view are responsible for the arrest and disappearance of her husband. The author claims that the scarce responses and information she has received from the authorities aim to further delay the legal proceedings.

The State party's submission on the admissibility and merits of the communication and author's comments

4.1 By note verbale of 31 January 2002, the State party contests the admissibility of the communication for non-exhaustion of domestic remedies. Of the various bodies seized by the author, only the Director of Public Prosecutions of the Tribunal of Constantine has the power to open a preliminary inquiry and to refer the case to the competent judicial authority, namely the investigating magistrate (*juge d'instruction*). The author, in having done so, has availed herself of only

one of three remedies which Algerian law provides for in such circumstances.

4.2 The author could have referred the case directly to the investigating magistrate of the Tribunal of Constantine, had the Director of Public Prosecutions failed to act (the latter has a discretion as to whether or not to pursue any matter before it).³ This direct referral is provided for in articles 72⁴ and 73⁵ of the Criminal Procedure Code, and would have resulted in the initiation of a public action (*action publique*). Further, any decisions of the investigating magistrate pursuant to those articles may be appealed to the Indictment Division (*Chambre d'accusation*).⁶

4.3 Further, the author could have lodged an action founded on tort against the State party (contentieux relatif à la responsabilité civile de l'Etat)⁷ which grants victims the right, independently of any decision in the criminal action, to submit a case to the competent administrative authorities and obtain damages and interest. The State party concludes that the most relevant domestic remedies have not been exhausted, that these remedies are frequently used, and lead to satisfactory results.

4.4 Subsidiarily, the State party submits some information on the merits of the case. Mr. Saker was arrested in June 1994 by the judicial police of the Wilaya of Constantine, on suspicion that he was a member of a terrorist group which had perpetrated a number of attacks in the region. After he had been heard, and as it had not been possible to confirm that

he belonged to the terrorist group, the judicial police released him from custody and transferred him to the military branch of the judicial police for further questioning. Mr. Saker was released after one day by the military branch of the judicial police. He is wanted in connection with an arrest warrant issued by the investigating magistrate of Constantine, in an investigation against 23 persons, including Mr. Saker, who all allegedly belong to a terrorist group. This arrest warrant remains valid as Mr. Saker is a fugitive. A judgement in absentia was rendered against him and his co-accused on 29 July 1995 by the criminal division of the Court of Constantine.

5.1 By letter of 22 April 2002, counsel contends that the requirement to exhaust domestic remedies has been fulfilled.

5.2 Further to the petition lodged by the author on 20 January 1996, the author was summoned on 20 March 1999 by the investigating magistrate of the 3rd chamber of the Tribunal of Constantine. During the hearing with the judge, she was informed that the matter of the disappearance of her husband had been registered (case 32/134) and was being investigated. The judge proceeded to question her as to the circumstances of Mr. Saker's arrest. Since that day the public action (*action publique*) has been pending. According to the author, the opening of this investigation precludes her from using the procedure highlighted by the State party and provided for in articles 72 and 73 of the Criminal Procedure Code.

5.3 Further, the author is precluded from lodging an action founded on tort against the State party until the criminal judge rules on the petition against the security services of the Wilaya of Constantine: the Criminal Procedure Code states that civil actions are stayed until a decision is reached in the public action.⁸ In any event, the author claims that the referral of the matter to an administrative body, when the matter is principally criminal in nature (in this instance punishable by the Criminal Procedure Code (art. 113, para. 2)), is inappropriate.

5.4 Some of the other bodies which the author appealed to have judicial powers, including the Minister of Justice who can request that the Director of Public Prosecutions initiate an action or instruct the competent authority to do so,⁹ whereas other bodies are mandated to investigate and search for the truth. These include the Ombudsman and the National Observatory for Human Rights. As none of

³ Article 36, paragraph 1, of the Criminal Procedure Code.

⁴ Article 72 of the Criminal Procedure Code: "Toute personne qui se prétend lésée par une infraction, peut, en portant plainte, se constituer partie civile devant le juge d'instruction compétent."

⁵ Article 73 of the Criminal Procedure Code: "Le juge d'instruction ordonne communication de la plainte au Procureur de la République, dans un délai de cinq jours, aux fins de réquisitions. Le Procureur de la République doit prendre des réquisitions dans les cinq jours de la communication. Le réquisitoire peut être pris contre personne dénommée ou non dénommée. Le Procureur de la République ne peut saisir le juge d'instruction de réquisition de non informé, que si, pour des causes affectant l'action publique elle-même, les faits ne peuvent légalement comporter une poursuite, ou si, à supposer ces faits démontrés, ils ne peuvent admettre aucune qualification pénale. Dans le cas où le juge d'instruction passe outre, il doit statuer par une ordonnance motivée. En cas de plainte insuffisamment motivée ou insuffisamment justifiée, le juge d'instruction peut aussi être saisi de réquisitoires tendant à ce qu'il soit provisoirement informé contre toutes personnes que l'information fera connaître. Dans ce cas, celui ou ceux qui se trouvent visés par la plainte peuvent être entendus comme témoins par le juge d'instruction, sous réserve des dispositions de l'article 89 dont il devra leur donner connaissance, jusqu'au moment où pourront intervenir les inculpations ou, s'il y a lieu, de nouvelles réquisitions contre personnes dénommées."

⁶ Articles 170 to 174 of the Criminal Procedure Code.

⁷ Article 7 of the Civil Procedure Code.

⁸ Article 4, paragraph 2, of the Criminal Procedure Code: "tant qu'il n'a pas été prononcé définitivement sur l'action publique lorsque celle-ci a été mise en mouvement".

⁹ Article 30, paragraph 2, of the Criminal Procedure Code: "d'engager ou de faire engager des poursuites ou de saisir la juridiction compétente de telles réquisitions écrites qu'il juge opportunes".

these bodies replied, the author concludes that domestic remedies were neither adequate nor effective. The author recalls that she waited for 19 months after her hearing with the investigating magistrate for any information on the petition which she had lodged almost five years earlier.

5.5 The author contends that certain elements submitted by the State party confirm the arbitrary nature of Mr. Saker's detention and the unlawfulness of the warrant against him. His conviction was handed down in secret (no member of his family was informed of the trial or of the judgement of the court) on 29 July 1995 by the Court of Constantine. Further, the State party has not clarified the date, time or place when Mr. Saker was allegedly released from detention.

5.6 The author highlights that the issue of disappearances and prolonged secret detentions in Algeria are of great concern to human rights activists. The author also refers to the Committee's concluding observations on Algeria during the consideration of the State party's second periodic report. The Committee had urged the State party to ensure that independent mechanisms be set up to investigate all violations of the right to life and security of the person, and that offenders should be brought to justice. The author submits that no such mechanisms have been put into place and that offenders enjoy complete impunity.

Further State party observations and author's comments

6. On 17 November 2003 the State party reiterated that the author has not exhausted domestic remedies, and submitted further information on the merits. Mr. Saker was taken in for questioning on 12 June 1994 by the police. After being held for three days he was handed over to the military branch of the judicial police for further questioning on 15 June 1994. As soon as that questioning ended, Mr. Saker was released. Finally, the judgement of 29 July 1995 pronounced in absentia sentenced Mr. Saker to death.

7. By letter of 5 February 2004 the author refutes the State party's version of events and reiterates her own version. The author also highlights the contents of the letter dated 26 February 1997 from Salim Abdenour (judicial police officer) confirming the date on which Mr. Saker was handed over to the Territorial Centre for further questioning. The author explains that the letter doesn't specify the date of arrest as this would have clearly shown that the length of detention (33 days) had exceeded the legal maximum of 12 days.¹⁰

¹⁰ Article 51, paragraph 3, of the Criminal Procedure Code.

Issues and proceedings before the Committee

Admissibility considerations

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

8.2 The Committee notes that the same matter is not being examined under any other international procedure, in line with the requirements of article 5, paragraph 2 (a), of the Optional Protocol.

8.3 The Committee also notes that the State party maintains that the author has not exhausted available domestic remedies. On this point, the Committee takes note of the author's claim that her complaint lodged on 20 January 1996 remains under consideration, and that this exempts her from exhausting the civil party remedies highlighted by the State party. The Committee considers that the application of domestic remedies has been unduly prolonged in relation to the complaint introduced on 20 January 1996. It has not been demonstrated by the State party that the other remedies it refers to are or would be effective, in light of the serious and grave nature of the allegation, and the repeated attempts made by the author to elucidate the whereabouts of her husband. Therefore, the Committee considers that the author exhausted domestic remedies in conformity with article 5, paragraph 2 (b), of the Optional Protocol.

8.4 As to the alleged violation of article 14, paragraph 3, the Committee considers that the author's allegations have been insufficiently substantiated for purposes of admissibility. On the question of the complaints under articles 2, paragraph 3; 6, paragraph 1; 7; 9 and 10, the Committee considers that these allegations have been sufficiently substantiated. The Committee therefore concludes that the communication is admissible under articles 2, paragraph 3; 6, paragraph 1; 7; 9 and 10, of the Covenant and proceeds to their consideration on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee recalls the definition of enforced disappearance in article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court: Enforced disappearance of persons means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State

or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time. Any act of such disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to liberty and security of the person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10). It also violates or constitutes a grave threat to the right to life (art. 6).

9.3 With regard to the author's claim of the disappearance of her husband, the Committee notes that the author and the State party have submitted different accounts, dates and outcome of events. While the author contends that her husband was arrested without a warrant on 29 May 1994, and according to a letter from the judicial police (referring to Decision No. 16536/96 of the Director of Public Prosecutions of the Tribunal of Constantine) he was handed over to the Territorial Centre on 3 July 1994, the State party contends that Mr. Saker was arrested on 12 June 1994, handed over to the military branch of the judicial police on 15 June 1994, and released some time thereafter. The Committee also recalls that according to the National Observatory for Human Rights, the author's husband was "kidnapped" by an unidentified military group, this according to information received from the security forces. The Committee notes that the State party has not responded to the sufficiently detailed allegations exposed by the author, nor submitted any evidence such as arrest warrants, release papers, records of interrogation or detention.

9.4 The Committee has consistently maintained¹¹ that the burden of proof cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities and to furnish to the Committee the

information available to it. In cases where the allegations are corroborated by evidence submitted by the author and where further clarification of the cases depends on information exclusively in the hands of the State party, the Committee may consider the author's allegations as substantiated in the absence of satisfactory evidence and explanation to the contrary submitted by the State party.

9.5 As to the alleged violation of article 9, paragraph 1, the evidence before the Committee reveals that Mr. Saker was removed from his home by State agents. The State party has not addressed the author's claims that her husband's arrest was made in the absence of a warrant. It has failed to indicate the legal basis on which the author's husband was subsequently transferred to military custody. It has failed to document its assertion that he was subsequently released, even less how he was released with conditions of safety. All these considerations lead the Committee to conclude that the detention as a whole was arbitrary, nor has the State party adduced evidence that the detention of Mr. Saker was not arbitrary or illegal. The Committee concludes that, in the circumstances, there has been a violation of article 9, paragraph 1.¹²

9.6 As to the alleged violation of article 9, paragraph 3, the Committee recalls that the right to be brought "promptly" before a judicial authority implies that delays must not exceed a few days, and that incommunicado detention as such may violate article 9, paragraph 3.¹³ It takes note of the author's argument that her husband was held incommunicado for 33 days by the judicial police before being transferred to the Territorial Centre on 3 July 1994, without any possibility of access to a lawyer during that period. It concludes that the facts before it disclose a violation of article 9, paragraph 3.

9.7 As to the alleged violation of article 9, paragraph 4, the Committee recalls that the author's husband had no access to counsel during his incommunicado detention, which prevented him from challenging the lawfulness of his detention during that period. In the absence of any pertinent information on this point from the State party, the Committee finds that Mr. Saker's right to judicial review of the lawfulness of his detention (art. 9, para. 4) has also been violated.

9.8 The Committee notes that while not specifically invoked by the author, the

¹¹ Communication No. 146/1983, *Baboeram-Adhin and others v. Suriname*, Views adopted on 4 April 1985, para. 14.2; communication No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 7.2; communication No. 202/1986, *Graciela Ato del Avellanal v. Peru*, Views adopted on 31 October 1988, para. 9.2; communication No. 30/1978, *Bleier v. Uruguay*, Views adopted on 29 March 1982, para. 13.3.

¹² Communication No. 778/1997, *Coronel et al. v. Colombia*, Views adopted on 24 October 2002, para. 9.4; communication No. 449/1991, *Barbarin Mojica v. Dominican Republic*, Views adopted on 10 August 1994, para. 5.4.

¹³ Communication No. 1128/2002, *Rafael Marques de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.3. See also general comment No. 8 (16), para. 2.

communication appears to raise issues under article 7 of the Covenant in relation to the author and her husband. The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. In this context, the Committee recalls its general comment No. 20 (44) on article 7 of the Covenant, which recommends that States parties should make provision against incommunicado detention. In the circumstances, the Committee concludes that the disappearance of the author's husband and the prevention of contact with his family and with the outside world constitute a violation of article 7 of the Covenant.¹⁴ The Committee also notes the anguish and stress caused to the author by the disappearance of her husband and the continued uncertainty concerning his fate and whereabouts. The Committee is therefore of the opinion that the facts before it reveal a violation of article 7 of the Covenant with regard to the author's husband as well as the author¹⁵ herself.

9.9 In light of the above findings, the Committee does not consider it necessary to address the author's claims under article 10 of the Covenant.

9.10 As to the alleged violation of article 6, paragraph 1, of the Covenant, the Committee notes that according to the letter from the judicial police (referring to Decision No. 16536/96 of the Director of Public Prosecutions of the Tribunal of Constantine), the author's husband was handed to Government agents on 3 July 1994, and that the author has not heard from her husband since then. The Committee also notes that the author understood the letter from the National Observatory for Human Rights as informing her of his death.

9.11 The Committee refers to its general comment No. 6 (16) concerning article 6 of the Covenant, which provides inter alia that States parties should take specific and effective measures to prevent the disappearance of individuals and establish facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.¹⁶ In the

¹⁴ Communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 8.5; communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 24 July 1994, para. 9.4; communication No. 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya*, Views adopted on 23 March 1994, para. 5.

¹⁵ Communication No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14; communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 31 July 2003, para. 9.5.

¹⁶ General comment No. 6 (16), para. 4; communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 16 April 1996, para. 8.3; communication No. 563/1993, *Federico Andreu v. Colombia*, Views adopted on 13 November 1995, para. 8.3; communication No. 449/1991,

present case, the Committee notes that the State party does not deny that the author's husband has been unaccounted for since at least 29 July 1995, when the judgement in absentia was handed down by the criminal division of the Court of Constantine. As the State party has not provided any information or evidence relating to the victim's release from the Territorial Centre, the Committee is of the opinion that the facts before it reveal a violation of article 6, paragraph 1, in that the State party failed to protect the life of Mr. Saker.

9.12 The author has invoked article 2, paragraph 3, of the Covenant, which requires that in addition to effective protection of Covenant rights States parties must ensure that individuals also have accessible, effective and enforceable remedies to vindicate those rights. The Committee attaches importance to States parties establishing appropriate judicial and administrative mechanism for addressing claims of rights violations under domestic law. It refers to its general comment No. 31 (80) on the nature of the general legal obligation imposed on States parties to the Covenant, which provides inter alia that a failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.¹⁷ In the present case, the information before the Committee indicates that the author did not have access to such effective remedies, and concludes that the facts before it disclose a violation of article 2, paragraph 3, of the Covenant in conjunction with articles 6, paragraph 1, 7 and 9.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of articles 6, paragraph 1, 7 and 9, paragraphs 1, 3 and 4, of the Covenant in relation to the author's husband as well as article 7 in relation to the author, violations in conjunction with article 2, paragraph 3, of the Covenant.

11. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author's husband, his immediate release if he is still alive, adequate information resulting from its investigation transmitted to the author, and appropriate levels of compensation for the violations suffered by the author's husband, the author and the family. The State party is also under a duty to prosecute criminally, try and punish those held responsible for

Barbarin Mojica v. Dominican Republic, Views adopted on 10 August 1994, para. 5.5.

¹⁷ General comment No. 31 (80), para. 15.

such violations. The State party is also under an obligation to take measures to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure all

individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

Communication No. 1016/2001

Submitted by: Rubén Santiago Hinostroza Solís (not represented by counsel)

Alleged victim: The author

State party: Peru

Date of adoption of Views: 27 March 2006

Subject matter: Dismissal of a public servant owing to the restructuring of the organization

Procedural issues: ---

Substantive issues: Age discrimination

Article of the Covenant: 25, para. (c)

Finding: No violation

1.1 The author of the communication, which is dated 19 July 1999, is Rubén Santiago Hinostroza Solís, a Peruvian national, who claims to be a victim of a violation by Peru of article 25 (c) of the Covenant. He is not represented by counsel.

1.2 The Optional Protocol entered into force for Peru on 3 January 1981.

The facts as presented by the author

2.1 The author worked as a public servant in the National Customs Authority (SUNAD). Supreme Decree No. 043-91-EF of the Executive called for the reorganization of that body, including a reduction in the number of staff. In this connection, the National Customs Authority issued resolution No. 6338 of 5 September 1991 in which it declared a number of its employees redundant and ordered their dismissal on the basis of two criteria: time in service (25 years or more for women and 30 for men) and age (55 or older for women and 60 for men). The author, who was 61 years old and had 11 years of service, was one of those employees.

2.2 On 5 December 1991, the author appealed against the resolution before the National Civil Service Tribunal, alleging that he had been dismissed without any notification and because he

was 61 years old, although the legal retirement age for National Customs Authority employees under the Public Service Act was 70. On 19 February 1992, the Tribunal declared that his appeal was unfounded.

2.3 On 5 December 1991, the author submitted a complaint against the aforementioned resolution to the National Civil Service Tribunal, requesting reinstatement in his job. On 19 February 1992, the complaint was declared unfounded.

2.4 The author submitted an administrative claim to the labour division of the Lima High Court of Justice on 26 March 1992. In its judgement of 28 December 1994, the labour division allowed the claim, finding that the author had been dismissed illegally, being under the legal retirement age, and that he had the right to be reinstated in his job.

2.5 On 11 December 1995, the State Procurator lodged an appeal before the Supreme Court. On 21 August 1996, the Supreme Court declared the judgement of the Lima High Court null and void for technical reasons, and ordered that another judgement be issued.

2.6 On 13 October 1997, the Lima High Court again ruled that the appeal was justified and ordered that the author be reinstated in his job. The State again lodged an appeal with the Supreme Court. The judgement of 7 October 1998 upheld the appeal, finding that the National Customs Authority had good reason to dismiss the author, since it was endeavouring to reduce civil service staff, which was "oversized".

2.7 The case has not been submitted to another procedure of international investigation or settlement.

The complaint

3. The author alleges a violation of article 25 (c) of the Covenant, since the National Customs Authority's resolution led to his dismissal without just cause. The resolution violated the principle of the hierarchy of norms, since it was contrary to the provisions of article 35 of Legislative Decree No. 276, the Public Service Act, which establishes 70 as the maximum age for employment in public service. Moreover, article 48 of the 1979 Constitution, which was in force at the time, recognizes the right to security of employment. The author also refers to the excessive length of the procedure, as well as the fact that the judiciary was under investigation by President Fujimori's Special Commission on Reorganization of the Government, which naturally brought the work of the Supreme Court to a standstill.

The State party's observations

4.1 In its observations of 22 April 2002, the State party states that it has no objections to the admissibility of the communication. With regard to the merits, it points out that the Supreme Decree of 8 January 1991, in which the Executive announced the reorganization of all public bodies, including ones in the central Government, regional governments, decentralized public institutions, development corporations and special projects, was legally supported by article 211 of the 1979 Constitution and was decided upon in view of overstaffing and with the aim of securing the country's economic stability and financial balance. In this context, the Supreme Decree of 14 March 1991 announced the reorganization of the National Customs Authority in order to improve customs services as part of the process of liberalization of foreign trade. That reorganization plan called, among other things, for the streamlining of personnel, indicating that staff not joining in the voluntary resignation programme would be declared redundant and laid off because of restructuring. The Customs Authority issued resolution 2412 on 4 April 1991, establishing the criteria to be taken into account for announcing the redundancy of employees who had not joined in the voluntary resignation programme, identifying among others staff who had reached the age limit defined in the rules of Decree Law No. 20530 and 19990, i.e., 55 years for women and 60 for men.

4.2 Resolution No. 6338, which declared the author redundant and terminated his employment as of 6 September 1991, was in keeping with the legal framework governing the reorganization of the customs service and respected the principle of the hierarchy of norms, which was: article 211 of the Constitution; Supreme Decree No. 043-91-EF of 14 March 1991 concerning the reorganization of the National Customs Authority; and National Customs

Authority resolution No. 002412 of 4 April 1991 establishing the criteria to be used for declaring that the Authority was overstaffed.

4.3 While article 48 of the Constitution, which was invoked by the author, guarantees the right to security of employment, it also points out that a worker can be dismissed for just cause provided in the law and duly proven. In the present case, there was just cause for dismissing the author, since he was terminated due to reorganization.

4.4 The State party declares that it has not violated article 25 (c) of the Covenant, since the author was not deprived of access, on general terms of equality, to public service in his country, as demonstrated by his 11 years of service in a public institution. His dismissal was motivated by objective reasons based on a reorganization of public bodies.

Issues and proceedings before the Committee

Consideration of admissibility

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

5.2 The Committee has ascertained, as it is required to do under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter has not been submitted to another procedure of international investigation or settlement.

5.3 The Committee notes that the State party indicates that it has no objections to the admissibility of the communication. There being no obstacle in this respect the Committee considers that the communication is admissible and that the issue raised by the author should be considered on the merits.

Consideration of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

6.2 The question raised by the author is whether his dismissal from public service for reasons relating to the reorganization of public bodies constitutes a violation of article 25 (c) of the Covenant. Article 25 (c) recognizes for every citizen the right to have access, on general terms of equality, to public service in his country, without any of the distinctions mentioned in article 2, paragraph 1, namely race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. To ensure access on general terms of

equality, the criteria and procedures for appointment, promotion, suspension and dismissal must be objective and reasonable.

6.3 The Committee recalls its jurisprudence with respect to article 26,¹ to the effect that not every distinction constitutes discrimination, but that distinctions must be justified on reasonable and objective grounds. While age as such is not mentioned as one of the grounds of discrimination prohibited in article 26, the Committee takes the view that a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination on the ground of “other status” under the clause in question, or to a denial of equal protection of the law within the meaning of the first sentence of article 26. This reasoning also applies to article 25 (c) in conjunction with article 2, paragraph 1, of the Covenant.

6.4 In the present case the Committee notes that the author was not the only public servant who lost his job, but that other employees of the National Customs Authority were also dismissed because of restructuring of that entity. The State party indicates that the restructuring originated from the Supreme Decree of 8 January 1991, wherein the Executive announced a reorganization of all public entities. The criteria for selecting those employees to be dismissed were established following a general implementation plan. The Committee considers that the age limit used in the present case for continued post occupancy was an objective distinguishing criterion and that its implementation in the context of a general plan for the restructuring of the civil service was not unreasonable. Under the circumstances, the Committee considers that the author has not been the subject of a violation of article 25 (c).

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of article 25 (c) of the Covenant.

APPENDIX

Individual opinion (dissenting) of Committee members

Mr. Michael O’Flaherty, Mr. Walter Kälin, Mr. Edwin Johnson and Mr. Hipólito Solari-Yrigoyen

1. In the present case, the majority of the Committee concluded that age as such “was an objective distinguishing criterion” and “that its implementation in the context of a general plan for the restructuring of the civil service was not unreasonable” (para. 6.4). In our view this is tantamount to saying that age as such is an objective and reasonable criteria for deciding who would have to leave public service. This reasoning cannot be reconciled with the approach taken by the Committee in

¹ See communication No. 983/2001, *Love v. Australia*, Views adopted on 25 March 2003, para. 8.2.

the case of *Love v. Australia*. There, the Committee decided that while age as such is not mentioned as one of the enumerated grounds of prohibited discrimination in the second sentence of article 26, a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination on the ground of “other status” under the clause in question. It stressed that while a mandatory retirement age would generally not constitute age discrimination, it still would have the task under article 26 of the Covenant of assessing in the particular case whether any particular arrangement for mandatory retirement age departing from the general retirement age in a given country is discriminatory. As it did in the case of *Love v. Australia*, the Committee should have examined in the present case whether there were reasonable and objective grounds justifying the use of age as a distinguishing criterion. It did not do so and thus departed from the approach taken in the case of *Love v. Australia* in a way that cannot be justified in our view.

2. In the present case, the State party has failed to demonstrate that the aims of the plan to restructure the National Customs Authority were legitimate. In this context, we note that the Committee in particular did not address the claims of the author that both the Constitution and laws adopted by Parliament guaranteed him security of employment and that these guarantees were not removed as a result of a democratic process of amending the relevant provisions but by decree issued by the then President of Peru. Furthermore, the use of the criterion of age as applied to the author is not objective and reasonable for several reasons. First, the case concerns a matter of dismissal and not retirement. Second, while age may justify dismissal in cases where age affects the ability of the person concerned to perform their functions or where the person concerned has worked long enough to have acquired full or at least substantial pension rights, the State party has not shown that in the case of the author who, notwithstanding his age, had been employed for just 11 years, any such reasons were present. It is therefore our view that the author has been the subject of a violation of article 25 (c) of the Covenant.

Individual opinion (concurring) of Committee members

Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood

The Committee has concluded that Peru did not violate the rights of the author under article 25 (c) of the Covenant, even though the Peruvian National Customs Authority dismissed him in a downsizing based in part on his age. This decision was evidently troubling for the Committee in the light of the fact that the State has offered no reason for its discriminatory use of age in layoffs.

One thing remains clear, however: the Committee’s decision in this case should not be understood as supporting Peru’s use of gender discrimination in layoffs and downsizing. The Peruvian National Customs Authority peculiarly requires women to leave public service five years earlier than men, based on age and length of service.

There is no evident reason why women should be forced into retirement at an earlier stage than men, and it is hard to see how, if the issue had been litigated between the parties, such a practice could be regarded as consistent with either article 25 or article 26 of the Covenant.

Communication No. 1036/2001

Submitted by: Bernadette Faure (represented by her father, Leonard Faure)

Alleged victim: The author

State party: Australia

Date of adoption of Views: 31 October 2005

Subject matter: Receipt of unemployment benefits conditioned upon performance of compulsory labour

Procedural issues: Exhaustion of domestic remedies
– Substantiation, for purposes of admissibility
– Scope of the Covenant

Articles of the Covenant: 2 and 8

Article of the Optional Protocol: 5, para. 2 (b)

Finding: Violation (arts. 2, para. 3; and 8)

1. The author of the communication, initially dated 19 June 2001, is Bernadette Faure, an Australian and Maltese national, born 22 April 1980. She claims to be a victim of a violation by Australia of her rights under articles 2, paragraphs 2 and 3 (a)–(c), and 8, paragraph 3. She is represented by her father, Leonard Faure, who acts with her express authority.

The facts as presented by the author

2.1 After leaving high school aged 16 in 1996, the author continuously drew unemployment benefits. On 7 July 1997, the *Social Security Legislation Amendment (Work for the Dole) Act 1997* (“the 1997 Act”) entered into force.

2.2 On 3 November 2000, after having been referred to and attending an “Intensive Assistance” programme at IPA Personnel Ltd (a Government-accredited private employment agency), the author failed to comply with the terms of her “Preparing for Work Agreement” (first “activity test” breach in two years). As a result, on 13 November 2000, a rate reduction period was imposed on her unemployment benefit.¹

2.3 Following completion of the “Intensive Assistance” programme, the author was referred on three occasions to an employer, Mission Australia, to undertake the Work for Dole programme, with an interview scheduled on each occasion. She did not attend any interview. In the meantime, on 12 June 2001, the Human Rights and Equal Opportunities Commission (HREOC) also declined to investigate a complaint lodged on her behalf that the Work for

Dole programme amounted to a forced or compulsory labour, reasoning that the alleged violation arose by direct operation of legislation, rather than as a result of a decision maker’s discretion and therefore fell outside of its statutory mandate. HREOC observed, in addition, that “...reducing or cancelling unemployment assistance because a person does not want to participate in the Work for the Dole programme does not constitute forced or compulsory labour, as the nature of the punishment and the degree of involuntariness does not reach the threshold required to breach article 8 (3) (a) of the [Covenant].”

2.4 On 9 July 2001, the author commenced the Work for Dole programme, finishing her initial employment placement on 7 October 2001. After starting a second employment placement on 24 October 2001, she did not attend the placement on 30 October and again on 5–6 November. On 22 November 2001, a rate reduction period was imposed on her unemployment benefit for her unexplained absence on 30 October (second “activity test” breach in two years).²

2.5 On 6 December 2001, her unemployment benefit was entirely cancelled for her unexplained absence on 5–6 November 2001 (her third “activity test” breach in two years) and she left the Work for Dole programme. Prior to the cancellation, she was contacted and claimed that she had been too ill to attend the employment placement. She was unable to provide a medical certificate for her absence, claiming to have lost the original one provided by her doctor, and was unable to provide a copy from the doctor. The cancellation resulted in a two months non-payment period of her unemployment benefits.

2.6 On 10 December 2001, an administrative review officer affirmed the decision to cancel the author’s unemployment benefit. On 26 February 2002, her unemployment benefits were reinstated following a renewed application for payment of unemployment benefits.

The complaint

3.1 The author alleges that she was required to perform forced or compulsory labour in violation of article 8, paragraph 3 (a), of the Covenant, in

¹ The State party explains that the reduction in payment for a first activity test breach in two years is 18 per cent of the person’s maximum basic rate of payment for 26 weeks.

² The State party explains that the reduction in payment for a second activity test breach in two years is 24 per cent of the person’s maximum basic rate of payment for 26 weeks.

particular by being required to attend the Work for Dole programme. If she refused to participate, she would be impoverished by a reduction or suspension of her unemployment benefits.

3.2 The author further claims that she is without a remedy for her complaint, in violation of article 2, paragraphs 2 and 3 (a), (b) and (c), of the Covenant, as her complaint to HREOC was not accepted for consideration. In particular, she argues that HREOC had the authority to make reports or recommendations to the Attorney-General which could have been utilized in this case.

The State party's submissions on admissibility and merits

4.1 By submissions of 17 June 2002, the State party challenges both the admissibility and merits of the communication. The State party details the operation of its WFD programme, imposing on persons such as the author the obligation to perform certain community labour, upon pain of reduction of unemployment benefits. The scheme is described in greater detail in Annex to the communication.

4.2 As to the admissibility of the communication, the State party argues that the principal claim under article 8 is inadmissible for failure to exhaust domestic remedies, as the author's participation in the Work for Dole programme could have been challenged under an extensive domestic social security review and appeals system established by law. Administrative review is available for any decision made in relation to social security entitlement—thus, a decision to include participation in a Work for Dole programme in a person's 'Preparing for Work' Agreement is subject to review, as is a decision that a person participate in a Work for Dole programme as part of the general activity test. This objective review is carried out by specialist officer, not being the original decision maker. Thereafter, review is available in the Social Security Appeals Tribunal and appeal to the Administrative Appeals Tribunal. Further appeal to the federal courts and the High Court of Australia then is available.

4.3 In the present case, the author only sought an internal administrative review on 10 December 2001, not availing herself of the further appeals available. The communication was submitted well prior to that date, despite the author having been notified on numerous occasions as to her appeal rights. She can thus be taken to have been reasonably aware of her review rights, and any doubts she may have about their effectiveness cannot absolve her of her obligation to pursue them.

4.4 The author also did not apply for judicial review of HREOC's decision that it did not have jurisdiction to entertain her complaint on the basis

that it concerned direct operation of social security law, rather than any exercise of discretion by a decision maker. Alternatively, the State party argues that the author could have applied to Federal Court directly for judicial review of the decision to refer her to a Work for Dole programme.

4.5 Turning to the subsidiary claim under article 2, the State party argues that the claim under article 2 is incompatible with the Covenant and further inapplicable to the facts pleaded. The State party refers to the Committee's jurisprudence that article 2 is of accessory nature to the substantive articles of the Covenant, and thus, in the absence of a violation of article 8 of the Covenant, a separate article 2 issue cannot arise. In addition, the communication contains no claims that are capable of amounting to a breach of article 2, nor does the communication set out the nature of the alleged violation claimed.

4.6 The State party adds that this claim is inadmissible for failure to exhaust domestic remedies on the basis of the arguments set out in this respect in relation to article 8, *supra*. Finally, it contends this claim is unsubstantiated, for purposes of admissibility: it is a mere assertion, with no evidence submitted to suggest that the author has been denied an effective remedy.

4.7 On the merits of the article 8 claim, the State party points out that in the absence of substantive consideration of the issue of forced labour by the Committee, the Committee should be guided by the approaches of other international organizations.³ While reference to the ILO conventions on forced labour (No. 29 of 1930) and on the abolition of forced labour (No. 105 of 1957) was deliberately omitted from the Covenant because of difficulties with the ILO definitions, it is suggested that conclusions of the ILO's Committee of Experts can still be drawn on for assistance in determining the "permissible" forced or compulsory labour that can be imposed. An academic commentator argues that States must meet certain minimum labour and social welfare law standards contained in the two ILO conventions in order to come within the exceptions set out in article 8, paragraph 3, of the Covenant.⁴

³ The State party refers to but two occasions where the issue was even touched on: *Timmerman v. The Netherlands*, communication No. 871/1999, decision adopted on 29 October 1999, and *Wolf v. Panama* communication No. 289/1988, Views adopted on 26 March 1992. [Note to the Committee: In the first case, the Committee declared inadmissible a claim that engaging in certain professional employment on a disputed pay scale amounted to forced labour, while in the second, the Committee found unsubstantiated a claim that a remind prisoner had to perform forced labour while in pretrial custody.]

⁴ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel, Kehl am Rhein, 1993), p. 157.

4.8 The State party concedes that the ILO Committee of Experts monitoring Chilean legislation on unemployment benefits considered a loss of benefits imposed if a person refused to carry out community relief work to be “equivalent to a penalty in the sense of the Convention.” It distinguishes the schemes, however, on the basis that, in Chile, payment of unemployment benefits was conditional upon payment of contributions for 52 weeks of the preceding two years, while in Australia benefits are not conditional upon any prior contribution. In addition, Chilean unemployment benefits are time-bound, while in Australia they are not. In the State party’s view, therefore, the Committee of Experts’ comments on Chile are not presently relevant.

4.9 Turning to the relatively scarce jurisprudence arising under the similar terms of article 4 of the European Convention on Human Rights, the State party refers to the case of *Van der Musselle v. Belgium*.⁵ The European Court there held that a law student, voluntarily choosing to enter the legal profession, could not be held to have been required to perform forced labour by a requirement to undertake a certain amount of pro bono work during his clerking apprenticeship in order to register as advocates. In the Court’s view, the service did not impose a burden so excessive or disproportionate to the advantages attached to future exercise of the profession that it could be treated as not having been voluntarily accepted beforehand. Given that the governing ideas of the exceptions to article 4 were the general interest, social solidarity and what is in the ordinary or normal course of affairs, the requirement of service was not disproportionate or unreasonable.

4.10 In *X v. The Netherlands*,⁶ the European Commission of Human Rights found that a suspension for 26 weeks of a builder’s unemployment benefit due to the builder’s refusal, on grounds of alleged overqualification, of a job offer made to him did not amount to forced or compulsory labour. The Commission reasoned that nobody was forced, by penalty, to accept a job offer made by competent public authorities. Rather, acceptance of such an offer was simply a condition to receipt of unemployment benefits, a refusal being penalized only by temporary loss of those benefits.

4.11 The State party observes that the Covenant’s exception for “any work or service which forms part of normal civic obligations” is not specifically defined, but should be interpreted against the backdrop of the minimum standards contained in ILO Convention No. 29. That Convention, in article 2, paragraph 2 (e), excludes:

“...minor communal services of a kind which, being performed by the members of the community in the direct interests of the said community, can therefore be considered as normal civic obligations incumbent on members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.”

4.12 It is also relevant that article 11 sets out a minimum age of 18 and prior medical examinations for those required to perform compulsory labour, while article 12 states that the maximum labour period shall not exceed sixty days per year. Article 13 provides that the working hours in question should correspond to those of voluntary labour, and article 14 sets out cash remuneration not less than prevailing for similar work in the district. Article 15 applies workers’ compensation and incapacitation legislation to both forms of labour. The State party argues that the Work for Dole programme generally satisfies the minimum standards of the Convention. It is quite proper, as recognized in the above-mentioned ILO instruments, to place reasonable conditions on social security payments. By participating in the Work for Dole programme, long-term unemployed persons enhance their skills, employability and thus future self-sufficiency. Unemployment benefits in Australia are not dependent on prior contributions, nor are they time-bound. Nobody is forced to accept them, but if an individual does choose to do so, compliance with participation in a Work for Dole programme is a reasonable condition.

4.13 The State party argues that the present communication raises issues of compulsory rather than forced labour, given the absence of any physical or mental constraint. Applying the *Van der Musselle* test developed by the European Court, the author’s participation in the Work for Dole programme does not even reach the threshold of compulsory labour, as neither the necessary intensity of penalty or of involuntariness are involved. The State party points out that it carefully considered the programme’s compatibility with its international obligations, as borne out by statements made during the second parliamentary reading of the draft Bill:

“The Government is cognizant of its international obligations. It has taken advice of the Attorney-General’s Department that a work for the dole initiative should not contravene our international obligations, provided that the work offered under work for the dole is ‘suitable’ and ‘reasonable’ for that person. The fact that payment of unemployment allowance is not based on any prior mandatory contribution, coupled with

⁵ Series A, 70 (1983).

⁶ No. 7602/76, 7 DR 161 (1976).

the positive benefits of work for the dole for participants, means that the initiative should be regarded as reasonable in its requirement of a contribution to the community from participants.”

4.14 Assessing the two dimensions of penalty and involuntariness, the State party points out that a failure to participate in the programme, without reasonable excuse, initially only leads to a reduction in the rate of unemployment benefits payable, with repeated failure—again without reasonable excuse—leading to non-payment for 2 months only. There is no absolute right to social security, and ILO standards on unemployment benefits accept that they may be withdrawn where an individual refuses an offer of suitable and reasonable employment.⁷ In this light, there is no element of penalty for failure to participate in the Work for Dole programme that would raise participation in the programme to the threshold of compulsory labour.

4.15 In terms of involuntariness, the State party argues that the programme modalities satisfy requirements of reasonableness and proportionality. Unemployed people are not required to accept benefits but, if they do, a precondition to receipt may be participation in the Work for Dole programme. Long-term youth unemployment is a serious problem in Australia, and this programme is part of a series of innovative responses to the problem. The programme is based on the concept of mutual obligation between an unemployed person and the community supporting him or her. The relevant projects provide real tangible benefits to communities in the form of community facilities, infrastructure, care and assistance. The programme is specially designed to improve the skills, employability, self-esteem and experience of young unemployed people. 18–20-year-olds are only required to work 12 hours per week, while older persons work 15 hours per week, with working hours corresponding to those in the general marketplace.

4.16 In addition, participants can only work in the programme for six months at a time, and for six months per year. Job search requirements applicable to participants are reduced to two employer contacts per fortnight. Checks and balances, coupled with review processes, ensure specific work is suitable and reasonable, with a participant being able to raise these issues. The State contracts personal injury and third party liability insurance for participants. Finally, a fortnightly supplement is paid in view of the extra costs. In light of these elements, the burden the Work for Dole programme imposes on young

unemployed persons as a condition of receiving unemployment benefits is not unreasonable, or disproportionate when weighed up to the positive benefits received by them and the community.

4.17 The author had received unemployment benefits for four years before her referral to the programme, at age 21. Previously, she had been involved in a number of activities enhancing her employability, including a year-long Intensive Assistance programme. Her benefits were cancelled because of her failure to provide supporting evidence for alleged illness and thus being unable to demonstrate a reasonable excuse for her absence. This decision was upheld on review. In the review, she also contended she was unable to carry out concreting work as part of the project. However the Community Work Coordinator for the project advised that the concreting was minor, there were other young women involved and nobody was asked to do anything they were incapable of physically performing. In the State party’s view, these processes show how checks and balances work to ensure that Work for Dole participants are given reasonable and suitable work.

4.18 In conclusion, the State party invites the Committee to find that the author was not required to engage in compulsory labour, within the meaning of article 8 of the Covenant, or that, if so, the labour is justified by the exception of “normal civic obligation” contained in article 8, paragraph 3 (c) (iv), resulting in no violation of the Covenant.

4.19 On the merits of the article 2 claims, the State party argues that as the substantive claim under article 8 is either inadmissible or without merit, the assertion of an article 2 claim must also be considered to be without merit. In any event, the author has not provided evidence sufficient to enable a proper consideration of this claim. Even if the communication could be said to contain any substantiated evidence, the State party contends, in the light of its admissibility submissions on article 2, that it fully protects Covenant rights under common law and Federal, State and Territory legislation. In the present case, numerous appeal and review instances were available but not utilized. Her failure to exhaust domestic remedies also supports a finding that there is no violation.

4.20 On the specific claim that HREOC did not make a report and recommendations to the Attorney-General, the State party points out that this was because HREOC rejected the author’s complaint and thus cannot serve as a basis for an article 2 claim.

The author’s comments on the State party’s submissions

5.1 By letter of 1 September 2002, the author challenged the State party’s submissions, rejecting

⁷ ILO Convention No. 44 of 1934 Ensuring Benefit or Allowances to the Involuntarily Unemployed and ILO Convention No. 168 of 1988 Concerning Employment Promotion and Protection against Unemployment.

the present applicability of the *Van der Mussele* reasoning of the European Court, on the basis that she was not in an apprentice-teacher relationship or training for a specific vocation compulsory labour. In any event this precedent is inapplicable as she was never offered, and thus could not have refused, *suitable* work, as said to be required by the ILO instruments. Rather, she was enrolled into the Work for Dole programme, and subsequently had her unemployment benefits suspended, in the absence of a prior offer of suitable work. She emphasizes that she was enrolled into the Work for Dole programme for purposes of doing community work. She rejects the European Commission's reasoning in the *X* case that suspension of unemployment benefits cannot be taken as amounting to payments later suspended without having being offered such work.

5.2 The author argues that the threat, real or perceived, of an entire suspension of unemployment benefits in the event of her failure to participate in the Work for Dole programme must be taken as imposing a high degree of mental constraint, contending that "the prospective scenario of starvation cannot be reasonably construed otherwise".

5.3 The author rejects the contention that domestic remedies were not exhausted, arguing that HREOC and certain Work for Dole administrative correspondence did not explicitly advise a right of review. In any event, the threat of cancellation of unemployment benefits described in the latter conveyed the impression that no right of review was available. The author cites the Committee's decision in *Landry v. Canada*⁸ as support for the proposition that in such circumstances the State party is stopped from advancing a claim that domestic remedies have not been exhausted.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 On the issue of exhaustion of domestic remedies, the Committee observes that there is no dispute that the author comes squarely within the scope of the impugned legislation, with the alleged violation deriving from the direct application of the law to her. As the Committee observed in a similar context, it would be futile to expect an author to bring judicial proceedings which would merely confirm the undisputed fact that the primary

legislation in question, in this case the 1997 Act and the requirement of participation in the Work for Dole programme imposed pursuant to it, does in fact apply to her, when what is being challenged before the Committee is the substantive operation of that law, the content of which is not open to challenge before the domestic courts.⁹ As the State party has not shown how the substantive content of the Work for Dole regime set out in the 1997 Act that is applicable to her can be challenged in the domestic courts, the Committee considers that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol from consideration of the case.

6.3 As to the argument that the claims under articles 2 and 8 fall *ratione materiae* outside the scope of the Covenant and are insufficiently substantiated, the Committee considers that the author has advanced arguments of a sufficient weight to substantiate, for purposes of admissibility, her claims under these articles of the Covenant.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

7.2 Turning first to the claim under article 2 of the Covenant, the Committee recalls that article 2 requires a State party to provide an effective remedy for breaches of Covenant rights. In its decision in the case of *Kazantzis v. Cyprus*,¹⁰ the Committee stated that "article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States parties must ensure that individuals also have accessible, effective and enforceable remedies to vindicate those rights A literal reading of this provision seems to require that an actual breach of one of the guarantees of the Covenant be formally established as a necessary prerequisite to obtain remedies such as reparation or rehabilitation. However, article 2, paragraph 3 (b), obliges States parties to ensure determination of the right to such remedy by a competent judicial, administrative or legislative authority, a guarantee which would be void if it were not available where a violation had not yet been established. While a State party cannot be reasonably required, on the basis of article 2, paragraph 3 (b), to make such procedures available

⁹ See the Committee's rejection of the same argument with respect to mandatory detention provisions of the *Migration Act* in *A. v. Australia*, case No. 560/1993, Views adopted on 4 March 1997, *C v. Australia*, case No. 900/1999, Views adopted on 28 October 2002, *Baban et al. v. Australia*, communication No. 1014/2001, Views adopted on 6 August 2003, and *Bakhtiyari v. Australia*, case No. 1069/2002, Views adopted on 29 October 2003.

¹⁰ Case No. 972/2001, decision adopted on 7 August 2003, para. 6.6.

⁸ Communication No. 112/1981, decision adopted on 8 April 1986.

no matter how unmeritorious such claims may be, article 2, paragraph 3, provides protection to alleged victims if their claims are sufficiently well founded to be arguable under the Covenant.” (internal footnote omitted)

7.3 Applying this reasoning to the present claim that the State party did not provide an effective remedy for the alleged breach of article 8 of the Covenant, the Committee observes, with reference to its admissibility considerations identified above in the context of exhaustion of domestic remedies, that, in the State party’s legal system, it was and remains impossible for a person such as the author to challenge the substantive elements of the Work for Dole programme, that is, the obligation imposed by law on persons such as the author, who satisfy the preconditions for access to the programme, to perform labour in exchange for receipt of unemployment benefits. The Committee recalls that the State party’s proposed remedies address the question of whether or not an individual in fact satisfies the requirements for access to the programme, but no remedy is available to challenge the substantive scheme for those who are by law subject to it.

7.4 As the Committee’s consideration (*infra*) on the merits of the substantive article 8 shows, the question presented undoubtedly raises an issue, in the language of the Committee’s decision in *Kazantzis*, that was “sufficiently well founded to be arguable under the Covenant”. It follows, therefore, that the absence of a remedy available to test an arguable claim under article 8 of the Covenant such as the present amounts to a violation of article 2, paragraph 3, read together with article 8, of the Covenant.

7.5 Concerning the principal claim under article 8, paragraph 3, of the Covenant, the Committee observes that the Covenant does not spell out in further detail the meaning of the terms “forced or compulsory labour”. While the definitions of the relevant ILO instruments may be of assistance in elucidating the meaning of the terms, it ultimately falls to the Committee to elaborate the indicia of prohibited conduct. In the Committee’s view, the term “forced or compulsory labour” covers a range of conduct extending from, on the one hand, labour imposed on an individual by way of criminal sanction, notably in particularly coercive, exploitative or otherwise egregious conditions, through, on the other hand, to lesser forms of labour in circumstances where punishment as a comparable sanction is threatened if the labour directed is not performed. The Committee notes, moreover, that article 8, paragraph 3 (c) (iv), of the Covenant exempts from the term “forced or compulsory labour” such work or service forming part of normal civil obligations. In the Committee’s view, to so

qualify as a normal civil obligation, the labour in question must, at a minimum, not be an exceptional measure; it must not possess a punitive purpose or effect; and it must be provided for by law in order to serve a legitimate purpose under the Covenant. In the light of these considerations, the Committee is of the view that the material before it, including the absence of a degrading or dehumanizing aspect of the specific labour performed, does not show that the labour in question comes within the scope of the proscriptions set out in article 8. It follows that no independent violation of article 8 of the Covenant has been made out.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 2, paragraph 3, read together with article 8, of the Covenant.

9. While in accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, the Committee is of the view that in the present case its Views on the merits of the claim constitutes sufficient remedy for the violation found. The State party is under an obligation to ensure that similar violations of the Covenant do not occur in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views.

The State party’s description of the WFD programme

The WFD programme was introduced by the 1997 legislation. Its object, according to the statute, is “to reinforce the principle of mutual obligations applying to [unemployment benefits] by recognizing that it is fair and reasonable that persons in receipt of such payments participate in approved programmes of work in return for such payments and to set out the means by which they may be enabled, or required, to undertake such work”.

The State party points out that a Work for Dole programme cannot require more than 24 or 30 hours’ work (up to and beyond 21 years of age, respectively) per fortnight, and an individual is

referred to a programme for a maximum of 6 months per year. To qualify for an unemployment benefit, a person must generally

(a) Be unemployed;

(b) Satisfy the “activity test” or be exempt from it by virtue of, for example, being in full-time education, being in a remote area, giving birth to a child, and so forth. The “activity test” requires a person to be actively seeking and willing to undertake suitable paid work *and* to attend such programmes, for example the Work for the Dole programme, and training that may be directed;

(c) Be prepared to enter into and comply with a ‘Preparing for Work’ Agreement, which may include participating in a Work for Dole programme; and

(d) Satisfy certain other formal criteria of age, residence and the like.

After receiving an unemployment benefit for six months, an unemployed person must, if subject to “activity testing”, commence a programme or activity of their choice, of which the Work for Dole programme is one, geared towards enhancing their employment prospects. Failure on the part of the person to choose a programme or activity results in referral for a Work for Dole placement for six months as a matter of administrative practice if:

(a) The person receives the full rate of unemployment benefit;

(b) The person possesses the skills and experience to perform the required tasks;

(c) The tasks of the employment placement in question are medically appropriate and do not otherwise pose occupational health and safety; and

(d) Certain other requirements are satisfied.

Once a Work for Dole placement begins, the person’s unemployment benefit is augmented by \$A 21 per week reflecting the extra costs of participating in the programme. Community Work Coordinators both assist the person in the placement and submit, under strict requirements, participation reports to ensure that participation requirements are being met.

Failure to commence or complete the Work for Dole programme, including where this forms part of a Preparing for Work Agreement, or failure to comply with conditions of a Work for Dole programme, result, in the absence of reasonable excuse, in an “activity test” breach and accompanying financial penalties in the form of reduced payment of unemployment benefits. Any third such breach

within a two year period results in a two-month non-payment of unemployment benefits.

APPENDIX

Individual opinion by Committee member Ms. Ruth Wedgwood

In a world that is still replete with problems of caste, customary systems of peonage and indentured labour, forced labour in remote areas under conditions that often mimic slavery, and the disgrace of sexual trafficking in persons, it demeans the significance of the International Covenant on Civil and Political Rights to suppose that a reasonable work and training requirement for participation in national unemployment benefits in a modern welfare state could amount to “forced or compulsory labour” within the meaning of article 8 (3) (a).

Australia has a programme of unemployment benefits that supports new job seekers for six months, so long as they are willing to accept gainful employment. After six months, continued receipt of benefits may be conditioned on the participant’s willingness to enhance his or her job skills and give something back to the community, through a “Work for Dole” programme. The latter programme is limited to 12 hours per week (for persons under 21 years of age), and 15 hours per week (for persons of 21 years or older).

The author of this communication, Ms. Bernadette Faure, began to draw unemployment benefits immediately after leaving high school in 1996. In November 2000, after attending an “Intensive Assistance” programme at a Government-accredited employment agency, she failed to comply with the terms of a “Preparing for Work Agreement” and her public benefit was partially reduced. She then failed to attend three scheduled interviews with an employer called “Mission Australia” as part of the Work for Dole programme. Finally, in July 2001, she took part successfully in the “Work for Dole” programme and worked at a job placement until 7 October 2001. She started another placement on 24 October 2001, but failed to show up on 30 October or 5–6 November 2001, and did not corroborate her claim of illness with any medical certificate. The unexcused absence on 30 October resulted in a rate reduction of 24 per cent and the second absence resulted in cancellation of her benefits. Her benefits were reinstated on 26 February 2002.

Ms. Faure asserts that Australia has imposed a type of “forced or compulsory labour” forbidden by the Covenant, by requiring that she should take part in a work and training programme as a condition of receiving public unemployment benefits. The State party argues that the programme contributes to the acquisition of employment skills, and is a form of “mutual obligation” that respects the claims of the community and the job seeker, Ms. Faure, characterizes the work requirement in terms one might have thought originally aimed at horrific instances such as the forced labour required by colonial powers to build canals and roads, rather than the mutual obligations of a modern democratic society.

Professor Manfred Nowak, in his work on the UN Covenant on Civil and Political Rights, CCPR Commentary (2nd edition 2005), at page 202, has concluded that “The mere lapse of unemployment

assistance when a person refuses to accept work not corresponding to his or her qualifications does not ... represent a violation [of article 8]; in this case, neither the intensity of the involuntariness nor that of the sanction reaches the degree required for forced or compulsory labour.” Professor Nowak’s common-sense assessment is faithful to the purposes of article 8. On the uncontested facts of this case, I would dismiss the author’s claim of “forced or compulsory labour” as inadmissible for lack of substantiation.

The author has also failed to exhaust administrative and judicial remedies. In her complaint, the author challenges the “Work for Dole” programme because, inter alia, her work assignments were not “suitable” (e.g., she was required to learn how to apply “concrete” in a community project) and did not amount to training for a “specific vocation.” See Views of the Committee, paragraphs 4.17 and 5.1 supra. Thus, she says, her assignments cannot be characterized as apprenticeship or vocational training that might escape the opprobrium of “forced labour.”

But the author did not challenge the “suitability” of her assignments through the framework of administrative and judicial remedies available in Australia for a “Work for Dole” participant. A beneficiary is apparently entitled to challenge a particular work assignment, or dispute its use as a “general activity test” for the continued receipt of benefits. See id., paragraphs 4.2–4.4, supra. The appeals include review by a specialist officer, and remedies in the Social Security Appeals Tribunal, Administrative Appeals Tribunal, federal courts and High Court.

So, too, after the author’s unexcused absences from her employment placement resulted in a loss of benefits, she declined to pursue any appeal of the decision beyond a first-level review, even though she was “notified on numerous occasions as to her appeal rights.” See id., paragraph 4.3.

It is true that the author did seek early intervention by the Australian Human Rights and Equal Opportunities Commission, after failing to show up for three scheduled interviews at Mission Australia, and suffering an 18 per cent reduction in her benefits. See id., paragraphs 2.2–2.3. In a decision on 12 June 1991, the Australian human rights commission concluded that its jurisdiction was limited to the discretionary decisions of Government personnel, rather than the review of statutory mandates. But the Australian human rights commissioners also observed on the merits that “reducing or cancelling unemployment assistance because a person does not want to participate in the Work for the Dole programme does not constitute forced or compulsory labour, as the nature of the punishment and the degree of involuntariness does not reach the threshold required to breach article 8 (3) (a) of the Covenant.” The author did not apply for judicial review of the Commission’s decision.¹¹

By virtue of these facts, it is difficult to conclude that the author has exhausted her domestic remedies. Nor has she established that the State party failed to provide an effective remedy as required by article 2 for an “arguable” violation of Covenant rights.

¹¹ In *Baban et al. v. Australia*, communication No. 1014/2001, Views adopted on 6 August 2003, this member offered the view that the Committee “should not presume what the courts of the State party might decide in a particular case. A court’s interpretation of parliamentary intent may be informed by Covenant norms, and the permissible inference that parliament would have wished to comply with the State party’s treaty obligations.” See also *Young v. Australia*, case No. 941/2000, Views adopted on 6 August 2003 (concurring opinion of R. Wedgwood).

Communication No. 1052/2002

Submitted by: Ms. N.T. (not represented)

Alleged victims: The author and her daughter, J.T.

State party: Canada

Date of adoption of Views: 20 March 2007

Subject matter: Denial of access of mother to her child

Substantive issues: arbitrary interference with family, protection of the family, protection of the child as a minor, fair trial, undue delay

Procedural issues: failure to substantiate claim.

Articles of the Covenant: 14; para. 1; 17; 23; and 24

Article of the Optional Protocol: 2

Finding: Violation (arts. 2; 14, para. 1; 17; 23; and 24)

1. The author of the communication is N.T., a Canadian citizen of Ukrainian origin, born on 28 July 1960. She also submits the communication on behalf of her daughter, J.T., born in Canada on 20 February 1993, who was removed from her care on 2 August 1997 and later adopted. Although the author did not initially make any specific claims under the Covenant, she later claimed that they were the victims of violations by Canada¹ of articles 1, 2, 3, 5 (2), 7, 9 (1, 3 and 5), 10 (1 and 2 *a*), 13, 14 (1, 2, 3 *d* and *e*, and 4), 16, 17, 18 (4), 23, 24, 25 (*c*) and 26, of the International Covenant on Civil and Political Rights (the Covenant). She is not represented by counsel.

The facts as presented by the author

2.1 The author was born in the Ukraine and obtained a qualification in the medical field there. She migrated to Canada in 1989 and became a Canadian citizen in 1994. After the birth of her daughter on 20 February 1993, she raised her child as a single parent, while pursuing University studies in order to obtain a professional Canadian qualification. The child's biological father did not have any contact with her.

2.2 During the night of 1 to 2 August 1997, the author called the police to report a sexual abuse of her four-year-old daughter. The author also slapped her daughter, to prevent her from visiting the neighbours, resulting in a red mark on her face.² According to the author, this only happened once, in a special circumstance where she was concerned for

her daughter's well-being. According to a police report, the author stopped a motorist to "give away" her daughter and said that she no longer wanted her daughter and that Canada could take care of her. However this has been consistently denied by the author, according to whom the child was standing on the sidewalk waiting for the author who was talking to the police, and according to whom she never abandoned her daughter. The police took her child to the Police Station and placed her in the care of the Children's Aid Society of Metropolitan Toronto which in turn entrusted her to a foster home. Despite the author's report that her daughter had been sexually assaulted, no investigation was allegedly made and the child was not examined by a doctor.

2.3 A few days later (5 August), the author was arrested and charged with assault (for what she believed to be an exercise of parental authority) of her daughter.³ In an affidavit of 6 August, the author explained the circumstances of the incident and stated that she believed that she was capable of caring for her daughter, and that she would be pleased to have the Children's Aid Society attend her home to follow her parenting style. However, on 7 August, the Scarborough Provincial Court placed the child in temporary (three months) care of the Catholic Children's Aid Society of Toronto (CCAS), with supervised access. According to the author, this order did not provide the authority to place her child permanently in a foster home, nor to release her child for adoption. She claims that until the child protection trial and the judgement of 26 June 2000,⁴ no custody order was issued in favour of the CCAS and it was not established that the child needed protection, as would have been required by national legislation, i.e., the Rules of Civil Practice, the Family Court Rules and the Family and Services Act, for the further apprehension of her daughter from 1997 to 2000. Although the girl initially disclosed that her mother had hit her, she repeatedly expressed the wish to return home and reacted negatively when separated from her mother at the

¹ The Covenant and the Optional Protocol entered into force for Canada on 19 August 1976.

² According to the police, the girl had bruises on her face and arms.

³ The author confessed the assault and was convicted of assault on 24 April 1998 and received a conditional sentence of 90 days imprisonment.

⁴ The author refers to the trial which led to the 26 June 2000 judgement of Justice B.E. Payne of the Ontario Court of Justice, on the application of the Children's Aid Society of Toronto for an order for crown wardship without access of the child.

end of visits. All visits were strictly supervised and the mother and daughter were allowed no privacy.

2.4 On 1 December 1997,⁵ on her daughter's request, the author took her home. As a result, she was convicted of child abduction and sentenced to one month imprisonment. In prison, she was severely beaten by an inmate and thereafter placed in segregation without medical attention for 10 days. On 24 December 1997, she was released on bail, with the condition that before she could have any access to her daughter, she undergo an assessment as approved by the CCAS, and that any access to her daughter be under the immediate and direct supervision of the CCAS. Telephone contact between mother and daughter was terminated following an angry exchange between the author and the foster mother.

2.5 In March 1998, the author was assessed, on the CCAS' request, by Dr. K., an attending psychiatrist at the Clarke Institute of Psychiatry, for a total of 4 hours. The Committee has not been provided with a copy of the 14-page report that he produced. However, it transpires from the judgement of 26 June 2000⁶ that the doctor, who based his assessment on two interviews and second-hand information from other psychiatrists, found the author to suffer from a delusional disorder and erotomanic, persecutory, and somatic delusions. According to the judge, the doctor also observed that because her mental illness was proceeding untreated, her ability to care for her daughter was in question.

2.6 On 29 September 1998, Dr. K. replied to a letter from the author's counsel, and clarified a number of issues, among which was the fact that he was not able to detect the author's erotomanic delusions in his time spent with her, but rather that the notes from the University of Toronto Health Services Clinic suggested that her treatment there flowed from her erotomanic delusional material. He also indicated in his conclusions that if she did experience erotomanic delusions, they did not appear to have had an impact on her ability to care for her daughter.⁷

2.7 On 12 May 1998, the author was assessed by Dr. G. from the Toronto Hospital. In describing the author, he indicated that "there do not appear to be any manic or overt psychotic symptoms", that "there was no formal thought disorder" and that "her thought content revealed mostly ideas of persecution which appeared to be overvalued, but not of delusional proportions". He considered that "it is

likely that this patient suffers from a paranoid personality disorder, although it is difficult to say at this point as a result of only one interview", but concluded that she did not need medication.

2.8 On 2 July 1998, a Dr. G., the author's family physician since May 1995, indicated in a letter that he did not feel that he knew the patient well and that she was difficult to describe, but that she did not appear to suffer from any major psychiatric illness and had not been on any medications.

2.9 In a letter of 6 July 1998, Dr. T., Consultant Paediatrician who had seen the child in consultation intermittently since August 1993, indicated that he had no reason or evidence to suggest that the author was an unfit mother.

2.10 As a result of Dr. K.'s report which outlined a medical condition, and despite other specialists' acknowledgment that she was in good health and did not need medication, the CCAS refused to reinstate access. In June 1998, the initial application of the CCAS for an order of 3 months wardship was amended to seek an order of crown wardship with no access, to allow the child to be adopted. In July, August and November 1998, the author's motions to reinstate access were denied by no-access orders.

2.11 In an adoptability assessment of 28 September 1998, an Adoption Social Worker of the CCAS considered that "since her admission into care, J.'s social skills have greatly improved". However, she found that "J. appears to have a significant attachment to her mother" and "she has stated that she wants to live with her". "J., in a discussion with this worker indicated that she wanted to be with her mother, although she still has some ambivalence about her." She stated that she loved her mother although she had been beaten by her. "Despite this, she was not able to consider the possibility of living with another family at this time." The social worker concluded that it would be helpful to have the child psychologically assessed and specifically explore the attachment issues before making a decision about her adoptability.

2.12 On 12 December 1998, Dr. P., the child's psychologist, wrote a report on the possible effect that crown wardship without access might have on the child. The psychologist indicated that the child, who at that time had not seen her mother for one year, was at risk of developing attachment disorder. She further stated that:

"J. misses her mother, says she wants to see her, she is confused by her mother's absence. (...) J. is a child in limbo. (...) The impression I got from both conversations with J.'s foster mother and from J.'s presentation is that she is clinging to the memory of

⁵ According to the author, the temporary order of 7 August 1997, granting temporary care to the CCAS with supervised access, had expired at this time, and was neither varied nor extended by another order.

⁶ See below.

⁷ This information was also made available to the judge.

her mother, that she is confused, and does not know what she should and can feel about her mother. She is at risk of depression. (...) J. needs to come to some resolution in relation to her mother. (...) It could be helpful for J. to have contact with her mother so that such a resolution can be achieved. (...) The recommendation is therefore that supervised visits with [the author] are reinstated. That J. is given a chance to know her mother. (...) Should it be considered that the visits are detrimental to J., they should be stopped and the reasons for the termination explained to her.”

2.13 In order to regain the care and control of her child or visiting rights, the author turned to various lawyers and eventually proceeded in person to pursue numerous motions and appeals to the courts during the years 1997 to 2000. In the result on 11 January 1999, on the CCAS’ request, the Ontario Court of Justice, relying on Dr. K.’s report, found the author to be under a “mental disability” and ordered that she not be allowed to pursue any further court proceedings in person. In the circumstances the Public Guardian and Trustee Office (PGT) was assigned as the author’s litigation guardian.⁸ She claims that the PGT did not act on her behalf and tried to mislead her. The Court also ordered that the trial scheduled for February 1999 be postponed, as the PGT was not ready to proceed to trial.

2.14 In June 1999, as a result of an order issued on 17 May 1999, access to her child was reinstated by consent on certain terms and conditions, among which:

“1. [The author] shall have supervised access to the child in the sole and absolute discretion of the CCAS.

2. Access shall be once every three weeks for a period of not more than 90 minutes.

4. [The author] shall remain in the visitation room at the CCAS office with the child at all times during the visits, fully supervised by CCAS employees. There will be a CCAS employee in the room at all times as well as a CCAS employee behind an observation mirror.

⁸ In an affidavit of 17 May 2000, a lawyer from the PGT indicated that the author had “demonstrated that she was capable of instructing and keeping legal counsel” in support of a motion for the PGT to be removed as legal representative for the author.

10. [The author] shall not question J. regarding where she lives, her telephone number or where she attends school.

13. In the event [the author] fails to abide by any of these terms and conditions the access visits shall be terminated immediately and the CCAS shall have the right to determine if future visits shall take place.”

2.15 Access was removed again by the CCAS in August 1999 although the visits had gone well and the author fully complied with all access conditions at each visit. On the author’s motion to reinstate access, the access order was varied on 21 December 1999, in the best interests of the child. In December 1999, the child started living with new foster parents, who expressed the wish to adopt her.

2.16 On 8 December 1999, the author filed an application for judicial review of the entire child protection process in the Superior Court of Justice. The CCAS initiated a counter-application under Section 140 of the Courts of Justice Act, banning the author from continuing any proceedings she had commenced in any court, and preventing her from initiating any subsequent proceedings. On 8 March 2000, the Superior Court of Justice prohibited her from instituting further proceedings in any court, and ordered that all proceedings previously instituted in any court be discontinued. The Court’s reasoning was that the author had initiated numerous motions, appeals and applications, sabotaging the timetable of the trial regarding the protection of the child, and thereby seriously compromising the child’s welfare.

2.17 On 26 June 2000, in the main trial on the child protection case, the Ontario Court of Justice made an order for crown wardship without access for the purpose of adoption. The Court considered that “the evidence in this matter is overwhelming to permit the Court to find that the child is in need of protection and that there is overwhelming evidence to demonstrate that this child’s best interests can only be served by an order for crown wardship without access.” The Court further “firmly believed” that the author was a “seriously ill person”, and that if the child were to be left in her care, she would suffer not only physical harm but irreparable emotional damage. The Court based this finding on Dr. K.’s 1998 medical report, Dr. G.’s indication that “it is likely that this patient suffers from a paranoid personality disorder” and another doctor’s statement of 12 May 1998 that “While I have no direct confirmatory evidence of her suffering from a delusional disorder, I would feel that the material presented by Dr. K. and presumably to the Courts, would likely have stood up and would continue to do so”. None of these specialists came to Court to testify.

2.18 The child was not heard during the trial. However, it transpires from the judgement that through her lawyer, “the position was taken on behalf of the child that she wished to remain with her present foster parents although she still indicated a wish to visit with her mother”. During the trial, the child’s psychologist stated that J. was strongly attached to her mother, that she needed contact with her, and that she would suffer if deprivation of all access continued.

2.19 With regard to the author’s condition and her conduct, the Court further noted that:

“It is difficult to determine where [the author’s] illness ends and her malicious behaviour begins as they are intertwined. The apprehension of this child took place in the early hours of the morning on August 2nd, 1997 and from then until this matter proceeded to trial in May and June of 2000, there were endless legal proceedings related to this apprehension which delayed the hearing of the initial problem and [the author], with the assistance of seven or eight lawyers, ran off in all directions attacking everyone with motions and appeals from decisions until finally this year an order was made in the Superior Court, directing that [the author] was a vexatious litigant and she was not permitted to institute any new legal proceedings without prior leave of the Court.”

Finally, it considered that continued access would only perpetuate the state of limbo the child found herself in, and that there were no special circumstances demonstrated which would justify the continuation of access in these circumstances. On 10 October 2000, the author’s attempted appeal of 26 July 2000 was dismissed, on procedural grounds.

2.20 In November 2000, the author asked the CCAS for the release of information related to J.’s placement for adoption. The CCAS replied that “the Society has no obligation to advise you as to whether your daughter has been placed for adoption”.

2.21 It transpires from an affidavit of 22 June 2001 sworn by the child’s foster mother, that the author attempted to be in contact with her daughter on several occasions. She called their home in February, August and October 2000 and went to her school twice, in May and June 2001. According to the foster mother, the girl had run away from the author and sought the assistance of a teacher. J. told her foster mother that the author had approached her, but that “she knew not to speak to her”, and that she “continued to be afraid of her mother”. An “Acknowledgement of Adoption Placement” of 9 August 2001 signed by the foster parents indicates their intention to adopt the child.

2.22 The author made further motions and appeals which were all rejected on procedural grounds. Finally, on 13 September 2001, the Supreme Court of Canada dismissed an application for leave to appeal and a motion for stay of adoption filed by the author. Her applications to the Ontario Human Rights Commission, the Ministry of Community and Social Services, and to “many other authorities” were fruitless.

The complaint

3.1 While the author did not initially invoke violations of specific provisions of the Covenant, she subsequently, in comments on the State party’s observations, invoked violations of articles 1; 2; 3; 5, paragraph 2; 7; 9, paragraphs 1, 3 and 5; 10, paragraphs 1 and 2 (a); 13; 14, paragraphs 1, 2, 3 (d) and (e) and 4; 16; 17; 18, paragraph 4; 23; 24; 25 (c); and 26 of the Covenant. The Committee, upon analysis of the complaint, considers that it raises the following issues under the Covenant.

3.2 The author claims, on her own behalf, violations of article 14, in relation to her convictions and imprisonment for the assault and abduction of her daughter, and of article 9 and article 10, in relation to her treatment while serving her sentence.

3.3 The author claims, on her daughter’s and her own behalf, that her daughter was “abducted” and requests that she be returned to her custody or granted access. She claims that her family was “illegally destroyed” as her daughter was apprehended and kept by the CCAS without a legitimate custody order. Her access to her daughter was unlawfully and arbitrarily terminated by the CCAS without any explanations and in spite of a court order guaranteeing access. Her daughter stayed in the temporary care of the CCAS well beyond the maximum statutory one-year limit.⁹ No efforts to return the child to the author, or seek a less restrictive solution, were made in the course of the proceedings. These claims raise issues under article 17, article 23 and article 24.

3.4 The author denounces on her daughter’s and her own behalf the delays in considering their case, in particular a delay of almost three years between the commencement of the child protection proceedings in August 1997 and the trial in June 2000, thus raising issues under article 14, paragraph 1.

⁹ Child and Family Services Act, Section 70.(1) (...) “the court shall not make an order for society wardship under this Part that results in a child being a society ward for a period exceeding,

(a) 12 months, if the child is less than 6 years of age on the day the court makes an order for society wardship”.

3.5 The author claims that the hearing of the child protection case was unfair. She claims that during the trial which resulted in the judgement of 26 June 2000, the court did not call the main witnesses nor acknowledge the numerous contradictions in the witnesses' statements. Further, the psychiatric assessment on which the Court based its finding was carried out two years before the trial and included hearsay information which was not evaluated in court. The judge based his decision on a single outdated report, prepared by the psychiatrist on the CCAS' request, and paid for by the CCAS. This psychiatrist did not testify during the proceedings. These claims also raise issues under article 14, paragraph 1, of the Covenant.

3.6 The author contends on her daughter's behalf that the court decisions in the case were not taken in the child's best interest, and that the unfair and prolonged nature of the proceedings caused her mental suffering, thus raising issues under article 7.

3.7 The author does not further substantiate her claims under articles 1, 2, 3, 5, 13, 16, 18, 25 and 26 of the Covenant.

State party's submission on the admissibility and merits of the communication

4.1 On 15 May 2002, the State party commented on the admissibility and merits of the communication. It notes that in her communication, the author describes her experiences with various legal and social institutions of the State party, and contends that the communication should be declared inadmissible for non-substantiation, as the author's allegations are formulated in an imprecise manner, without specifying which provisions of the Covenant allegedly were violated. The State party argues that in the light of this deficiency, it cannot provide a response to the author's complaint.

4.2 The State party refers to the Committee's decision in the case of *J.J.C. v. Canada*¹⁰ where the Committee concluded that the author's complaint was not sufficiently substantiated due to the "sweeping nature" of the allegations made against the Canadian Court system, and found the communication inadmissible. It submits that the present communication suffers from the same inadequacies as those in that particular communication, and that it should likewise be found inadmissible.

4.3 The State party argues that the author's allegations reveal no specific violations of any Covenant provisions, and that the communication is without merits.

4.4 The State party reserved the right to make submissions with respect to the admissibility and merits of the communication if further information was received.

Author's comments

5.1 On 21 September 2003, the author commented on the State party's submissions, arguing that her sole intention is to gain the possibility to see her only child. All her efforts and court applications were aimed at reinstating contact with her daughter, who was separated from her against their will.

5.2 In reply to the State party's contention that her communication reveals no specific violations of Covenant provisions, the author lists the provisions she considers to have been violated by the State party (see para. 1 above). She reiterates her claim that her daughter was illegally removed from her custody, as the interim supervision order of 7 August 1997 expired after three months. When she decided to take her daughter home after the expiry of that order, she was immediately arrested and imprisoned for two months without trial. She contends that the subsequent terminations of access to her daughter were arbitrarily decided by the CCAS, despite a court order granting her access.¹¹

5.3 The author reiterates that her daughter wanted to have contact with her, which was ignored by the judge, and refers to the adoptability assessment and the psychologist's recommendation that the author should have access to her child.

5.4 Finally the author claims that her daughter suffered severe anxiety and depression symptoms, as a result of her separation from her. Unnecessarily severe measures towards the family caused an irreversible psychological trauma to the child, and put her at risk of developmental disorders. For the author, this constituted cruel and unusual punishment of her child.

5.5 On the issue of standing of the author to represent her daughter, the author has confirmed that she wishes to bring the complaint also on behalf of her daughter. On 19 August 2006, she informed the Committee that her daughter has been adopted, and that she has no more contact with her. As a result of the incidents of 2001 in which she attempted to enter into contact with her, she was taken to court by her daughter's foster/adoptive parents and arrested. She also indicates that she has not been provided any information as to the date of adoption.

¹⁰ Communication No. 367/1989, *J.J.C. v. Canada*, inadmissibility decision of 5 November 1991.

¹¹ The author refers to the order of 7 August 1997 giving her access and the termination of access on 1 December 1997 further to the abduction, as well as the order of 17 May 1999 reinstating access and the CCAS' unilateral decision to terminate access in August 1999.

5.6 On 31 October 2006, the author indicated that her attempts to contact her daughter were prevented by the present caregivers, and that she has not been able to obtain an authorization from her daughter to act on her behalf in the proceedings before the Committee. Consequently she took the matter to court, in which the proceedings are still pending. On 22 February 2007, she confirmed that a court hearing initially scheduled for December 2006 had been postponed to 9 March 2007.

Absence of further comments from the State party

6. On 10 December 2003, the author's comments were transmitted to the State party, which did not provide any further comments.

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol. It notes that the State party has not contested the admissibility of the communication on grounds of non-exhaustion of domestic remedies, and that the author's application for leave to appeal to the Supreme Court was denied on 13 September 2001. It thus considers that the author has exhausted domestic remedies.

7.3 The Committee has noted the State party's contention that the communication should be declared inadmissible for non-substantiation because the author's allegations were formulated in an imprecise and sweeping manner, without referring to the Covenant. It observes, however, that in response to State party's comments, the author, who is unrepresented, made an effort to organize her claims and referred to different articles of the Covenant, although in a broad manner. The State party has not commented on these claims, although it has been given the opportunity to do so. The Committee concludes that the author's claims are not inadmissible on this ground.

7.4 With respect to the author's standing to represent her daughter in relation to her claims under article 7, article 14, article 17, article 23 and article 24, the Committee notes that the author's daughter is now fourteen years old and has been adopted. It further notes that the author has not provided an authorization from her daughter to act on her behalf. It recalls, however, that a non-custodial parent has sufficient standing to represent his or her children

before the Committee.¹² The bond existing between a mother and her child and the allegations in the case should be considered sufficient to justify representation of the author's daughter by her mother. In addition, the Committee also notes that the author has repeatedly but unsuccessfully sought to obtain authorization from her daughter to act on her behalf (see para. 5.6 above). In the circumstances, the Committee is not precluded from examining the claims made on behalf of the child by her mother.

7.5 The Committee understands the author's claims under article 9, article 10 and article 14, paragraph 2, as relating to her convictions for assault of her daughter and for child abduction, and the imprisonment related thereto. It notes that she has not provided any evidence supporting these claims, nor any description of facts sufficiently substantiated for purposes of admissibility, and accordingly finds them inadmissible under article 2 of the Optional Protocol.

7.6 The Committee considers that the author's claim that her daughter was a victim of mental suffering in violation of article 7 is not sufficiently substantiated for purposes of admissibility, and finds this claim inadmissible under article 2 of the Optional Protocol.

7.7 The Committee considers that the remaining claims raise issues under the Covenant and are sufficiently substantiated, for purposes of admissibility, and declares the communication admissible with respect to the claims under article 14, paragraph 1; article 17; article 23; and article 24 of the Covenant.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

8.2 As to the alleged violation of article 17, the Committee recalls that the term "family" must be understood broadly, and that it refers not solely to the family home during marriage or cohabitation, but also to the relations in general between parents and a child.¹³ Where there are biological ties, there is a strong presumption that a "family" exists and only in exceptional circumstances will such relationship not be protected by article 17. The Committee notes that the author and her daughter lived together until the

¹² See communication No. 417/1990, *Santacana v. Spain*, Views adopted on 15 July 1994, para. 6.1.

¹³ See communication No. 201/1985, *Hendriks v. The Netherlands*, Views adopted on 27 July 1988, para. 10.3, and communication No. 417/1990, *Santacana v. Spain*, Views adopted on 15 July 1994, para. 10.2.

child was four years old and she was placed in institutional custody and that the author was in contact with the child until August 1999. In these circumstances, the Committee cannot but find that at the time when the authorities intervened, the author and her daughter formed a family within the meaning of article 17 of the Covenant.

8.3 In respect of the author's claim that she unlawfully lost custody of and access to her child and that her family was destroyed, the Committee observes that the removal of a child from the care of his or her parent(s) constitutes interference in the parents' and the child's family. The issue thus arises whether or not such interference was arbitrary or unlawful and contrary to article 17. The Committee considers that in cases of child custody and access, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the effective right of a parent and a child to maintain personal relations and regular contact with each other, and on the other hand, in the light of the best interests of the child.¹⁴

8.4 The Committee notes that the authorities' initial removal of her daughter from the author's care, on 2 August 1997, confirmed by a judicial order of 7 August placing her under the care of the CCAS, was based on their belief, later confirmed by the author's conviction, that she had assaulted her child. The Committee notes that although the order was temporary (three months), it only granted the author access to her daughter under extremely harsh circumstances. It considers that the initial three-month placement of the author's daughter in the care of the CCAS was disproportionate.

8.5 In relation to the author's claims regarding the period commencing after the expiry of the three-month period covered by the interim order of 7 August 1997 up to the trial in May 2000, the Committee notes that the CCAS kept the child in its care. According to the order of 7 August 1997, the author was to have access to her daughter, although under very strict conditions. Following the author's "abduction" of her daughter on 1 December 1997 and her conviction in April 1998, the author was denied access. She did not regain access until June 1999, also under very harsh conditions, as a result of an order of 17 May 1999 reinstating access. For instance, the author and her daughter were allowed to meet only in the CCAS' premises, every third week for 90 minutes. The visits were fully supervised by CCAS employees. The author was not allowed to telephone her daughter. The CCAS again terminated access on its own initiative, while the order for access of 17 May 1999 was still in force. In

the conditions for access appended to that order, it was stated that the author should have supervised access to the child *in the sole and absolute discretion of the CCAS*. The access issue was not assessed by a judge until 21 December 1999 when the judge decided not to reinstate the author's access to her daughter. Since then, the author's access has not been reinstated.

8.6 The Committee observes that the child repeatedly expressed the wish to go home, that she cried at the end of visits and that her psychologist recommended that access be reinstated. It considers that the conditions of access, which also excluded telephone contact, were very severe vis-à-vis a four-year-old child and her mother. The fact that the author and the foster mother had an argument on the phone is not sufficient to justify the definitive termination of that contact between the author and her daughter. The Committee finds that the CCAS' exercise of its power unilaterally to terminate access in December 1997 and August 1999, without a judge having reassessed the situation or the author having been given the opportunity to present a defence constituted arbitrary interference with the author and her daughter's family, in violation of article 17 of the Covenant.

8.7 With respect to the alleged violation of article 23, the Committee recalls its jurisprudence that the national courts are generally competent to evaluate the circumstances of individual cases. However, the law should establish certain criteria so as to enable the courts to apply the full provisions of article 23 of the Covenant. "It seems essential, except in exceptional circumstances, that these criteria should include the maintenance of personal relations and direct and regular contact between the child and parents."¹⁵ In the absence of such special circumstances, the Committee recalls that it cannot be deemed to be in the best interest of a child to eliminate altogether a parent's access to him or her.¹⁶

8.8 In the present case, the judge, during the child protection trial of 2000, considered that "there were no special circumstances demonstrated which would justify the continuation of access in these circumstances", instead of examining the issue whether there were exceptional circumstances justifying terminating access, thereby reversing the perspective under which such issues should be considered. Given the need to ensure family bonds, it is essential that any proceedings which have an impact on the family unit deal with the question of whether the family bonds should be broken, keeping in mind the best interests of the child and of the

¹⁴ See communication No. 946/2000, *L.P. v. Czech Republic*, Views adopted on 25 July 2002, para. 7.3.

¹⁵ Communication No. 201/1985, *Hendriks v. The Netherlands*, Views adopted on 27 July 1988, para. 10.4.

¹⁶ Communication No. 514/1992, *Fei v. Colombia*, Views adopted on 4 April 1995, para. 8.10.

parents. The Committee does not consider that the slapping incident, the author's lack of cooperation with the CCAS and the contested fact of her mental disability constituted exceptional circumstances which would justify total severance of contact between the author and her child. It finds that the process by which the State party's legal system reached a conclusion to completely deny the author access to her daughter, without considering a less intrusive and less restrictive option, amounted to a failure to protect the family unit, in violation of article 23 of the Covenant. In addition, these facts result in a violation of article 24 with respect to the author's daughter, who was entitled to additional protection as a minor.

8.9 With respect to the claim of undue delay under article 14, paragraph 1, the Committee recalls its jurisprudence that the right to a fair trial guaranteed by this provision includes the expeditious rendering of justice, without undue delay,¹⁷ and that the very nature of custody proceedings or proceedings concerning access of a divorced parent to his or her children requires that the issues complained of be adjudicated expeditiously.¹⁸ The Committee considers that this jurisprudence also applies to child protection proceedings, which relate to the removal of parental authority and access of a parent to his or her child. In examining this issue, the Committee must take into consideration the age of the child in question and the consequences that delayed proceedings may have on the child's well-being and the outcome of the court case.

8.10 In the present case, the child was four years old at the time of apprehension in August 1997, and seven years old at the time of the child protection trial in June 2000. As a consequence of the delayed proceedings, the child's psychologist warned that she was at risk of depression and of developing attachment disorder¹⁹ and that she found herself in a "state of limbo,"²⁰ as she did not know where she belonged. Moreover, the judge partly based his finding on the fact that the child had formed very strong bonds with her foster parents, who wanted to adopt her, and that she wished to remain with them. The Committee notes that the child initially wanted to return to her mother's care, and that her wish only changed over time.

¹⁷ See communication No. 203/1986, *Muñoz Hermoza v. Peru*, Views adopted on 4 November 1988, para. 11.3; and communication No. 263/1987, *González del Río v. Peru*, Views adopted on 28 October 1992, para. 5.2.

¹⁸ In a different context, see communication No. 514/1992, *Fei v. Colombia*, Views adopted on 4 April 1995, para. 8.4; and communication No. 417/1990, *Santacana v. Spain*, Views adopted on 15 July 1994, para. 6.2.

¹⁹ P. psychological report of 12 December 1998.

²⁰ P. psychological report of 12 December 1998, 25 October 1999 and testimony at trial.

8.11 It further transpires from the file that the author changed lawyers various times and filed numerous court motions, which delayed the proceedings. She was also found to be a vexatious litigant who, by her numerous motions and appeals, was sabotaging the timetable of the trial. However, these were all motions aimed at reinstating access of the author to her child. The Committee considers that bringing a motion for access should not have as a necessary consequence the delaying of the main trial. In addition, the delay cannot be attributable only to the author. The Committee for example notes that it was on the CCAS' request that the PGT was appointed as the author's representative and that a consequence of this appointment was the postponement of the trial. The Committee finds that in view of the young age of the child, the delay of nearly three years between the placement of the child in CCAS' care and the trial on the child protection application, which cannot solely be imputed to the author, was undue and in violation of the author's and her daughter's rights to an expeditious trial, as guaranteed by article 14, paragraph 1.

8.12 As to the claims of unfair hearing under article 14, paragraph 1, the Committee observes that the judge based his finding on what he believed to be the "serious illness of the mother". This conclusion was based on the two-year-old assessment of Dr. K. that the author suffered "from a delusional disorder" and "erotomantic, persecutory and somatic delusions", and other psychiatric reports. It transpires from the judgement that the judge selectively and incorrectly used these reports. In particular, he appears to have misinterpreted Dr. K.'s assessment (see paras. 2.5 and 2.6 above) that if she did experience erotomantic delusions, they did not appear to have had an impact on her ability to care for her daughter. Further, the judge omitted Dr. G.'s opinion that there was no formal thought disorder, and that her ideas of persecution were not of delusional proportions. The judge did not hear Dr. K., who had been summoned to court by the author but failed to appear, nor did he solicit the testimony any of the other doctors who had assessed the author.

8.13 It transpires from the file that the judge decided the question of removal on one single incident of assault and contested facts, which took place three years earlier. In addition, there is no indication that the judge considered hearing the child, or that the child was involved at any point in the proceedings. While her wishes were expressed by her lawyer at trial, indicating that "she wished to remain with her present foster parents although she still indicated a wish to visit with her mother", the judge found that "continued access would only keep this state of limbo which Dr. P. believes is very

damaging for the child and there should be closure and the child should be permitted to get on with the new opportunity which she has for a decent life.” The Committee notes however that the child’s psychologist considered that the child was in a state of limbo because she was “confused by her mother’s absence”. Further, the judge pointed out that “it is significant to note that the child that we are dealing with now is not the same one that was apprehended in that these proceedings have taken nearly three years and we are now dealing with a seven-year-old child who has now expressed the desire not to return home”. While the Committee has taken note that the judge did examine the child’s wishes and ordered crown wardship without access in the best interests of the child, the Committee cannot share the Court’s assessment that the termination of all contact between mother and child could serve the child’s best interest in this case. In view of the above, the Committee considers that the author and her daughter did not have a fair hearing in the child protection trial, in violation of article 14, paragraph 1.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, finds that the facts before it disclose a violation of article

14, paragraph 1; article 17 read alone and in conjunction with article 2; article 23; and article 24 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 and her daughter with an effective remedy, including regular access of the author to her daughter and appropriate compensation for the author. In addition, the State party should take steps to prevent further occurrences of such violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee’s views.

Communication No. 1100/2002

Submitted by: Yuri Bandajevsky (represented by counsel)

Alleged victim: The author

State party: Belarus

Date of adoption of Views: 28 March 2006

Subject matter: Detention ordered under anti-terrorist legislation; alleged persecution because of public expression of opinions critical of State party’s Government.

Procedural issues: Level of substantiation of claim; non-exhaustion of domestic remedies.

Substantive issues: Unlawful detention; conditions of detention, unfair trial, freedom of opinion/right to impart information.

Articles of the Covenant: 9, 10, 14 and 19

Articles of the Optional Protocol: 2 and 5, para. 2 (a)

Finding: Violation (arts. 9, paras. 3 and 4; 10, para. 1; and 14, paras. 1 and 5)

1. The author of the communication is Yuri Bandajevsky, a citizen of Belarus, born in 1957, who at the time of submission of the communication was

imprisoned in Minsk, Belarus. He claims to be a victim of violations by Belarus of his rights under articles 9, 10, 14 and 19 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as presented by the author

2.1 The author was a professor and Rector of the State Institute of Medicine in Gomel, Belarus. In 1999, a criminal case was filed against him under article 169 of the Criminal Code of Belarus (1960 version), on a charge of having accepted bribes. He was arrested on 13 July 1999, subsequently released, but asked not to leave the State territory. On 18 June 2001, the Military Chamber (Collegium) of the Supreme Court convicted him of having accepted bribes, pursuant to article 430 of the Criminal Code (1999 version), and sentenced him to 8 years of imprisonment. According to the author, the Court held that in 1997, when he was Rector of the

Medical Institute, he proposed to the Education Director to collect money as bribes from parents of applicants to study at the Institute.

2.2 The author affirms that he has exhausted all domestic remedies.

The complaint

3.1 The author claims a violation of article 9, paragraph 1, of the Covenant: he notes that he was arrested on 13 July 1999, with approval of the Procurator General, and detained for 30 days under a Presidential Decree of 21 October 1997 “On the urgent measures for the fight of terrorism and other particularly dangerous violent crimes”. He claims that he was later charged with having accepted bribes, contrary to article 169 (3) of the Criminal Code of Belarus. This offence, he notes, has no relation with terrorism or other violent or particularly dangerous crimes. According to him, there was no justification for his arrest and detention.

3.2 The author claims that he was not informed of the charges against him upon his arrest on 13 July 1999, and that he was accused of having received bribes only 3 weeks later, on 5 August 1999, in violation of article 9, paragraph 2, of the Covenant. He also claims that he was deprived of the possibility of having his detention reviewed, in violation of article 9, paragraph 4, of the Covenant.

3.3 He also claims that, during his detention, he did not receive any medical care, commensurate to his state of health, in violation of article 10, paragraph 1, of the Covenant. He states that only after an abrupt deterioration of his state of health, he was hospitalized on 8 August 1999 in the regional hospital of Mogilev; on 18 September 1999, at the request of the authorities, he was again placed in detention. He further claims that he was unable to have any items for personal hygiene or adequate personal facilities. The conditions of detention did not allow the author to consult scientific or artistic literature, or press from independent media, “corresponding to his background and profession”.

3.4 He claims that during his pretrial detention, the conditions of detention were identical to those of convicted prisoners, in violation of article 10, paragraph 2, of the Covenant.

3.5 The author reiterates that the charges against him were notified only on 5 August 1999 (23 days after his arrest), and claims that until this moment, he was deprived of the possibility to defend himself against those charges, in violation of article 14, paragraph 3 (a), of the Covenant. He alleges that between 6 August 1999 and 18 September 1999, during his stay in hospital, he was not allowed to consult his lawyer, in violation of article 14, paragraph 3 (b), of the Covenant. Allegedly, the Court did not allow his counsel—Mr. G.P. from the

Belarusian Helsinki Committee—to represent him in court, in violation of article 14, paragraph 3 (d).

3.6 In relation to article 14, the author claims that his guilt was not proven in Court. The only evidence against him were the allegedly contradictory declarations of two witnesses—Mr. Shaichuk and Mr. Ravkov; the judgement allegedly did not refer to other evidence. It is stated that the Court considered only the arguments of benefit to the prosecution, ignoring procedural violations committed during the investigation and in court. According to the author, this proves the lack of impartiality of the Court, and that the investigation and the court’s proceedings were biased and incomplete. He adds that Mr. Ravkov had initially made a deposition on 12 July 1999, accusing him of taking bribes, but later, in court, he retracted his deposition, stating that initially he was under pressure from the investigators (interrogation longer than legally authorized, with no food or sleep, and use of threats against his wife and daughter; he also claimed that a psychotropic substance had been added to his food). The Court allegedly ignored these declarations and took into account only the initial ones.

3.7 The author contends that contrary to article 14 of the Covenant, courts in Belarus are not independent because the President of the Republic has sole authority to appoint and dismiss judges; before their formal designation, they go through a probationary period, without any guarantee that they will ultimately be appointed. In the author’s opinion, the lack of independence of judges is also confirmed by a report of the Special Rapporteur on the independence of judges and lawyers of the United Nations Commission on Human Rights (June 2000).

3.8 The author further claims that under article 1 of the Decision of the Supreme Council (Supreme Chamber of the Belarusian Parliament) on the “interim situation in the designation of people’s jurors (assessors)” (7 June 1996), all Belarusian citizens of above 25 years can become jurors, and citizens of 25 years and in active military service — can become jurors in military courts. However, in his case, only the President of the Military Chamber of the Supreme Court was in active military service, and none of the jurors. This is said to raise issues under article 14 of the Covenant.

3.9 Finally, the author claims that his rights under article 19, paragraphs 1 and 2, of the Covenant were violated. He contends that in April 1999, during a Parliamentary Session on the consequences of the Chernobyl disaster, he produced a critical report on the effects of the event for Belarus, which was very different from the official position of the Government. In the author’s opinion, his criticism was the true reason for his persecution and dismissal from the Medical Institute.

State party's observations on admissibility

4. By submission of 17 September 2002, the State party argued that the communication should be declared inadmissible, because “the same matter” was already registered and was being examined by another international body of settlement, i.e., the United Nations Educational, Scientific and Cultural Organization (UNESCO), under the individual complaints procedure before the Executive Board’s Committee on Conventions and Recommendations of UNESCO. The author presented no comments in this regard.

Committee's admissibility decision

5. On 7 July 2003, at its seventy-eighth session, the Committee examined the admissibility of the communication. It noted the State party’s challenge to admissibility, and considered that the complaints procedure before the Executive Board’s Committee on Conventions and Recommendations of UNESCO is extra-conventional, without any obligation of the State party concerned to cooperate with it; that no conclusion of violation or non-violation of specific rights by a given State is made in the examination of individual cases; and that such an examination ultimately does not lead to any authoritative determination of the merits of a particular case. The Committee concluded that the UNESCO complaints procedure does not constitute another “procedure of international investigation or settlement” in the sense of article 5, paragraph 2 (a), of the Optional Protocol, and having also noted the author’s statement that domestic remedies were exhausted, declared the communication admissible.

State party's observations on the merits

6.1 By note verbale of 20 January 2004, the State party notes that the author was found guilty of being, in his personal and official capacity, a member of a group that had conspired to receive bribes in large amounts.¹ He was arrested on 13 July 1999 on the basis of a written statement of 12 July 1999 of his colleague Ravkov to the Gomel Regional Prosecutor, in which the latter voluntarily informed the prosecutor about the bribes he received for the admission of new students to the Institute. Ravkov had described, in detail, dates and names of persons from whom he received bribes that he transmitted to the author, the exact amounts received, and the functioning of the group. He had affirmed in writing that his confessions were made under no constraint, and that he was informed of his criminal responsibility in case of giving false information against the author.

¹ I.e., for the crime prescribed by article 430 (2) of the Criminal Code of Belarus article 430 (2) of the Belarusian Criminal Code: receipt of bribes.

6.2 For the State party, the author’s arrest was carried out with the agreement (“sanction”) of a prosecutor and at the moment of arrest, the author was informed of the reasons and grounds for his arrest. His arrest is said to be grounded on and made in accordance with Presidential Decree of 21 October 1997; the Decree was applied in his case as it applies not only to suspects of “terrorism and other particularly dangerous violent crimes”, but also to individuals who “lead a criminal organization, an organized criminal gang, or belong to it”. The State party adds that in the light of Ravkov’s deposition, the existence of an organized criminal group could not be excluded by the investigators.

6.3 From the criminal case file, it transpires that the author led a group set up with Ravkov and other individual. Under the provisions of the above-mentioned Decree, and after a verification of the facts by the preliminary investigation, and within the statutory 30-day delay, the author was served his indictment for bribery. His detention was extended with the approval of a prosecutor.

6.4 The State party explains that the author’s detention was lawful, as he was charged with a serious crime, and that article 126 of the Criminal Procedure Code provides that in relation to those accused of having committed serious offences, preventive detention is justified by reference to the nature of the crime. In addition, the investigators had information that the author had exerted pressure on witnesses in the case, on subordinates at his Institute, thus obstructing the conduct of the investigation. The author was released in light of his health, after he signed a declaration that he would not leave the country, and was also allowed to continue his work. On 10 June 2001, however, he was arrested with a forged passport, when attempting illegally to cross the border to Ukraine.

6.5 The State party argues that during the investigation, the author received the necessary medical care. On 13 August 1999, his chronic illness intensified and he was treated at the Hospital of the Committee on the Execution of Penalties. On 13 December 1999, he was admitted for an examination in the National Cardiology Research Institute. He continued to receive the required medical care in the prison colony to which he was transferred. According to information provided by the Committee on the Execution of Penalties on 28 February 2003, the author had not requested medical assistance since September 2002 and visited the colony’s medical unit only at the doctors’ request. His mental and physical health is said to be satisfactory. No requests for detailed examination of his health were received from him, his lawyer or relatives.

6.6 According to the State party, the author was always assisted by a lawyer during the investigation and in court. Investigation proceedings, accusation, and consultation of the content of the criminal case, were all carried in a lawyer's presence and were co-signed by the latter. Exceptionally, no lawyer took part in certain proceedings (as during a cross-examination with Ravkov); this was due however to the author's request and was duly recorded. The author was informed by investigators and in court of his rights; these rights were also printed on the procedural forms that were examined and signed by him.

6.7 The State party recalls that G.P. was not allowed to act as the author's representative, because domestic law does not provide for such representation, and because he had no licence to practise as a lawyer in Belarus.

6.8 According to the State party, the preliminary investigation established that the author had received bribes from families of student applicants; he acted through Mr. Ravkov and members of examination commissions; all instances of bribes were duly examined during the investigation and in court (amount, currency, exact place and time of the transfer, etc.). In addition, various examination forms and questions on different subjects, as well as records with names of persons for whom bribes were given, were seized in the author's office.

6.9 The State party contends that the court concluded that Ravkov modified his testimony in court as a defence strategy. The allegation that he confessed under influence of psychotropic substances was duly examined by the court, including through psychiatric/psychological examinations, and was not confirmed. The author's guilt was established by testimony of other accused, cross-examinations, and other material evidence. He was charged with multiple receipt of bribes, acting in agreement within an organized group; preparation and attempted receipt of bribes on preliminary agreement with a group; and abuse of authority. On 12 December 2000, the case was sent to court; proceedings were instituted by the Supreme Court, given the public interest in the case and the author's notoriety. The proceedings were public and held in presence of representatives of international non-governmental organizations.

6.10 Under article 270 of the Criminal Procedure Code, the case was examined by the Military College of the Supreme Court, as Ravkov was a medical colonel of the reserve, and it was impossible to try him separately. As an example of objectivity and impartiality of the trial, several charges made by the investigators were dropped in court. In accordance with article 15 of the Covenant, the author was convicted under the provisions of a new

law which applied lighter penalties than those at the time of commission of the offences. The form and the content of the judgement is said to be in compliance with the criminal procedure then in force. The court took into account the severe social repercussions of the crime (classified as "heavy" in the Criminal Code), as well as information on the personality of the accused and the existence of mitigating circumstances (e.g., positive references from the author's employer; his merits as an internationally recognized medical scientist; his health; and the fact that he had the charge of his children). Mr. Bandajevsky was sentenced for multiple acts of bribery to 8 years of imprisonment, coupled with a ban on the exercise of any administrative functions for 5 years.

6.11 On appeal, the criminal case was examined under the supervisory procedure by the Supreme Court, and the judgement was found lawful and just. According to the State party, if the Supreme Court had detected serious violations of the law, the judgement would have been cancelled.

6.12 The State party rejects the author's allegation that he was prosecuted because of his critical opinion on the authorities' reaction to the Chernobyl crisis, and affirms that in prison, the author has continued his research and has completed several scientific publications

6.13 According to the State party, the author has submitted no request for a pardon since October 2002. Pursuant to an Amnesty Law of 2002, his sentence was reduced by one year. According to articles 90 and 91 of the Criminal Code, his sentence could be substituted by a lighter one after serving not less than half of the initial sentence, which in the author's case would be after 6 September 2004. The issue of conditional early release could therefore be examined after 6 September 2005.

6.14 By note verbale of 10 March 2004, the State party informs the Committee that on 8 January 2004, the author's sentence was reduced by another year. It is stated that the author was placed on medical observation for "duodenal ulcer" and receives treatment. His health situation is said to be stable. It also submits the text of a report from the OSCE representative in Minsk, after his visit to Mr. Bandajevsky on 3 December 2003.

Author's comments on State party's submissions

7.1 By letters of 12 March, 26 April 2004, and 17 May 2005, the author reaffirms that his arrest was unlawful, and recalls that a preventive detention up to 30 days relates only to terrorism and other particularly serious crimes. He reaffirms that the conditions in the detention centre where he was held for 23 days were inadequate, and that this allegation was not refuted. He claims that he was not able to

meet with his lawyer within 24 hours, nor was he promptly informed of the charges against him, and that “he could not exercise other procedural guarantees as a suspect”.

7.2 In detention, the author allegedly developed acute peritonitis and had to be operated on “at the end of September 2003”, due to inadequate medical attention. He had suffered from ulcers for a long time and claims that he is allowed to receive only 30 kg of parcels per trimester, while the prison diet is inadequate for his ailment.

7.3 He reiterates that he had requested Mr. G.P. to represent him in court, but on two occasions the Supreme Court allegedly dismissed the latter’s requests to this effect. Mr. G.P. is a member of the Moscow Lawyers’ Guild, and under the CIS² Convention³ of 23 January 1993, Russian lawyers can practise in Belarus.

7.4 The author notes that the State party does not refute his allegations about the unlawful composition of the court and about the impossibility for him to file an appeal in cassation against the judgement of the Supreme Court.

7.5 As to the possibility of his conducting scientific research, the author claims that because of his detention, his contacts with foreign researchers are limited, and he is unable to use special equipment or to gain access to the latest scientific developments. Such articles as he wrote were mainly based on his memory. His computer has no Internet access and is used only for word processing, and he had no mobile phone access.

Additional submissions by the State party

8.1 On 16 December 2004, the State party submits that under article 22 of the Law on Collective Organizations (1994), organizations (such as NGOs) are allowed to represent rights and lawful interests of their own members. The author was not a member of the Belarusian Helsinki Committee, and in addition, he had requested Mr. G.P. to participate in the trial not as his representative, but as a NGO representative.

8.2 From 5 July 2001 to 1 June 2004, the author was held at the Minsk Correctional Colony No. 1. According to his medical records, during this period, he visited the medical service on twelve occasions, including for eight routine examinations in the dispensary, passed a number of specialized examinations, and was also hospitalized. He was given treatment commensurate with his health, and he received additional medicines from abroad. The State party denies that he was operated on for

“peritonitis” on 1 October 2003, stating that the operation was in fact for “appendicitis”, and that he was discharged as early as 6 October 2003.

8.3 On 26 May 2004, the Minsk Central District’s Court changed the author’s penitentiary regime and he was transferred to a Gazzalyi colony-village. Since 7 June 2004, he has worked as a guard in a private agricultural firm and lives outside the colony-village. He has received visits from foreign diplomats, journalists, and the Chairperson of the United Nations Working Group on Arbitrary Detention. On two occasions, he has been allowed to travel to Minsk, for a week. His family is free to visit him without limitation.

8.4 On 25 April 2005, the State party reaffirms that during his free time, the author is able to conduct scientific research. The administration’s decision not to request his anticipated release was lawful and taken pursuant to the provisions of the Criminal Execution Code (CEC). On 21 September 2004, the author was granted a 7-day leave, but he returned only on 4 January 2005. During his absence, he omitted duly to inform the prison authorities or the police of the reasons for his absence, in violation of both the provisions of CEC and the colony’s internal rules. During this period, he passed different examinations and received treatment in several medical institutions in Minsk, but from 27 September to 27 October 2004, and from 23 November to 3 January 2005, he was treated at a day hospital, whereas from 12 to 16 November 2004, he stayed at home.

8.5 The State party contends that during his treatment in Minsk, the author consulted different specialists and passed a number of examinations, following which he was prescribed appropriate medication. The author was able to visit the local (ordinary) medical institution in charge of the penitentiary colony.

8.6 By note verbale of 18 August 2005, the State party explained that on 5 August 2005, the Dyatlov regional court decided to release the author early and conditionally.

Additional comments by author

9.1 On 20 February 2005, the author reaffirmed that the detention centre where he was held between 13 July and 4 August 1999 was not even equipped with beds, so that detainees slept on the floor, with no visits with relatives or lawyers allowed.

9.2 As to the visits received, the author concedes that journalists, researchers, and other visitors were allowed to see him, but that this was possible only upon a specific authorization from the Ministry of Internal Affairs’ Department on Execution of Penalties. He claims that several such requests for visits were denied.

² Community of Independent States.

³ CIS Convention on Legal Assistance and Relations on Civil, Family, and Criminal Cases.

9.3 He contends that on 31 January 2005, the penitentiary authorities refused to request his anticipated release, allegedly because they considered that he could not demonstrate that he was “rehabilitated”, and also because he was absent from the colony, and refused to pay the fine of 35 million BLR. He affirms that his absence from the colony for 3 months was due to “clinical treatments for illnesses he contracted in prison”.

9.4 On 1 June 2005, the author reiterated that his scientific work is limited to the analysing of data of his past research. According to him, his treatment in Minsk towards the end of 2004 had been approved by the chief of the penitentiary colony; he wrote to the colony and received the authority’s agreement to be treated in Minsk, without informing him of any particular obligation to notify or to report to the police. He called the penitentiary twice a week, and regularly faxed copies of attestations and medical records; the penitentiary authorities checked his whereabouts on several occasions, by calling the medical institutions concerned and asking to talk to him.

Examination of the merits

10.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee has noted the author’s claim that his arrest on 13 July 1999 was “groundless”, that he was not informed on the reasons upon arrest, was not able to meet with his lawyer within the first 24 hours, and was indicted for bribery only 23 days later, and that the Presidential Decree “On the urgent measures for the fight of terrorism and other particularly dangerous violent crimes” was applied to him to limit his defence rights. The State party claims that the author’s arrest and pretrial detention were lawful, as a criminal case for bribery had been opened on 12 July 1999 against him; that there were grounds for believing that he was a leader of a criminal group, and that the investigators had information that he exercised pressure on witnesses of the case. According to the State party, the author’s arrest under the provisions of the Decree was fully justified, as the crime he was suspected of was serious; he was informed of the reasons for arrest, and was accused within 23 days, and also he was represented by a lawyer throughout the preliminary investigation. On the basis of the information before it, the Committee concludes that there has been no violation of article 9, paragraph 1.

10.3 However, the author claimed that he was arrested and detained for 23 days under Decree No. 21 (1997), without any possibility to challenge the lawfulness of his detention before a court, as those detained under this Decree are not allowed to

do so. This allegation has not been refuted by the State party, which only noted that the author’s arrest and subsequent detention were subject to previous approval by a public prosecutor. The Committee recalls,⁴ first, that it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. It further considers that the public prosecutor cannot be characterized as having the institutional objectivity and impartiality to be considered as an “officer authorized to exercise judicial power” within the meaning of article 9, paragraph 3.⁵ In the circumstances, the Committee concludes that the author’s rights under article 9, paragraph 3, of the Covenant, were violated.

10.4 In light of the above finding, the Committee considers that the author’s right under article 9, paragraph 4, of the Covenant, was also violated.

10.5 The Committee notes the author’s allegations under article 10, paragraph 1, about the lack of appropriate medical care and on the way he was treated medically in detention. The State party in turn provides detailed information on the type of medical treatment, clinical examinations and hospitalizations the author received or underwent while in detention. It also affirms that neither the author nor his relatives or his lawyer complained to the competent authorities or in court about these issues. This is not refuted by the author. In these circumstances, the Committee considers that there is no violation of article 10, paragraph 1.

10.6 The Committee has noted the author’s allegations, that, contrary to article 10, paragraph 1, the conditions of detention in the Gomel detention centre, where he was held from 13 July 1999 to 6 August 1999, were inappropriate for long stays, and that the centre was not equipped with beds; that, in general, he did not have items of personal hygiene or adequate personal facilities. The State party has not refuted these allegations. In the circumstances, the Committee must give them due weight, and it concludes that the author’s conditions of detention reveal a violation of his rights under article 10, paragraph 1, of the Covenant.

10.7 The author has claimed that during his preliminary detention, his conditions of detention were “identical to those of convicted prisoners”. Even though the State party has not commented on this, the Committee notes that the author’s allegation remains vague and general. Accordingly, and in the absence of any other pertinent information, the Committee concludes that the facts before it do not

⁴ See *Kulomin v. Hungary*, communication No. 521/1992, Views adopted on 22 March 1996, para. 11.3.

⁵ See Views on communication No. 1218/2003, *Platonov v. Russian Federation*, adopted 1 November 2005, para. 7.2.

reveal any violation of the author's rights under article 10, paragraph 2.

10.8 The author has further claimed that the State party's courts are not independent because judges are nominated by the President. The State party has not commented on this. In the absence of further relevant information from the author to the effect that he was personally affected by the alleged lack of independence of the courts that tried him, however, the Committee considers that the facts before it do not disclose a violation of article 14, paragraph 1, on this count.

10.9 The author alleges, again in general terms, a violation of article 14, paragraph 1, in that his guilt was not proven in court, that the court proceedings were biased, incomplete, and that the court considered only the arguments of the prosecution, and that the judgement was based only on Ravkov's deposition that the latter retracted in court. The State party replies, in detail, that the court had considered Ravkov's retraction as a defence strategy, and that the author's guilt was established by several other testimonies and other evidence. The Committee notes that the above claims relate primarily to the evaluation of facts and evidence. It recalls its jurisprudence that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that it was clearly arbitrary or amounted to a denial of justice.⁶ The Committee considers that the material before it do not reveal that the author's trial had suffered from such defects, and the Committee considers that the facts before it do not disclose a violation of the author's rights under article 14, paragraph 1.

10.10 Further in relation to article 14, the author claims that he was sentenced by the Military Chamber of the Supreme Court which was sitting in an unlawful composition, as pursuant to a decision of the Supreme Council of Belarus of 7 June 1996, people's jurors (assessors) in military courts must be in active military service, whereas in his case, only the presiding judge was a member of the military but not the jurors. The State party has not refuted this allegation and merely stated that the trial did not suffer from any procedural defect. The Committee considers that the unchallenged fact that the court that tried the author was improperly constituted means that the court was not established by law, within the meaning of article 14, paragraph 1, and thus finds a violation of this provision on this count.

10.11 The author has claimed that since he was charged only on 5 August 1999 (23 days after his

arrest), he was deprived of the possibility to defend himself properly, in violation of article 14, paragraph 3 (a), of the Covenant. He also claimed that in violation of article 14, paragraph 3 (b), he was not allowed to see his lawyer between 6 August 1999 and 18 September 1999, during his stay in hospital. The State party refutes these allegations and argues that he was always assisted by a lawyer, and was informed both by the investigators and in court of his procedural defence guarantees. On the basis of the material before it, the Committee considers that there has been no violation of article 14, paragraph 3 (a) and (b).

10.12 As to the author's claim under article 14, paragraph 3 (d), that on two occasions the Supreme Court rejected his request to be represented by G.P., a member of the Belarusian Helsinki Committee, the Committee notes the State party's objection that the author was represented by another lawyer, and that G.P. had asked to represent him only in his quality as NGO representative, and that also he had no Belarusian lawyer's licence. The author has replied that G.P. was a member of the Moscow Bar Association and could have practised in Belarus under a specific CIS Agreement. He has however not challenged the State party's claim that he had requested this lawyer to participate in the trial not as his own representative but as a NGO representative. In the circumstances, the Committee concludes that there has been no violation of article 14, paragraph 3 (d), in relation to this allegation.

10.13 The author has claimed that his sentence was not susceptible of cassation appeal and became executory immediately. The State party affirms that the case was examined by the Supreme Court under a supervisory procedure which reviewed the first instance judgement, and that if the Supreme Court had detected violations of the law, the judgement would have been cancelled. The Committee notes, however, that the judgement stipulates that it could not be reviewed by a higher tribunal. The supervisory review invoked by the State party only applies to already executory decisions and thus constitutes an extraordinary mean of appeal which is dependent on the discretionary power of judge or prosecutor. When such review takes place, it is limited to issues of law only and does not permit any review of facts and evidence. The Committee recalls that even if a system of appeal may not be automatic, the right to appeal within the meaning of article 14, paragraph 5, imposes on States parties a duty substantially to review conviction and sentence, both as to sufficiency of the evidence and of the law.⁷ In

⁶ See communication No. 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision adopted on 3 April 1995, para. 6.2.

⁷ See *Aliboev v. Tajikistan*, communication No. 985/2001, Views adopted on 18 October 2005; *Khalilov v. Tajikistan*, communication No. 973/2001, Views adopted on 30 March 2005; *Domukovsky et al. v. Georgia*, communications No. 623-627/1995, Views adopted on 6

the circumstances, the Committee considers that the supervisory review cannot be characterized as an “appeal”, for the purposes of article 14, paragraph 5, and that this provision has been violated.⁸

10.14 Finally, on the author’s claim under article 19, in that he was persecuted because of his criticism of certain Government positions, especially on the consequences of the Chernobyl disaster, the Committee notes that the State party has repeatedly emphasized that the author was prosecuted and sentenced for bribery only. In the absence of any other relevant information on this particular issue, and given the general nature of the author’s claim, the Committee considers that there has been no violation of article 19 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of Mr. Bandajevsky’s rights under articles 9, paragraphs 3 and 4; 10, paragraph 1; and 14, paragraphs 1 and 5, of the Covenant.

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

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee’s Views. The State party is also requested to publish the Committee’s Views.

April 1998, and *Saidova v. Tajikistan*, communication No. 964/2001, Views adopted on 8 July 2004.

⁸ See decision in *Gelazauskas v. Lithuania*, communication No. 836/1998, Views adopted on 17 March 2003, and *Domukovsky et al. v. Georgia*, communications Nos. 623-624, and 627-628/1995, Views adopted on 6 April 1998.

Communications Nos. 1108/2002 and 1121/2002

Submitted by: Mr. Makhmadim Karimov and Mr. Amon Nursatov (not represented by counsel)

Alleged victims: Aidamir Karimov (Makhmadim Karimov's son), Saidabror Askarov, Abdumadzhid Davlatov and Nazar Davlatov (Nursatov's brother and cousins respectively).

State party: Tajikistan

Date of adoption of Views: 27 March 2007

Subject matter: Imposition of death sentence after unfair trial and absence of legal representation in capital case.

Substantive issue: Torture; unfair trial; right to life; conditions of detention

Procedural issues: Evaluation of facts and evidence; substantiation of claim

Articles of the Covenant: 6, 7, 9, 10 and 14

Article of the Optional Protocol: 2

Finding: Violation (Messrs. Davlatov: arts. 6, para. 2; 7 and 14, para. 3 (g); 10; and 14, para. 2; Messrs. Karimov and Askarov: art. 6, para. 2; 7, 10; and 14, paras. 2 and 3 (b), (d) and (g))

1.1 The first author is Makhmadim Karimov, a Tajik national born in 1950, who submits the communication on behalf of his son, Aidamir Karimov, also Tajik national born in 1975. The second author is Mr. Amon Nursatov, a Tajik national born in 1958, who submits the communication on behalf of his brother Saidabror Askarov,¹ and his cousins Abdumadzhid Davlatov and Nazar Davlatov, both Tajiks born in 1975. At the time of submission of the communications, all four victims were awaiting execution, after being sentenced to death by the Military Chamber of the Supreme Court on 27 March 2002. The authors claim violations by Tajikistan of the alleged victims' rights under article 6, paragraphs 1 and 2; article 7; article 9, paragraphs 1 and 2; article 10; and article 14, paragraphs 1, and 3, (e) and (g), of the Covenant.² The second author invokes in addition violations of article 14, paragraph 3 (b) and (d) in relation to his brother Askarov; the communication appears to raise similar issues also in relation to Aidamir Karimov. They are unrepresented.

1.2 Pursuant to article 92 of its rules of procedures, when registering the communications, the Committee, acting through its Special Rapporteur of New Communications and Interim Measures, on 19 August (Karimov) and 25 September 2002

¹ Both the author and the State party use two names in relation to Mr. Nursatov's brother: Saidabror Askarov and Said Rezvonzod.

² The Optional Protocol entered into force for the State party on 4 April 1999.

(Askarov/Davlatovs) respectively, requested the State party not to carry out the alleged victims' executions while their cases are under examination by the Committee. Later, the State party explained that all the death sentences of the alleged victims were commuted to 25 years' imprisonment.

The facts as presented by the authors

2.1 On 11 April 2001, at around 8 a.m., the First-Deputy Minister of Internal Affairs of Tajikistan, Khabib Sanginov, was shot dead in his car near his house in Dushanbe. Two bodyguards and the car driver also died in the ambush. Seven individuals were arrested during 2001 as suspects in the murders, including the alleged victims.

The case of Aidamir Karimov

2.2 On an unspecified date in early June 2001, Aidamir Karimov was arrested in Moscow on charges of terrorism, pursuant an arrest warrant issued by the Tajik Prosecutor's Office that was transmitted to the Russian authorities. He was remitted to the Tajik authorities and arrived in Dushanbe allegedly on 14 June 2001, but his relatives were informed of this only five days after his arrival.

2.3 He was detained for two weeks on premises of Dushanbe's Internal Affairs' Department. The author claims that the building is not adapted for prolonged detentions, and the maximum allowed period for detention there is three hours. His son was transferred to a Temporary Detention Centre only two weeks later (exact date not specified) and kept there for two months, instead of the statutorily maximum authorized 10 days. Afterwards, he was transferred to the Investigation Detention Centre No 1 in Dushanbe, but was systematically brought to the Internal Affairs' Department and subjected to long interrogations there that went on all day and often continued into the night. The food was insufficient and the parcels his family transmitted to the authorities did not reach him.

2.4 On 11 September 2001, the author's son was officially charged with premeditated murder under aggravating circumstances, accomplished with a particular violence, with use of explosives, acting in an organized group, theft of fire arms and explosives, illegal acquisition of fire arms and explosives, and deliberate deterioration of property.

2.5 During the preliminary investigation, the author's son was allegedly subjected to torture to force him to confess guilt. He was beaten, kicked in the kidneys, and beaten with batons. Allegedly, he received electroshocks with the use of a special electric device: electric cables were attached to different parts of his body (they were placed in his mouth and attached to his teeth, as well as to his genitals). According to the author, one of his son's torturers was I.R., deputy head of the Criminal Search Department of Dushanbe. His son was also threatened that if he did not confess guilt, his parents would also be arrested. These threats were taken seriously by his son, because he was aware that his two brothers and his father had already been arrested on 27 April and released on 28 May 2001. In these circumstances, he confessed and signed the confession (exact date not provided).

2.6 The author affirms that no relatives could see his son during the initial two months after arrest. His family met with him only once during the preliminary investigation, in the investigators' presence.

2.7 According to the author, the investigators had planned an investigation act—a verification of his son's confession at the crime scene—in advance. Two days before the actual verification, his son was brought to the crime scene where he was explained where to stand, what to say, and was shown to the individuals who later identified him during an identification parade. The reconstruction at the crime scene allegedly took place in the presence of 24 investigators, and his son was obliged to repeat what he had been previously instructed to say.

2.8 The author affirms that his son was given a lawyer by the investigators towards the beginning of the preliminary investigation, but the lawyer "acted passively" and was often absent. For this reason, two months after the beginning of the preliminary investigation, the author hired privately a lawyer to represent his son. His son allegedly immediately retracted his confessions and affirmed that they had been extracted under torture. The investigators allegedly refused to video tape his retraction and wrote a short note for the record.

2.9 The preliminary investigation ended on 15 November 2001. The case was examined by the Military College of the Supreme Court³ from 8 January to 27 March 2002. On 27 March 2002, all alleged victims were sentenced to death. The author claims that his son's trial was not fair and that the court was partial. In substantiation, he affirms that:

³ The author explains that the case was adjudicated by the Military Chamber because one of the accused was a member of the military forces.

(a) The court refused to order the removal of the handcuffs of the accused, thus preventing them from taking notes, although they were all sitting inside a metal cage in the court room. The alleged victims' presumption of innocence was violated because the chief of security, General Saidamorov, stated in court that it was impossible to remove handcuffs as the accused were "dangerous criminals" and could escape.

(b) At the end of the preliminary investigation, the author's son's indictment contained only three charges against him. At the beginning of the trial, the judge read out two new counts against him; this constitutes, according to the author, a violation of his son's right to be promptly informed of charges against him;

(c) The author's son retracted his confessions in court and claimed to be innocent. He affirmed that when the crime was committed, he was not in Dushanbe. This was confirmed by 15 witnesses, who testified that from 7 to 22 April he was in the Panch Region. These testimonies were allegedly ignored.

(d) Several witnesses against Karimov made contradictory depositions.

(e) The prosecution exercised pressure on the witnesses, limited the lawyers' possibility to ask questions, and interrupted the lawyers and witnesses allegedly in an aggressive manner.

(f) The court did not objectively examine the circumstances of the crime—the nature of the crime committed or the existence of a causal link between the acts and their consequences.

(g) Allegedly no witness could identify the co-accused in court as participants in the crime.

(h) According to the author, the conviction itself does not comply with the requirement of proportionality between crime and punishment, as those who were found to be the organizers of the crime received lighter sentences (15 to 25 years' of imprisonment) than those who were found to be the executors and who were sentenced to death.

2.10 On 29 April 2002, the Supreme Court confirmed on appeal the judgement of 27 March 2002. On 27 June 2002, the Supreme Court refused a request for a supervisory review.⁴

The case of Saidabrор Askarov, and Abdumadzhid and Nazar Davlatovs

2.11 The second author, Mr. Nursatov, affirms that following the murder of Sanginov, several suspects

⁴ The supervisory review procedures empower the President of the Supreme Court or the Prosecutor General (or their deputies) to introduce (or not) a motion to the Court with a request for the reexamination of a case (on issues of law and procedure only).

were arrested, including his brother, Saidabror Askarov and the Davlatov brothers, as well as Karimov.

2.12 The author claims that after Askarov's arrest (exact date not provided), the latter was held in a building of the Ministry of Internal Affairs for a week. The author affirms that the Ministry's premises are inadequate for a long detention. On 4 May 2001, his brother was transferred to a Temporary Detention Centre where, instead of the statutorily authorized period, he was kept until 24 May 2001, and then he was transferred to the Investigation Detention Centre No 1. During the initial month of detention, Askarov was interrogated at the Ministry of Internal Affairs' building all day long and often interrogatories continued into the night. An official record of his arrest was allegedly produced only on 4 May 2001 and he was placed in custody by a decision the same day. Abdulmadzhid and Nazar Davlatovs were sent to the Temporary Detention Centre on 5 May, and transferred to the Investigation Centre No.1 on 24 May 2001.

2.13 The author claims that during the first three days of detention, Askarov and the Davlatov brothers were not given any food but received only limited quantities of water. The food provided to the detainees was insufficient and the parcels the family sent to the authorities did not reach the detainees.

2.14 According to the author, his brother Askarov was subjected to beatings and torture to force him to confess guilt. He allegedly received electric shocks with a special device, and electric cables were introduced into his mouth and anus or were attached to his teeth or genitals. One of his fingers was broken.⁵ In addition, he was placed under psychological pressure, because his brothers Amon (the author of the present communication) was also arrested together with their other brother, Khabib, on 27 April, and detained until 29 May 2001, and their fourth brother, Sulaymon, was also arrested on 27 April and released two months later. Askarov was constantly reminded of his brothers' arrests. Because of this treatment, Askarov and Davlatovs signed confessions.

2.15 Allegedly, Askarov was only allowed to meet with relatives for ten minutes six months after arrest (exact date not provided), in investigators' presence. Nazar Davlatov met his relatives only at the beginning of the trial, whereas Abdumadzhid Davlatov saw his mother only six months after his arrest.

⁵ The author claims that one of the persons that tortured his brother was Rasulov, deputy chief of Dushanbe's Criminal Search Department. Every day he visited the Temporary Detention Centre to check whether there "[was] good news for him". Receiving a negative reply, he beat Askarov.

2.16 The author affirms that his brother was not informed of his right to be represented by a lawyer from the moment of arrest, nor of the right to have a lawyer designated free of charge in case of lack of financial means. On 23 June 2001, the investigators appointed a lawyer (Aliev) for him. After one month, the family privately retained a lawyer, Fayzullaev, because all attempts to meet with the investigation-appointed lawyer failed. The new lawyer was allegedly forced to withdraw by the investigators, because he complained to the Prosecutor General about the illegality of Askarov's charges. After that, they privately hired a third lawyer.

2.17 In court, Askarov and the Davlatov brothers retracted their confessions. They claimed innocence and affirmed that they were in Panch region from 9 to 14 April 2001. This was confirmed by five witnesses. The court concluded that the court depositions, including the allegations of torture, were made in order to escape criminal liability.

2.18 The author presents similar claims to those made on behalf of Karimov (para. 2.9, letters (e) to (h) above).

2.19 The judgement against Askarov and the Davlatov brothers was confirmed, on 29 April 2002, by the Supreme Court's Criminal Chamber.

The complaint

Karimov's case

3.1 The author claims that in violation of articles 7 and 14, paragraph 3 (g), his son was beaten, tortured, and put under psychological pressure and thus forced to confess guilt.

3.2 His son's rights under article 9, paragraphs 1 and 2, were violated, because he was arrested unlawfully and was not charged for a long period of time after arrest.

3.3 He claims that in violation of article 10, the conditions of detention during the early stages of his son's arrest were inadequate. The food received was insufficient and the parcels sent by the family were not transmitted to him.

3.4 The author further claims that his son's rights under article 14, paragraph 1, were violated because the court was partial. His son's presumption of innocence was violated, contrary to article 14, paragraph 2, because of the statement of the high ranked policeman in court that the accused were "dangerous criminals". He adds that article 14, paragraph 3 (e), was violated as the testimonies of the witnesses on his son's behalf were rejected under the simple pretext that they were false.

3.5 Finally, it is claimed that Karimov's rights under article 6, paragraphs 1 and 2, were violated, as

he was sentenced to death after an unfair trial which violated article 14, of the Covenant.

3.6 While the author does not invoke article 14, paragraph 3 (b) and (d) specifically, the communication appears to raise issues under these provisions in Karimov's respect.

Askarov and Davlatov brothers' case

3.7 Mr. Nursatov claims a violation of article 7, and article 14, paragraph 3 (g), as his brother Askarov and his cousins Abdumadzhid and Nazar Davlatov were tortured and forced to confess guilt.

3.8 Article 9, paragraphs 1 and 2, were violated in their cases, because they were detained for long periods of time without being informed of their charges on arrest.

3.9 The author claims that his brother's and cousins' rights under article 10 of the Covenant were also violated as at the early stages of detention, they were kept at premises that were inadequate for long detention, they were given no food and only limited quantities of water, and the parcels their family prepared for them never reached them.

3.10 The author claims that the court was partial, in violation of article 14, paragraph 1. He adds that article 14, paragraph 2, was violated, because of the statement made by a senior security officer in court that the accused were "dangerous criminals".

3.11 According to the author, his brother's and cousins' right to a defence was violated, contrary to article 14, paragraph 3 (b) and (d).

3.12 Askarov and the Davlatov brothers allegedly are victims of a violation of article 14, paragraph 3 (e), because the testimonies of the witnesses on their behalf were rejected as "false".

3.13 Finally, the author claims that Askarov's and the Davlatov brothers' rights under article 6, paragraphs 1 and 2, were violated, because they were sentenced to death after a trial that did not meet the requirements of article 14.

State party's observations

Karimov's case

4.1 On 20 February 2003, the State party informed the Committee that pursuant a Ruling of the Presidium of the Supreme Court of 3 December 2002, Karimov's death sentence was commuted to a 25 years' prison term.

4.2 On 3 April 2006, the State party presented its observations on the merits. According to it, the Supreme Court examined the criminal case and recalled that the author's son was found guilty of a multitude of crimes, including murder, committed together with his co-accused Revzonzod (Askarov),

the Davlatovs, Mirzoev and Yormakhmadov, and was sentenced to death on 27 March 2000.

4.3 The murder victim was an opposition leader and a member of the National Reconciliation Commission created in 1997. After the work of the Commission resumed in June 1999, he was appointed as First Deputy Minister of Internal Affairs. In this function he took a number of steps for the demilitarization of armed opposition groups. He thus became a target of assassination attempts.

4.4 According to the Court, Karimov and the other co-accused were found guilty of murder, theft of fire arms and ammunitions, acting in an organized group, robbery, intentional deterioration of property, and illegal acquisition, storing, and carrying of fire arms and ammunition. Their guilt was established not only by their confessions made during the preliminary investigation, but also confirmed by the testimonies of many witnesses; as well as the records of several identification parades, face-to-face confrontations, records of the reconstruction of the crime scene; and the verification of depositions at the crime scene; seized fire arms, ammunition (bullets), conclusions of several medical-forensic and criminal experts, as well as other evidence collected. Karimov's acts were qualified correctly under the law, and his punishment was proportionate to the gravity and the consequences of the acts committed.

4.5 According to the court, the author's allegations that his son did not take part in the crime but was obliged to confess guilt during the preliminary investigation and the court convicted him on the basis of untrue and doubtful evidence, were not confirmed and were refuted by the material contained in the case file.

4.6 According to the State party, the author's allegations that his son was beaten and was kept unlawfully under arrest for a long period to force him confess guilt were rejected and were not corroborated by the circumstances and the material of the criminal case. The case file shows that Karimov left for the Russian Federation after the crime occurred. On 4 May 2001, the Tajik Prosecutor's Office charged him in absentia with terrorism, and an arrest warrant was issued against him. On this basis, he was arrested in Moscow on 14 June 2001. He was transferred to Dushanbe on 25 June 2001. The State party contends, without providing any documentary evidence, that Karimov was examined by a medical doctor upon arrival in Dushanbe, who concluded that his body did not reveal any bodily injuries as a result of ill-treatment. On 28 June 2001, in his lawyer's presence, Karimov described the crime events in detail at the crime scene, and on 30 June 2001, during a confrontation with his co-accused Mirzoev and again in their

lawyers' presence, both co-accused reaffirmed that they had participated in the crime.

4.7 On 3 July 2001, Karimov was given a new lawyer and in his presence, during a reconstruction of the crime at the crime scene, he explained in detail how he had committed the crime.

4.8 The State party affirms, again without providing documentary evidence, that on 9 July 2001, Karimov was again examined by a medical expert, whose conclusions are contained in the case file, and which establish that Karimov's body did not show any marks of beatings and did not reveal any bodily injury.

The cases of Askarov and the Davlatov brothers

5. On 27 July 2004, the State party informed the Committee that after a Presidential Pardon, Askarov's and the Davlatovs' death sentences were commuted to long prison terms. Although several requests for submission of observations on the merits of the communication were addressed to the State party (on 10 March 2003, 20 September 2004, 17 November 2005, and 30 November 2006), no further information was received.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee notes that the same matter is not being examined under any other international procedure, as required by article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The authors claim that the alleged victims' rights under article 9, paragraphs 1 and 2, were violated, as they were arrested unlawfully and detained for a long period of time without being charged. In relation to Karimov, the State party affirms that following the opening of the criminal case in relation to the murder, and in light of the depositions of other co-defendants, he was charged with participation in the murder and a search warrant was issued against him. The State party has not commented on this issue in relation to Nursatov's brother and cousins. The Committee notes, however, that the material before it does not permit it to establish the exact date of their respective arrests, and it also remains unclear whether these allegations were ever brought up in the court. In these circumstances, the Committee considers that this part of the communication is unsubstantiated, for purposes of admissibility, and therefore inadmissible

under article 2, and article 5, paragraph 2 (b), of the Optional Protocol.

6.4 Both authors claim that in violation of article 14, paragraph 1, of the Covenant, the trial did not meet the requirements of fairness and that the court was biased (paras. 2.9 and 2.18 above). The State party has not commented on these allegations. The Committee observes, however, that all of these allegations relate primarily to the evaluation of facts and evidence by the court. It recalls that it is generally for the courts of States parties to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice.⁶ However it falls under the Committee's competence to assess if the trial was conducted in accordance with article 14 of the Covenant. Nevertheless, in the present case, the Committee considers that the authors have failed to sufficiently substantiate their claims under this provision, and therefore this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 The authors also claim that contrary to the requirements of article 14, paragraph 3 (e), the court heard the testimonies of witnesses on the alleged victims' behalf but simply ignored them. The State party has not made any observation in this relation. The Committee notes however, that the material available to it shows that the Court indeed evaluated the testimonies in question and concluded that they constituted a defence strategy. In addition, these allegations relate primarily to the evaluation of facts and evidence by the court. The Committee reiterates that it is generally for the courts of the States parties to evaluate facts and evidence, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice. In the absence of other pertinent information that would demonstrate that the evaluation of evidence indeed suffered from such deficiencies in the present case, the Committee considers this part of the communication to be inadmissible under article 2 of the Optional Protocol.

6.6 The Committee considers that the remaining part of Mr. Karimov's and Mr. Nursatov's allegations, raising issues under articles 6; 7 read together with article 14, paragraph 3 (g); article 14, paragraph 2; and article 10, in relation to all four alleged victims, as well as under article 14, paragraph 3 (b) and (d), in relation to Messrs. Karimov and Askarov, are sufficiently substantiated, for purposes of admissibility, and declares them admissible.

⁶ See, inter alia, communication No. 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision adopted on 3 April 1995, para. 6.2.

Consideration of the merits

7.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

7.2 The authors claimed that the alleged victims were beaten and tortured by the investigators, so as to make them confess guilt. These allegations were presented both in court and in the context of the present communication. The State party has replied, in relation to the case of Mr. Karimov, that these allegations were not corroborated by the materials in the case file, and that the alleged victim was examined on two occasions by medical doctors who did not find marks of torture on his body. The State party makes no comment in relation to the torture allegations made on behalf of Mr. Askarov and the Davlatov brothers. In the absence of any other pertinent information from the State party, due weight must be given to the authors' allegations. The Committee recalls that once a complaint about ill-treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially.⁷ In the present case, the authors have presented a sufficiently detailed description of the torture suffered by Messrs Karimov, Askarov, and the Davlatov brothers, and have identified some of the investigators responsible. The Committee considers that in the circumstances of the case, the State party has failed to demonstrate that its authorities adequately addressed the torture allegations put forward by the authors. In the circumstances, the Committee concludes that the facts as presented disclose a violation of article 7, read together with article 14, paragraph 3 (g), of the Covenant.

7.3 Both authors claim that the conditions of detention at the premises of the Ministry of Internal Affairs were inadequate having regard to the lengthy period of detention. They point out that the alleged victims were unlawfully detained during periods largely exceeding the statutorily authorized time limits for detention in premises of the Ministry of Internal Affairs, and in the Temporary Detention Centre. During this period, no parcels sent to the victims by their families were transmitted to them, and the food distributed in the detention facilities was insufficient. In addition, Mr. Askarov and the Davlatov brothers were denied food for the first three days of arrest. The State party has not commented on these allegations. In these circumstances, due weight must be given to the authors' allegations. The Committee considers therefore that the facts as submitted reveal a violation by the State party of Mr. Karimov's,

Mr. Askarov's, and the Davlatov brothers' rights under article 10, of the Covenant.

7.4 Mr. Karimov and Mr. Nursatov claim that the alleged victims' presumption of innocence was violated, as in court they were placed in a metal cage and were handcuffed. A high ranked official publicly affirmed at the beginning of the trial that their handcuffs could not be removed because they were all dangerous criminals and could escape. The State party has not presented any observations to refute this part of the authors' claim. In the circumstances, due weight must be given to the authors' allegations. The Committee considers that the facts as presented reveal a violation of the alleged victims' rights under article 14, paragraph 2, of the Covenant.

7.5 Both authors invoke violations of article 14, paragraph 3 (b) and (d). The first author has claimed violations of Karimov's right to defence as although he was assigned a lawyer at the beginning of the preliminary investigation, this lawyer only occasionally attended the investigation hearings, to the point that a lawyer was hired privately to represent his son. Mr. Nursatov claims that his brother Askarov was not given a lawyer at the beginning of the investigation, although he risked the death sentence; when he was assigned an ex-officio lawyer, this lawyer was ineffective; and that the lawyer hired privately by his family was later forced to withdraw from the case. The State party has not refuted these allegations; in the circumstances the Committee concludes that they, since adequately substantiated, must be given due weight. The Committee recalls⁸ its jurisprudence that particularly in cases involving capital punishment, it is axiomatic that the accused is effectively assisted by a lawyer at all stages of the proceedings. In the circumstances of the present case, the Committee concludes that Mr. Karimov's and Askarov's rights under article 14, paragraph 3 (b) and (d), were violated.

7.6 The Committee recalls that the imposition of a sentence of death upon conclusion of a trial that did not meet the requirements for a fair trial constitutes a violation of article 6 of the Covenant. In the present case, death sentences were imposed on all victims in violation of article 7 read together with article 14, paragraph 3 (g), as well as in violation of article 14, paragraph 2, of the Covenant. In addition, in relation to both Messrs. Karimov and Askarov, the death sentence was imposed in violation of the fair trial guarantees set out in article 14, paragraph 3 (b) and (d), of the Covenant. Accordingly, the Committee concludes that the alleged victims' rights under article 6, paragraph 2, of the Covenant, have also been violated.

⁷ General comment on article 7, No. 20 [44], adopted on 3 April 1992, para. 14.

⁸ See for example *Aliev v. Ukraine*, communication No. 781/1997, Views adopted on 7 August 2003, para. 7.2.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of Messrs Davlatovs' rights under articles 6, paragraph 2; article 7 and 14, paragraph 3 (g) read together; article 10; and article 14, paragraph 2; as well as Messrs. Karimov's and Askarov's rights under article 6, paragraph 2; article 7 read together with article 14, paragraph 3 (g); article 10; and article 14, paragraphs 2 and 3 (b) and (d), of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Messrs. Karimov, Askarov, and Abdumadzhid and Nazar Davlatovs with an effective remedy, including compensation. The State

party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

Communication No. 1123/2002

Submitted by: Carlos Correia de Matos (not represented by counsel)

Alleged victim: The author

State party: Portugal

Date of adoption of Views: 28 March 2006

Subject matter: Right to defend oneself in person

Procedural issues: Status of "victim"; amnesty; final decision of inadmissibility by the European Court of Human Rights; exhaustion of domestic remedies closely linked to substantive issues

Substantive issues: Right to defend oneself in person; fair trial; proper dispensation of justice

Article of the Covenant: 14, para. 3 (d)

Article of the Optional Protocol: 5, para. 2 (a)

Finding: Violation (art. 14, para. 3 (d))

1. The author is Mr. Carlos Correia de Matos, a Portuguese citizen, born on 25 February 1944 and residing at Viana do Castelo, Portugal. He states that he is a victim of a violation by Portugal of article 14, paragraph 3 (d), of the International Covenant on Civil and Political Rights. The author is not represented by counsel. The Covenant and the Optional Protocol came into force for Portugal on 15 June 1978 and 3 May 1983 respectively.

The facts as presented by the author

2.1 The author is an auditor and lawyer in Portugal. However, his name was temporarily removed from the Bar Council's roll by decision

dated 24 September 1993 of the Bar Council, which considered the exercise of the profession of lawyer to be incompatible with that of auditor.

2.2 On 4 July 1996, the author was committed to trial at the Ponte de Lima District Court. He was accused of insulting a judge. The investigating magistrate officially assigned a lawyer to represent the author contrary to his wishes, as he considered he was entitled to defend himself in person.

2.3 The author appealed against the committal order (*despacho de pronúncia*) to the Oporto Court of Appeal (*Tribunal da Relação do Porto*). The investigating magistrate declared the appeal inadmissible, however, on the grounds that it had not been lodged by a lawyer, and the appellant could not defend himself in person. A complaint by the author to the President of the Court of Appeal was dismissed on the same grounds.

2.4 The author then lodged a constitutional appeal with the Constitutional Court. In an order of 16 May 1997, the President of the Court of Appeal ruled that the issue raised by the author, that he was not allowed to defend himself in person, should be decided by the Constitutional Court, and accordingly ordered the appeal to be referred to that Court.

2.5 On 23 September 1997, the judge rapporteur at the Constitutional Court, noting that the

applicant's name had been temporarily removed from the Bar Council's roll, requested him to instruct a lawyer, pursuant to the Constitutional Court Act. On 6 October, the author submitted that the provision obliging him to appoint a defence lawyer was unconstitutional, and requested consideration of his appeal. In an order of 4 November 1997, the judge rapporteur ruled that the provision in question was not in conflict with the Constitution and once again invited the author to instruct a lawyer, failing which the Court would refuse to hear his appeal. On 19 November 1997, the author asked that the matter be submitted to a committee of judges.

2.6 In a ruling of 13 October 1999, a committee of judges upheld the order of 4 November 1997, stressing that neither the provision in the Constitutional Court Act nor the arrangements provided for under the Code of Civil Procedure were unconstitutional. The Constitutional Court accordingly invited the author to instruct a lawyer.

2.7 Meanwhile, the Ponte de Lima Court scheduled a hearing for 15 December 1998. When it was called to order, the author declared that he had asked to defend himself, but this had been refused by the judge. A court-appointed lawyer was then designated.

2.8 Under a judgement of 21 December 1998, the Court found the author guilty and sentenced him to 170 day-fines (*jours-amende*), i.e., 600,000 Portuguese escudos in damages to the judge concerned.

2.9 The author lodged an appeal which the judge decided not to refer to the Court of Appeal, considering that it was merely a statement by the author within the meaning of article 98 of the Code of Penal Procedure. A second application under the same heading was rejected by an order of 23 March 1999. The author brought in a final application on 18 January 2001 against an order of 4 January 2001, and the matter was referred to the Court of Appeal on 7 February 2001. The judge-president of the Court of Appeal confirmed on 12 June 2001 that the matter was still before the Third Section of the Court (case No. 268/01).

2.10 On 12 May 1999, Amnesty Act No. 29/99 was adopted. On 3 December 1999, the judge at the Ponte de Lima Court, considering that this Act should apply, cancelled the author's sentence. On 14 August 2000, however, the author learned of enforcement proceedings instituted by the prosecutor in respect of the amount payable to the judge in damages.

2.11 On 2 February 2000, following a request by the author to that effect, the judge rapporteur at the Constitutional Court cancelled the appeal still pending before that court.

The complaint

3.1 The author complains he was not permitted to defend himself, in contravention of article 14, paragraph 3 (d), of the Covenant, and considers that he did not have a fair trial.

3.2 On 17 April 1999, the author also filed a claim with the European Court of Human Rights, which ruled it partly inadmissible on 14 September 2000¹ and inadmissible overall on 15 November 2001,² on the grounds that the application was ill-founded.

State party's submissions on admissibility and the merits

4.1 In a note verbale dated 3 January 2003, the State party contests the admissibility of the communication. In the first place, article 5, paragraph 2 (a), of the Optional Protocol and article 96 (e) (formerly 90 (e)) of the rules of procedure of the Committee provide that the latter shall not consider an application already examined under another international judicial body. As the author's claim has also come before the European Court of Human Rights, which has already ruled on its admissibility and merits, the State party considers that the Committee cannot examine the present claim, in part because of the risk of inconsistency in international decisions.

4.2 Secondly, the author failed to respect the rule that he must submit his claim within six months from the date of the final domestic decision. Thirdly, the author does not have the status of victim, inasmuch as during the proceedings he was granted an amnesty that expunged the effects of his conviction.

4.3 Finally, the author has not exhausted all domestic remedies, inasmuch as he lodged an appeal with the Constitutional Court but the Court has been unable to consider it, given the author's refusal to instruct a lawyer. According to the State party, as the appeal to the Constitutional Court was not properly submitted, the author prevented consideration of the question and so has not exhausted all domestic remedies.

4.4 In its submissions of 1 April 2003, the State party reiterates its arguments on the inadmissibility of the communication and provides comments on the merits. It points out that the right to defend oneself in person, provided for in article 14, paragraph 3 (d), of the Covenant, demands that there should be no hindrance to the accused's right to self-representation. This means that the accused should

¹ *Carlos Correia de Matos v. Portugal* (dec.), No. 48188/99, 14 September 2000.

² *Carlos Correia de Matos v. Portugal* (dec.), No. 48188/99, CEDH 2001-XII.

be able to make a personal submission of his version of the facts, and that a defence counsel should not be imposed on him, leaving him free to choose who will defend him.

4.5 The State party points out that the right to defend oneself is a right enshrined in Portugal's penal procedure. Articles 138 and 140 of the Code of Penal Procedure allow the accused to be given a hearing and to express directly and personally his position with regard to the facts, and article 332 of the same Code requires the accused to be present in court.

4.6 In the State party's view, a distinction should be drawn between personal defence, which allows the accused to be given a hearing and to submit his position with regard to the facts directly, and technical defence, to be conducted by a lawyer, for certain stages of the proceedings such as hearings or appeals. The right to defend oneself is not absolute: in certain circumstances States may require legal representation by a lawyer.³ Though article 14, paragraph 3 (d), of the Covenant recognizes the right of the accused to defend himself in person or with legal assistance, it does not specify under what conditions and leaves to States parties the choice of the appropriate means to enable their judicial systems to guarantee the defence.

4.7 The State party maintains that the requirement for a lawyer to act at certain stages of the proceedings is a sufficient and proportionate means for States to employ in order to provide greater guarantees and more strictly defend the accused, given the type and specific nature of the issues raised in criminal proceedings.

Author's comments on the State party's submissions

5.1 In his comments of 4 August 2003, the author contests the arguments of the State party. First of all, he considers that Portugal's Code of Penal Procedure departs from article 14 of the Covenant in stipulating that in certain cases, including attendance at hearings and the lodging of appeals, the presence of a defence lawyer is obligatory, and if the accused fails to appoint a lawyer, the court must assign him one. The author also refers to the case law of the Portuguese Supreme Court (*Supremo Tribunal de Justiça*) under which the accused cannot act in person in criminal proceedings, even if he is a lawyer or a judge. Finally, the author considers that the reference by the State party to the ruling of the European Court of Human Rights in relation to the case of *Croissant v. Germany*, 25 September 1992, is not relevant, as on that occasion the Court decided that the assignment

³ The State party refers to Ireneu Cabral Barreto in its comments to the European Court of Human Rights (2nd ed., pp. 168-169) and to the case of *Croissant v. Germany*, 25 September 1992 (Series A, No. 237-B).

of a third lawyer to an appellant who did not wish to assume his own defence was not in breach of the European Convention.

5.2 With regard to admissibility, the author explains that the claim which he has lodged with the Committee differs from the case heard by the European Court. First of all, the Court only considered the events relating to the judgement of the Court of first instance of 15 December 1998. Since then, he appealed against the judgement and is still awaiting a decision. Moreover, the point of law raised relates to article 14 of the Covenant, not article 6 of the European Convention on Human Rights; the tenor of those provisions is different. According to the author, in addition to the breach of the basic guarantee set out in article 14, paragraph 3 (d) and (e), there has also been a violation of paragraphs 1 and 5 of that article, namely, the right to a fair trial in connection with the judgement, on appeal, regarding the civil obligations resulting from an unlawful criminal conviction.

5.3 Lastly, article 5, paragraph 2 (a), of the Optional Protocol to the Covenant rules out consideration by the Committee of any communication if the same matter is "being examined" under another procedure of international investigation or settlement, not if the matter *has already been examined*.

5.4 The author points out that the rule requiring a claim to be lodged within six months of the final decision does not apply to the Committee. As to his status as victim, the amnesty granted by the Court of Ponte de Lima on 3 December 1999 did not expunge his sentence to pay damages to the judge in question and that he can therefore still claim to be a victim.

5.5 So far as the exhaustion of domestic remedies is concerned, the author concedes that he has not exhausted domestic remedies given the application he filed on 18 January 2001. He maintains, however, although without laying a complaint for a violation of article 14, paragraph 3 (c), of the Covenant, that he has been waiting for more than four years for a decision from the Appeals Court, and this does not constitute an appeals procedure functioning within a reasonable lapse of time. He also explains that he raised before the Constitutional Court the question of his right to defend himself personally, and that the Constitutional Court's decision did not take account of the fact that the temporary removal of his name from the Bar Council's roll was wrongful.

5.6 On the merits, the author points out that a breach of article 14, paragraph 3 (d), is manifest in Portuguese legislation, whereas other States' laws⁴ allow an accused to defend himself in person. At the judicial level there is also a breach of article 14,

⁴ For example, China, Sweden and Switzerland.

paragraph 3 (d), given the decision of the Portuguese courts to assign him a lawyer against his will. The author notes the distinction between personal defence and technical defence compulsorily provided by a lawyer. He considers, however, that the way personal defence is guaranteed under Portuguese laws limits the accused to a passive role, and asserts that the limits to personal defence should not apply when the accused is a lawyer himself.

Consideration of admissibility

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

6.2 The Committee cannot accept the argument by the State party that the communication is inadmissible owing to the Committee's lack of competence, the present communication having already been considered by the European Court of Human Rights: on the one hand, article 5, paragraph 2 (a), of the Optional Protocol only applies when the same matter is "being examined" under another procedure of international investigation or settlement, and on the other, Portugal has entered no reservation to article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With regard to the status of victim, the Committee has noted the State party's argument that the author cannot claim to be a "victim" within the meaning of article 1 of the Optional Protocol inasmuch as he has been awarded an amnesty that erased the effects of his conviction. The Committee notes that the amnesty of the Court of Ponte de Lima dated 3 December 1999 did not expunge the award of damages against the author. The Committee concludes that the author can therefore claim to be the victim of a breach of the Covenant.

6.4 As to the State party's argument on the deadline of six months for submitting communications, the Committee points out that this rule cannot be used in the present case, since it is not explicitly provided for by the Optional Protocol or established by the Committee.

6.5 So far as the exhaustion of domestic remedies is concerned, the Committee has taken note of the arguments advanced by the State party maintaining that the author's appeal to the Constitutional Court over the right to defend himself in person could not be considered because of his failure to instruct a lawyer, meaning that he had not exhausted all the domestic remedies. Having also taken note of the author's arguments, the Committee remarks that the only reason why the Constitutional Court has not examined the appeal is that the author did not

instruct a lawyer but asked to defend himself in person. In these circumstances, the Committee considers that the exhaustion of domestic remedies is closely linked to the issue of whether the author could claim to defend himself in person in the proceedings against him. The Committee considers that these arguments should be taken up when the merits of the communication are examined.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee has taken note of the arguments submitted by the State party recalling that articles 138–140 of the Portuguese Code of Penal Procedure guarantee the right to defend oneself in person and the references to the decision of the European Court of Human Rights. The State party asserts that the right to defend oneself in person is not absolute, and in this respect draws a distinction between personal defence (allowing the accused to be given a hearing and to state his position on the facts at issue) and technical defence (to be represented by a lawyer at certain stages of the proceedings). It also considers that article 14, paragraph 3 (d), of the Covenant does not specify the way defence is to be conducted, and leaves to States parties the choice of the appropriate means to enable their judicial systems to guarantee the defence. Finally, the Committee takes note of the author's position as a lawyer himself, and his arguments that he has an absolute right to defend himself in person at every stage of the proceedings, failing which the fairness of the trial would be tainted.

7.3 The Committee notes that article 14, paragraph 3 (d), of the Covenant provides that everyone accused of a criminal charge shall be entitled "to defend himself in person or through legal assistance of his own choosing". The two types of defence are not mutually exclusive. Persons assisted by a lawyer retain the right to act on their own behalf, to be given a hearing, and to state their opinions on the facts of the case. At the same time, the Committee considers that the wording of the Covenant is clear in all official languages, in that it provides for a defence to be conducted in person "or" with legal assistance of one's own choosing, taking as its point of departure the right to conduct one's own defence. In fact, if an accused person had to accept an unwanted counsel whom he does not trust he may no longer be able to defend himself effectively as such counsel would not be his assistant. Thus, the right to conduct one's own defence, which is a cornerstone of justice, may be

undermined when a lawyer is imposed against the wishes of the accused.

7.4 The right to defend oneself without a lawyer is not absolute, however. Notwithstanding the importance of the relationship of trust between accused and lawyer, the interests of justice may require the assignment of a lawyer against the wishes of the accused, particularly in cases of a person substantially and persistently obstructing the proper conduct of trial, or facing a grave charge but being unable to act in his own interests, or where it is necessary to protect vulnerable witnesses from further distress if the accused were to question them himself. However, any restriction of the accused's wish to defend himself must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice.

7.5 The Committee considers that it is the task of the competent courts to assess whether in a specific case the assignment of a lawyer is necessary in the interests of justice, inasmuch as a person facing criminal prosecution may not be in a position to make a proper assessment of the interests at stake, and thus defend himself as effectively as possible. However, in the present case, the legislation of the State party and the case law of its Supreme Court provide that the accused can never be freed from the duty to be represented by counsel in criminal proceedings, even if he is a lawyer himself, and that the law takes no account of the seriousness of the

charges or the behaviour of the accused. Moreover, the State party has not provided any objective and sufficiently serious reasons to explain why, in this instance of a relatively simple case, the absence of a court-appointed lawyer would have jeopardized the interests of justice or why the author's right to self-representation had to be restricted. The Committee concludes that the right to defend oneself in person, guaranteed under article 14, paragraph 3 (d), of the Covenant has not been respected.

8. The Committee recalls that by acceding to the Optional Protocol, the State party has recognized the Committee's competence to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, it has undertaken to respect and ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, and to take the necessary steps and provide an effective and enforceable remedy in cases where a violation has been established. The Committee considers that the author is entitled to an effective remedy under article 2, paragraph 3 (a), of the Covenant. The State party should amend its laws to ensure their conformity with article 14, paragraph 3 (d), of the Covenant. Consequently, within 90 days of communicating these views, the Committee would like to receive from the State party information on the measures taken to give effect to them. The State party is also requested to make the Committee's views public.

Communication No. 1126/2002

Submitted by: Marlem Carranza Alegre (represented by counsel, Carolina Loayza Tamayo)

Alleged victim: The author

State party: Peru

Date of adoption of Views: 28 October 2005

Subject matter: Trial and conviction of an individual under anti-terrorist legislation

Procedural issues: Possible failure to exhaust domestic remedies following the annulment of the conviction and initiation of new proceedings

Substantive issues: Violation of the right to liberty and security of person and the guarantees of due process

Articles of the Covenant: 2, 7, 9, 10, 14 and 15

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

Finding: Violation (arts. 2, para. 1; 7; 9; 10; and 14)

1.1 The author of the communication is Ms. Marlem Carranza Alegre, a Peruvian citizen, currently imprisoned in the Chorrillos Women's Maximum Security Prison, Lima. She claims to be the victim of violations by Peru of articles 2, 7, 9, 10, 14 and 15 of the International Covenant on Civil and Political Rights. She is represented by counsel, Carolina Loayza Tamayo.

1.2 The Optional Protocol entered into force for Peru on 3 January 1981.

The facts as presented by the author

2.1 The author worked as a doctor in Casimiro Ulloa Emergency Hospital, Lima. On 16 February 1993 she was stopped in the street by individuals in civilian clothes who forced her into a vehicle for an unknown destination. Once in the vehicle the

individuals identified themselves as members of the police and informed her that she was being detained in connection with the investigation of terrorist incidents. They handcuffed her and covered her head with her jacket. The author was then taken to premises which she later learned were those of the Department of Counter-Terrorism (DINCOTE).

2.2 The author was interrogated blindfolded. During interrogation she was threatened with the arrest of her family members and with the confiscation of her possessions and medical equipment; she was accused of treating terrorists and was hit on the head and lost consciousness. When she recovered her senses, the interrogation continued with blows, insults and threats, including the threat of rape. During the first days of her detention she was forced to remain standing for the entire day.

2.3 The police searched her home and claimed to have found a document establishing a link between her and the *Sendero Luminoso* terrorist organization. The author asserts that this document did not belong to her. She was accused of having treated “subversives” and coerced medical colleagues into doing the same. She was also urged under threat to denounce other persons who had allegedly “forced her” to perform those acts.

2.4 The author remained in solitary confinement for seven days, following which the police report was prepared. It concluded that the author was guilty of the offence of terrorism. On 24 February 1993 Lima’s provincial criminal prosecutor No. 14 drew up a charge against the author, accusing her of being a member of “the subversive organization the *Sendero Luminoso* Communist Party of Peru, in the health section of the People’s Aid Association, as an activist, trainer, organizer of support and contact”. She was remanded in custody. On the same date the judge initiated pretrial proceedings and ordered her to be detained.

2.5 The author was tried for an offence against the public peace/terrorism by the Special Criminal Division for terrorist affairs of the High Court of Lima (a “faceless” or concealed identity division), under Decree-Law No. 25475 of 5 May 1992, which established this offence. On 2 March 1994 the Division handed down a judgement sentencing the author to 20 years’ imprisonment. The sentence was appealed and declared void by the Supreme Court on 8 June 1995, on the grounds that there had been irregularities in the proceedings in breach of the Code of Criminal Procedure.

2.6 On 16 October 1995 a new oral hearing took place before the Special (faceless) Criminal Division of the High Court of Lima, accusing the author of “being a member of the so-called health section of the department of support of the Peruvian People’s Aid Association, one of the central bodies of the

self-styled terrorist group, the *Sendero Luminoso* Communist Party of Peru”. More specifically, she was accused of being a member of the leadership cell of the health section, of being in charge of it and of drawing up plans for the care and examination of persons wounded in terrorist actions in metropolitan Lima. She was sentenced to 25 years’ imprisonment and a fine for the offence of terrorism under articles 4 (terrorism—acts of collaboration), 5 (membership of a terrorist organization) and 6 (incitement to commit acts of terrorism) of Decree-Law No. 25475. The author claims that these definitions of offences do not apply.

2.7 On 3 September 1997 the author filed a petition for annulment with the Supreme Court, contending that the conviction was based on legislation—Decree-Law No. 25475 of 5 May 1992—which had not been in force when the acts with which she was charged allegedly took place, that is, between 1987 and the early months of 1992. At that time, the legislation applicable was the Criminal Code and Act No. 24953, which punished offences against the public peace/terrorism with maximum sentences of 15 and 25 years respectively for the alleged offence of association. In addition, pretrial investigations were initiated against her for allegedly being an accessory to the offence of terrorism but she was convicted on a different charge, namely, that of being a “middle level cadre” of *Sendero Luminoso*. On 29 September 1997 the Court rejected the petition. Neither the author nor her counsel were notified of the judgement.

2.8 In October 1997, the author’s father sought a pardon from the President of the Republic under Act No. 26655. Under this Act an ad hoc commission had been set up to propose that the President should grant a pardon to persons sentenced for the offence of terrorism contrary to fundamental standards of justice.

2.9 During the first few years of her detention in Chorrillos Maximum Security Prison, even before being convicted, the author was held in a cell 2.5 metres square, shared with five or six persons simultaneously, where she remained all day except for half an hour in the yard. During her periods in the yard she could not talk to other inmates. She did not have access to reading and writing materials. Her visiting rights were restricted to two immediate relatives per month for a total of 30 minutes in multi-person visiting rooms and without physical contact. The food was inadequate. As a result of all of this she had health problems and began to suffer from bruxism, facial paralysis, dermatitis, aggravated myopia, bronchial symptoms, etc.

2.10 The author maintains that she was subjected to the regime under Decree-Law No. 25475, in accordance with which:

The determination of the unlawful act was made by officers of the DINCOTE police, and used as a basis to determine the competent court;

The appointment of defence counsel was regularly made after the police investigation had taken place;

Counsel freely elected by the defendant could not have an interview with the defendant before the latter made a statement to the examining magistrate;

Neither defendants nor their counsel were shown the evidence against them. Nor was the defence permitted to challenge witnesses who had made statements during the police investigation;

Defendants had no access to any right of conditional release before the conclusion of proceedings;

A special ad hoc procedure was established and applied by a judge during the investigation phase and by faceless judges during the oral hearing, whereby procedural guarantees were not admitted;

Charge and evidence statements, records of hearings and judgements lacked the signature of the prosecutors and judges involved because of their faceless status;

During the first year of imprisonment, a regime of continuous solitary confinement was imposed on the accused, in addition to other restrictions.

2.11 The author declares that she has not made application to any other international body with regard to the subject matter of the communication.

The complaint

3.1 The author claims that the facts described are a violation of several provisions of the Covenant.

3.2 As the author asserted in her testimony before the Criminal Court on 10 March 1993, she was subjected to physical and mental torture during her detention by DINCOTE; she was also left without food and kept in solitary confinement for seven days. All the interrogations were accompanied by blows to the head, insults, threats and psychological pressure. The solitary confinement was permitted under article 12 (d) of Decree-Law No. 25475 and was absolute, even counsel being excluded. This constitutes a form of cruel and inhuman treatment damaging to an individual's physical, mental and moral well-being. According to the author, these facts are a violation of article 7 of the Covenant.

3.3 Article 9, paragraph 1, was also violated, since the author was detained arbitrarily, without a court order and without having been caught *in flagrante delicto*, these being requirements of article

2.24 (f) of the Constitution of Peru. Moreover, the legislation applied to her did not permit the judge to order the appearance of the detainee. Contrary to article 9, paragraph 3, of the Covenant, detention in custody was the general rule, with no exceptions. Furthermore, article 6 of Decree-Law No. 25659, which restricted the possibility of filing a remedy of habeas corpus in respect of persons under investigation for the offence of terrorism, was applied to her. This was a violation of article 9, paragraph 4, of the Covenant.

3.4 According to the author, the regime of deprivation of liberty applied to her on the basis of Decree-Law No. 25475 was inhumane and thus a violation of article 10 of the Covenant. It excluded, inter alia, the possibility of taking advantage of the benefits set out in the Criminal Code and the Code of Criminal Enforcement. It furthermore provided that it was mandatory for the sentence to be served in a maximum security prison with continuous solitary confinement during the first year of detention and imposed severe restrictions on the system of visits.

3.5 The author further asserts that article 14, paragraph 1, was violated since she was tried by faceless courts, where the identity of the judges is kept secret and objection is impossible. The Decree-Law also lays down that both pretrial proceedings for the offence of terrorism and the oral hearing must be conducted in specially designed premises within the criminal courts. According to the author, the secret nature of the oral hearing distorts it since its public nature is its fundamental characteristic and a guarantee of fairness.

3.6 Article 14, paragraph 2, was also violated, since Decree-Law No. 25475 eliminated the independence of the judge and of the Public Prosecutor's Office.¹ The judge was unable to take a decision on the basis of the evidence submitted as to whether or not there were grounds for initiating the pretrial investigation; rather, the Decree "orders" the judge to initiate the investigation and issue an arrest warrant. Detention is compulsory; the judge no

¹ Article 13: "For the investigation and trial of the terrorist offences referred to in this Decree-Law the following rules shall be observed: (a) Once the charge has been formalized by the Public Prosecutor's Office, the detainees shall be brought before the criminal judge, who shall give the order to commence investigation with an arrest warrant within a period of 24 hours, after the necessary security measures have been taken. During the investigation no form of release may be envisaged; there shall be no exceptions. (...) (d) On conclusion of the investigation, the file shall be transmitted to the President of the court in question, who shall transmit the proceedings to the chief prosecutor, who in turn shall appoint the senior prosecutor who must draw up the indictment within three days, being liable for failure to do so."

longer has the discretion to order a conditional release. With regard to the Public Prosecutor's Office, the Decree requires the senior prosecutor to issue a charge and evidence statement when the pretrial investigation is concluded, with the consequent disappearance of any discretion in proceeding. Overall, this represents a violation of the right to be presumed innocent.

3.7 According to the author, there was a violation of article 14, paragraph 3, since as the police report attests, the author was not clearly notified in detail of the reason for her detention. She was furthermore unable to communicate with her counsel during the time she remained in solitary confinement, since article 12 (f) of the Decree-Law established that the defence lawyer could only intervene as from when the detainee made his statement before the Public Prosecutor. Article 13 of the Decree-Law also eliminated a fundamental defence mechanism by preventing individuals involved in the investigation from being called to testify as witnesses before a judge or court. The author's conviction was based exclusively on the police report, which means that the Public Prosecutor's Office did not prove the accusations; instead, the burden of proof was on the author.

3.8 The facts on which the detention and subsequent trial and sentencing of the author were based supposedly took place between 1987 and the early months of 1992. The complaint by the Public Prosecutor's Office, the initiation of proceedings and the subsequent sentence were, however, based on Decree-Law No. 25475, promulgated on 5 May 1992, which imposed heavier penalties. This is a violation of article 15 of the Covenant.

3.9 Article 15 was also violated by the fact that the author was sentenced for acts and offences other than those for which the criminal investigation was initiated. The Fourteenth Specialized Criminal Court of Lima opened an investigation for an alleged offence against the public peace/terrorism, as "collaboration", under article 4 (b) of the Decree-Law. As set out in the order to commence investigation, the alleged acts of collaboration consisted of surgical operations and the provision of surgical instruments, medical equipment, medicine, X-rays and clinical analyses to the "terrorist" group. She was, however, sentenced for being a "middle level cadre" of *Sendero Luminoso*. The medical acts described were further criminalized as collaboration, although none of them is described as collaboration in article 321 of the Criminal Code, one of the applicable standards in force.

3.10 Lastly, the author maintains that any violation of any of the rights enshrined in the Covenant entails the violation of the State's obligation to respect those rights, embodied in article 2, paragraph 1.

The State party's observations on admissibility

4.1 In its observations of 22 December 2004² the State party reports that in January 2003 the Constitutional Court handed down a judgement in which it declared various procedural and criminal rules in anti-terrorist matters to be unconstitutional. As a result, the Government issued Legislative Decree No. 926 in February 2003 standardizing the annulment of proceedings for the offence of terrorism conducted before judges and prosecutors whose identity was concealed and where the prohibition of objection applied. It also issued Legislative Decree No. 922, according to which criminal proceedings for the offence of terrorism are to be conducted in accordance with the ordinary procedural arrangements of the Code of Criminal Procedure.

4.2 On 15 January 2003, the High Court of Lima issued a decision concerning the remedy of habeas corpus filed by the author against the Special Criminal Division of the High Court of Lima and the Supreme Court for violation of her personal liberty as a result of a breach of due process. The remedy was declared admissible and the criminal trial of the author consequently void since the fundamental principles of due process—a competent and established judge and the right to know whether the trial judge had jurisdiction—had been violated and since she had been sentenced by faceless judges. On 3 February 2003 the National Terrorism Division issued a writ ordering this decision to be implemented.

4.3 On 27 March 2003, the First Special Court for terrorist offences instituted pretrial proceedings against the author for the offence of ordinary terrorism as provided in article 288-A and article 288-B, paragraph (a), of the 1924 Criminal Code, introduced by Act No. 24651; articles 319 and 320, paragraph 1, of the 1991 Criminal Code; and articles 2 and 5 of Decree-Law No. 25475, and issued a detention order. The proceedings were assigned to the National Terrorism Division and referred to the Office of the Second Senior Prosecutor specializing in terrorist offences. In a decision of 6 September 2004 the Prosecutor entered a charge of terrorism. The author was charged with belonging to a subversive organization, the *Sendero Luminoso* Communist Party of Peru, and with being a member of the cell management committee of the health section of the department of support of the People's Aid Association and therefore in charge of groups belonging to the organization. As a surgeon, she was

² The communication was transmitted to the State party on 14 October 2002. The State party had six months, i.e., until 14 April 2003, to give its reply on admissibility and merits. When no reply was received, reminders were sent on 15 September and 18 November 2004.

responsible for recruiting doctors, organizing them and providing support activities consonant with the medical profession. The prosecutor requested a 30-year prison sentence, a fine and an accessory penalty of loss of civil rights.

4.4 The author's case is pending in the National Terrorism Division in the context of new criminal proceedings instituted in accordance with the new anti-terrorist legislation. The State party therefore considers that domestic remedies have not been exhausted and that the communication should be declared inadmissible.

The author's comments

5.1 The author states that she is being tried for the second time for the same acts, as a result of her quest for justice. A new trial, however, is not adequate reparation in cases of the violation of due process, particularly when this is owing to an act on the part of the State challenged.

5.2 This communication was submitted to the Committee when the author was serving a sentence resulting from a criminal trial against her in total violation of due process; this situation has been acknowledged by the Peruvian judiciary, which pronounced admissible the remedy of habeas corpus filed on her behalf in a decision in first instance on 2 December 2002 and in second instance on 15 January 2003. Furthermore, Legislative Decree No. 926, which provides for the annulment of trials by ordinary courts for the offence of terrorism, is accompanied by express State acknowledgement of the violation of due process and judicial guarantees, and hence of the right to liberty of persons detained, tried and sentenced for the offence of terrorism.

5.3 The lack of precision in the definition of the offence of terrorism in article 2 of Decree-Law No. 25475 is incompatible with the principle of legality enshrined in the Covenant, since the acts comprising the offence were described in the abstract and imprecisely, so that it is impossible to know exactly what specific behaviour constitutes this criminal offence.

5.4 The author asserts that she was accused of having treated and supplied medicines to "terrorists" and their family members. Not only are these two acts not illegal, they are lawful and ethically correct. The acts of participation in a surgical operation, treatment and provision of medicines do not form part of the crime of terrorism. A state of anxiety or terror is neither provoked, created nor maintained, deliberately or involuntarily, by medical acts, nor can they be assimilated to acts injurious to life, physical integrity, health or individual freedom and safety or to State or private property, nor do they constitute an attack on public or private safety.

5.5 In accordance with the estoppel principle enshrined in international law, the State is precluded from invoking its own acts. Consequently, it cannot contend that the author did not exhaust domestic remedies. In a recent judgement of 18 November 2004 handed down in the case of De la Cruz Flores, the Inter-American Court of Human Rights stated that a new trial was not sufficient to make reparation for violations of due process.

5.6 The author says that she has been detained for approximately 12 years, accused but not sentenced, in violation of article 9 of the Covenant. In July 2002, she applied to be granted semi-liberty, but this was declared inadmissible, initially by the Twenty-eighth Provincial Criminal Court of Lima and subsequently by the High Court, on the grounds that the period of detention under the Code of Criminal Procedure had not been completed, in that it ran as from the date of the order to commence investigation, i.e., 21 March 2003. The State party thus ignored the period spent by the author in prison due to its failure to ensure her fair trial. In other words, the State invokes its own acts in order to deny the author her right to trial within a reasonable time or to release, as article 9, paragraph 3, of the Covenant requires.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement, in compliance with the provisions of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With regard to the requirement of the exhaustion of domestic remedies, the Committee takes note of the State party's assertion that the case is pending in the National Terrorism Division in the context of new criminal proceedings instituted in accordance with the new anti-terrorist legislation, and that, consequently, domestic remedies have not been exhausted. The Committee is pleased to observe the amendment of several procedural and penal rules of anti-terrorist legislation, particularly those that permit the annulment of proceedings for the offence of terrorism conducted before judges and prosecutors whose identity has been concealed and establish that criminal proceedings for the offence of terrorism will be conducted in accordance with the ordinary procedures for which the Code of Criminal Procedure provides. With reference, however, to

article 5, paragraph 2 (b), of the Optional Protocol, the Committee observes that the author was arrested on 16 February 1993 and subsequently tried and sentenced under Decree-Law No. 25475 of 5 May 1992, and that she filed all the appeals permitted under that legislation against her sentence, including a petition for annulment to the Supreme Court. All of this was prior to her submitting her communication to the Committee. The fact that the legislation applied to the author and on which her communication was based was declared null and void several years later cannot be considered to her disadvantage. In the circumstances, it cannot be claimed that the author should wait for the Peruvian courts to take a new decision before the Committee can consider the case under the Optional Protocol. Further, the Committee observes that the application of remedies before the Peruvian courts was initiated in 1993 and has still not been concluded.

6.4 The author contends that she received a harsher sentence than was appropriate under the legislation applicable at the time the alleged acts were committed, thus constituting a violation of article 15 of the Covenant. The Committee considers, however, that the author has not furnished sufficient evidence for it to take a decision with regard to this contention, and therefore considers that this part of the communication should be considered inadmissible, under article 2 of the Optional Protocol, for lack of substantiation.

6.5 The Committee accordingly declares the communication admissible with regard to the alleged violations of articles 7, 9, 10 and 14 of the Covenant and proceeds to consider the merits of the complaint under article 5, paragraph 1, of the Optional Protocol, bearing in mind the information provided by the parties.

Consideration of the merits

7.1 The Committee regrets that the State party has not submitted observations on the merits of the case under consideration. It recalls that it may be inferred from article 4, paragraph 2, of the Optional Protocol that the State party must examine in good faith all the complaints made against it and provide the Committee with all the information at its disposal. Since the State party has not cooperated with the Committee in the matters raised, the author's claims must be given their due weight in so far as they are substantiated.

7.2 The author asserts that during the days she was held by DINCOTE she was subjected to torture, of which she provides details. As the State party provides no information to contradict these allegations, due weight must be given to them and it must be taken that the events occurred as described by the author. The Committee thus considers that

there has been a violation of article 7 of the Covenant.

7.3 With regard to the author's contentions concerning the violation of her right to liberty and security of person, the Committee considers that her arrest and detention incommunicado for seven days and the restrictions on the exercise of the right of habeas corpus constitute violations of article 9 of the Covenant as a whole.

7.4 The author contends that the regime of deprivation of liberty applied to her under Decree-Law No. 25475 constitutes a violation of article 10 of the Covenant. The Committee considers that the conditions of detention in the Chorrillos Women's Maximum Security Prison described by the author, particularly those applied during her first year of detention, violated her right to be treated with humanity and with respect for the inherent dignity of her person and therefore breached the provisions of article 10 as a whole.

7.5 With regard to the author's complaints in relation to article 14, the Committee takes note of her allegations that the hearings at her trial were held in private and that the court comprised faceless judges who could not be challenged; that she was unable to communicate with her lawyer during the seven days she was held incommunicado; that the police officers involved in the investigation were not called as witnesses since this was not permitted under Decree-Law No. 25475; and that her lawyer was not able to challenge witnesses who had made statements during the police investigation. In the circumstances, the Committee concludes that article 14 of the Covenant, which refers to the right to a fair trial, was breached as a whole.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7, 9, 10 and 14, together with article 2, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy and appropriate compensation. In the light of the long period she has already spent in detention and the nature of the acts of which she stands accused, the State party should give serious consideration to terminating her deprivation of liberty, pending the outcome of the current proceedings. Such proceedings must comply with all the guarantees required by the Covenant.

10. Bearing in mind that, as a party to the Optional Protocol, the State party recognizes the competence of the Committee to determine whether there has been a violation of the Covenant, and that, under article 2 of the Covenant, the State party has

undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to offer an effective and enforceable remedy when a violation is found to have occurred, the Committee wishes to receive

from the State party, within 90 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the Committee's Views.

Communication No. 1153/2003

Submitted by: K.N.L.H. (represented by the organizations DEMUS, CLADEM and Center for Reproductive Law and Policy)

Alleged victim: The author

State party: Peru

Date of adoption of Views: 24 October 2005

Subject matter: Refusal to provide medical services to the author in connection with a therapeutic abortion which is not a punishable offence and for which express provision has been made in the law.

Procedural issues: Substantiation of the alleged violation; unavailability of effective domestic remedies.

Substantive issues: Right to an effective remedy; right to equality between men and women; right to life, right not to be subjected to cruel, inhuman or degrading treatment; right not to be the victim of arbitrary or unlawful interference in one's privacy; right to such measures of protection as are required by the status of a minor and right to equality before the law.

Articles of the Covenant: 2, 3, 6, 7, 17, 24 and 26

Article of the Optional Protocol: 2

Finding: Violation (arts. 2, 7, 17 and 24)

1. The author of the communication is K.N.L.H., born in 1984, who claims to be a victim of a violation by Peru of articles 2, 3, 6, 7, 17, 24 and 26 of the International Covenant on Civil and Political Rights. She is represented by the organizations DEMUS, CLADEM and Center for Reproductive Law and Policy. The Optional Protocol entered into force for Peru on 3 October 1980.

The facts as presented by the author

2.1 The author became pregnant in March 2001, when she was aged 17. On 27 June 2001 she was given a scan at the Archbishop Loayza National Hospital in Lima, part of the Ministry of Health. The scan showed that she was carrying an anencephalic foetus.

2.2 On 3 July 2001, Dr. Ygor Pérez Solf, a gynaecologist and obstetrician in the Archbishop

Loayza National Hospital in Lima, informed the author of the foetal abnormality and the risks to her life if the pregnancy continued. Dr. Pérez said that she had two options: to continue the pregnancy or to terminate it. He advised termination by means of uterine curettage. The author decided to terminate the pregnancy, and the necessary clinical studies were carried out, confirming the foetal abnormality.

2.3 On 19 July 2001, when the author reported to the hospital together with her mother for admission preparatory to the operation, Dr. Pérez informed her that she needed to obtain written authorization from the hospital director. Since she was under age, her mother, Ms. E.H.L., requested the authorization. On 24 July 2001, Dr. Maximiliano Cárdenas Díaz, the hospital director, replied in writing that the termination could not be carried out as to do so would be unlawful, since under article 120 of the Criminal Code, abortion was punishable by a prison term of no more than three months when it was likely that at birth the child would suffer serious physical or mental defects, while under article 119, therapeutic abortion was permitted only when termination of the pregnancy was the only way of saving the life of the pregnant woman or avoiding serious and permanent damage to her health.

2.4 On 16 August 2001, Ms. Amanda Gayoso, a social worker and member of the Peruvian association of social workers, carried out an assessment of the case and concluded that medical intervention to terminate the pregnancy was advisable "since its continuation would only prolong the distress and emotional instability of Karen and her family". However, no intervention took place owing to the refusal of the Health Ministry medical personnel.

2.5 On 20 August 2001, Dr. Marta B. Rondón, a psychiatrist and member of the Peruvian Medical Association, drew up a psychiatric report on the author, concluding that "the so-called principle of the welfare of the unborn child has caused serious

harm to the mother, since she has unnecessarily been made to carry to term a pregnancy whose fatal outcome was known in advance, and this has substantially contributed to triggering the symptoms of depression, with its severe impact on the development of an adolescent and the patient's future mental health".

2.6 On 13 January 2002, three weeks late with respect to the anticipated date of birth, the author gave birth to an anencephalic baby girl, who survived for four days, during which the mother had to breastfeed her. Following her daughter's death, the author fell into a state of deep depression. This was diagnosed by the psychiatrist Marta B. Rondón. The author also states that she suffered from an inflammation of the vulva which required medical treatment.

2.7 The author has submitted to the Committee a statement made by Dr. Annibal Faúdes and Dr. Luis Távora, who are specialists from the association called Center for Reproductive Rights, and who on 17 January 2003 studied the author's clinical dossier and stated that anencephaly is a condition which is fatal to the foetus in all cases. Death immediately follows birth in most cases. It also endangers the mother's life. In their opinion, in refusing to terminate the pregnancy, the medical personnel took a decision which was prejudicial to the author.

2.8 Regarding the exhaustion of domestic remedies, the author claims that this requirement is waived when judicial remedies available domestically are ineffective in the case in question, and she points out that the Committee has laid down on several occasions that the author has no obligation to exhaust a remedy which would prove ineffective. She adds that in Peru there is no administrative remedy which would enable a pregnancy to be terminated on therapeutic grounds, nor any judicial remedy functioning with the speed and efficiency required to enable a woman to require the authorities to guarantee her right to a lawful abortion within the limited period, by virtue of the special circumstances obtaining in such cases. She also states that her financial circumstances and those of her family prevented her from obtaining legal advice.

2.9 The author states that the complaint is not being considered under any other procedure of international settlement.

The complaint

3.1 The author claims a violation of article 2 of the Covenant, since the State party failed to comply with its obligation to guarantee the exercise of a right. The State should have taken steps to respond to the systematic reluctance of the medical community to comply with the legal provision

authorizing therapeutic abortion, and its restrictive interpretation thereof. This restrictive interpretation was clear in the author's case, in which a pregnancy involving an anencephalic foetus was considered not to endanger her life and health. The State should have taken steps to ensure that an exception could be made to the rule criminalizing abortion, so that, in cases where the physical and mental health of the mother was at risk, she could undergo an abortion in safety.

3.2 The author claims to have suffered discrimination in breach of article 3 of the Covenant, in the following forms:

(a) In access to the health services, since her different and special needs were ignored because of her sex. In the view of the author, the fact that the State lacked any means to prevent a violation of her right to a legal abortion on therapeutic grounds, which is applicable only to women, together with the arbitrary conduct of the medical personnel, resulted in a discriminatory practice that violated her rights—a breach which was all the more serious since the victim was a minor.

(b) Discrimination in the exercise of her rights, since although the author was entitled to a therapeutic abortion, none was carried out because of social attitudes and prejudices, thus preventing her from enjoying her right to life, to health, to privacy and to freedom from cruel, inhuman and degrading treatment on an equal footing with men.

(c) Discrimination in access to the courts, bearing in mind the prejudices of officials in the health system and the judicial system where women are concerned and the lack of appropriate legal means of enforcing respect for the right to obtain a legal abortion when the temporal and other conditions laid down in the law are met.

3.3 The author claims a violation of article 6 of the Covenant. She states that her experience had a serious impact on her mental health from which she has still not recovered. She points out that the Committee has stated that the right to life cannot be interpreted in a restrictive manner, but requires States to take positive steps to protect it, including the measures necessary to ensure that women do not resort to clandestine abortions which endanger their life and health, especially in the case of poor women. She adds that the Committee has viewed lack of access for women to reproductive health services, including abortion, as a violation of women's right to life, and that this has been reiterated by other committees such as the Committee on the Elimination of Discrimination against Women and the Committee on Economic, Social and Cultural Rights. The author claims that in the present case, the violation of the right to life lay in the fact that Peru did not take steps to ensure that the author

secured a safe termination of pregnancy on the grounds that the foetus was not viable. She states that the refusal to provide a legal abortion service left her with two options which posed an equal risk to her health and safety: to seek clandestine (and hence highly risky) abortion services, or to continue a dangerous and traumatic pregnancy which put her life at risk.

3.4 The author claims a violation of article 7 of the Covenant. The fact that she was obliged to continue with the pregnancy amounts to cruel and inhuman treatment, in her view, since she had to endure the distress of seeing her daughter's marked deformities and knowing that her life expectancy was short. She states that this was an awful experience which added further pain and distress to that which she had already borne during the period when she was obliged to continue with the pregnancy, since she was subjected to an "extended funeral" for her daughter, and sank into a deep depression after her death.

3.5 The author points out that the Committee has stated that the prohibition in article 7 of the Covenant relates not only to physical pain but also to mental suffering, and that this protection is particularly important in the case of minors.¹ She points out that, after considering Peru's report in 1996, the Committee expressed the view that restrictive provisions on abortion subjected women to inhumane treatment, in violation of article 7 of the Covenant, and that in 2000, the Committee reminded the State party that the criminalization of abortion was incompatible with articles 3, 6 and 7 of the Covenant.²

3.6 The author claims a violation of article 17, arguing that this article protects women from interference in decisions which affect their bodies and their lives, and offers them the opportunity to exercise their right to make independent decisions on their reproductive lives. The author points out that the State party interfered arbitrarily in her private life, taking on her behalf a decision relating to her life and reproductive health which obliged her to carry a pregnancy to term, and thereby breaching her right to privacy. She adds that the service was available, and that if it had not been for the interference of State officials in her decision, which enjoyed the protection of the law, she would have been able to terminate the pregnancy. She reminds the Committee that children and young people enjoy special protection by virtue of their status as minors,

as recognized in article 24 of the Covenant and in the Convention on the Rights of the Child.

3.7 The author claims a violation of article 24, since she did not receive the special care she needed from the health authorities, as an adolescent girl. Neither her welfare nor her state of health were objectives pursued by the authorities which refused to carry out an abortion on her. The author points out that the Committee laid down in its general comment No. 17, relating to article 24, that the State should also adopt economic, social and cultural measures to safeguard this right. For example, every possible economic and social measure should be taken to reduce infant mortality and to prevent children from being subjected to acts of violence or cruel or inhuman treatment, among other possible violations.

3.8 The author claims a violation of article 26, arguing that the Peruvian authorities' position that hers was not a case of therapeutic abortion, which is not punishable under the Criminal Code, left her in an unprotected state incompatible with the assurance of the protection of the law set out in article 26. The guarantee of the equal protection of the law implies that special protection will be given to certain categories of situation in which specific treatment is required. In the present case, as a result of a highly restrictive interpretation of the criminal law, the health authorities failed to protect the author and neglected the special protection which her situation required.

3.9 The author claims that the administration of the health centre left her without protection as a result of a restrictive interpretation of article 119 of the Criminal Code. She adds that the text of the law contains nothing to indicate that the exception relating to therapeutic abortion should apply only in cases of danger to physical health. But the hospital authorities had drawn a distinction and divided up the concept of health, and had thus violated the legal principle that no distinction should be drawn where there is none in the law. She points out that health is "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity", so that when the Peruvian Criminal Code refers to health, it does so in the broad and all-embracing sense, protecting both the physical and the mental health of the mother.

State party's failure to cooperate under article 4 of the Optional Protocol

4. On 23 July 2003, 15 March 2004 and 25 October 2004, reminders were sent to the State party inviting it to submit information to the Committee concerning the admissibility and the merits of the complaint. The Committee notes that no such information has been received. It regrets that the State party has not supplied any information concerning the admissibility or the merits of the

¹ Human Rights Committee, general comment No. 20, paras. 2 and 5.

² Concluding observations of the Human Rights Committee: Peru, 15 November 2000 (CCPR/CO/70/PER), para. 20.

author's allegations. It points out that it is implicit in the Optional Protocol that States parties make available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.³

Issues and proceedings before the Committee

Consideration of admissibility

5.1 In accordance with rule 93 of the rules of procedure, before examining the claims made in a communication, the Human Rights Committee must decide whether the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes that, according to the author, the same matter has not been submitted under any other procedure of international investigation. The Committee also takes note of her arguments to the effect that in Peru there is no administrative remedy which would enable a pregnancy to be terminated on therapeutic grounds, nor any judicial remedy functioning with the speed and efficiency required to enable a woman to require the authorities to guarantee her right to a lawful abortion within the limited period, by virtue of the special circumstances obtaining in such cases. The Committee recalls its jurisprudence to the effect that a remedy which had no chance of being successful could not count as such and did not need to be exhausted for the purposes of the Optional Protocol.⁴ In the absence of a reply from the State party, due weight must be given to the author's allegations. Consequently, the Committee considers that the requirements of article 5, paragraph 2 (a) and (b), have been met.

5.3 The Committee considers that the author's claims of alleged violations of articles 3 and 26 of the Covenant have not been properly substantiated, since the author has not placed before the Committee any evidence relating to the events which might confirm any type of discrimination under the article in question. Consequently, the part of the complaint referring to articles 3 and 26 is declared inadmissible under article 2 of the Optional Protocol.

5.4 The Committee notes that the author has claimed a violation of article 2 of the Covenant. The Committee recalls its constant jurisprudence to the effect that article 2 of the Covenant, which lays

down general obligations for States, is accessory in nature and cannot be invoked in isolation by individuals under the Optional Protocol.⁵ Consequently, the complaint under article 2 will be analysed together with the author's other allegations.

5.5 Concerning the allegations relating to articles 6, 7, 17 and 24 of the Covenant, the Committee considers that they are adequately substantiated for purposes of admissibility, and that they appear to raise issues in connection with those provisions. Consequently, it turns to consideration of the substance of the complaint.

Consideration of the merits

6.1 The Human Rights Committee has considered the present complaint in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

6.2 The Committee notes that the author attached a doctor's statement confirming that her pregnancy exposed her to a life-threatening risk. She also suffered severe psychological consequences exacerbated by her status as a minor, as the psychiatric report of 20 August 2001 confirmed. The Committee notes that the State party has not provided any evidence to challenge the above. It notes that the authorities were aware of the risk to the author's life, since a gynaecologist and obstetrician in the same hospital had advised her to terminate the pregnancy, with the operation to be carried out in the same hospital. The subsequent refusal of the competent medical authorities to provide the service may have endangered the author's life. The author states that no effective remedy was available to her to oppose that decision. In the absence of any information from the State party, due weight must be given to the author's claims.

6.3 The author also claims that, owing to the refusal of the medical authorities to carry out the therapeutic abortion, she had to endure the distress of seeing her daughter's marked deformities and knowing that she would die very soon. This was an experience which added further pain and distress to that which she had already borne during the period when she was obliged to continue with the pregnancy. The author attaches a psychiatric certificate dated 20 August 2001, which confirms the state of deep depression into which she fell and the severe consequences this caused, taking her age into account. The Committee notes that this situation could have been foreseen, since a hospital doctor had diagnosed anencephaly in the foetus, yet the hospital director refused termination. The omission on the part of the State in not enabling the author to benefit

³ See communication No. 760/1997, *J. G. A. Diergaart et al. v. Namibia*; Views adopted on 25 July 2000, para. 10.2, and communication No. 1117/2002, *Saodat Khomidova v. Tajikistan*; Views adopted on 29 July 2004, para. 4.

⁴ See communication No. 701/1996, *Cesáreo Gómez Vázquez v. Spain*; Views adopted on 20 July 2000, para. 6.2.

⁵ See communication No. 802/1998, *Andrew Rogerson v. Australia*; Views adopted on 3 April 2002, para. 7.9.

from a therapeutic abortion was, in the Committee's view, the cause of the suffering she experienced. The Committee has pointed out in its general comment No. 20 that the right set out in article 7 of the Covenant relates not only to physical pain but also to mental suffering, and that the protection is particularly important in the case of minors.⁶ In the absence of any information from the State party in this regard, due weight must be given to the author's complaints. Consequently, the Committee considers that the facts before it reveal a violation of article 7 of the Covenant. In the light of this finding the Committee does not consider it necessary in the circumstances to make a finding on article 6 of the Covenant.

6.4 The author states that the State party, in denying her the opportunity to secure medical intervention to terminate the pregnancy, interfered arbitrarily in her private life. The Committee notes that a public-sector doctor told the author that she could either continue with the pregnancy or terminate it in accordance with domestic legislation allowing abortions in cases of risk to the life of the mother. In the absence of any information from the State party, due weight must be given to the author's claim that at the time of this information, the conditions for a lawful abortion as set out in the law were present. In the circumstances of the case, the refusal to act in accordance with the author's decision to terminate her pregnancy was not justified and amounted to a violation of article 17 of the Covenant.

6.5 The author claims a violation of article 24 of the Covenant, since she did not receive from the State party the special care she needed as a minor. The Committee notes the special vulnerability of the author as a minor girl. It further note that, in the absence of any information from the State party, due weight must be given to the author's claim that she did not receive, during and after her pregnancy, the medical and psychological support necessary in the specific circumstances of her case. Consequently, the Committee considers that the facts before it reveal a violation of article 24 of the Covenant.

6.6 The author claims to have been a victim of violation of articles 2 of the Covenant on the grounds that she lacked an adequate legal remedy. In the absence of information from the State party, the Committee considers that due weight must be given to the author's claims as regards lack of an adequate legal remedy and consequently concludes that the facts before it also reveal a violation of article 2 in conjunction with articles 7, 17 and 24.

⁶ Human Rights Committee, general comment No. 20: Prohibition of torture and other cruel, inhuman or degrading treatment or punishment (art. 7), paras. 2 and 5.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of articles 2, 7, 17 and 24 of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy, including compensation. The State party has an obligation to take steps to ensure that similar violations do not occur in the future.

9. Bearing in mind that, as a party to the Optional Protocol, the State party recognizes the competence of the Committee to determine whether there has been a violation of the Covenant, and that, under article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to offer an effective and enforceable remedy when a violation is found to have occurred, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the Committee's Views.

APPENDIX

Dissenting Opinion by Committee member Hipólito Solari-Yrigoyen

My dissenting opinion on this communication—the majority not considering that article 6 of the Covenant was violated—is based on the following grounds:

Consideration of the merits

The Committee notes that when the author was a minor, she and her mother were informed by the obstetric gynaecologist at Lima National Hospital, whom they had consulted because of the author's pregnancy, that the foetus suffered from anencephaly which would inevitably cause its death at birth. The doctor told the author that she had two options: (1) continue the pregnancy, which would endanger her own life; or (2) terminate the pregnancy by a therapeutic abortion. He recommended the second option. Given this conclusive advice from the specialist who had told her of the risks to her life if the pregnancy continued, the author decided to follow his professional advice and accepted the second option. As a result, all the clinical tests needed to confirm the doctor's statements about the risks to the mother's life of continuing the pregnancy and the inevitable death of the foetus at birth were performed.

The author substantiated with medical and psychological certificates all her claims about the fatal risk she ran if the pregnancy continued. In spite of the risk, the director of the public hospital would not authorize the therapeutic abortion which the law of the State party allowed, arguing that it would not be a therapeutic abortion but rather a voluntary and unfounded abortion punishable under the Criminal Code. The hospital director did not supply any legal ruling in support of his pronouncements outside his

professional field or challenging the medical attestations to the serious risk to the mother's life. Furthermore, the Committee may note that the State party has not submitted any evidence contradicting the statements and evidence supplied by the author. Refusing a therapeutic abortion not only endangered the author's life but had grave consequences which the author has also substantiated to the Committee by means of valid supporting documents.

It is not only taking a person's life that violates article 6 of the Covenant but also placing a person's life in grave danger, as in this case. Consequently, I consider that the facts in the present case reveal a violation of article 6 of the Covenant.

Communication No. 1156/2003

Submitted by: Rafael Pérez Escolar (represented by counsel)

Alleged victim: The author

State party: Spain

Date of adoption of Views: 28 March 2006

Subject matter: Scope of review in cassation proceedings in the Spanish Supreme Court; imposition of heavier penalties by the higher court

Procedural issues: -

Substantive issues: Right to have sentence and conviction reviewed by a higher court in accordance with the law

Article of the Covenant: 14, para. 5

Articles of the Optional Protocol: -

Finding: No violation

1. The author of the communication, dated 13 December 2002, is Rafael Pérez Escolar, a Spanish national born in 1927, who claims to be a victim of a violation by Spain of article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel, Mr. Iván Hernández Urraburu and Mr. José Luis Mazón Costa.

The facts as presented by the author

2.1 The author was a shareholder and board member of the Banco Español de Crédito (BANESTO). On 28 December 1993 he was dismissed from his post along with the other board members.

2.2 On 14 November 1994, the prosecutor's office attached to the National High Court brought criminal proceedings against 10 individuals, including the author, for forgery of a commercial document and misappropriation. In the course of the hearings, which lasted two years, statements were taken from 470 witnesses and expert witnesses. The case file consisted of 53 volumes of pretrial proceedings and 121 volumes of evidence. The

author was accused of involvement in 3 out of 11 allegedly irregular operations approved by the management of BANESTO. On 31 March 2000 the National High Court sentenced the author to five years and eight months' imprisonment and a fine of 18 million pesetas for fraud and four months for misappropriation. The author was acquitted of a charge of forgery. With regard to the first offence, the author states that he was charged with having obtained joint venture partnerships free of charge. He claims that the High Court refused to admit as evidence either the statements of seven expert witnesses for the defence or the documents submitted by the author himself—none of which evidence, according to the author, may be reviewed in the higher court. With regard to the second offence, the author claims that the conviction was based on conflicting evidence, including in particular the testimony of three prosecution witnesses whose credibility could not be reviewed by the higher court.

2.3 The author submitted an appeal in cassation on 16 grounds in the Criminal Division of the Supreme Court, requesting it to review various points of fact relating to his conviction. Since no review of the facts of a case is possible in cassation, the author attempted to obtain reconsideration of the prosecution evidence underpinning the conviction indirectly, by invoking the presumption of innocence, but without success. In the course of the cassation proceedings, the Committee published its opinion in the *Gómez Vázquez* case, which prompted the author to petition the Supreme Court on three different occasions to apply the Committee's reasoning on the second hearing principle contained in article 14, paragraph 5, but his applications were rejected.

2.4 The General Workers Union (UGT), the plaintiff in the appeal in cassation, claimed before the Supreme Court that, with regard to the offence of

misappropriation for which the author had been convicted as an accessory, the incriminating conduct should have been classed as the perpetration of an offence, not merely aiding and abetting. The author disputed that claim, notably in a letter to the Supreme Court dated 4 December 2000, which is in the file before the Committee. In a judgement dated 29 July 2002, the Supreme Court ruled on the appeal and increased the author's sentence for misappropriation from four months' to four years' imprisonment, holding that he had been more deeply involved in the offence, as a perpetrator and not merely an accessory. According to the author, the Supreme Court failed to address questions of fact owing to the restricted nature of cassation proceedings, and he was thus deprived of the right to a full review of his case.

2.5 On the day sentence was handed down, i.e., 29 July 2002, the author was taken to prison where he stayed until September the same year, when he was released on probation by reason of his age and infirmity.

2.6 The author is of the view that domestic remedies were exhausted with the judgement handed down by the Supreme Court. He admits that he has not submitted an application for *amparo* (enforcement of constitutional rights) to the Constitutional Court, maintaining that this option is pointless in the light of the Constitutional Court's consistently held position that an appeal in cassation complies with the requirement for a review established under article 14, paragraph 5, of the Covenant.

The complaint

3.1 The author alleges a violation of article 14, paragraph 5, of the Covenant, arguing that he was unable to secure a full review of the judgements handed down by the National High Court. Although the author sought to have the evidence underpinning his conviction re-examined, alleging a violation of his right to presumption of innocence, he says that, owing to the narrow scope of cassation proceedings, the Supreme Court's review of his case was confined to points of law only, thereby precluding a re-examination of issues of fact and a review of the evidence originally dismissed by the National High Court. He maintains that the Supreme Court's argument that it is unable to review the evidence as it was not present at the trial does not apply in his case, since the entire trial proceedings were recorded on videotape.

3.2 According to the author, the Supreme Court has consistently taken the position that the assessment of evidence adduced in the course of proceedings is not a matter for an appeal in cassation, save in exceptional cases characterized by

extreme arbitrariness or manifest irrationality. Moreover, the author argues that in rulings handed down after the Committee had delivered its opinion in the *Gómez Vázquez* case, the Constitutional Court has held that article 14, paragraph 5, of the Covenant does not actually establish the principle of a second hearing, but merely stipulates that the judgement and sentence should be referred to a higher court, and that an appeal in cassation, notwithstanding the restricted scope of this remedy, is in keeping with the review and safeguard function required by the Covenant.

3.3 In support of his complaint, the author cites the Committee's concluding observations on the fourth periodic report of Spain, which recommend that the State party should institute a right of appeal against decisions of the National High Court in order to meet the requirements of article 14, paragraph 5, of the Covenant. He also cites the Committee's opinion in the *Gómez Vázquez* case, wherein it concluded that the lack of any possibility of fully reviewing the author's conviction and sentence, the review having been limited to the formal or legal aspects of the conviction, meant that the guarantees provided for in article 14, paragraph 5, of the Covenant had not been met.

3.4 The author alleges a second violation of article 14, paragraph 5, on the grounds that he was denied any kind of review in relation to the increased sentence imposed by the Supreme Court. The author claims that Spain, unlike other States parties, did not enter reservations to article 14, paragraph 5, to ensure that this provision would not apply to first-time convictions handed down by an appeal court. He adds that the settled practice of the Constitutional Court is that there is no right of appeal in respect of a sentence handed down by the court of cassation, so it was futile to submit an application for *amparo*.

Observations of the State party on admissibility

4.1 In its written submission of 17 April 2003, the State party maintains that the communication is inadmissible under article 5, paragraph 2 (b), of the Covenant because domestic remedies have not been exhausted. It holds that the author of the communication should have submitted an application for *amparo* to the Constitutional Court with respect to the Supreme Court's decision to reject his appeal in cassation, and that *amparo* proceedings cannot be considered an ineffective remedy in the specific case of the author.

4.2 In the view of the State party, the Constitutional Court should have had the opportunity to give its opinion, in *amparo* proceedings, on the scope of review in cassation in the present case. Since the author failed to apply for *amparo*, the Constitutional Court was denied that

opportunity. According to the State party, the question of the exhaustion of domestic remedies must be considered in relation to each specific case. As far as the author is concerned, the State party claims that the review of his conviction in cassation was not limited to formal or legal aspects, but allowed for a complete review of the facts and the evidence on which the conviction had been based, as the Supreme Court judgement in the author's case actually states. As to the scope of review in cassation, the State party argues that judicial practice has evolved on the question of the scope of review in cassation, especially in respect of errors of fact and assessment of evidence. The State party claims that this point is addressed in the cassation judgement too. In the State party's view, therefore, the author should have submitted an application for *amparo* in order to allow the Constitutional Court to consider the scope of the review undertaken in his specific case.

4.3 The State party refers to the judgement handed down by the Supreme Court in the author's case, which reads: "As a perusal of this judgement will confirm, the various parties have had the opportunity to formulate more than 170 grounds for cassation, frequently invoking errors of fact in the assessment of evidence and the subsequent review of proven facts. The presumption of innocence is also invoked as grounds for challenging the rationality and logic applied in assessing the evidence. This implies that we are speaking of a remedy that goes beyond the strictly defined, formal limits of cassation in the conventional sense and satisfies the requirement of a second hearing."

4.4 The State party argues that a heavier penalty was imposed in full compliance with the accusatorial procedure and that the author was fully aware of the penalties associated with the charges; moreover, it was quite untrue to say that it was a first-time conviction for the author. In the State party's view, the fact that a number of States parties have made reservations to article 14, paragraph 5, of the Covenant, thereby excluding its application to cases in which a heavier sentence is handed down, does not imply that the provision itself precludes the imposition of a heavier sentence.

Author's comments

5.1 In his written submission of 25 July 2003, the author reiterates the futility of submitting an application for *amparo* to the Constitutional Court. He says that the settled practice of the Supreme Court and the Constitutional Court both before and after publication of the Committee's opinion in the *Gómez Vázquez* case has not changed with regard to cassation proceedings, in the sense that neither will review matters of fact in a given case. He indicates that the so-called evolution of judicial practice

actually refers to a situation that has always existed, for the Supreme Court may examine the facts in cassation proceedings in cases characterized by extreme arbitrariness or manifest irrationality.

5.2 The author emphasizes that it is untrue that in cassation the Supreme Court undertook a complete review of the errors of fact in the judgement. He calls attention to the fact that the judgement handed down by the National High Court ignored evidence presented in his defence, and that this was not reviewed in cassation. According to the author, his communication is identical to the one on which the Committee ruled in the *Gómez Vázquez* case and should be dealt with in the same manner. He alleges that, while the State party claims the possibility of a remedy of *amparo* before the Constitutional Court, it also admits that if he were to exercise that remedy it would be dismissed, which he considers to be proof of its futility.

Decision of the Committee on admissibility

6. At its eightieth session, on 8 March 2004, the Committee found that domestic remedies had been exhausted in accordance with article 5, paragraph 2 (b), of the Optional Protocol and declared the communication admissible inasmuch as it raised issues relating to article 14, paragraph 5, of the Covenant.

Submissions of the State party on the merits

(a) Legislative amendment extending the remedy of appeal in Spain

7.1 The State party reports that Organic Law No. 19/2003, of 23 December 2003, instituted the right to a second hearing in Spain, empowering the Criminal Divisions of the High Courts of Justice to try appeals against rulings handed down by the provincial courts and providing for the creation of an Appeals Division in the National High Court. According to the preamble, the aim of this Act was, in addition to reducing the workload of the Second Division of the Supreme Court, to resolve the controversy that arose following publication of the Human Rights Committee's opinion of 20 July 2000, in which it found that Spain's current cassation procedure violated the Covenant. The State party further notes that the considerable extension of the scope of cassation had necessitated a legislative amendment to transfer responsibility from the Supreme Court and allow it to confine itself to standardizing the application of the law. The State party stresses that the law was amended not because the scope of cassation was not broad enough to meet the requirements of the Covenant but because, on the contrary, that scope had been broadened so far that it became necessary to address the problem of the Supreme Court's excessive caseload.

(b) *Scope of cassation now considerably extended*

7.2 The State party argues that the remedy of cassation is now considerably broader in scope than it used to be. The State party cites a Supreme Court judgement of 16 February 2004 which notes that, as originally conceived and as amended prior to the entry into force of the Spanish Constitution, the remedy of cassation was bound by a rigid formalism that precluded any review of the evidence save, in exceptional cases, on the basis of documentation providing incontrovertible proof of the error committed by the trial court. The State party maintains that the situation changed with the adoption of the new Constitution and the amendment of article 5.4 of the Judiciary (Organization) Act, which opened up ample opportunity for the review of evidence. The possibility of action for violation of the basic rights enjoyed by anyone accused of a criminal offence and, more fundamentally, the overriding right to an effective legal remedy and the presumption of innocence, as well as the requirement for an adequate account of the considerations and logic that led the court to hand down a given judgement, are a sufficient basis for asserting that the remedy can be effective.

7.3 The State party further argues that neither in Spain's legal order nor in those of its neighbours do remedies of appeal imply a resubmission of the evidence. In the author's case, the Supreme Court stressed that there is no remedy of appeal that allows a full repetition of the lower court proceedings. Under article 795 of the Criminal Procedure Act, which provides that judgements handed down by the criminal courts may be appealed in the provincial court or the National High Court, the grounds for application are restricted to breaches of procedural rules and safeguards, errors in the evaluation of the evidence and violations of the Constitution or the law. Application may be made only for examination of evidence that the lower court was unable to examine, or of evidence that was rejected without just cause, or of evidence that was admitted but not examined, for reasons not attributable to the appellant, and provided the right to a defence was violated. The State party goes on to list various European countries whose legislation, in its view, also precludes from appeals any repetition of the trial with a full resubmission of the evidence.

7.4 The State party points out that, in the author's case, the Supreme Court deliberated at great length over whether the remedy of cassation includes a right to review of the judgement and the sentence. According to the State party, the judgement draws attention to the remarkable breadth of the review of proven facts, stating: "It is true that the 9 November 1993 judgement (in the *Gómez Vázquez* case) held that such evidence has to be evaluated exclusively

by the lower court in accordance with the provisions of article 741 of the Criminal Procedure Act, and that a re-evaluation of the evidence would change the nature of the remedy of cassation and turn it into a second hearing; however, that does not alter the fact that the remedy of cassation has lost its procedural rigidity and formalism and now provides numerous opportunities for review, including review of the provincial courts' assessment of evidence."

7.5 Thus the judgement cited by the State party shows that the old rules under which evidence already examined could not be re-examined have been superseded. Rational evaluation of the evidence, action in respect of presumption of innocence, the requirement for reasoned court rulings and the rejection under the Constitution of any suggestion of arbitrary action by the public authorities, all entail the possibility, through the cassation process, of reviewing and assessing evidence. The Supreme Court has established in its case law not only that the cassation process includes an assessment of the legality or illegality of the evidence submitted, but also that the review includes substantive examination of the evidence to determine whether it is incriminatory or exculpatory, or simply too flimsy to set aside the presumption of innocence. The maxim *in dubio pro reo*, a principle of interpretation long considered not to apply in cassation proceedings, is now one of the principles applied in assessing evidence and may be reviewed in cassation in the course of the review of the evidence. The State party stresses that due account must be taken of this indisputable development in the remedy of cassation in Spain, to the point where it now allows a detailed and extensive scrutiny of facts that were deemed proven in the lower court. In support of its arguments, the State party also cites a judgement of the European Court of Human Rights dated 19 February 2002, which, in ruling on a complaint by a Spanish national concerning the alleged lack of a right to a second hearing, found that the Spanish cassation process was compatible with articles 6, paragraph 1, and 13 of the European Convention on Human Rights.¹

(c) *Scope of the review in the author's case*

7.6 The State party argues that it is necessary to examine the circumstances surrounding the review in cassation carried out specifically in the author's case. In the State party's view, unlike what happened in the *Gómez Vázquez* case, the Supreme Court reviewed matters of fact and of evidence on the eight occasions on which the author invoked factual errors in the evaluation of the evidence or violations of the presumption of innocence. In this regard, the State

¹ European Court of Human Rights, case No. 65892/01, *Ramos Ruiz v. Spain*, decision adopted on 19 February 2002.

party cites the Supreme Court's own ruling on the author's case, stating that the formulation by the parties of more than 170 grounds for cassation, and their frequent invocation of errors in the assessment of evidence and the presumption of innocence, led to conclude that in the author's case the right to a second hearing had been exercised. Lastly, the State party asserts that, whatever the merits of the appeal system within the Spanish legal order, it is clear that in this specific case there was a wide-ranging review of the facts and the author's conviction and sentence were submitted in their entirety to a higher court, in full compliance with the requirements of the Covenant.

(d) Increased sentence not a violation of the Covenant

7.7 The State party argues that it is not only the convicted person but also the accusers, including those harmed by the offences being tried, who have the right to appeal and request a review of a conviction, and that this in no way impairs the convicted person's right to a defence, since he is aware of the charges and may advance whatever arguments he sees fit. The State party adds that any increase in the sentence is passed with every regard for the accusatory principle and in respect of crimes and penalties not exceeding those called for by the charges and of which the accused has been aware since the opening of the trial and naturally remains aware as the remedy proceeds. The rights to information and to a defence enjoyed by the accused in the lower court are not forfeit during cassation. Nor is there any material change in the accused's circumstances, since the penalties sought in the charges still stand. In this sense, the State party argues, remedies constitute a continuation of the trial. Furthermore, it is not true that the author was convicted for the first time in cassation. The possibility of increasing the sentence upon review and within the terms of the charges and the remedies sought is characteristic of all the sophisticated legal orders to be found in Spain's neighbours. Anything else would be a denial of the accuser's right to a remedy, which it cannot be claimed is required under article 14, paragraph 5, of the Covenant. The reservations to article 14, paragraph 5, entered by certain States parties in no way imply that that provision precludes an increase in the sentence when a remedy is sought by the accusers; the intention appears to be rather to forestall any interpretation of article 14, paragraph 5, along the lines of the author's reading thereof: in other words the aim is to ensure the applicability of that provision, not to preclude it.

Author's comments on the State party's submissions on the merits

(a) Amendment to Organic Law No. 19/2003

8.1 In his submission dated 15 November 2004, the author states that this law is not immediately applicable and is not yet in force as the regulations required for its effective implementation have not been enacted. Furthermore, the amendment has no retroactive effect, which means the author's situation of having been deprived of the right to a second hearing remains unchanged, since the law provides no remedy for cases that have already been judged. The author claims that the *ratio legis* of the amendment is not, as the State party maintains, extension of the scope of cassation, but rather, as indicated in the preamble to the Act, settlement of the controversy arising out of the Committee's Views on the *Gómez Vázquez* case.

(b) Alleged extension of the scope of cassation

8.2 The author claims that the State party has disregarded the Committee's Views in the *Gómez Vázquez*, *Sineiro* and *Semey* cases, in which it found against the State party for the inadequacy of its reviews of criminal judgements. The Committee's task is to consider a specific case and not, as the State party claims, to give an opinion on the overall human rights situation in the country in question, which is more a matter for the periodic report procedure. The Supreme Court judgement of 16 February 2004 refers to the *Sineiro Fernández* case in rejecting an appeal in cassation, but disregards the Committee's Views on the communication submitted by Mr. Sineiro. The Constitutional Court resorted to reasoning the author finds less than convincing: "...it is quite impossible, for reasons both temporal and metaphysical, to faithfully reproduce all that occurred in the trial court. The system complies with the provisions of the Covenant if... it re-evaluates the interpretation of the evidence made by the trial court and reviews the rationality and deductive logic required by any judicial weighing of evidence... One cannot stop time. Not even a video recording of the trial would suffice, for these are images of the past and show us only the scene, not the direct, uncommunicable experiences of those involved." In respect of the competence of the Supreme Court, says the author, the Constitutional Court states in the same judgement that "...a reassessment of the evidence upon which the trial court based its decision to convict is not one of its functions". The author adds that, under the Code of Criminal Procedure, article 884, any challenge to the facts deemed proven in the judgement is a ground for dismissal of an application; and, under article 849, an appeal in cassation may be lodged only on the basis of an error in the evaluation of the evidence, where said error is

substantiated by documentary proof which is attached to the file, demonstrates the error of the court, and is not contradicted by other evidence.

(c) *Scope of the review in the author's case*

8.3 The author claims that the remedy of cassation does not permit any challenge to the credibility of the witness or expert testimony upon which the sentence was based except in cases of manifest arbitrariness or a complete absence of evidence for the prosecution. On the count of fraud, the National High Court judgement found that the author had obtained joint venture partnerships free of charge; this the author denied, stating that what he had received were professional fees in payment for his services as a lawyer. A number of expert witnesses supported the author's version, but it was not accepted by the court; nor did the court admit the documentary evidence submitted by the author in his defence. No review of these points is possible in cassation, says the author. On the count of misappropriation, the National High Court based its ruling on conflicting statements of which the court accepted only those which told against the innocence of the accused, referring explicitly to three prosecution witnesses, whose credibility cannot be reviewed in cassation. The Supreme Court does not deny that it did not review the evidence in this regard, but claims that in reviewing the rationality of the court's consideration of the evidence it has complied with article 14, paragraph 5, of the Covenant. The prosecutor attached to the Supreme Court, on the other hand, recognized that the Supreme Court was not competent to assess the evidence. The author points out that the State party's reference to a judgement of the European Court of Human Rights disregards the fact that the right to a second hearing is not recognized in the European Convention on Human Rights but in Protocol No. 7 to that Convention, to which Spain is not a party. He further points out that the Inter-American Court of Human Rights, for its part, in a judgement handed down on 2 July 2004 in the case of *Herrera Ulloa v. Costa Rica*, took into account the Committee's decisions in the cases previously referred to and found that Costa Rica's system of cassation did not comply with the provisions of article 8 of the American Convention on Human Rights because the higher court may not "conduct a complete and thorough review of all the matters discussed and considered by the lower court".²

² Inter-American Court of Human Rights, *Herrera Ulloa v. Costa Rica*, judgement of 2 July 2004, series C, No. 107, paras. 166-167.

(d) *No right to a second hearing on the increased sentence imposed in cassation*

8.4 The author claims that those States parties that wish to preclude application of article 14, paragraph 5, of the Covenant in cases where a sentence is increased by the higher court have entered a specific reservation to that effect. The author cites the reservation entered by Austria in that regard. He adds that the State party could make certain simple changes to the law to ensure that a division of the Supreme Court could carry out a full review of a penalty imposed or increased on appeal. He points out that Spain's Judiciary (Organization) Act provides a review mechanism for similar cases, such as judgements handed down by the Administrative Division of the Supreme Court.

Issues and proceedings before the Committee

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 In a previous case (communication No. 1095/2002, *Gomariz v. Spain*, Views of 22 July 2005, para. 7.1) the Committee held that the absence of a right of review by a higher court of a conviction imposed by an appeal court following acquittal by a lower court constituted a violation of article 14, paragraph 5, of the Covenant. The present case is different in that the conviction by the lower court was confirmed by the Supreme Court. That court, however, increased the penalty imposed by the lower court in respect of the same offence. The Committee notes that in the legal systems of many countries appeal courts may lower, confirm or increase the penalties imposed by the lower courts. Although the Supreme Court in the present case took a different view of the facts found by the lower court, in that it concluded that the author was a principal, and not merely an accessory, in relation to the misappropriation offence, in the Committee's view the finding of the Supreme Court did not change the essential characterization of the offence but merely reflected the Supreme Court's assessment that the seriousness of the circumstances of the offence merited a higher penalty. Thus there is no basis for a finding of violation in this case of article 14, paragraph 5, of the Covenant.

9.3 As to the author's remaining claims under article 14, paragraph 5, of the Covenant, the Committee notes that several of the grounds for cassation submitted by the author to the Supreme Court referred to alleged errors of fact in the evaluation of the evidence and violation of the principle of presumption of innocence. It is clear

from the judgement that the Supreme Court looked at the author's allegations in great detail and considered the evidence submitted in the trial and referred to by the author in his appeal, and found that there was sufficient incriminating evidence to rule out errors in weighing the evidence and set aside the presumption of innocence in the author's case.³ The Committee finds that this part of the complaint of a violation of article 14, paragraph 5, is not duly substantiated by the author.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of article 14, paragraph 5, of the Covenant.

³ For similar cases, see communication No. 1059/2002, *Carvalho v. Spain*, decision of 28 October 2005; communication No. 1399/2005, *Cuartero v. Spain*, decision of 25 July 2005, para. 4.4; communication No. 1356/2005, *Parra Corral v. Spain*, decision of 29 March 2005, para. 4.3; communication No. 1389/2005, *Bertelli v. Spain*, decision of 25 July 2005, para. 4.5.

Communication No. 1159/2003

Submitted by: Mariam Sankara et al. (represented by counsel)

Alleged victim: Mariam, Philippe, Auguste and Thomas Sankara

State party: Burkina Faso

Date of adoption of Views: 28 March 2006

Subject matter: Failure to conduct a public inquiry or legal proceedings following the assassination; denial of justice based on political opinions

Procedural issues: Request for re-examination of the admissibility decision of 9 March 2004

Substantive issues: Failure to conduct a public inquiry or legal proceedings following the assassination; inhuman treatment; failure to correct a death certificate; denial of justice; principle of “equality of arms”; right to be heard by an independent and impartial court within a reasonable period; right to security of the person; discrimination based on political opinions

Articles of the Covenant: 7; 9, para. 1; 14, para. 1; and 26

Article of the Optional Protocol: 5, para. 1

Finding: Violation (arts. 7 and 14, para. 1)

1.1 The authors, Ms. Mariam Sankara (born on 26 March 1953 and residing in France) and her sons Philippe (born on 10 August 1980 and residing in France) and Auguste Sankara (born on 21 September 1982 and residing in France) are, respectively, the wife and children of Mr. Thomas Sankara, former President of Burkina Faso, who died on 15 October 1987. The authors state that they are acting on behalf of Mr. Thomas Sankara and as victims themselves. They allege violations by Burkina Faso of: article 6, paragraph 1, of the Covenant in connection with Thomas Sankara; articles 2, paragraphs 1 and 3 (a) and (b), 14, paragraph 1, 17, 23, paragraph 1, and 26 of the Covenant in connection with Ms. Sankara and her children; and also article 16 of the Covenant in the case of Auguste Sankara. The authors are represented by counsel, Vincent Valai and M. Milton James Fernandes, of the Collectif Juridique Internationale Justice pour Sankara.

1.2 The Covenant and the Optional Protocol thereto entered into force for Burkina Faso on 4 April 1999.

Facts as presented by the authors

2.1 On 15 October 1987, Thomas Sankara, President of Burkina Faso, was assassinated during a coup d'état in Ouagadougou.

2.2 From 1987 to 1997, the authorities did not, according to the authors, conduct any inquiry into this assassination. Moreover, on 17 January 1988, a death certificate was issued, falsely stating that Thomas Sankara had died of natural causes.

2.3 On 29 September 1997, within the 10-year statute of limitations, Ms. Mariam Sankara, in her capacity as spouse and on behalf of her two minor children, lodged a complaint with the senior examining judge in the Ouagadougou Tribunal de Grande Instance against a person or persons unknown for the assassination of Mr. Thomas Sankara and also for the falsification of administrative documents. On 9 October 1997, the authors deposited a bond of 1 million CFA francs, in accordance with the Code of Criminal Procedure.

2.4 On 29 January 1998, the Procurator-General of Faso issued a direction not to commence a judicial investigation, challenging the jurisdiction of the ordinary courts on the grounds that the alleged events occurred in a military establishment among members of the armed forces and non-combatant personnel, and that the death certificate had been issued by the armed forces health service and signed by a physician who had the rank of commander, and was hence a member of the armed forces.

2.5 On 23 March 1998, by order No. 06/98, the examining judge decided, on the contrary, that the Ouagadougou Tribunal de Grande Instance was the ordinary court competent to examine the case.¹

¹ The examining judge considered that, in accordance with article 51 of the Code of Criminal Procedure, the examination division of the Ouagadougou Tribunal de Grande Instance had jurisdiction in the light of the location of the crime and the fact that it was not time-barred. “[...] Considering that, in the present case, it was not reported that the crime of premeditated murder in question had taken place in a military establishment; that even if this were true, it should be noted that the perpetrator or perpetrators of this crime have not been identified to date; that this, moreover, is the reason why the complaint was lodged against a person or persons unknown; that consequently, in the present circumstances, it would be very hazardous, without having previously identified the perpetrators, to conclude that they were members of the armed forces; that even if the person responsible for issuing a false administrative document had military status, it should be pointed out that this second offence is subsidiarily linked to the first, namely premeditated murder, in the sense that its existence depends on the existence of the first, which is the principal

2.6 On 2 April 1998, the Procurator of Faso appealed against this decision.²

2.7 On 10 December 1999, in the absence of a decision by the Court of Appeal's indictment division, counsel for the authors formally requested the Minister of Justice and the Higher Council of the Judiciary to take all necessary measures in order to ensure the impartiality of justice.

2.8 On 26 January 2000, by decision No. 14, the Ouagadougou Court of Appeal set aside order No. 06/98 of 23 March 1998 and declared the ordinary courts incompetent.

2.9 According to the authors, despite Court of Appeal decision No. 14 and their own application of 27 January 2000, the Procurator of Faso refused or omitted to report the case to the Minister of Defence so that the Minister could institute proceedings.

2.10 On 27 January 2000, counsel challenged decision No. 14 by lodging an appeal with the judicial division of the Supreme Court.

2.11 On 19 June 2001, by decision No. 46, the Supreme Court declared the appeal inadmissible on the grounds that no bond had been deposited.³

offence; that, moreover, it is a general principle of law that the accessory follows the principal [...]; that it follows that the military status of the person responsible for the false document could not serve as legal justification for the referral of the perpetrator or perpetrators of the principal offence, namely premeditated murder, to the military courts [...]."

² "[...] it is no secret that the events on which the complaint is based took place on the evening of 15 October 1987 in the Conseil de l'Entente barracks. In other words, the acts in question were perpetrated not only in a military establishment, but also by persons with military status. In no respect does this involve an ordinary offence. The false document mentioned in the complaint is an accessory following the principal, the outcome of which is linked to the principal action. Therefore: The indictment division is requested to declare the examining judge incompetent, in accordance with article 34 of the Code of Military Justice [...]. Article 34 of the Code of Military Justice: "The military courts are competent to examine and pass judgement on ordinary offences committed by members of the armed forces, or equivalent non-combatant personnel in service, in military establishments or where they are accommodated, as well as the military offences established under this Code in accordance with the rules of procedure which apply thereto [...]."

³ It emerges from the Supreme Court decision that the authors stated in the Court that, at the time they lodged their complaint on 9 October 1997, pursuant to article 85 of the Code of Criminal Procedure, they had paid to the examining judge a bond of 1 million CFA francs, and that, furthermore, they had not paid the security to the Supreme Court registrar as the latter had omitted to read out the provisions of article 110 of order No. 91-0051/PRES of 26

2.12 On the same day, counsel requested the Prosecutor-General attached to the Supreme Court to report the case to the Minister of Defence so that the Minister could institute proceedings.⁴ Also on the same day, in anticipation of a notification from the Procurator's Office, counsel requested the Minister of Defence to issue an order to initiate proceedings.

2.13 On 19 June 2001, during an interview on Radio France Internationale focusing largely on the Sankara case, the President of Burkina Faso stated

August 1991 relating to the composition, organization and functioning of the Supreme Court ("the plaintiff is required, on pain of inadmissibility, to pay a sum of 5,000 francs as security before the end of the month following his or her notice of intent to appeal. The security is payable either directly to the chief registrar of the Supreme Court or by a money order addressed to the chief registrar. The registrar receiving the notice of intent shall read out to the plaintiffs the provisions of the foregoing two paragraphs and mention this formality in the record"). The Supreme Court considered that the deposits of security provided for under article 85 of the Code of Criminal Procedure and article 110 of the above-mentioned order were separate, and that the payment of the security provided for in the first provision did not obviate payment of that required under the second provision. The Supreme Court also considered that in failing to inform the plaintiffs of the obligation to pay security the registrar was not, in law, liable to any procedural penalty, and that the authors could not, therefore, be exempted from this obligation as a result of the aforesaid omission.

⁴ Arguing that Court of Appeal decision No. 14 had become final as a result of Supreme Court decision No. 46 and that consequently the ordinary courts were incompetent, the authors, on the strength of article 71 (3) of the Code of Military Justice, asked the Prosecutor-General to report the criminal act to the Minister of Defence, who would then be required to issue a prosecution order (article 71: "If the case involves an offence within the competence of the military courts, the Minister of Defence shall determine whether or not it is necessary to refer the case to the military justice system. No proceedings may take place, on pain of invalidity, without a prosecution order issued by the Minister of Defence. In all cases where the offence has been reported by a civilian examining judge, a Procurator of Faso or a Procurator-General, the Minister of Defence is required to issue the prosecution order. The said prosecution order cannot be appealed; it must make specific reference to the acts to which the proceedings will relate, characterize them and indicate the applicable legislation"). The authors recalled that, on 27 January 2000, they had also, unsuccessfully, addressed such a request to the Procurator of Faso. However, according to the authors, in a similar case (*Public Prosecutor v. Kafando Marcel et al.*, which was the subject of referral order No. 005/TMO/CCI of 17 July 2000), the Procurator of Faso in the Ouagadougou Tribunal de Grande Instance had, in communication No. 744/99, reported to the Government Commissioner to the Military Court acts categorized as serious and ordinary offences that appeared to have been committed on Conseil de l'Entente premises. Moreover, according to the authors, the Minister of Defence, after a preliminary inquiry, had issued a prosecution order.

that the Minister of Defence should not have to deal with court cases.⁵

2.14 On 25 June 2001, a further application was addressed to the Procurator of Faso.

2.15 On 23 July 2001, the Procurator of Faso replied to counsel, stating that their request related to acts categorized as offences committed on 15 October 1987, in other words, over 13 years and 8 months previously, and that, in its decision of 26 January 2000, the Court of Appeal had declared itself incompetent and had instructed the parties to refer the matter to a different court.

2.16 On 25 July 2001, counsel challenged the reply provided by the Procurator of Faso,⁶ and once again requested that the case should be brought before the military courts, in accordance with article 71 (3) of the Code of Military Justice, since a claimant for criminal indemnification may not lodge an appeal. To date, no reply from the Procurator, and hence no referral to the Minister of Defence, have been reported.

The complaint

3.1 The authors consider that the failure to organize a public inquiry and legal proceedings to determine the identity and civil and criminal responsibilities of Thomas Sankara's assassins, and also the failure to correct his death certificate, constitute a serious denial of justice in terms of their protection as members of the Sankara family, in

⁵ "It's all very well to keep harping on one particular aspect of the Sankara case. But it should not be forgotten that there are certainly many cases before the courts. The Minister of Defence is not there to deal with justice-related issues; he certainly has other concerns. But I can assure you that, in all matters relating to all legal cases, there will be nothing to prevent cases from proceeding from start to finish in our country. We have chosen the rule of law and we intend to meet our responsibilities in this regard."

⁶ The authors claim, first, that the statute of limitations was interrupted (neither the judicial examination order nor the Court of Appeal decision challenged the admissibility of the complaint. Similarly, the predecessor of the current Procurator of Faso had not invoked the statute of limitations, but article 34 of the Code of Military Justice. Lastly, the Supreme Court's decision on inadmissibility applies only to the non-payment of security and not to the statute of limitations). Secondly, the authors claim that the Court of Appeal decision instructed the parties, not only the claimant but also the prosecuting authorities, to take proceedings in another court. In accordance with this decision, the authors explain that they were unable, under the provisions of the Code of Military Justice, to bring the case directly before the Minister of Defence (who is the only person with authority to issue the prosecution order in connection with an offence within the jurisdiction of the military courts), and were thus obliged to refer the case to the Procurator in accordance with article 71 (3) of the Code of Military Justice. Once again, reference is made to the *Public Prosecutor v. Kafando Marcel et al.* case.

breach of articles 17 and 23, paragraph 1, of the Covenant. They consider, moreover, that the failure to conduct an inquiry, and hence the failure to uphold guarantees relating to equality before the law, and also the Procurator's refusal to refer the case to the Minister of Defence, thus preventing their complaint from being resolved, are attributable to their political opinions, in breach of articles 2, paragraph 1, and 26 of the Covenant.

3.2 The authors maintain that the State party has failed to comply with its obligations (a) to provide them with an effective remedy for the violations they suffered, in accordance with article 2, paragraph 3 (a) and (b), of the Covenant, and (b) to guarantee the impartiality of justice as required under article 14, paragraph 1, of the Covenant. In this regard, the authors explain that the purpose of the decision taken by the court of first instance to declare the military courts competent and to require an abnormally high bond (1 million CFA francs) was to obstruct the examination of their complaint and, consequently, constituted a violation of the "equality of arms" principle. Similarly, the fact that their counsel were obliged to make a formal request to the Court of Appeal to issue a decision falls into the above category of violations. The authors consider that this also applied to the procedure before the Supreme Court, in particular because the President of the Supreme Court is a supporter of both the ruling party and the serving President, and because the decision to rule the appeal inadmissible on the grounds that no bond had been paid was in fact a pretext for not ruling on the merits of the case.

3.3 The authors consider that, as a minor, Auguste Sankara should have been exempted from deposit of a bond under the legislation in force. However, by its decision of 19 June 2001, the Supreme Court refused to recognize him as a minor, in breach of article 16 of the Covenant.

3.4 Lastly, the authors maintain that the authorities' refusal to correct Thomas Sankara's death certificate constitutes a continuing violation of article 6, paragraph 1, of the Covenant.

Observations of the State party on the admissibility of the communication

4.1 In its observations of 1 April 2003, the State party contests the admissibility of the communication.

4.2 The State party conducts what it terms a historical review, focusing primarily on the conditions under which Captain Thomas Sankara came to power on 4 August 1983 and the consequences of this development in terms of human rights violations. The State party describes what it calls a process of democratization and national

reconciliation under way since 1991. It also describes the remedies available in Burkina Faso.

4.3 The State party considers that the authors have abused the procedure afforded by the Optional Protocol. In this regard, it points out that, on 30 September 2002, the authors lodged with the senior examining judge in the Ouagadougou Tribunal de Grande Instance a complaint against a person or persons unknown for failure to produce the corpse, accompanied by an application for criminal indemnification. On 16 October 2002, without awaiting the results of this application, the authors submitted a complaint to the Committee. On 16 January 2003, the Procurator of Faso issued a direction not to commence a judicial examination, invoking the previous complaint by the claimant concerning the death of Thomas Sankara. On 3 February 2003, the examining judge in the Ouagadougou Tribunal de Grande Instance issued an order declaring the complaint unfounded, given that the same claimant had, in September 1997, lodged a complaint concerning the assassination of the same person, whose death had been confirmed by the evidence. In the State party's opinion, therefore, the authors had brought the matter before the Committee even though proceedings were pending in the national courts.

4.4 The State party also considers the authors' complaint inadmissible on the grounds that the events in question occurred prior to Burkina Faso's accession to the Covenant and the Optional Protocol, namely, 15 years ago. Furthermore, the State party is of the view that the authors cannot claim a denial of justice in connection with these events, given that there has been no such denial.

4.5 In the State party's opinion, the condition that domestic remedies must have been exhausted has not been met.

4.6 The State party explains that, following the Supreme Court's inadmissibility decision of 19 June 2001 on the grounds of non-payment of the bond, the authors refrained from making use of non-contentious remedies, and consequently cannot claim that the system for the protection of human rights in Burkina Faso is inadequate or that their constitutional right of access to the courts has been violated. The State party asserts, in this regard, that no appeals have been made to:

- The Médiateur (ombudsman) of Faso (as the allegations were linked to the operation of the machinery of the State, the complainant could, under articles 11 and 14 of Act No. 22/94/ADP of 17 May 1994 instituting the office of ombudsman, have brought the case before him for the purposes of State mediation);

- The Collège des sages (panel of elders): the complainant could, like victims of the events of 15 October 1987, have brought the case before this Collège, which was established on 1 June 1999;
- The National Reconciliation Commission (having taken over from the Collège des sages, the Commission had competence to identify economic crimes and crimes of violence committed in Burkina Faso since it became independent in 1960, with a view to proposing recommendations conducive to national reconciliation);
- The Compensation Fund for Victims of Political Violence (despite the fact that the death of Thomas Sankara was attributed to a situation of political violence, the complainant did not approach the Fund, unlike victims of the events of 15 October 1987).

4.7 Similarly, in the State party's view, not all contentious remedies have been exhausted. In respect of complaints of denial of justice, a remedy is available for anyone who considers that he or she is a victim of such a violation under article 4 of the Civil Code,⁷ article 166 of the Penal Code⁸ and article 281 of order No. 91-51 of 26 August 1991 relating to the organization and functioning of the Supreme Court. However, Ms. Sankara has not made use of these remedies. As to the complaint relating to the President of the Supreme Court, in conformity with articles 648–658 of the Code of Criminal Procedure and articles 291 and 292 of order No. 91-51, any party to proceedings who harbours legitimate suspicions about a judge who will be called upon to rule on his or her interests may apply for disqualification of the judge. The author has not in fact used this remedy. Similarly, she has not made use of articles 283 and 284 of order No. 91-51 providing for penalties in the event of denial of justice.

4.8 In the opinion of the State party, the author also, through negligence or ignorance, committed procedural errors which prevented her application from being examined on the merits. The State party

⁷ Article 4: "Any judge who, invoking the silence, obscurity or inadequacy of the law, refuses to deliver a judgement may be prosecuted for denial of justice."

⁸ Article 166: "Any judge who, on whatever pretext, including the silence or obscurity of the law, refuses to render the justice he owes to the parties after being requested to do so, and who persists in his refusal after a warning or order from his superiors, shall be liable to imprisonment for a term of two months to one year and a fine of 50,000 to 300,000 francs. A judge found guilty of this offence may, furthermore, be barred from any judicial function for a period of not more than five years."

refers to the tardy lodging of the complaint, namely on 29 September 1997, whereas the statute of limitations expired on 15 October 1997, i.e., 10 years after the alleged events. The author was thus running the risk of her complaint being time-barred in the event of referral to a court which lacked jurisdiction. In the State party's view, referral to the Tribunal de Grande Instance, in lieu of the military court, constitutes a procedural error attributable to the author. Given the victim's status (Thomas Sankara was a captain in the regular army of Burkina Faso) and the location where the events occurred (the premises of the Conseil de l'Entente, classed as a military zone during the revolutionary period), the author should quite naturally, in accordance with the law, have brought the matter before the military courts. In the opinion of the State party, the time-barring of the proceedings, which was related to the tardy referral to the courts, and the procedural error invalidated any proceedings before the military court. Consequently, the author cannot blame the Procurator for having refused to refer the case to the Minister of Defence, in conformity with the provisions of the Code of Military Justice. Furthermore, in its view, the author cannot invoke the dismissal of the appeal to the Supreme Court for non-payment of the bond as a ground for denial of justice, since it was incumbent on her to conform to the procedures provided for by law.

4.9 Lastly, the State party claims inadmissibility as to substance in view of the political nature of the complaint. In its view, the late referral of her husband's death to the national courts indicates the author's clear lack of interest in establishing the truth through the law. The State party considers that the facts of the case are fundamentally political since they occurred in a particularly troubled national context which was linked, first, to the aberrations of the revolutionary regime and the risks of instability in the country, and secondly to the military coup which was rendered necessary by circumstances. Lastly, the author's quest for justice is fundamentally political in nature and constitutes an abuse of law. In the State party's view, the author has set herself the goal of avenging her dead husband. Since her decision to go into exile immediately after the events in question, she has persisted in taking numerous initiatives aimed at damaging the country's image. In its opinion, despite the steps taken to facilitate her return to the country, the author has stubbornly remained abroad, where she has the status of a political refugee. Her complaint, therefore, does not fall within the competence of the Committee.

The authors' comments on admissibility

5.1 In their comments of 30 August 2003, the authors contest the State party's arguments on admissibility.

5.2 In the first place, the authors stress that their complaint must be also viewed from the standpoint of article 7 of the Covenant, in that the authorities' refusal to conduct a proper inquiry and to establish the facts surrounding the death of Thomas Sankara may be regarded as cruel, inhuman and degrading treatment inflicted on them. Thus, the authorities prevented them from finding out the circumstances of the victim's death and the precise place where his remains were officially buried. Lastly, the unlawful conduct of the State has had the effect of intimidating and punishing the Sankara family, who have been unjustly left in a state of uncertainty and mental distress.⁹

5.3 The authors consider that the State party's arguments on inadmissibility of the complaint *ratione materiae* and its allegedly political character are without legal basis. In their view, the Committee is competent to consider the facts of the present communication, which admittedly pre-date Burkina Faso's accession to the Optional Protocol, but represent a continuing violation of the Covenant and produce effects which themselves constitute violations of the Covenant to this day, account being taken of the acts of the Government and decisions of the courts since the Covenant's entry into force.

5.4 The authors maintain that the communication as a whole is admissible in that Burkina Faso has failed to comply with its obligations under the Covenant. Citing communication No. 612/1995 (*Vicente v. Colombia*, Views of 29 July 1997), the authors refer, first, to the fact that the State party did not fulfil its obligation to conduct an inquiry into the death of Thomas Sankara. Secondly, the State party has never denied its failure to fulfil that obligation under the Covenant, a violation which occurred before and after accession to the Optional Protocol. They further note that Thomas Sankara's death certificate falsely attributed his death to natural causes, and that the State party refused or wilfully omitted to rectify it before and after it acceded to the Optional Protocol. Thirdly, the authors consider that, in its observations, the State party made an admission of legal significance, namely that the State authorities were fully aware that Thomas Sankara had not died of natural causes, but did nothing about it.

5.5 The authors emphasize that the acts and wilful omissions on the part of the State party have

⁹ Communication No. 886/1999, *Schedko et al. v. Belarus*, Views of 3 April 2003.

continued since its accession to the Optional Protocol, and have constituted continuing violations of the Covenant. They recall that they initiated judicial proceedings on 29 September 1997, within the 10-year statute of limitations, because of the authorities' refusal to respect their obligations, and draw attention to the attitude of the authorities, who endeavoured to obstruct or delay their appeals.

5.6 The authors consider that the Court of Appeal was tardy in handing down its decision of 26 January 2000, after their counsel had served a notice to perform. They recall that following that decision declaring the ordinary courts incompetent, the authorities concerned refused or omitted to refer the case to the Ministry of Defence in order that proceedings might be brought in the military courts, as provided for in article 71 (1) and (3) of the Code of Military Justice. On 27 January 2000, therefore, the authors lodged an appeal with the Supreme Court challenging the validity of the decision of the Court of Appeal.

5.7 According to the authors, when they lodged the appeal with the Supreme Court on 27 January 2000, the registrar refused or wilfully omitted to give the counsel formal notification of the requirements laid down in article 110 of order No. 91-0051/PRES of 26 August 1991. He also omitted to ascertain whether article 111 of that order¹⁰ applied, in other words to ascertain the age of Auguste Sankara in order to determine whether he was a minor. By its decision of 19 June 2001, the Supreme Court refused or wilfully omitted to remedy the registrar's violations and to verify *proprio motu* the age of Auguste Sankara, who, having been born on 21 September 1982, was in fact a minor when the appeal was lodged—thus committing two separate violations of Auguste Sankara's rights under article 16 of the Covenant. In addition, the authors draw attention to the fact that counsel were not allowed to pay 5,000 CFA francs when making their application, and that the Supreme Court refused to examine the case on the merits, on the sole grounds that payment of 5,000 CFA francs¹¹ was required, and hence to permit continuation of the proceedings.

5.8 The authors again refer to the authorities' wilful failures to act at various stages of the proceedings, namely, their failure to refer the matter to the Minister of Defence in order that proceedings might go ahead before a military court, when in fact

such an action is required under the above-mentioned article 71 (3).

5.9 As to the exhaustion of domestic remedies, the authors, referring to the Committee's jurisprudence,¹² state that the Covenant requires criminal proceedings to be initiated at the national level in the case of serious violations, and in particular unlawful deaths. As the State wilfully omitted or refused to initiate any form of inquiry or civil, criminal or military proceedings, the authors explain that they then lodged a complaint against a person or persons unknown in connection with the death of Thomas Sankara and the rights of his family, in so far as that was the only domestic remedy available in respect of the alleged violations. They recall that they were unable to initiate such proceedings before the military courts under article 71 (3) of the Code of Military Justice. On the basis of the Committee's jurisprudence,¹³ the authors maintain that none of the remedies mentioned by the State party may be regarded as effective, given their purely disciplinary or administrative nature, and the fact that they are not legally binding on the public authorities (in the case of non-contentious remedies) and cannot provide an effective remedy for alleged serious violations (in the case of contentious remedies). As to domestic remedies for denial of justice, the authors, citing the Committee's jurisprudence,¹⁴ consider that it is incumbent on the Committee to determine whether the Supreme Court violated its obligations of independence and impartiality, and that they could not, at the time of their appeal, know in advance what action the Court would take. In their opinion, the application for disqualification of the President of the Supreme Court could not constitute an effective recourse in that it would not remedy the irreversible effects of the Court's decision, which is not appealable. With regard to the appeal of 20 September 2002 concerning the failure to produce the body of Thomas Sankara, the authors state that the purpose of that appeal was to obtain direct evidence concerning the circumstances of the victim's death, and that the appeal could not remedy the alleged violations vis-à-vis the members of his family. The authors add that the only effective and adequate remedy for the family members was exhausted by the Supreme Court decision of 19 June 2001. Lastly,

¹⁰ Article 111 of order No. 91-0051/PRES of 26 August 1991: "The following are nevertheless exempted from payment of a bond: persons sentenced to ordinary imprisonment or light imprisonment; persons who are in receipt of, or have requested, legal aid; minors under the age of 18."

¹¹ Equivalent to approximately 7.6 euros, according to the authors.

¹² Communications Nos. 563/1993, *Nydia Bautista de Arellana v. Colombia*, Views of 27 October 1995, 612/1995, *Vicente v. Colombia*, Views of 29 July 1997, and 778/1997, *Coronel v. Colombia*, Views of 24 October 2002.

¹³ Communication No. 612/1995, *Vicente v. Colombia*, Views of 29 July 1997.

¹⁴ Communication No. 886/1999, *Schedko et al. v. Belarus*, Views of 3 April 2003.

in conformity with the Committee's jurisprudence,¹⁵ the authors consider that they could not be required to apply for habeas corpus.

5.10 The authors made further submissions concerning the merits of the communication. They point out that, in its observations, the State party officially admitted that the authorities knew the death of Thomas Sankara on 15 October 1987 was not due to natural causes. From that they conclude that the appeal lodged on 30 [sic] September 2002 is no longer necessary. They further note that the then Minister of Justice, now the President of Burkina Faso, did not institute proceedings despite being aware that the victim did not die a natural death. Similarly, the Procurator of Faso and the Minister of Defence did not ensure that the Supreme Court's decision was referred to the military courts. The authors again refer to the statement made by the President of Burkina Faso on Radio France Internationale on 19 June 2001 and consider it to be in breach of article 71 (1) and (3) of the Code of Military Justice, which establishes, among the duties of the Minister of Defence, his exclusive competence to order proceedings in the military courts. The authors stress that whenever a violation has been reported by a civilian examining judge, Procurator of Faso or Procurator-General, the Minister of Defence has ordered proceedings to be brought. According to the authors, who refer to a statement in *Le Pays*,¹⁶ the Minister of Defence personally refused to exercise the powers conferred on him by article 71 (3) of the Code of Military Justice. They again stress that all the judicial authorities, including the Procurator of Faso and the Procurator-General, have either refused to allow, or wilfully prevented or omitted to initiate, proceedings in the military courts.

Decision on admissibility

6.1 At its eightieth session, the Committee examined the admissibility of the communication.

6.2 The Committee noted the State party's arguments concerning the inadmissibility of the communication *ratione temporis*. Having also noted the authors' arguments, the Committee considered that a distinction should be drawn between the

¹⁵ Communication No. 30/1978, *Bleier v. Uruguay*, Views of 29 March 1982.

¹⁶ "At this juncture, matters must not be confused. To date, the Minister of Defence has not been called upon to intervene as such in the Thomas Sankara case. I have no judicial document or a document from a claimant calling on me to act. If one day this problem arises, courageously and with the President of Burkina Faso as the supreme chief of the armed forces, we shall ensure that a solution is found to the problem. Thomas Sankara was in fact one of our brothers in arms. There is no reason why any problem raised concerning him cannot be solved." *Le Pays*, No. 2,493, 22 October 2001.

complaint relating to Mr. Thomas Sankara and the complaint concerning Ms. Sankara and her children. The Committee considered that the death of Thomas Sankara, which may have involved violations of several articles of the Covenant, occurred on 15 October 1987, hence before the Covenant and the Optional Protocol entered into force for Burkina Faso.¹⁷ This part of the communication was therefore inadmissible *ratione temporis*. Thomas Sankara's death certificate of 17 January 1988, stating that he died of natural causes—contrary to the facts, which are public knowledge and confirmed by the State party (paras. 4.2 and 4.7)—and the authorities' failure to correct the certificate during the period since that time must be considered in the light of their continuing effect on Ms. Sankara and her children.

6.3 In conformity with its jurisprudence,¹⁸ the Committee was of the view that it could not consider violations which occurred before the entry into force of the Optional Protocol for the State party unless those violations continued after the Protocol's entry into force. A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of previous violations by the State party. The Committee took note of the authors' arguments concerning, first, the failure of the authorities to conduct an inquiry into the death of Thomas Sankara (which was public knowledge) and to prosecute those responsible—allegations which are not in fact challenged by the State party. These constitute violations of their rights and of the obligations of States under the Covenant.¹⁹ Secondly, it was clear that in order to remedy this situation, the authors initiated judicial proceedings on 29 September 1997, i.e., within the limits of the 10-year statute of limitations, and these proceedings continued after the Covenant and the Optional Protocol entered into force for Burkina Faso. Contrary to the arguments of the State party, the Committee considered that the proceedings were prolonged, not because of a procedural error on the part of the authors, but because of a conflict of competence between authorities. Consequently, in so far as, according to the information provided by the authors, the alleged violations resulting from the failure to conduct an inquiry and prosecute the guilty parties have affected

¹⁷ Communication No. 345/1998, *R.A.V.N. et al. v. Argentina*, decision of 26 March 1990 on inadmissibility.

¹⁸ Communications Nos. 24/1997, *S. Lovelace v. Canada*, Views of 30 July 1981, 196/1985, *I. Gueye v. France*, Views of 3 April 1989, 516/1992, *J. Simunek et al. v. Czech Republic*, Views of 19 July 1995, 520/1992, *E. and A.K. v. Hungary*, decision of 7 April 1994 on inadmissibility, and 566/1993, *Ivan Somers v. Hungary*, Views of 23 July 1996.

¹⁹ Communication No. 612/1995, *Vicente v. Colombia*, Views of 29 July 1997.

them since the entry into force of the Covenant and the Optional Protocol because the proceedings have not concluded to date, the Committee considered that this part of the communication was admissible *ratione temporis*.

6.4 As to the exhaustion of domestic remedies, and the State party's argument of inadmissibility based on failure to make use of non-contentious remedies,²⁰ the Committee recalled that domestic remedies must be not only available but also effective, and that the term "domestic remedies" must be understood as referring primarily to judicial remedies. The effectiveness of a remedy also depended, to a certain extent, on the nature of the alleged violation.²¹ In the present case, the alleged violation concerned the right to life, and was linked primarily to the alleged failure to conduct an inquiry and to initiate proceedings against the guilty parties, and secondarily to the alleged failure to correct the victim's death certificate, as well as to the failure of the appeals initiated by the authors in order to remedy the situation. In these circumstances, the Committee considered that the non-contentious remedies mentioned by the State party in its submission could not be considered effective for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.²²

6.5 With regard to the State party's claims relating to the non-use of certain contentious remedies concerning the denial of justice, the Committee noted that the State party had confined itself to a mere recital of remedies available under Burkina Faso law, without providing any information on the relevance of those remedies in the specific circumstances of the case or demonstrating that they would have constituted effective and available remedies. With particular regard to the application for disqualification of the President of the Supreme Court, the Committee considered that the authors could not know the Court's decision in advance, and that it would be for the Committee to determine, in the examination of the merits, whether the President's decision had been arbitrary or constituted a denial of justice.

6.6 On the question of the claim of inadmissibility on the ground that the authors had lodged a complaint with the Committee when proceedings were pending before the national courts, the Committee could not accept this argument in that the

additional remedy introduced by the authors in connection with the complaint of 30 September 2002 against a person or persons unknown had been exhausted at the time the communication was examined.

6.7 As to the State party's claim concerning prescription resulting from the tardy and procedurally incorrect referral of the case to the courts, the Committee considered it unfounded as set out above (cf. para. 6.3). Moreover, the Committee cannot accept this argument in support of the State party's assertion that the Procurator could not be blamed for having refused to refer the case to the Minister of Defence. In this connection, the Committee found that the grounds for refusal adduced by the Procurator on 23 July 2001 were manifestly unfounded since (a) as set forth above, that statute of limitations could not be applied (and had not in fact been applied by the various authorities throughout the proceedings), and (b) the authors could not themselves bring the case before the military courts (the only competent jurisdiction, the Court of Appeal's decision No. 14 having become final following decision No. 46 of the Supreme Court). Only the Minister of Defence, after referral by the Procurator, could issue the order to initiate proceedings, failing which it would be invalid. Hence the Procurator wrongly halted the proceedings initiated by the authors and, furthermore, did not respond to their appeal of 25 July 2001, a fact which has not been commented on by the State party.

6.8 Lastly, the Committee considered that the authors exhausted domestic remedies in conformity with article 5, paragraph 2 (b), of the Optional Protocol.

6.9 As to the State party's argument about the allegedly political character of the complaint, the Committee considered that this in no way affected the admissibility of the communication and, in fact, fell within the scope of the examination of the communication on the merits.

6.10 Regarding the complaints of violations of articles 17 and 23 of the Covenant, the Committee considered that the authors' allegations concerning the consequences, where their protection in particular was concerned, of the failure to conduct an inquiry into the death of Thomas Sankara and to identify those responsible did not fall within the scope of the articles mentioned, but did raise issues

²⁰ Médiateur du Faso, Collège des sages, National Reconciliation Commission, and Compensation Fund for Victims of Political Violence.

²¹ Communication No. 612/1995, *Vicente v. Colombia*, Views of 29 July 1997.

²² Communications Nos. 612/1995, *Vicente v. Colombia*, Views of 29 July 1997, and 778/1997, *Coronel et al. v. Colombia*, Views of 24 October 2002.

with respect to article 7²³ and article 9, paragraph 1,²⁴ of the Covenant.

6.11 Concerning the complaint of a violation of article 16 of the Covenant, the Committee considered that the authors' allegations did not fall within the scope of this article, but might raise issues with regard to article 14, paragraph 1.

6.12 On the question of the complaints under article 14, paragraph 1, and article 26 of the Covenant (cf. para. 3.1), the Committee considered that these allegations had been sufficiently substantiated for purposes of admissibility. The Human Rights Committee therefore decided that the communication was admissible under articles 7, 9, paragraph 1, 14, paragraph 1, and 26 of the Covenant.

State party's observations on the merits

7.1 On 27 September 2004, the State party forwarded its observations on the merits. It considers that in its decision on admissibility, the Committee, by recharacterizing some of the authors' allegations, prejudged its decision on the merits and ignored the principle of the presumption of innocence. The State party reiterates that the use of domestic remedies by the author was characterized by wilful omissions which constitute an abuse of the procedure under the Optional Protocol.

7.2 Concerning the allegation under article 2, paragraph 1, and article 26 of the Covenant, the State party considers that the authors have not demonstrated that the Sankara family suffered discrimination because of their political views. The authors cannot cite their lack of success in the judicial proceedings as evidence of such discrimination since they are not active in any political party in Burkina Faso, do not live there and play no direct part in national political life. In any event, in the view of the State party, the authors cannot validly claim a violation of article 2, paragraph 1, of the Covenant because at the time the Covenant and the Optional Protocol entered into force for Burkina Faso in April 1999, the State party could no longer legally institute an investigation into the death of Thomas Sankara. The State party maintains that, since all legal action regarding this matter has been time-barred since 15 October 1997, no continuing violation of the Covenant can be alleged, unless it were to be considered that domestic law became invalid on the entry into force of the Covenant for Burkina Faso, which is not the case.

7.3 With regard to the alleged violation of article 2, paragraph 3, of the Covenant, the State party considers that the Committee has indicated a preference for contentious remedies (para. 6.4), whereas the possibility of the use of non-contentious remedies cannot be ruled out. The State party explains that in practice these procedures can often prove more effective than contentious procedures. It enumerates the non-contentious remedies available in Burkina Faso, which are effective remedies, and which have in most cases proved more important and more effective than contentious remedies, but which the authors refused to pursue (cf. para. 4.6). The State party holds that contentious remedies are also effective, but that the Sankara family expected "special justice" because of its history, in breach of the principle of equality before the law and justice.

7.4 Concerning the alleged violation of article 6, paragraph 1, of the Covenant, the State party explains that legally Thomas Sankara's death certificate is an administrative document, and that it was incumbent on the Sankara family, in keeping with the current legislation, to apply to the competent administrative court to have it cancelled or corrected. The State party also considers that the failure to correct the death certificate does not in itself constitute a violation of the right to life.

7.5 Concerning the alleged violation of article 14, paragraph 1, of the Covenant, the State party outlines its legislation guaranteeing the independence of the judicial system. It also maintains that in the present case the authors have not demonstrated that the judges were biased. Thus the judge in the court of first instance has discretion to set the amount of the bond in the light of the circumstances of the case. Setting the amount at 1 million CFA francs cannot by itself indicate bias in the judge's decision, since the amount varies with the importance of the case and the parties involved. The State party claims that this amount is in no way exceptional in the context of the customary practice of courts in Burkina Faso.²⁵ As for the deposit of security at the appeal stage, which stands at 5,000 CFA francs, payment is legally mandatory for all persons lodging an appeal, failing which the application is inadmissible. According to the State party, the authors, having omitted to comply with this formality, cannot allege or presume bias on the part of the judges. The State party also considers that citing the political links of the President of the Appeal Court cannot stand up to examination, in view of the fact that the Appeal Court's decisions are in any event collective, and that the complainant was

²³ Communications Nos. 950/2000, *Sarma v. Sri Lanka*, Views of 16 July 2003, and 886/1999, *Schedko v. Belarus*, Views of 3 April 2003.

²⁴ Communication No. 821/1998, *Chongwe v. Zambia*, Views of 25 October 2000.

²⁵ As an example, the State party mentions a bond in the amount of 1.5 million CFA francs deposited in the case *Fonds Chrétien de l'Enfance Canada (FCC) v. Batiano Célestin* in 1997.

free to apply for the disqualification of the President of the Appeal Court in accordance with the current legislation,²⁶ but did not do so. In any event, in the State party's view, losing a case constitutes insufficient grounds for describing a judge as partisan or a court as biased.

7.6 With regard to the alleged violation of article 16 of the Covenant, which the Committee preferred to recategorize in terms of article 14, paragraph 1, of the Covenant, the State party holds that, contrary to the authors' claims, exempting minors from the requirement to deposit a bond, in accordance with article 111 of order No. 91-0051/PRES of 26 August 1991, cannot be regarded as mandatory, so that it was not incumbent on the Supreme Court to note *proprio motu* Auguste Sankara's status as a minor. Moreover, Auguste Sankara's application is not separate from those of the other members of the family, and consequently cannot be considered separately.

7.7 Concerning the alleged violation of article 17 of the Covenant, which the Committee preferred to recategorize in terms of articles 7 and 9, paragraph 1, of the Covenant, the State party explains that the failure to hold an inquiry into the death of Thomas Sankara and identify those responsible are not admissible, in view of the fact that the events predated the entry of the Covenant into force for Burkina Faso. The State party maintains that article 7 of the Covenant cannot be invoked in so far as the authors have never been harassed, and have never suffered from treatment to which this provision refers. Moreover, such an allegation would involve a physical impossibility, in so far as the authors have not lived in Burkina Faso since the events of 1987. Similarly, according to the State party, article 9, paragraph 1, of the Covenant cannot be invoked since the authors no longer live in Burkina Faso.

7.8 Concerning the allegation that article 23 of the Covenant was violated, which the Committee ruled inadmissible, the State party, after referring to its legislation recognizing and guaranteeing the rights of the family, points out that the authors cannot accuse Burkina Faso of not having protected them, since they no longer live in the country and voluntarily removed themselves from the

supervision of the Burkina Faso authorities by seeking refugee status abroad, though they were in no way at risk, or being harassed.

7.9 The State party reiterates its position that the authors' complaint constitutes an abuse of process, in so far as it pursues purely political aims. According to the State party, it would be difficult to subject the facts alleged by the complainant to a legal assessment in the light of Burkina Faso's international human rights commitments, owing to their political nature. What are involved are incidents closely related to the country's political life which occurred in a troubled national context that was linked to the aberrations of the revolutionary regime and the risks of instability in the country and to the military coup which was rendered necessary by circumstances. Hence these incidents cannot be dissociated from the events of 15 October 1987, and the Committee cannot evaluate them independently of their context. The State party claims that the Committee would be exceeding its authority if it were nevertheless to examine all of these incidents. It explains that Ms. Sankara has set herself the goal of seeking revenge for her dead husband, and harming the image of the country and the Government.

7.10 Lastly, the State party calls on the Committee to reject the communication and rule that there has been no violation since the Covenant entered into force. It adds that, at the express request of the parties concerned, the Government is nonetheless prepared to check Thomas's death certificate and, if necessary, to have it corrected, in keeping with the applicable laws and regulations in force in Burkina Faso. In any event, according to the State party, there is nothing to prevent the authors from returning to Burkina Faso or living there. The State party maintains that it guarantees security and protection to all persons living on its territory or subject to its jurisdiction. Furthermore, if the authors consider themselves to be under threat or lacking security, it is for them to seek special protection from the competent authorities. However, according to the State party, Burkina Faso cannot effectively guarantee protection for its nationals living in a foreign State. In addition, according to the State party, it remains true that the security of the authors has never been disturbed at the hands of Burkina Faso in the various countries where they have chosen to live (Gabon, France, Canada).

Authors' comments

8.1 In their comments dated 15 November 2004, the authors state that they are presenting new elements which would warrant a partial revision of the Committee's decision on admissibility. They consider that, in its observations on the merits, the State party acknowledged that Thomas Sankara did

²⁶ Under articles 648-658 of the Code of Criminal Procedure and articles 291 and 292 of order No. 91-51 of 26 August 1991 on the organization and functioning of the Supreme Court, any party in court proceedings who entertains legitimate suspicions regarding a judge who is to rule on his or her interests may prevent the judge from doing so by applying for disqualification. However, according to the State party, the author did not make use of this opportunity. Nor did she make use of the appeal against judicial misconduct provided for in articles 283 and 284 of order No. 91-51, under which denial of justice may be punished.

not die a natural death and that a number of public figures were aware of the circumstances surrounding the events of 15 October 1987.

8.2 Consequently, the authors first request the Committee to declare admissible the allegation under article 6 of the Covenant, a provision which obliges the State party to investigate and prosecute those responsible for violations of Thomas Sankara's right to life, and to respect and guarantee Thomas Sankara's right to life.²⁷ According to the authors, the State party's obligation to protect the human dignity of Thomas Sankara continues after his death.²⁸ The failure to comply with the obligation to establish the circumstances of the acknowledged extrajudicial death of an individual is an affront to human dignity. In the light of the evidence that Mr. Sankara did not experience a natural death, notwithstanding his death certificate, but was in fact assassinated during a coup d'état, the authors deem it vital for the State party to protect his dignity by embarking on a judicial investigation and determining the circumstances of his death, and then correcting the death certificate.

8.3 Secondly, the authors call on the Committee to declare admissible the allegation under article 16, on the grounds that the State party did not supply a copy of Supreme Court decision No. 46 of 19 June 2001 or did not recognize the authenticity of the copy they themselves submitted. The authors reiterate that the Supreme Court arbitrarily denied Auguste Sankara's right to be recognized as a person before the law. According to the authors, since the provisions of article 111 of order No. 91-0051/PRES of 26 August 1991 relating to minors are mandatory, it was incumbent on the Supreme Court to note *proprio motu* the status of Auguste Sankara as a minor, to grant him exemption from the bond requirement and thus to grant him the right of access to the courts. In addition, the authors point out that when the right of a person to be recognized by the law is violated, article 14 of the Covenant is necessarily violated.

8.4 The authors also reiterate their comments relating to violations of articles 7 and 9, paragraph 1, by the State party. They emphasize that the State party's response to the above-mentioned new elements relating to the role played by President

²⁷ The authors cite communications Nos. 161/1983, *Herrera Rubio v. Colombia*, Views of 2 November 1987, and 778/1997, *Coronel et al. v. Colombia*, Views of 24 October 2002.

²⁸ The authors refer to communications Nos. 1024/2001, *Sanlés Sanlés v. Spain*, decision of 30 March 2004 on inadmissibility, and 717/1996, *Acuña Inostroza et al. v. Chile*, decision of 23 July 1999 on inadmissibility, and to the individual opinions on communication No. 718/1996, *Vargas Vargas v. Chile*, decision of 26 July 1999 on inadmissibility.

Blaise Compaoré in the death of Thomas Sankara will be vital in throwing light on the events of 15 October 1987.

8.5 The authors point out that the State party violated article 26 of the Covenant, protecting the right to equality before the law and to freedom from discrimination based on political opinions. Contrary to the State party's observations, the authors explain that a person may have a political opinion, even if he or she no longer lives in Burkina Faso, and is not involved in politics. The authors consider that the State party has not presented sufficient legal arguments to refute their detailed allegations. Moreover, the State party had noted that the surviving members of the Sankara family had been granted refugee status abroad. The granting of that status, in the authors' view, constitutes *prima facie* proof of the existence of discrimination based on political opinions in the country of origin. According to the authors, the State party's allegations that the Sankara family wished to benefit from special treatment in the Burkina Faso courts demonstrated a failure to understand the nature of the discrimination they had suffered, namely, the deliberate unfair treatment suffered by the authors in their dealings with a variety of official bodies in Burkina Faso.

8.6 In relation to article 14, paragraph 1, of the Covenant, the authors point out that the Supreme Court was guilty of a denial of justice in adopting its decision No. 46 of 19 June 2001, which the State party has still not supplied. The Committee's jurisprudence confirms that a decision taken by a country's highest court can in itself be the source of an alleged denial of justice.²⁹ The authors acknowledge that the Committee has no independent machinery which could conduct an investigation, and is generally not in a position to review the evidence and the facts as assessed by domestic courts. However, the authors refer to the exception to that rule set out in the case *Griffin v. Spain*.³⁰ In the authors' view, the Supreme Court displayed a lack of logic when it invoked the failure to pay the modest sum of 5,000 CFA francs in refusing to consider the merits of a case.

Supplementary observations by the State party on the authors' comments

9.1 In its supplementary observations of 15 October 2005, the State party reiterates its observations concerning inadmissibility. According

²⁹ Communication No. 718/1996, *Vargas Vargas v. Chile*, decision of 26 July 1999 on inadmissibility, para. 6.7.

³⁰ Communication No. 493/1992, *Griffin v. Spain*, Views of 4 April 1995: "... unless it can be ascertained that the proceedings were manifestly arbitrary, that there were procedural irregularities amounting to a denial of justice, or that the judge manifestly violated his obligation of impartiality" [para. 9.6].

to the State party, neither the failure to conduct an investigation, nor the alleged failure to correct the death certificate, nor the invoking of the violation of Thomas Sankara's dignity, can justify applying the provisions of the Covenant in respect of him retroactively, since there is no continuity in the events over time, and to do so would run totally counter to the principles of public international law. The State party maintains the argument of prescription to justify the fact that no investigation has been held since the Covenant entered into force. Furthermore, in bringing the case before a court which was manifestly incompetent to consider it, the authors brought on prescription by their own actions, since referral to an incompetent court does not interrupt the statute of limitations. In that way, it was not incumbent on the State party to institute proceedings after the Covenant had entered into force. In the present case, since the author of the communication had not indicated any act attributable to the State party which had been committed subsequently or had continued after the entry into force of the Covenant, the Committee could not validly rule on the facts without ignoring its own jurisprudence and a well-established international rule. Regarding the author's allegations that the last investigative action was taken on 29 September 1997, providing grounds for suspending the statute of limitations, the State party considers this to be a "pernicious interpretation" of article 7 of the Code of Criminal Procedure: the institution of proceedings is not an investigative act, because it is not brought before a competent court.

9.2 Concerning the allegations that the State party omitted or refused to correct Thomas Sankara's death certificate, before and after acceding to the Optional Protocol, the State party explains that the death certificate is no more than an act of recording by an expert, and not a civil registration document. A document prepared by an expert can be rectified or corrected only by an expert, a role the State party could not play, and the responsibility of an expert is and remains an individual and personal responsibility. Hence the failure to correct the death certificate cannot bring into play the responsibility of the State party.

9.3 The State party maintains that the authors' assertions regarding violation of the dignity of Thomas Sankara, allegedly constituting a continuing violation, are not substantiated and do not point to violations of the provisions of the Covenant. Sympathizers regularly visit Thomas Sankara's grave to pay tribute, he himself has been officially rehabilitated and honoured as a national hero, a number of political parties which are still represented in the National Assembly bear his name, and a heroes' monument is under construction in Ouagadougou, partly celebrating Thomas Sankara.

In addition, according to the State party, the protection of dignity under the Covenant guarantees only the rights of living persons, and not the dead. Consequently, the allegation that Thomas Sankara's right to dignity has been violated is manifestly unfounded.

9.4 Concerning the alleged admissions of legal significance made by the State party in connection with Thomas Sankara's status as a victim, the State party notes the flimsiness of these observations and considers that the Committee should reaffirm its initial position regarding the inadmissibility of this part of the complaint.

9.5 In the view of the State party, the authors' observations demonstrate that the requirements for admissibility before the Committee have not all been met in this case, in relation to the Committee's partial decision on admissibility. The State party requests the Committee to reconsider its admissibility decision. Not only have not all remedies been exhausted in relation to all their allegations, but in addition the allegations reflect an abuse of rights and abuse of process and are manifestly incompatible with the provisions of the Covenant.

9.6 The State party reaffirms that it has demonstrated the effectiveness of non-contentious remedies in the specific case of Burkina Faso, in the prevailing political and social context. The authors have not denied that these remedies are effective, and do not explain their steadfast refusal to make use of non-contentious remedies. The State party also reiterates that the authors have failed to use certain contentious remedies. It refers to its observations on admissibility, and in particular to article 123 of the Personal and Family Code, under which they could secure correction of the death certificate. Lastly, the State party maintains that Ms. Sankara, through negligence or ignorance, committed procedural errors which prevented consideration of the substance of her complaint, and it refers to its observations on admissibility.

9.7 In relation to abuse of process, the State party maintains that the complaints raised by the authors are more political than legal in nature, and are in fact directed at the country's President.

9.8 The State party puts forward the following arguments as to the merits. Regarding the alleged violation of article 2, the State party considers that these violations cannot have occurred in the present case, but if the Committee were to acknowledge such an obligation, the State party is prepared to present relevant arguments. Concerning the alleged violation of article 7, the State party holds that any accusation of cruel, inhuman and degrading treatment cannot be validly upheld in fact or in law,

owing to the efforts made by the State party, which met with a categorical refusal on the part of Ms. Sankara. The State party refers to the efforts it has made to achieve reconciliation vis-à-vis Thomas Sankara, and in particular the fact that the location of his grave is public knowledge. The Sankara family cannot claim intimidation of any kind, in so far as its members no longer live in Burkina Faso. The State party considers that the authors have not demonstrated any act attributable to the State party which has caused either physical suffering or mental suffering such as to substantiate a violation of article 7.

9.9 Concerning the alleged violation of article 9, paragraph 1, the State party indicates that the authors have put forward the same arguments as for article 7, and that they have failed likewise to supply any specific arguments to back up the allegations. The authors have not been the victims of arrest or arbitrary detention, nor has their security been disturbed. Accordingly, the State party calls on the Committee to reject the allegation.

9.10 Concerning article 14, paragraph 1, the State party refers to its observations on the merits, in relation to the amount of the bond, which cannot alone indicate bias on the part of the judge. In addition, and citing the Committee's jurisprudence,³¹ the State party maintains that the authors did not raise any irregularity before the judicial division of the Supreme Court. Moreover, concerning the authors' arguments based on *Griffin v. Spain*, the State party notes that they have not demonstrated the arbitrary and unfair nature of the proceedings in the Supreme Court, that they have not demonstrated any procedural irregularity, and that the only procedural obstacles which may be cited in the present case are attributable to the failure to deposit a bond, for which the authors have only themselves to blame.

9.11 Concerning article 26, the State party refers to its observations, adding that articles 1 and 8 of Burkina Faso's Constitution protect citizens against all forms of discrimination and guarantee freedom of expression. Discrimination is forbidden by the new 1996 Criminal Code, which lays down severe punishment. According to the State party, the authors have not demonstrated that they have political opinions which gave rise to discriminatory measures on the part of the authorities. Benefiting from refugee status in a foreign country does not in itself constitute proof of discrimination based on the political opinions of the beneficiary. According to the State party, the criteria used by each State in

³¹ Communication No. 811/1998, *Mulai v. Republic of Guyana*, Views of 20 July 2004: "where attempts at jury tampering come to the knowledge of either of the parties, these alleged improprieties should have been challenged before the court" [para. 6.1].

granting refugee status are in practice sometimes subjective, and the Sankara family members still living in Burkina Faso are not harassed in any way because of their political views. The State party calls on the Committee to reject the allegation that article 26 was violated.

Authors' comments on the State party's observations

10. In their comments of 15 January 2006, the authors reaffirm their earlier observations. Concerning the time bar, they explain that no court has called this matter into question, and that in relation to article 7 of the Code of Criminal Procedure³² and the applicable case law, there has never been a time bar.

Request for reconsideration of the admissibility decision

11. The Committee has taken note of the request for reconsideration of its decision on admissibility, made both by the State party and by the authors. It points out that most of the arguments advanced in support of the request for reconsideration relate to parts of the communication which had already been thoroughly examined during consideration of the issue of admissibility, and that the other arguments must be analysed as part of the consideration of the merits. Consequently, the Committee decides to proceed to consider the merits of the communication.

Consideration of the merits

12.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

12.2 Concerning the alleged violation of article 7, the Committee understands the anguish and psychological pressure which Ms. Sankara and her sons, the family of a man killed in disputed circumstances, have suffered and continue to suffer because they still do not know the circumstances surrounding the death of Thomas Sankara, or the precise location where his remains were officially buried.³³ Thomas Sankara's family have the right to

³² "In criminal matters, prosecution is time-barred 10 years after the date on which the offence was committed, if no act of investigation or prosecution has taken place in that interval. If such acts have taken place during that interval, prosecution shall be time-barred only 10 years after the latest such act. The same applies even to persons who were not affected by the act of investigation or prosecution."

³³ Communications Nos. 886/1999, *Schedko v. Belarus*, Views of 3 April 2003, para. 10.2, and 887/1999, *Staselovich v. Belarus*, Views of 3 April 2003, para. 9.2.

know the circumstances of his death,³⁴ and the Committee points out that any complaint relating to acts prohibited under article 7 of the Covenant must be investigated rapidly and impartially by the competent authorities.³⁵ In addition, the Committee notes, as it did during its deliberations on admissibility, the failure to correct Thomas Sankara's death certificate of 17 January 1988, which records a natural death contrary to the publicly known facts, which have been confirmed by the State party. The Committee considers that the refusal to conduct an investigation into the death of Thomas Sankara, the lack of official recognition of his place of burial and the failure to correct the death certificate constitute inhuman treatment of Ms. Sankara and her sons, in breach of article 7 of the Covenant.

12.3 Concerning the alleged violation of article 9, paragraph 1, of the Covenant, the Committee recalls its jurisprudence to the effect that the right to security of person guaranteed in article 9, paragraph 1, of the Covenant applies even outside the context of formal deprivation of liberty.³⁶ The interpretation of article 9 does not allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction.³⁷ In the present case, individuals shot and killed Thomas Sankara on 15 October 1987, and, fearing for their safety, his wife and children left Burkina Faso shortly thereafter. However, the arguments put forward by the authors are not sufficient to reveal a violation of article 9, paragraph 1, of the Covenant.

12.4 Concerning the alleged violation of article 14, paragraph 1, of the Covenant, while the authors' request for public inquiry and legal proceedings do not need to be determined by a court or tribunal, the Committee considers however that whenever, as in the present case, a judicial body is entrusted with the task of deciding on the start of such inquiry and proceedings, 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.³⁸

³⁴ Communication No. 107/1981, *Quinteros v. Uruguay*, Views of 21 July 1983, para. 14.

³⁵ General comment No. 20, para. 14.

³⁶ Communications Nos. 195/1985, *Delgado Páez v. Colombia*, Views of 12 July 1990, para. 5.5, and 711/1996, *Carlos Dias v. Angola*, Views of 20 March 2000, para. 8.3.

³⁷ Communications Nos. 821/1998, *Chongwe v. Zambia*, Views of 25 October 2000, para. 5.3, and 468/1991, *Bahamonde v. Equatorial Guinea*, Views of 20 October 1993, para. 9.2.

³⁸ Communication No. 1015/2001, *Pertterer v. Austria*, decision of 20 July 2004 on inadmissibility, para. 9.2.

12.5 The Committee notes the authors' arguments regarding the non-respect of the guarantee of equality by the Supreme Court when it rejected the appeal on the grounds of failure to deposit security of 5,000 CFA francs, and its refusal to take into account Auguste Sankara's status as a minor. It appears, firstly, that the State party did not contest the claim that, contrary to article 110 of order No. 91-51 of 26 August 1991, the registrar failed to inform counsel of the obligation to deposit the sum of 5,000 CFA francs as security; and secondly, that the Supreme Court ruling stating that the authors provided no evidence in support of an exemption for Auguste Sankara, as a minor, was unwarranted since the authors were unaware that security was required precisely because of the registrar's failure to inform them of the fact—a key point of which the Court was fully aware. The Committee accordingly considers that the Supreme Court failed to comply with the obligation to respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, of the Covenant and the principles of impartiality, fairness and equality of arms implicit in this guarantee.

12.6 The Committee notes that after the Supreme Court adopted decision No. 46 of 19 June 2001, confirming decision No. 14 in which the Appeal Court declared the ordinary courts incompetent, the relevant authorities refused or omitted to refer the case to the Minister of Defence so that proceedings could be instituted in the military courts in accordance with article 71 (1) and (3) of the Code of Military Justice. The Committee also refers to its deliberations on admissibility and the conclusion it reached that the Procurator wrongly halted the proceedings instituted by the authors and in addition failed to respond to their appeal of 25 July 2001. Lastly, the Committee notes that after the ordinary courts were declared incompetent, almost five years passed, but no judicial proceedings were instituted by the Minister of Defence. The State party was unable to explain these delays, and on this point the Committee considers that, contrary to the State party's arguments, no time bar could invalidate proceedings in a military court, and consequently the failure to refer the matter to the Minister of Defence should be attributed to the Procurator, who alone had the power to do so. The Committee considers that this inaction since 2001, despite the various remedies sought subsequently by the authors, constitutes a violation of the obligation to 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.

12.7 Concerning the alleged violation of article 26 of the Covenant, the Committee considers that the arguments put forward by the authors concerning the

authorities' discrimination against them for their political opinions are insufficient to reveal a violation.

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of articles 7 and 14, paragraph 1, of the Covenant.

14. The Committee recalls that in acceding to the Optional Protocol, the State party recognized the competence of the Committee to determine whether the Covenant had been breached and that, under article 2 of the Covenant, it undertook to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to guarantee an effective and enforceable remedy when a violation has been established. Under article 2, paragraph 3 (a), of the Covenant, the State party is required to provide Ms. Sankara and her sons an effective and enforceable remedy in the

form, inter alia, of official recognition of the place where Thomas Sankara is buried, and compensation for the anguish suffered by the family. The State party is also required to prevent such violations from occurring in the future.

15. Bearing in mind that, by acceding to the Optional Protocol, States parties recognize the competence of the Committee to determine whether there has been a violation of the Covenant, and that, under article 2 of the Covenant, they undertake to ensure to all individuals within their territory and subject to their jurisdiction the rights recognized in the Covenant, and to guarantee an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 90 days following the submission of these Views, information about the measures taken to give effect to them. The State party is also requested to publish the Committee's Views.

Communication No. 1172/2003

Submitted by: Salim Abbassi (represented by Mr. Rachid Mesli)

Alleged victim: Abbassi Madani (his father)

State party: Algeria

Date of adoption of Views: 28 March 2007

Subject matter: Arbitrary detention, house arrest, fair trial, freedom of expression

Procedural issue: Power of attorney

Substantive issues: Right to liberty and security of person; arbitrary arrest and detention; right to liberty of movement; right to a fair trial; right to a competent, independent and impartial tribunal; right to freedom of expression

Articles of the Covenant: 9, 12, 14 and 19

Articles of the Optional Protocol: -

Finding: Violation (arts. 9 and 14)

1. The author of the communication, dated 31 March 2003, is Salim Abbassi, born on 23 April 1967 in Algiers, who is submitting the communication on behalf of his father, Mr. Abbassi Madani, an Algerian citizen, born on 28 February 1931, in Sidi Okba (Biskra). The author states that his father is the victim of violations by Algeria of articles 9, 12, 14, 19, 20 and 21 of the International Covenant on Civil and Political Rights (the Covenant). He is represented by Mr. Rachid Mesli.

The Covenant and the Optional Protocol entered into force for the State party on 12 December 1989.

The facts as presented by the author

2.1 Abbassi Madani is one of the founding members and, at the time of the submission of the communication, president of the Front Islamique du Salut (Islamic Salvation Front) (FIS),¹ an Algerian political party approved by the State party as of 12 September 1989 following the introduction of political pluralism. With a view to forthcoming elections and in the wake of gains made by FIS during the local elections of 1990, the Algerian Government had to push through a new electoral law, which was unanimously condemned by all Algerian opposition parties. Protesting against this law, FIS organized a general strike along with peaceful sit-ins in public squares. After a few days of strikes and peaceful marches, the parties agreed to end the protest movement in exchange for a review of the electoral law in the near future. Despite this agreement, on 3 June 1991, the head of Government

¹ FIS was disbanded in 1992, as the author confirms (see para. 2.5).

was requested to resign and public squares were stormed by the Algerian army.

2.2 On 30 June 1991, Abbassi Madani was arrested at his party's headquarters by the military police and on 2 July 1991 was brought before the investigating judge of the military court, accused of "jeopardizing State security and the smooth operation of the national economy". In particular, he was reproached for having organized a strike, which the prosecution described as subversive, since it had allegedly done serious harm to the national economy. The lawyers appointed to defend Abbassi Madani challenged the grounds for his prosecution before the military court, and the lawfulness of the investigation conducted by a military judge under the authority of the public prosecutor's office. According to the defence, the court had been established in order to remove leaders of the main opposition party from the political scene, and it was not competent to hear the case, it could only adjudicate on offences under criminal law and the Code of Military Justice committed by members of the armed forces in the performance of their duties. The competence of the military court to deal with political offences under legislation dating from 1963 had been revoked with the establishment of the National Security Court in 1971. Since the latter had been abolished following the introduction of political pluralism in 1989, the general rule of competence should therefore apply.

2.3 FIS won the first round of general elections on 26 December 1991, and the day after the official results were released, the military prosecutor was to inform defence lawyers of his intention to end the proceedings against Abbassi Madani. On 12 January 1992, however, the President of the Republic "resigned", a state of emergency was declared, the general elections were cancelled and so-called "administrative internment camps" were opened in southern Algeria. On 15 July 1992, the Blida military court sentenced Abbassi Madani in absentia to 12 years' rigorous imprisonment. The application for judicial review of this decision was rejected by the Supreme Court on 15 February 1993, thereby making the conviction final.

2.4 During his detention in Blida military prison, Abbassi Madani was, according to the author, subjected to ill-treatment on numerous occasions, in particular for having claimed political prisoner status and the same treatment as other prisoners. He was subjected to particularly severe treatment, despite his perilous state of health, spending a very long period of time in solitary confinement and being barred from receiving visits from his lawyers and family.

2.5 Following negotiations with the military authorities in June 1995, he was transferred to a residence normally used for dignitaries visiting

Algeria. He was returned to the Blida military prison² for having refused to concede to the demands of army representatives, in particular that he should renounce his political rights. He was then detained in particularly harsh conditions³ for the following two years until his release on 15 July 1997, on one condition "that he abide by the laws in force if he wished to leave the country". Upon his release, he did not resume his political activity as president of FIS, since the party had been banned in 1992.

2.6 Initially, the authorities tried to restrict Abbassi Madani's liberty of movement, considering any peaceful demonstration of support for him a threat to public order. Subsequently, the Minister of the Interior launched a "procedure" to place him under house arrest after he had been interviewed by a foreign journalist and had sent a letter to the Secretary-General of the United Nations⁴ in which he expressed his willingness to help seek a peaceful solution to the Algerian crisis. On 1 September 1997, members of the military police informed him orally that he was under house arrest and forbidden to leave his apartment in Algiers. He was also informed that he was forbidden to make statements or express any opinion "failing which he would return to prison". He was denied all means of communicating with the outside world: his building was guarded around the clock by the military police, who prevented anyone, except members of his immediate family, from visiting him. He was not allowed to contact a lawyer or to lodge any appeal against the decision to place him under house arrest, which was never transmitted to him in writing.

2.7 On 16 January 2001, a communication was submitted to the Working Group on Arbitrary Detention on behalf of Mr. Madani. On 3 December 2001, the Working Group rendered its Opinion according to which his deprivation of liberty was arbitrary and contrary to articles 9 and 14 of the Covenant. The Working Group requested the State party "to take the necessary steps to remedy the situation and to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights".⁵ No steps were taken by the State party.

The complaint

3.1 The author claims that the facts as presented by him reveal violations of articles 9, 12, 14 and 19 of the Covenant in respect of his father, Abbassi Madani.

² Exact date not provided.

³ Conditions not explained.

⁴ Exact date not provided.

⁵ Opinion No. 28/2001 of the Working Group on Arbitrary Detention.

3.2 As far as the allegations under articles 9 and 19 of the Covenant are concerned, Abbassi Madani's arrest was arbitrary and politically motivated. The charge against him that he had jeopardized State security was political, since no specific act that could in any way be categorized as a criminal offence could be established by the prosecution. He was reproached for having started a political strike that the military, and not the civil legal authorities, had described as subversive. This strike was put down with considerable bloodshed by the Algerian army, despite its peaceful nature and the guarantees provided by the head of Government. Even if a political protest movement could be categorized as a criminal offence, which is not the case under Algerian law, the protest movement had ended following the agreement between the head of Government and the party headed by Abbassi Madani. His arrest by the military police and the charges brought against him by a military tribunal clearly served the sole purpose of removing the president of the main opposition party from the Algerian political scene, in violation of articles 9 and 19 of the Covenant.

3.3 As for the allegations relating to article 14, minimum standards of fairness were not observed. Abbassi Madani was sentenced by an incompetent, manifestly partial and unfair tribunal. The tribunal comes under the authority of the Ministry of Defence and not of the Ministry of Justice and is composed of officers who report directly to it (investigating judge, judges and president of the court hearing the case appointed by the Ministry of Defence). It is the Minister of Defence who initiates proceedings and has the power to interpret legislation relating to the competence of the military tribunal. The prosecution and sentence by such a court, and the deprivation of liberty constitute a violation of article 14.

3.4 With regard to article 9, there is no legal justification for the house arrest of Abbassi Madani. The Algerian Government justified this decision by citing "the existence of this measure in several pieces of Algerian legislation", in particular article 6, paragraph 4, of Presidential decree No. 99-44 of 9 February 1992 declaring the state of emergency, which was still in force at the time the communication was submitted. According to the Government, this decree was in conformity with article 4 of the Covenant. The Government, however, never complied with the provisions of article 4, paragraph 3, pursuant to which it should "immediately inform the other States parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated". Article 9 of the Criminal Code, which prescribes house arrest as an

additional penalty,⁶ is applied together with article 11, which obliges a person convicted to remain within a geographical area specified in a judgement.⁷ House arrest may thus only be handed down as an additional penalty in the sentence imposing the main penalty. In the case of Abbassi Madani, there is no mention of any decision to place him under house arrest in the sentence handed down by the Blida military tribunal. At any rate, article 11 of the aforementioned Act lays down five years as the maximum duration for house arrest from the moment of the release of the convicted person. Since at the time the communication was submitted Abbassi Madani had been under house arrest for considerably more than five years, it constitutes a violation of the Act itself, which the Algerian Government is invoking to justify the imposition of that penalty.

3.5 The grounds for placing Abbassi Madani under house arrest are the same as those for his arrest and conviction by the military tribunal, namely the free exercise of his political rights enshrined in the Universal Declaration of Human Rights and the Covenant. This measure therefore constitutes a violation of articles 9, 12 and 19 of the Covenant.

State party's observations on admissibility and on the merits

4.1 On 27 June 2003, the State party pointed out that there is no indication in the communication that Abbassi Madani had given anyone the authority to act on his behalf, as provided for in the rules for submitting communications to the Committee. Mr. Salim Abbassi who claims to be acting on his father's behalf has not submitted any documentary evidence of his authority to so act. The power of attorney given by Salim Abbassi to Rachid Mesli was not authenticated and should not therefore be taken into consideration. Furthermore, Rachid Mesli submitted the petition in his capacity as a lawyer, when he no longer practises as a lawyer in Algeria,

⁶ Article 9, Act No. 89-05 of 25 April 1989: "Additional penalties are: (1) house arrest; (2) banishment order; (3) forfeiture of certain rights; (4) partial confiscation of property; (5) dissolution of a legal person; (6) publication of the sentence."

⁷ Article 11, Act No. 89-05 of 25 April 1989: "House arrest is the obligation on a convicted person to remain in a particular geographical area, specified in a judgement. Its duration may not exceed five years. House arrest shall take effect from the day the prisoner completes his or her main sentence or upon his or her release. The conviction shall be communicated to the Ministry of the Interior, which may issue temporary permits for travel within the country."

Ordinance No. 69-74 of 16 September 1969: "A person placed under house arrest who contravenes or avoids such a measure shall be liable to a term of imprisonment from three months to three years."

having been disbarred by the disciplinary board of the Bar Association of the Tizi-Ouzou region on 3 October 2002. He is not a member of the Bar Association of the Canton of Geneva either, from where the communication was submitted. Accordingly, he is not entitled to act in this capacity. By using the title of lawyer, Rachid Mesli has acted under false pretences and wrongfully claimed a profession which he does not exercise. The State party also points out that an international arrest warrant (ref. No. 17/02) for Rachid Mesli has been issued by the investigating judge of the Sidi M'hamed court for his involvement in allegedly terrorist activities carried out by the Groupe Salafiste de Prédication et de Combat (Salafist Group for Preaching and Combat) (GSPC), which is on the list of terrorist organizations drawn up by the United Nations.

4.2 On 12 November 2003, the State party recalled that Abbassi Madani was arrested in June 1991 following a call to widespread violence, which was launched by Abbassi Madani and others by means of a directive bearing his signature. This came in the wake of a failed uprising, which he and others had planned and organized, with a view to establishing a theocratic State through violence. It was in the context of these exceptional circumstances, and to ensure the proper administration of justice, that he was brought before a military tribunal, which, contrary to the allegations by the source, is competent to try the offences of which he is accused. Neither article 14 of the Covenant, nor the Committee's general comment on this article nor other international standards refer to a trial held in courts other than ordinary ones as necessarily constituting a violation of the right to a fair trial. The Committee has made this point when considering communications relating to special courts and military courts.

4.3 The State party also points out that Abbassi Madani is no longer being held in detention, since he was released on 2 July 2003. He is no longer subject to any restriction on his liberty of movement and is not under house arrest as the source claims. He has been able to travel abroad freely.

4.4 Abbassi Madani was prosecuted and tried by a military tribunal, whose organization and competence are laid down in Ordinance No. 71-28 of 22 April 1971 establishing the Code of Military Justice. Contrary to the allegations made, the military tribunal is composed of three judges appointed by an order issued jointly by the Minister of Justice, Garde des Sceaux, and the Minister of Defence. It is presided over by a professional judge who sits in the ordinary law courts, is subject by regulation to the Act on the status of the judiciary, and whose professional career and discipline are

overseen by the Supreme Council of Justice, a constitutional body presided over by the head of State. The decisions of the military tribunal may be challenged by lodging an appeal before the Supreme Court on the grounds and conditions set forth in article 495 ff. of the Code of Criminal Procedure. As far as their competence is concerned, in addition to special military offences, the military tribunals may try offences against State security as defined in the Criminal Code, when the penalty incurred is for terms of imprisonment of more than five years. Military tribunals may thus try anyone who commits an offence of this type, irrespective of whether he or she is a member of the military. Accordingly, and on the basis of this legislation, Abbassi Madani was prosecuted and tried by the Blida military tribunal, whose competence is based on article 25 of the aforementioned Ordinance. The State party notes that the competence of the military tribunal was not challenged by Abbassi Madani before the trial judges. It was called into question the first time with the Supreme Court, which rejected the challenge.

4.5 Abbassi Madani benefited from all the guarantees recognized under law and international instruments. Upon his arrest, the investigating judge informed him of the charges against him. He was assisted during the investigation and the trial by 19 lawyers, and in the Supreme Court by 8 lawyers. He has exhausted the domestic remedies available under the law, having filed an application with the Supreme Court for judicial review, which was rejected.

4.6 The allegation that the trial was not public is inaccurate, and suggests that he was not allowed to attend his trial, or to defend himself against the charges brought against him. In fact, from the outset, he refused to appear before the military tribunal, although he had been duly summoned at the same time as his lawyers. Noting his absence, the president of the tribunal issued a summons for him to appear, which was served on him in accordance with article 294 of the Code of Criminal Procedure and article 142 of the Code of Military Justice. In the light of his refusal to appear, a report establishing the facts was drawn up before the president of the tribunal decided to dispense with the hearing, in accordance with the aforementioned provisions. Nevertheless, the defendant was kept abreast of all the procedural formalities relating to the hearings and relevant reports were drawn up. The trial of the accused in absentia is neither contrary to Algerian law nor to the provisions of the Covenant: although article 14 stipulates that everyone charged with a criminal offence shall have the right to be tried in his presence, it does not say that justice cannot be done when the accused has deliberately, and on his or her sole initiative, refused to appear in court. The Code of Criminal Procedure and the Code of Military

Justice allow the court to dispense with the hearing when the accused persistently refuses to appear before it. This type of legal procedure is justified by the fact that justice must always be done, and that the negative attitude of the accused should not obstruct the course of justice indefinitely.

Comments by the author on the State party's observations

5.1 On 28 March 2004, counsel provided a power of attorney on behalf of Abbassi Madani, dated 8 March 2004, and informs the Committee that the order for house arrest was lifted on 2 July 2003, and that he is now in Doha, Qatar.

5.2 On the admissibility of the communication, counsel points out that rule 96 (b) of the Committee's rules of procedure allows a communication to be submitted by the individual personally or by that individual's representative. When the communication was submitted, Abbassi Madani was still under unlawful house arrest and unable to communicate with anyone except certain members of his immediate family. The house arrest order was lifted on 2 July 2003 and Abbassi Madani drew up a special power of attorney authorizing counsel to represent him before the Committee. Counsel responds to the personal attacks by the State party against him and requests the Committee to reject them.

5.3 On the merits, the house arrest order against Abbassi Madani was lifted on the expiration of his 12-year sentence to rigorous imprisonment, i.e., on 2 July 2003. Upon his release, he suffered further violations of his civil and political rights. The initial request to enjoin the State party to comply with its international obligations by lifting the house arrest order against the petitioner becomes moot. Abbassi Madani's detention in the conditions described in the initial communication constitutes a violation of the Covenant.

Additional comments by the State party

6. On 18 June 2004, the State party noted that, while acknowledging that he is no longer a lawyer, Abbassi Madani's representative nonetheless signs comments submitted to the Committee in that capacity. It also notes that the representative, instead of responding to the State party's observations on the merits, gives details of his own situation, forgetting that he is acting on behalf of a third party. The State party notes the representative's acknowledgement that Abbassi Madani is no longer subject to any restriction order and argues, accordingly, that his request to the Committee is now moot. The communication must therefore be considered unfounded and inadmissible.

Issues and proceedings before the Committee

Admissibility considerations

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

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

7.3 On the question of the validity of the power of attorney submitted by counsel, the Committee recalls: "Normally, the communication should be submitted by the individual personally or by that individual's representative; a communication submitted on behalf of an alleged victim may, however, be accepted when it appears that the individual in question is unable to submit the communication personally."⁸ In the present case, the representative stated that Abbassi Madani had been placed under house arrest on the date of the submission of the initial communication, and that he was only able to communicate with members of his immediate family. The Committee therefore considers that the power of attorney submitted by counsel on behalf of Abbassi Madani's son was sufficient for the purposes of registering the communication.⁹ Furthermore, the representative subsequently provided a power of attorney signed by Abbassi Madani, expressly and unequivocally authorizing him to represent him before the Committee in the case in question. The Committee therefore concludes that the communication was submitted to it in accordance with the rules.

7.4 As far as the complaints under articles 9, 12, 14 and 19 of the Covenant are concerned, in this case, the Committee considers that the facts as described by the author are sufficient to substantiate the complaints for the purpose of admissibility. It therefore concludes that the communication is admissible under the aforementioned provisions.

7.5 As for the decision to sentence Abbassi Madani in absentia to 12 years' rigorous imprisonment, the Committee, noting that the author only cites this matter when setting out the facts and does not take it up again when stating his complaint or respond to the detailed explanations furnished by

⁸ Rule 96 (b), rules of procedure of the Human Rights Committee (CCPR/C/3/Rev.8).

⁹ See for example communication No. 699/1996, *Maleki v. Italy*, Views adopted on 15 July 1999, submitted by Kambiz Maleki on behalf of his father, Ali Maleki.

the State party, considers that this aspect of the request does not constitute a claim that any of the rights enumerated in the Covenant have been violated, within the meaning of article 2 of the Optional Protocol.

7.6 The Committee notes the representative's request to restate his case, and his argument that his initial submission was made at a time when the author's father was under house arrest and before the order for house arrest had been lifted and that, although the request became moot as soon as the order for house arrest was lifted, this does not in any way affect the violation of the Covenant on the grounds of arbitrary detention. The Committee also takes note of the State party's request to deem the communication moot in the light of the representative's own admission that the author was no longer subject to any restriction order, and its call for the communication to be considered unfounded and inadmissible. The Committee considers that the lifting of the house arrest order does not necessarily mean that the consideration of the question of arbitrary detention automatically becomes moot, and therefore declares the complaint admissible.

Consideration of the merits

8.1 The Committee has considered this communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes that Abbassi Madani was arrested in 1991 and tried by a military tribunal in 1992, for jeopardizing State security and the smooth operation of the national economy. He was released from Blida military prison on 15 July 1997. According to the author, on 1 September 1997, he was then placed under house arrest, without receiving written notification of the reasons for such arrest.

8.3 The Committee recalls that under article 9, paragraph 1, of the Covenant everyone has the right to liberty and security of person, and no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law. It further recalls that house arrest may give rise to violations of article 9,¹⁰ which guarantees everyone the right to liberty and the right not to be subjected to arbitrary detention. The State party did not respond to the author's allegations, except to point out that Abbassi Madani is no longer being held in detention and is not under house arrest. Since the State party did not cite any particular provisions for the enforcement of prison sentences or

legal ground for ordering house arrest, the Committee concludes that a deprivation of liberty took place between 1 September 1997 and 1 July 2003. The detention is thus arbitrary in nature and therefore constitutes a violation of article 9, paragraph 1.

8.4 According to article 9, paragraph 3, anyone detained must be brought promptly before a judge or other officer authorized by law to exercise judicial power and is entitled to trial within a reasonable time or to release. 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.¹¹ In the present case, the author's father was released from house arrest on 2 July 2003, in other words after almost six years. The State party has not given any justification for the length of the detention. The Committee concludes that the facts before it disclose a violation of article 9, paragraph 3.

8.5 The Committee notes the author's allegations that for the duration of his house arrest the author's father was denied access to a defence lawyer, and that he had no opportunity to challenge the lawfulness of his detention. The State party did not respond to those allegations. The Committee recalls that in accordance with article 9, paragraph 4, judicial review of the lawfulness of detention must provide for the possibility of ordering the release of the detainee if his or her detention is declared incompatible with the provisions of the Covenant, in particular those of article 9, paragraph 1. In the case in question, the author's father was under house arrest for almost six years without any specific grounds relating to the case file, and without the possibility of judicial review concerning the substantive issue of whether his detention was compatible with the Covenant. Accordingly, and in the absence of sufficient explanations by the State party, the Committee concludes that there is a violation of article 9, paragraph 4, of the Covenant.

8.6 In the light of the above findings, the Committee does not consider it necessary to deal with the complaint in respect of article 12 of the Covenant.

8.7 As far as the alleged violation of article 14 of the Covenant is concerned, the Committee recalls its general comment No. 13, in which it states that, while the Covenant does not prohibit the trial of civilians in military courts, nevertheless such trials should be very exceptional and take place under

¹⁰ Communication No. 132/1982, *Monja Jaona v. Madagascar*, Views adopted on 1 April 1985, paras. 13-14; and communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 15 March 2005, para. 5.4.

¹¹ Communication No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002, para. 8.2; and communication No. 1014/2001, *Baban v. Australia*, Views adopted on 6 August 2003, para. 7.2.

conditions which genuinely afford the full guarantees stipulated in article 14. It is incumbent on a State party that does try civilians before military courts to justify the practice. The Committee considers that the State party must demonstrate, with regard to the specific class of individuals at issue, that the regular civilian courts are unable to undertake the trials, that other alternative forms of special or high-security civilian courts are inadequate to the task and that recourse to military courts is unavoidable. The State party must further demonstrate how military courts ensure the full protection of the rights of the accused pursuant to article 14. In the present case the State party has not shown why recourse to a military court was required. In commenting on the gravity of the charges against Abbassi Madani it has not indicated why the ordinary civilian courts or other alternative forms of civilian court were inadequate to the task of trying him. Nor does the mere invocation of domestic legal provisions for the trial by military court of certain categories of serious offences constitute an argument under the Covenant in support of recourse to such tribunals. The State party's failure to demonstrate the need to rely on a military court in this case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of article 14. The Committee concludes that the trial and sentence of Abbassi Madani by a military tribunal discloses a violation of article 14 of the Covenant.

8.8 Concerning the alleged violation of article 19, the Committee recalls that freedom of information and freedom of expression are the cornerstones of any free and democratic society. Such societies in essence allow their citizens to seek information regarding ways of replacing, if necessary, the political system or parties in power, and to criticize or judge their Governments openly and publicly without fear of reprisal or repression by them, subject to the restrictions laid down in article 19, paragraph 3, of the Covenant. With regard to the allegations that Abbassi Madani was arrested and charged for political reasons, the Committee notes that it does not have sufficient information to conclude that there was a violation of article 19 in respect of the arrest and charges brought against him in 1991. At the same time, although the State party has indicated that the author is enjoying all his rights and has been resident abroad since that time, and notwithstanding the author's allegations in this regard, the Committee notes that it does not have sufficient information to conclude that there was a violation of article 19 in respect of the alleged ban imposed on Abbassi Madani from making statements or expressing an opinion during his house arrest.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose violations by the State party of articles 9 and 14 of the Covenant.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide an effective remedy for Abbassi Madani. The State party is under an obligation to take the necessary steps to ensure that the author obtains an appropriate remedy, including compensation. In addition, the State party is required to take steps to prevent further occurrences of such violations in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to guarantee all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. It also requests the State party to publish the Committee's Views.

APPENDIX

*Individual opinion (dissenting) by Committee member
Abdelfattah Amor*

In this matter, the Committee, after affirming, in a style and language that it does not customarily employ, that:

“The State party's failure to demonstrate the need to rely on a military court in this case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of article 14.”

concludes that:

“the trial and sentence of Abbassi Madani by a military tribunal discloses a violation of article 14 of the Covenant”.

I cannot associate myself with the approach followed and the conclusion underlying this paragraph 8.7 of the Committee's Views. I believe that they exceed the scope of article 14 and deviate from the general comment on this article.

Article 14 is essentially concerned with guarantees and procedures for the equitable, independent and impartial administration of justice. It is exclusively in that context that the body which administers justice is cited, and then only in the first paragraph of the article: “All persons shall be equal before the courts and tribunals. ... everyone shall be entitled to a fair and public hearing by a

competent, independent and impartial *tribunal* established by law.”

Article 14 is not concerned with the nature of the tribunals. It contains nothing which prohibits, or expresses a preference for, any particular type of tribunal. The only tribunals which may not be covered by article 14 are those which have nothing to do with the safeguards and procedures which it provides. No category of tribunal is inherently ruled out.

In order to clarify the intent and the scope of article 14, in 1984, at its twenty-first session, the Committee adopted general comment No. 13. As of the present time, namely, the end of the eighty-ninth session, at which the present Views were adopted, this comment has never been amended or updated. Paragraph 4 of the general comment is concerned, in particular, with military courts. The general thrust of this paragraph may be summarized as follows:

- The Covenant does not prohibit the setting up of military tribunals;
- Only in exceptional circumstances may civilians be tried by military courts and such trials must be held in conditions which fully respect all the guarantees set out in article 14;
- Derogations from the normal procedures required under article 14 in times of public emergency, as contemplated by article 4 of the Covenant, may not go beyond the extent strictly required by the exigencies of the situation.

In other words, and taking due account of article 14, the Committee’s attention should be focused on guarantees of an equitable, impartial and independent administration of justice. It is in this context, and this context alone, that the question of the legal body—the courts—can be taken up or apprehended.

The military tribunal which tried Abbassi Madani was set up under Algerian law. Its statutory jurisdiction covers military offences, as is the case in all countries which have military forces. In general, this jurisdiction also extends to non-military co-defendants or accomplices where military offences have been committed. In certain States it covers all matters in which members of the military are implicated.

In Algeria, in addition to their statutory jurisdiction, military courts have assigned jurisdiction, specifically established by law. Thus, Ordinance No. 71-28 of 22 April 1971 vests in military tribunals the authority to try offences against State security committed by civilians which incur penalties of more than six years’ imprisonment. In other words, their powers go beyond the normal competence of military courts. This represents an exception to the general rules regarding the jurisdiction of military courts.

The Committee has always believed that, while the Convention may not actually prohibit the formation of military courts, these courts should only be used for the judgement of civilians in very exceptional circumstances and such trials should be conducted in conditions which

fully respect all the guarantees stipulated in article 14. *Is it really necessary to go a step further and to impose yet more conditions, requiring the State party to demonstrate (where civilians are being tried in military courts) that “the ordinary civil courts are not in a position to take such steps and that alternative forms of special civil tribunals or high security courts have not been adapted to perform this task”?*

This new condition imposed by the Committee raises some difficult legal issues. It certainly does not fall within the scope of article 14 and is not covered by general comment No. 13. Submitting the State to conditions which have not been stipulated from the outset is not an acceptable way of applying the standards stipulated by or implicit in the Covenant. At the same time, this condition is questionable. It is questionable in that, save in the event of an arbitrary judgement or obvious error, *the Committee may not replace the State in order to adjudicate on the merits of alternatives to military courts*. By which reasoning is it possible for the Committee to adjudicate on the options before the State for special civil tribunals, high security tribunals or military tribunals? In accordance with which criteria can the Committee determine whether or not the special civil courts or high security courts have been suitably modified to try civilians prosecuted for breaching State security? *The only possible yardsticks for the Committee, regardless which courts are under consideration, are and shall remain the procedures and guarantees provided in article 14*. Only here is the Committee on firm ground, protected from shifting sands and unforeseen vicissitudes.

Nor can the Committee arrogate to itself the role of adjudicating on the exceptional nature of circumstances or determining whether or not there is a public emergency. The Committee is not the right authority to be passing judgement on situations over the extent or severity of which it has no control. In this context it can only exercise a minimal monitoring function, looking out for arbitrary judgements and obvious errors. When states of emergency are declared on the basis of article 4 of the Covenant, the Committee must make sure that the declaration has complied with the rules and that any derogations from the provisions of article 14 remain within the bounds strictly required by the exigencies of the situation and respect the other conditions stipulated in that article. It is most regrettable that, in its analysis, the Committee has cast aside all these considerations. In proceeding as it has, *the Committee has ventured into uncharted waters*.

Another fundamental issue, in addition to that of the nature of the trial body, has to do with respect for the guarantees and procedures stipulated in article 14 and clarified in general comment No. 13. When, in exceptional circumstances, civilians are tried by military courts, it is essential that the proceedings should take place in conditions conducive to an equitable, impartial and independent administration of justice. *This is a key issue, which the Committee has skirted around, when it should have made it the focus of its attention and the goal of its endeavours*. In this context, a number of questions have remained unanswered.

Raising the issue of the composition of the military court, the author states that it is made up of military officers who report directly to the Ministry of Defence,

that “investigating judge and judges making up the court hearing the case are officers appointed by the Ministry of Defence” and that the president of the court, although himself a civilian judge, is also appointed by the Ministry of National Defence. In its response, on which the author makes no comment, the Algerian Government states that “the military tribunal is composed of three judges appointed by an order issued jointly by the Minister of Justice, Garde des Sceaux, and the Minister of Defence. It is presided over by a professional judge who sits in the ordinary-law courts, is subject by regulation to the Act on the status of the judiciary, and whose professional career and discipline are overseen by the Supreme Council of Justice”.

In another context, the author states that “it is the Minister of Defence who initiates proceedings, even, as in the current instance, against the wishes of the head of Government” and he explains that this minister also has the power to interpret legislation relating to the competence of the military tribunal. Without commenting on these allegations, the State party makes reference, in general terms, to the application of the Criminal Code, the Code of Criminal Procedure and the Code of Military Justice.

The Committee should have given due attention to these issues, just as it should have dwelt on a number of other points, such as the reasons for Mr. Madani’s arrest, which are viewed in directly opposite ways by the author and by the State party—without any supporting facts or documents—and have submitted all elements of the case file to a more rigorous examination.

In another context, the author states that “minimum standards of fairness were not observed. Abbassi Madani was sentenced by an incompetent, manifestly partial and unfair tribunal”. The State party asserts the opposite, without eliciting further comments from the author. It states that the military court was created by law, that its competence was not challenged before the trial judge and was only called into question the first time with the Supreme Court, which rejected the challenge. The State also indicates that the charges laid against Mr. Madani were notified to him at the time of his arrest, that he had the assistance of counsel during the investigation and the trial, that he availed himself of the remedies provided under law, that the trial, contrary to the allegations by the author, was public, that Mr. Madani’s refusal to appear was dealt with in compliance with the procedures provided by law and that he was kept abreast of all the procedural formalities relating to the trial hearings and reports were drawn up of all such formalities.

All these arguments should similarly have been considered by the Committee and its decision to reject them on the grounds that the State has failed to demonstrate that it has developed acceptable alternatives to military courts was not the soundest decision in legal terms.

Attention is also drawn, in respect of the issue of the impartiality of justice, to the general rule that it is up to the appeal courts of States parties to the Covenant to consider the facts and the evidence in a particular case and that it is not, in principle, the business of the Committee to censure the conduct of hearings by a judge except where it

might have been established that this was tantamount to a miscarriage of justice or that the judge had manifestly breached his obligation of the impartiality (see the Committee’s decision in matter No. 541/1993: *Simms v. Jamaica*, April 1995, para. 6.2).

Paragraph 8.7 of the Committee’s Views leaves certain essential questions unanswered. I feel duty-bound to point out that, on the one hand, the Committee has exceeded its remit in insisting that the State justify its choice of court from among a number of options available to it and, on the other, that it has not done what it was called upon to do and which was incumbent upon it with regard to determining whether or not the guarantees of full protection of the rights of the accused were duly upheld.

(Signed): Abdelfattah Amor

Individual opinion of Committee member Ahmed T. Khalil

As I have indicated in the plenary meeting of the Committee in New York on 28 March 2007, I cannot accept the views spelled out in paragraph 8.7 of the communication 1172/2003 *Abbassi Madani v. Algeria* which finds the State party in violation of article 14 of the Covenant. The reasons for taking this position on my part are based on the following considerations.

It is quite clear that the Covenant does not prohibit the establishment of military courts. Furthermore, paragraph 4 of general comment No. 13 on article 14, while clearly stating that the trial of civilians by such courts should be very exceptional, stresses, I believe more importantly, that the trying of civilians by such courts should take place under conditions which genuinely afford the full guarantees stipulated in article 14.

In that light the issue before the Committee in the case at hand is whether those guarantees were duly and fully respected. In other words the concern of the Committee, as I see it, is to ascertain whether the trial of Mr. Abbassi Madani meets the fundamental guarantees of equitable, impartial and independent administration of justice.

The author claims that the minimum standards of fairness were not observed and that Mr. Abbassi Madani was sentenced by an incompetent, manifestly partial and unfair trial.

For its part the State party informs that Mr. Abbassi Madani was prosecuted and tried by a military tribunal whose organization and competence are laid down in Ordinance No. 71-28 of April 1971 and that, contrary to the allegations by the author, a military tribunal is competent to try the offences of which Mr. Abbassi Madani was accused. The State party also points out that the competence of the military tribunal was not challenged by Mr. Abbassi Madani before the trial judges. It was called into question for the first time with the Supreme Court which rejected the challenge.

In addition the State party indicated inter alia that upon his arrest Mr. Abbassi Madani was informed by the investigating judge of the charges against him, that he was assisted during the investigation and trial and in the Supreme Court by a large number of lawyers and that

Mr. Abbassi Madani has availed himself of the domestic remedies under the law, etc. It should be noted that the observations of the State party cited above did not elicit any new comments from the author.

It seems quite clear that all these questions on the part of the author as well as on that of the State party should have received the primary consideration of the Committee in its endeavour to formulate its views in respect of article 14 in the light of the guarantees spelled out therein.

Unfortunately, as it appears from paragraph 8.7 of the communication, instead of giving serious consideration to these fundamental issues the Committee has chosen to claim that in trying civilians before military courts States parties must demonstrate that the regular civilian courts are unable to undertake the trials, i.e., a condition which I believe does not constitute part of the guarantees stipulated in article 14. The Committee found that in the present case, the failure by the State party to meet this new condition is sufficient by itself to justify a finding of a violation of article 14.

Furthermore the Committee, in the wording of paragraph 8.7, came to the conclusion that the State party's failure to demonstrate the need to rely on a military court in the case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of article 14. It seems to me that this last contention by the Committee could be read to mean that we cannot totally exclude the possibility that had the Committee chosen, as it should have done, to examine the question of guarantees it may conceivably have found that in fact the military trial in question did meet the guarantees stipulated by article 14 of the Covenant.

For all those reasons, I find myself unable to subscribe to the views expressed by the Committee in paragraph 8.7 of the communication.

(Signed): Ahmed T. Khalil

Communication No. 1173/2003

Submitted by: Mr. Abdelhamid Benhadj (represented by counsel, Mr. Rachid Mesli)

Alleged victim: Ali Benhadj (the author's brother)

State party: Algeria

Date of adoption of Views: 20 July 2007

Subject matter: Arbitrary detention

Procedural issue: Power of attorney

Substantive issues: Right to liberty and security of person; arbitrary arrest and detention; right to be treated with humanity and with respect for the inherent dignity of the human person; right to a fair hearing; a competent, independent and impartial tribunal; right to freedom of expression

Articles of the Covenant: 7, 9, 10, 12, 14 and 19

Articles of the Optional Protocol: -

Finding: Violation (arts. 9, 10 and 14)

1. The author of the communication, dated 31 March 2003, is Abdelhamid Benhadj, who is submitting the communication on behalf of his brother, Ali Benhadj, born on 16 December 1956 in Tunis. The author claims that his brother is a victim of violations by Algeria of articles 7, 9, 10, 12, 14 and 19 of the International Covenant on Civil and Political Rights (the Covenant). He is represented by Mr. Rachid Mesli. The Covenant and its Optional Protocol entered into force for the State party on 12 December 1989.

The facts as presented by the author

2.1 Ali Benhadj is one of the founding members and, at the time of submission of the communication, the Vice-President of the Front Islamique du Salut (Islamic Salvation Front - FIS), an Algerian political party registered by the State party on 12 September 1989, following the introduction of political pluralism. In the context of upcoming elections and following the gains made by FIS in the 1990 local elections, the Algerian Government was to adopt a new electoral law which was unanimously condemned by all the Algerian opposition parties. In protest against this law, FIS organized a general strike, accompanied by peaceful sit-ins in public squares. After several days of strikes and peaceful marches, the parties agreed to end the protests in exchange for a revision of the electoral law in the near future. However, on 3 June 1991, the Head of Government was asked to resign and the public squares were stormed by the Algerian army.

2.2 On 29 June 1991, Ali Benhadj was arrested by military security officers at the State television headquarters, where he had gone to present his party's position. On 2 July 1991, he was brought before the military prosecutor of Blida and charged with "crimes against State security" and "jeopardizing the proper functioning of the national

economy". In particular, he was accused of having organized a strike, which the prosecution characterized as subversive, since it had allegedly caused serious damage to the national economy. Ali Benhadj's counsel challenged the validity of the proceedings before the military tribunal and the lawfulness of the investigation led by a military judge subordinate to the prosecuting authority. According to the defence,¹ the tribunal had been established to remove the leaders of the main opposition party from the political scene and did not have jurisdiction to hear the case, being competent only to try offences against the Criminal Code and the Code of Military Justice committed by military personnel in the performance of their duties or by civilians acting as accomplices to an offence of which the main perpetrator is a member of the armed forces. The jurisdiction of military tribunals to try political offences, pursuant to a law of 1963, had been de facto abolished with the establishment, in 1971, of a special National Security Court to deal with this type of offence. That court had been dissolved after the introduction of political pluralism in 1989, and thus the general rules on jurisdiction should apply.

2.3 FIS won the first round of parliamentary elections on 26 December 1991; the day after the official results were announced, the military prosecutor was supposed to inform the defence lawyers of his intention to discontinue proceedings against Ali Benhadj. However, on 12 January 1992, the President of the Republic "resigned", a state of emergency was declared, parliamentary elections were cancelled, and "administrative internment" camps were installed in southern Algeria. On 15 July 1992, the military court of Blida sentenced Ali Benhadj in absentia to 12 years' rigorous imprisonment. The appeal against this decision was rejected by the Supreme Court on 15 February 1993, whereupon the sentence became final.

2.4 At the time of submission of the communication, Mr. Benhadj was still in prison. All his co-defendants were released after serving part of their sentences. During his time in detention, he was held in different forms of confinement and was treated differently according to whether he was considered by the military authorities to be a political interlocutor. From July 1991 to April 1993, he was detained in the military prison of Blida, where he was subjected to physical violence, in particular for having asked to be treated in accordance with the law and the prison regulations, and for having rejected political overtures by the military authorities. He was subsequently transferred to the civilian prison of Tizi-Ouzou, where he was

held in solitary confinement on death row for several months. He was transferred back to Blida military prison, where he was held until political negotiations broke down and he was transferred, on 1 February 1995, to a military barracks in the far south of Algeria. There he was held incommunicado for four months and six days and confined to a tiny punishment cell without ventilation or sanitary facilities. He was then transferred to a State residence normally reserved for dignitaries visiting Algeria, new negotiations having begun between a "national commission" chaired by General Liamine Zeroual and the FIS leaders.

2.5 On the day on which negotiations broke down—which General Zeroual attributed to Mr. Benhadj—the latter was again transferred to a secret place of detention, probably a military security barracks, in the far south of Algeria. He was kept in complete isolation in a tiny punishment cell² with no opening onto the outside, except for a hatch in the ceiling, and there he lost all sense of time. He was confined there for two years. He was permitted to write to all the official authorities (the President, the Head of Government, the Minister of Justice, the military authorities) and was assured that his letters would reach the addressees. He went on numerous hunger strikes, which were brutally suppressed by his guards. He was not allowed visits by his family, much less his lawyers.

2.6 In the autumn of 1997, he was again transferred to Blida military prison, where he was held incommunicado and subjected to ill-treatment for almost two years. Thus, over a period of four years, his family did not know where he was being detained and whether he was still alive. Only in 1999 was his family informed of his place of detention and authorized to visit him. In January 2001, his family noted that his conditions of detention had again deteriorated, after he had written to the President of the Republic. On 16 January 2001, Mr. Mesli referred the case of Mr. Benhadj to the Working Group on Arbitrary Detention. On 3 December 2001, the Working Group found that the deprivation of his liberty was arbitrary and in contravention of articles 9 and 14 of the Covenant. The Working Group requested the State party to "take the necessary steps to remedy the situation and to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the [...] Covenant".³ No such steps have been taken by the State party.

¹ Counsel submitted the defence statement dated 18 July 1992, denouncing serious irregularities in the proceedings.

² It was too small for him to be able to stand up or lie down.

³ Opinion No. 28/2001 of the Working Group on Arbitrary Detention.

The complaint

3.1 The author claims that the facts as submitted by him reveal violations of articles 7, 9, 10, 12, 14 and 19 of the Covenant in respect of his brother, Ali Benhadj.

3.2 As regards the allegations concerning articles 9, 12 and 19 of the Covenant, the indictment of Ali Benhadj for crimes against State security is politically motivated: no specific acts which could be classified as offences were proven by the prosecution. Mr. Benhadj was accused of having initiated a political strike described as subversive by the military authorities, not the civil judicial authorities. That strike was brutally suppressed by the Algerian army, despite its peaceful nature and the guarantees given by the Head of Government. Even assuming that an act of political protest could be described as a criminal offence, which is not the case under domestic legislation, the protest came to an end once an agreement between the Head of Government and the party co-chaired by Ali Benhadj had been reached. The sole aim of his arrest by the military security services at the State television headquarters, where he had gone to explain his position, and of his indictment before a military court, was clearly to remove one of the main leaders of an opposition party from the Algerian political scene.

3.3 With regard to the allegations concerning article 14, the minimum requirements of a fair trial have not been observed. Ali Benhadj was convicted for purely political reasons by an incompetent, partial and unfair court. No public hearing was held. At the beginning of the trial, his counsel requested that the trial be held in public and that the hearings be open to the public. The court turned down the request without stating the legal grounds or explicitly ordering an in-camera hearing. Some of the defence lawyers were denied access to the courtroom by military personnel who blocked all the access routes.⁴ From the beginning of the trial, Ali Benhadj was prevented from speaking by the military prosecutor who, in violation of the law, enforced order during the proceedings and imposed his decisions on the president of the court. The trial of Ali Benhadj was conducted in his absence, following his forcible expulsion from the courtroom, by order of the military prosecutor, for having protested against the conditions in which he was being held.

⁴ According to a defence statement, the defence lawyers were unable to communicate with Ali Benhadj before the hearing held on 18 July 1992, and "no legal document allows any civil or military authority to restrict access to a tribunal or a courtroom in which any person, whether an Algerian citizen or a foreigner, is on trial".

3.4 Lastly, the military court, which had no jurisdiction, could be neither fair nor impartial. The court depended on the Ministry of Defence and not on the Ministry of Justice, and was composed of officers who depended hierarchically on that Ministry (the investigating judge, magistrates and the president of the court were appointed by the Minister of Defence). It is the Minister of Defence who initiates legal proceedings and has the power to interpret the law on the jurisdiction of military courts. The proceedings and sentence by such a court and the deprivation of liberty constitute a violation of article 14.

State party's observations on admissibility and the merits

4.1 On 12 November 2003, the State party recalled that Ali Benhadj had been arrested in June 1991 following a call for mass violence issued in part by Ali Benhadj by means of a directive that he had signed. That call followed a failed attempted uprising which he had helped to organize with a view to establishing a theocracy by violent means. In view of this exceptional situation, and in order to ensure the proper administration of justice, he was brought before a military court, which, contrary to the author's allegations, was competent under Algerian law to try the offences of which Ali Benhadj is accused. Neither article 14 of the Covenant, nor the Committee's general comment on that article, nor other international standards deem that a trial before a court other than an ordinary court necessarily constitutes per se a violation of the right to a fair trial. The Committee has recalled this point when considering communications concerning special courts and military tribunals.

4.2 The State party submits that Ali Benhadj is no longer being held in detention, since he was released on 2 July 2003. His freedom of movement is no longer restricted in any way and he is not under house arrest as the author claims.

4.3 Ali Benhadj was prosecuted and tried by a military court, the organization and jurisdiction of which are specified in Ordinance No. 71-28 of 22 April 1971 establishing the Code of Military Justice. Contrary to the allegations, a military court is composed of three judges appointed by a joint order of the Minister of Justice and the Minister of National Defence. It is presided over by a professional judge of the ordinary courts, who is legally bound by the Judicature Act and whose career and discipline are overseen by the Supreme Council of the Judicature, a constitutional body presided over by the Head of State. Decisions of a military court can be appealed before the Supreme Court on the grounds and under the conditions laid down in articles 495 et seq. of the Code of Criminal Procedure. As regards jurisdiction, in addition to

special military offences, the military courts can try offences against State security, as defined by the Criminal Code, for which the penalty exceeds five years' imprisonment. In that case, the military courts can try anyone who commits such an offence, irrespective of whether that person is a member of the armed forces. It is in accordance with, and on the basis of, this legislation that Ali Benhadj was prosecuted and tried by the military court of Blida, the jurisdiction of which is based on article 25 of the above-mentioned Ordinance. The State party points out that the issue of lack of jurisdiction of the military court was not raised before the trial judges. It was raised for the first time before the Supreme Court, which dismissed it.

4.4 Ali Benhadj enjoyed all the guarantees afforded to him by the law and international instruments. As soon as he was arrested, the investigating judge informed him of the charges against him. He was assisted by 19 lawyers during the investigation and trial, and by 8 lawyers before the Supreme Court. He utilized the available legal remedies, as he filed an application for judicial review with the Supreme Court, which rejected it.

4.5 The allegation that the hearing was not held in public is inaccurate and suggests that he was not allowed to attend his trial or to defend himself against the charges brought against him. In fact, from the very beginning of the trial, he refused to appear before the military court, even though he and his lawyers had been duly summoned. Noting his absence at the trial, the president of the court issued a summons for him to appear, which was served on him in accordance with article 294 of the Code of Criminal Procedure and article 142 of the Code of Military Justice. A record of his refusal to appear was drawn up and the president of the court then decided to proceed with the hearing in accordance with the above-mentioned provisions. Nevertheless, the accused was duly informed of all the procedural steps concerning the hearing and a record of the hearing was made. Trial in absentia is contrary neither to national law nor to the provisions of the Covenant: although article 14 stipulates that everyone charged with an offence shall be entitled to be tried in his presence, it does not state that justice cannot be rendered when the defendant, solely on his or her own initiative, deliberately refuses to appear at the court hearings. The Code of Criminal Procedure and the Code of Military Justice authorize the courts to proceed with hearings when a defendant persistently refuses to appear. This type of legal procedure is justified by the fact that justice must be done under all circumstances and the negative behaviour of the accused should not obstruct the course of justice indefinitely.

The author's comments on the State party's observations

5.1 On 19 May 2004, Mr. Mesli provided a power of attorney, dated 13 March 2004, on behalf of Mr. Ali Benhadj. With regard to the admissibility of the communication, he points out that no objections were raised by the State party.

5.2 Ali Benhadj was released on 2 July 2003. The day before his release, he was asked to renounce all activities of any kind. He refused to sign a document to that effect, which amounted to a renunciation of his civil and political rights. The day after his release, he was informed, through a joint official press release by the military authorities and the Ministry of the Interior, that he was prohibited from exercising his most basic rights,⁵ on the pretext that such prohibitions were an accessory penalty to the main penalty of imprisonment. On several occasions Ali Benhadj was stopped for questioning, and told not to engage in any activities. He continues to be threatened and harassed.

5.3 The State party confines itself to reiterating that the proceedings before the military court were lawful and that the court had jurisdiction to hear political offences. It also claims that the issue of lack of jurisdiction of the military court was not raised by the defendants before the court. Mr. Mesli points out that the issue of jurisdiction was the subject of a petition to declare the military court incompetent addressed to the indictments chamber presided over by the president of the military court. The petition was rejected and submitted again *in limine litis* in the form of written submissions filed at the beginning of the trial. The petition was not examined by the president of the military court, who said that it would be considered in conjunction with the merits of the case. Following the physical abuse suffered by Ali Benhadj, in the presence of his lawyers, counsel for the defence withdrew in protest. With regard to the composition of the military court, although the court is indeed presided over by a professional ordinary judge, the latter is appointed by a joint decision of the Minister of Defence and the Minister of Justice. The court also comprises two military assessors, who are neither qualified nor competent in

⁵ For example, he is not allowed "to vote or to stand for election; to hold meetings; to found a political, cultural, charitable or religious association; to join or participate in the activities of political parties, or any other civil, cultural, social, religious or other associations, whether as a member, a leader or a supporter". He is also prohibited from "attending, addressing, or having his views expressed, in any capacity or through any medium, in any public or private meeting and, in general, from participating in any political, social, cultural, religious, national or local event, whatever the reason for it or the occasion".

judicial matters and who are appointed by, and subordinate to, the Minister of National Defence alone. These two assessors each have a vote when decisions are taken by a majority vote. Thus, during the trial, the military court of Blida was composed of the presiding judge and two members of the armed forces in active service, both subject to the orders of their superior, the Minister of National Defence. It is obvious to counsel that in the aftermath of a military coup d'état, and in the context of the declaration of the state of emergency on 12 February 1992, the military court of Blida could be neither independent nor impartial.

5.4 If the Committee does not consider that a trial before a military court necessarily entails a violation of the right to a fair trial, this is to be understood in the context of an independent system of justice based on effective separation of powers in a democratic society. With regard to trials of civilians before military courts, the Committee states, in its general comment No. 13 (para. 4), that "in some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights". The Committee has also considered that the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception.⁶ On the public nature of the trial, counsel has submitted a statement issued by the 19 defence lawyers on 18 July 1992, at the end of the trial, which lists a number of violations.

5.5 Mr. Mesli points out that the State party does not comment on the ill-treatment of Ali Benhadj during his detention, on his detention incommunicado over a period of four years, or on his detention in a military barracks of the intelligence and security department during at least two years.⁷ The treatment to which Ali Benhadj was subjected constitutes a violation of articles 7 and 10 of the Covenant.

Additional observations by the State party

6.1 On 27 September 2004, the State party submitted that the power of attorney which Ali Benhadj gave to Mr. Mesli was not authenticated and therefore cannot be considered. The Committee has defined the conditions for admissibility of communications, which must be submitted either by the victim himself or, when he is unable to do so, by a third party, who must prove that he is authorized to

act on the victim's behalf. This condition has not been met in the present case, since, in the absence of authentication of the power of attorney presented by Mr. Mesli, there is no evidence that Ali Benhadj authorized Mr. Mesli to act on his behalf. Therefore, the Committee should take note of the lack of authentication of the power of attorney and reject the communication on grounds of form.

6.2 On the merits, and with regard to the conduct of the trial, the State party considers that it has provided sufficient information for a decision to be taken. It requests the Committee to find in its favour. With regard to the "new violations" that Ali Benhadj allegedly suffered, he was sentenced to rigorous imprisonment and was subject to a number of prohibitions, which are in fact what are known as accessory penalties to the main penalty and are provided for under article 4, paragraph 3, and article 6 of the Criminal Code. These accessory penalties do not have to be read out and apply automatically to the convicted person; thus, they do not violate the fundamental rights of Ali Benhadj. The allegations of ill-treatment of Ali Benhadj during his detention are not substantiated.

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2 The Committee notes that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

7.3 On the issue of the validity of the power of attorney presented by Mr. Mesli, the Committee recalls that "normally, the communication should be submitted by the individual personally or by that individual's representative; a communication submitted on behalf of an alleged victim may, however, be accepted when it appears that the individual in question is unable to submit the communication personally".⁸ In the present case, Mr. Mesli indicated that Ali Benhadj was in detention on the date of the initial submission. The Committee therefore considers that the power of attorney presented by Mr. Mesli on behalf of the brother of Ali Benhadj is sufficient for the

⁶ Counsel is quoting communication No. 263/1987, *González del Río v. Peru*, Views adopted on 28 October 1992.

⁷ The duration of his incommunicado detention varies in the different submissions from counsel.

⁸ Rule 96 (b), rules of procedure of the Human Rights Committee (CCPR/C/3/Rev.8).

submission of the communication.⁹ In addition, Mr. Mesli has since provided a power of attorney signed by Ali Benhadj, expressly and unequivocally authorizing him to represent him before the Committee. The Committee therefore concludes that the communication was submitted to it in accordance with the rules.

7.4 With regard to the claim under article 12 of the Covenant, the Committee considers that the facts submitted by the author fail to demonstrate how they infringe the right to move freely within the State party's territory, and decides that the evidence is not sufficient to substantiate his claim for purposes of admissibility. With regard to the claims under articles 7, 9, 10, 14 and 19 of the Covenant, the Committee considers that in the present case, the evidence provided by the author is sufficient to substantiate these claims for purposes of admissibility. Thus, the Committee concludes that the communication is admissible with regard to the above-mentioned articles.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes that Ali Benhadj was arrested in 1991 and sentenced by a military court on 15 July 1992 to 12 years of rigorous imprisonment for jeopardizing State security and the proper functioning of the national economy. He was released on 2 July 2003. The Committee recalls the allegation that Ali Benhadj was held in a secret place of detention for four months and six days, beginning on 1 February 1995, and for four additional years up until March 1999. During that time, his family did not know where he was being detained or whether he was still alive. The Committee notes that the State party has not challenged the author's allegations on the incommunicado detention of Ali Benhadj.

8.3 The Committee recalls¹⁰ that the burden of proof cannot rest solely on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information. It

⁹ Communication No. 8/1977, *Weismann and Perdomo v. Uruguay*, Views adopted on 3 April 1980, para. 6.

¹⁰ Communications No. 146/1983, *Baboeram-Adhin and others v. Suriname*, Views adopted on 4 April 1985, para. 14.2; No. 107/1981, *Elena Quinteros Almeida v. Uruguay*, Views adopted on 21 July 1983, para. 11; No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.4; No. 1297/2004, *Medjounne v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to transmit to the Committee the information in its possession. In cases where the author has communicated detailed allegations to the Committee and where further clarification depends entirely on information the State party alone possesses, the Committee may consider the allegations substantiated if the State party fails to refute them by providing evidence and satisfactory explanations.

8.4 The Committee takes note of the author's allegation that, during several years of incommunicado detention, Ali Benhadj was denied access to counsel and was unable to challenge the lawfulness of his detention. The State party has not replied to these allegations. The Committee recalls that, in accordance with article 9, paragraph 4, judicial review of the lawfulness of detention must provide for the possibility of ordering the release of a detainee if his or her detention is declared incompatible with the provisions of the Covenant, in particular those of article 9, paragraph 1. In the present case, Ali Benhadj was detained in several prisons and held in secret places of detention three times for over four years, without the possibility of obtaining a judicial review of the compatibility of his detention with the Covenant. Consequently, and in the absence of sufficient explanations from the State party, the Committee concludes that there has been a violation of article 9, paragraph 4, of the Covenant.

8.5 With regard to the alleged violation of article 10 of the Covenant, the Committee notes that, according to the author, Ali Benhadj was subjected to physical abuse on several occasions during his detention and that he was held on death row for several months. Moreover, according to the author, during the first period of incommunicado detention he was confined to a tiny punishment cell without ventilation or any sanitary facilities, and subsequently, he was kept in a punishment cell that was too small for him to stand or to lie down. The Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; they must be treated in accordance with, inter alia, the Standard Minimum Rules for the Treatment of Prisoners.¹¹ In the absence of concrete information from the State party on the conditions of detention of Ali Benhadj, the Committee concludes that the rights set forth in

¹¹ General comment No. 21 [44] on article 10, paras. 3 and 5; communication No. 1134/2002, *Fongum Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2.

article 10, paragraph 1, of the Covenant, were violated. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary to consider separately the claims arising under article 7. The Committee is also of the view that it is not necessary to consider separately the other claims arising under article 9 of the Covenant.

8.6 With regard to the alleged violation of article 14 of the Covenant, the author has argued that the composition of the court violated the requirements of a fair trial; that Ali Benhadj's trial was closed to the public, without any legal justification being provided or an in-camera trial being ordered; and that some of his lawyers were not allowed to appear before the court.

8.7 With regard to the jurisdiction of the military court to hear the case, the State party points out that military courts can try offences against State security when the penalty exceeds five years of imprisonment, in accordance with article 25 of Ordinance No. 71-28 of 22 April 1971. The Committee notes that Ali Benhadj was represented before the military court and that he filed an application for judicial review with the Supreme Court, which upheld the military court's decision. With regard to the fact that the trial was not public, the Committee notes that the State party did not respond to the author's allegations other than by stating that the allegation was "completely inaccurate". Lastly, as regards the allegation that some of the lawyers were unable to attend the trial, the State party submitted that Ali Benhadj and his co-defendants were assisted by 19 lawyers during the investigation and trial, and by 8 lawyers before the Supreme Court.

8.8 With regard to the alleged violation of article 14 of the Covenant, the Committee recalls its general comment No. 13, in which it states that, while the Covenant does not prohibit the trial of civilians in military courts, nevertheless such trials should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. It is incumbent on a State party that does try civilians before military courts to justify the practice. The Committee considers that the State party must demonstrate, with regard to the specific class of individuals at issue, that the regular civilian courts are unable to undertake the trials, that other alternative forms of special or high-security civilian courts are inadequate to the task and that recourse to military courts ensures the full protection of the rights of the accused pursuant to article 14. The State party must further demonstrate how military courts ensure the full protection of the rights of the accused

pursuant to article 14. In the present case the State party has not shown why recourse to a military court was required. In commenting on the gravity of the charges against Mr. Benhadj, it has not indicated why the ordinary civilian courts or other alternative forms of civilian court were inadequate to the task of trying him. Nor does the mere invocation of domestic legal provisions for the trial by military court of certain categories of serious offences constitute an argument under the Covenant in support of recourse to such tribunals. The State party's failure to demonstrate the need to rely on a military court in this case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of article 14. The Committee concludes that the trial and sentence of Mr. Benhadj by a military court discloses a violation of article 14 of the Covenant.

8.9 With regard to the fact that Ali Benhadj was sentenced in absentia to 12 years' rigorous imprisonment, in proceedings which he refused to attend, the Committee recalls that the guarantees enshrined in article 14 cannot be construed as necessarily ruling out trial in absentia irrespective of the reasons for the defendant's absence. Proceedings in absentia in certain circumstances (for example, when a defendant who has been given sufficient advance notice of a hearing refuses to be present) are permissible in the interest of justice.¹² In the present case, the Committee notes that, according to the State party, Ali Benhadj and his lawyers were duly summoned, that the court issued Ali Benhadj a summons to appear, and that it was at this stage that the president of the court decided to proceed with the hearing. The Committee notes that the author has not responded to the State party's explanations, and concludes that the trial in absentia of Ali Benhadj does not disclose a violation of article 14 of the Covenant.

8.10 With regard to the alleged violation of article 19, the Committee recalls that the freedoms of information and expression are cornerstones in any free and democratic society. It is the essence of such societies that citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticize or openly and publicly evaluate their Governments without fear of interference or punishment by the Government, subject to certain restrictions set out in article 19, paragraph 3, of the Covenant. With regard to the allegations that Ali Benhadj's arrest and indictment were politically motivated, and that the restrictions imposed on him since his release are not

¹² Communication No. 16/1977, *Mbenge v. Zaire*, Views adopted on 25 March 1983, para. 14.1; No. 699/1996, *Maleki v. Italy*, Views adopted on 15 July 1999, paras. 9.2 and 9.3.

provided for by law, the Committee notes that it does not have sufficient information to conclude that article 19 has been violated.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of articles 9, 10 and 14 of the Covenant.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide Ali Benhadj with an effective remedy. The State party is under an obligation to take appropriate measures to ensure that the author obtains appropriate redress, including compensation for the distress suffered by his family and himself. In addition, the State party is required to take measures to prevent further occurrences of such violations.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to guarantee to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. It also requests the State party to publish the Committee's Views.

APPENDIX

*Individual opinion (dissenting) of Committee member
Abdelfattah Amor*

The Committee, in paragraph 8.7 of the present Views, after stating that:

“The State party's failure to demonstrate the need to rely on a military court in this case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of article 14”,

concludes that:

“the trial and sentence of Mr. Benhadj by a military court discloses a violation of article 14 of the Covenant”.

The Committee thus returns, but in a more customary style, to its position on the same subject in the *Madani* case, which I consider to be legally flawed (communication No. 1172/2003 and my dissenting opinion and that of Mr. Ahmed Tawfik Khalil).

I would like to refer to my dissenting opinion in the *Madani* case and uphold its terms and content which

apply perfectly to the present case, and to add the following remarks:

1. As in the *Madani* case, the Committee applied, before its adoption, new general comment No. 32 on article 14, which replaced general comment No. 13, when in fact the Committee's Views in the *Benhadj* case were adopted on 20 July 2007, prior to the adoption of the new general comment on 25 July 2007, which makes the Committee's position highly questionable. Apart from matters of principle regarding retroactivity, there is a more specific matter; namely, that the State party, having not been advised in advance of the “rule” to be applied, was not in a position to develop its argument in that connection.

2. In reality, the Committee did not simply engage in interpretation, as its implicit competence entitles it to do, but rather ventured into creation, by invoking a new “rule” that cannot be justified under the Covenant. This raises a fundamental question concerning the extent of the Committee's competence to determine its own jurisdiction, taking into account the obligations and commitments that the States parties to the Covenant have undertaken.

3. Even if one were to accept the Committee's logic, it is obvious that the Committee itself did not pursue that same logic. In the Committee's View, “The State party has not shown why recourse to a military court was required.” Nevertheless, the State has shown that an “exceptional situation” arose following an “attempted uprising” and that Mr. Benhadj was tried by a military court in order to ensure the proper administration of justice and that the court is legally established in order to deal, in addition to special military offences, with offences against State security, for which the penalty is over five years' imprisonment, with respect for the guarantees afforded by the law and international instruments. The Committee could, or rather should, have examined the State party's arguments intended to demonstrate the justification of recourse to a military court, and rejected them if they were deemed to be inadequate. Its failure to do so sawed off the very branch on which it intended to sit. Neither did it consider it necessary to determine whether the guarantees enshrined in article 14 had or had not been respected, which it should have done.

All in all, reservations about military courts and special courts, which I fully share with many Committee members, do not entitle the Committee to derogate from the legal rigour on which its reputation is built and which consolidates its credibility. Neither do they authorize it to exceed its remit or use the nature of the court hearing the case as an excuse not to ascertain whether all the guarantees and procedures spelled out in article 14 of the Covenant were respected or not. Legal flexibility can only be a source of enrichment and progress if law is not reduced to meta-law.

(Signed): Abdelfattah Amor

*Individual opinion (dissenting) of Committee member
Ahmed T. Khalil*

I wish to put on record that I cannot accept the views expressed in paragraph 8.8 on communication No. 1173/2003, *Benhadj v. Algeria* in which the Committee finds a violation by the State party of article 14 of the Covenant.

The reasons for taking this position on my part are based on the same considerations spelled out in detail in my dissenting opinion on communication No. 1172/2003, *Abbassi Madani v. Algeria*.

(Signed): Ahmed T. Khalil

Communication No. 1180/2003

Submitted by: Mr. Zeljko Bodrožić (represented by counsel, Mr. Biljana Kovacevic-Vuco)

Alleged victim: The author

State party: Serbia and Montenegro

Date of adoption of Views: 31 October 2005

Subject matter: Conviction of journalist for criminal insult concerning media article on a political figure

Substantive issues: Freedom of expression – Limitations necessary to protect rights and reputation of others

Procedural issues: -

Article of the Covenant: 19

Articles of the Optional Protocol: -

Finding: Violation (art. 19, para. 2)

1. The author of the communication, initially dated 11 May 2003, Zeljko Bodrožić, a Yugoslav national born on 16 March 1970. He claims to be a victim of a breach by Serbia and Montenegro of his rights under article 19 of the Covenant. He is represented by counsel. The Optional Protocol entered into force for the State party on 6 December 2001.

The facts as presented by the author

2.1 The author is a well-known journalist and magazine editor. In a magazine article published on 11 January 2002 entitled “Born for Reforms”, the author politically criticized a number of individuals, including a Mr. Segrt. At the time the article was published, Mr. Segrt was manager of the ‘Toza Mrakovic’ factory in Kikinda, and previously had been a prominent member of the Socialist Party of Serbia, including leader of the party group in the federal Yugoslav Parliament in 2001. Inter alia, the article stated:

“After he squandered away ‘Toza’s’ millions on the [Socialist Party of Serbia] and [Yugoslav Left] campaign and other party pastimes; after being cooed ‘my

friend D Mitar’ by Sloba [Milosevic] before he was sent off to The Hague prison; after he organized the protests with Seselj against the ‘caging’ of comrade Sloba; after the glitzy party moments in the first half of 2001 (he became the Socialist Party leader in the Federal Parliament and one of the Party’s top-level officials...); after he realized that the times of fun and games were over, he decided to ‘give his party the finger’ and become ‘the great advocate’ of the reforms undertaken by the Government of the comrade—oops, the Chancellor, Mr. Djindjic.”

The article also labelled Mr. Segrt “another former bolsterer of Sloba [Milosevic]” and “the manager from Plava Banja, also known as D Mitar Segrt”.

2.2 On 21 January 2002, Mr. Segrt filed private criminal complaints of libel and insult against the author in the Kikinda Municipal Court, on the basis of the above extracts.¹ On 14 May 2002, the court convicted the author of criminal insult, but acquitted him on the charge of libel. It dismissed the libel charge on the basis that the factual aspects of the extracts in question were, in fact, true and correct. As to the charge of insult, the Court found that the extracts were “actually abusive” and “inflict[ed] damage to the honour and reputation of the private plaintiff”. Rather than constituting, as argued by the author, “serious journalistic comment in which he used sarcasm”, the Court considered that the words used “are not the expressions that would be used in

¹ Article 92 of the Criminal Code of the Republic of Serbia criminalizes the conduct of anyone who “discloses or circulates any untrue material about a person, which can harm that person’s honour or reputation”, while article 93, paragraph 2, of the Code does likewise for “anyone who insults another”.

serious criticism; on the contrary, these are generally accepted words that cause derision and belittling by the social environment". In the Court's view the use of slang words and emphasized quotations, rather than "a literary language that would be appropriate for such a criticism", showed that the expressions employed "were used with the intention to belittle the private plaintiff and expose him to ridicule, and therefore this and such an act of his, though it was done within the performance of the journalist profession, is indeed a criminal offence [of insult]."

For the conviction of criminal insult, the Court sentenced the author to a fine of 10,000 Yugoslav dinars and costs.

2.3 On 20 November 2002, the Zrenjanin District Court dismissed the author's appeal against conviction. The Court considered that taken as a whole the article had an insulting character, giving particular weight to the use of the words "squandered", "give his party the finger" and "cooed". As part of the appeal, the author had also referred to previous speeches by Mr. Segrt in political speeches said to amount to hate speech, in which he labelled democratic opposition *inter alia* "traitors", "fascists" and "extended hand of NATO". The Court observed that while earlier speeches by Mr. Segrt could be "subjected to criticism and analysis", they "cannot be used for belittling and insulting [him], since dignity and honour of a man cannot be taken from anybody." On the contrary, the author could have asked for judicial protection if he had felt insulted by these speeches.

2.4 In the author's view, the appellate decision concluded the ordinary criminal process. On 30 December 2002, the author asked the Republic Prosecutor to file an extraordinary "request for the protection of legality" in the Supreme Court, but on 24 February 2003 the Prosecutor denied this request. With this, all domestic remedies are said to have been exhausted.

The complaint

3.1 The author alleges that his criminal conviction for the political article published violates his right under article 19 to freedom of expression. The author refers to the Committee's general comment 10 on this issue as well as the jurisprudence of the European Court of Human Rights (*Handyside v. United Kingdom*,² *Lingens v. Austria*,³ *Oberschlik v. Austria*,⁴ *Schwabe v. Austria*⁵), the Inter-American Commission on Human Rights in Report 22/94 on Argentinian 'destacato' laws and the United States

Supreme Court (*New York Times Co v. Sullivan*⁶ and *United States v. Dennis*⁷). From these authorities, the author derives his claim that article 19 of the Covenant protects a broad area of expression, especially in political debate, and limits on this expression should be tightly construed in order to avoid chilling legitimate expression.

3.2 In addition, the author argues that the appeal court's suggestion that he should have sought judicial protection against Mr. Segrt's earlier speeches from the courts during the Milosevic era, when Mr. Segrt held a high position, is wholly unrealistic (see para. 2.3, *supra*). As a result, the author contends that his conviction and sentence, as well as the existence of criminal offences of libel and insult in the State party's law, violate his rights under article 19 of the Covenant.

3.3 In consequence, the author seeks a declaration of violation of article 19, and recommendations that the State party decriminalizes "libel" and "insult", that it dismisses the criminal verdict against him and removes it from its records, that it compensates him for wrongful conviction, that it reimburses the fine and costs he was sentenced to pay, and that he be compensated for his costs before the domestic courts and the Committee.

State party's submissions on admissibility and merits and author's comments

4. By note verbale of 23 May 2005, the State party commented on the admissibility and merits of the communication, observing that the conviction for insult under article 93, paragraph 2, of the Criminal Code of the Republic of Serbia, upheld on appeal, were the result of legally valid judgements. It further points out that upon review of the case, the Office of the Public Prosecutor of the Republic of Serbia established that the request for legality protection with respect to these judgements was unfounded.

5. By letter of 25 July 2005, the author reiterated his earlier submissions, arguing that the State party's submissions implicitly confirm that domestic remedies had been exhausted.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee has ascertained that the same matter is not being examined under another

² A 24 (1976) at para. 49.

³ A 103 (1986) at para. 42.

⁴ Reports 1997-IV at para. 34.

⁵ A 242-B (1992) Com Rep at para. 55.

⁶ 376 US 254 (1964).

⁷ 341 US 494 (1951), opinion of Douglas J.

procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 As to the specific claims arising out of the author's conviction and sentence, the Committee does not construe the State party's submission of 23 May 2005 as raising an objection to the contention that domestic remedies have been exhausted, or to any other aspect of the admissibility of the communication, save substantiation for purposes of admissibility of the claims. In the Committee's view, however, the specific claims advanced by the author have been sufficiently advanced in fact and law so as to be substantiated, for purposes of admissibility. It therefore considers the communication to be admissible inasmuch as these claims raise issues under article 19 of the Covenant.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The question before the Committee is whether the author's conviction for criminal insult for the article published by him in January 2002 amounts to a breach of the right to freedom of expression, including the right to impart information, guaranteed in article 19, paragraph 2, of the Covenant. The Committee recalls that article 19, paragraph 3, permits restrictions on freedom of expression, if they are provided by law and necessary for respect of the rights or reputations of others. In the present case, the Committee observes that the State party has advanced no justification that the prosecution and conviction of the author on charges of criminal insult were necessary for the protection of the rights and reputation of Mr. Segrt. Given the factual elements found by the Court concerning the article on Mr. Segrt, then a prominent public and political

figure, it is difficult for the Committee to discern how the expression of opinion by the author, in the manner he did, as to the import of these facts amounted to an unjustified infringement of Mr. Segrt's rights and reputation, much less one calling for the application of criminal sanction. The Committee observes, moreover, that in circumstances of public debate in a democratic society, especially in the media, concerning figures in the political domain, the value placed by the Covenant upon uninhibited expression is particularly high.⁸ It follows that the author's conviction and sentence in the present case amounted to a violation of article 19, paragraph 2, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 19, paragraph 2, of the Covenant in respect of the author.

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 quashing of the conviction, restitution of the fine imposed on and paid by the author as well as restitution of court expenses paid by him, and compensation for the breach of his Covenant right.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

⁸ See, inter alia, *Aduayom et al. v. Togo*, cases Nos. 422-424/1990, Views adopted on 12 July 1996, at para. 7.4: "[T]he freedoms of information and of expression are cornerstones in any free and democratic society. It is the essence of such societies that its citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticize or openly and publicly evaluate their Governments without fear of interference or punishment".

Communication No. 1184/2003

Submitted by: Corey Brough (represented by counsel)

Alleged victim: The author

State party: Australia

Date of adoption of Views: 17 March 2006

Subject matter: Alleged ill-treatment and inhuman conditions of detention of juvenile Aboriginal detainee

Procedural issues: Substantiation of claims – Admissibility *ratione materiae* – Exhaustion of domestic remedies

Substantive issues: Freedom from torture or cruel, inhuman or degrading treatment or punishment – Right of persons deprived of their liberty to be treated with humanity and with respect for their dignity – Right to effective remedy

Articles of the Covenant: 2, para. 3; 7; 10; and 24, para. 1

Articles of the Optional Protocol: 2, 3 and 5, para. 2 (b)

Finding: Violation (arts. 10 and 24, para. 1)

1. The author of the communication is Mr. Corey Brough, an Australian citizen, born on 22 April 1982, currently residing in Australia. He claims to be a victim of a violation by Australia¹ of articles 7, 10 and article 2, paragraph 3, of the Covenant. Although not specifically invoked by the author, the communication also seems to raise issues under article 24, paragraph 1, of the Covenant. The author is represented by counsel, Mrs. Michelle Hannon.

The facts as presented by the author

2.1 The author is an Aboriginal. He suffers from a mild mental disability, with significant impairments of his adaptive behaviour, his communication skills and his cognitive functioning.²

¹ The Covenant and the Optional Protocol to the Covenant entered into force for the State party respectively on 13 November 1980 and 25 December 1991. Upon ratification of the Covenant, the State party entered the following reservation:

“Article 10

In relation to paragraph 2 (a), the principle of segregation is accepted as an objective to be achieved progressively. In relation to paragraph 2 (b) and 3 (second sentence) the obligation to segregate is accepted only to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned. [...]”

² See Clinical Psychological Assessment, 19 October 2000, prepared by S.H., PhD, Associate professor and

2.2 On 12 February 1999, the author was detained in Kariong Juvenile Detention Centre, due to the revocation of his parole order. On 5 March 1999, the Bidura Children’s Court convicted him of burglary, assault and causing bodily harm, and sentenced him to 8 months imprisonment. On 21 March 1999, the author participated in a riot at Kariong, to draw attention to “the mistreatment and brutalization by Kariong staff.” During that riot, one prison staff was taken hostage by the author.

2.3 On 22 March 1999, the Director General of the Department of Juvenile Justice applied to the Gosford Children’s Court for the author to be referred to an adult correctional facility, pursuant to section 28 (A)³ of the Children (Detention Centres) Act 1987. This was granted by the Court, and the author was transferred to Parklea Correctional Centre, where he was placed in the clinic. He protested against his transfer to an adult prison and asked for a return to a juvenile detention facility.

2.4 On arrival at Parklea, the author was segregated from other inmates, under section 22 (1) of the New South Wales Correction Centres Act 1952, on the ground that his association with other inmates constituted a threat to the personal safety of inmates and to the security of the Correctional Centre.

2.5 During an assessment of his psycho-medical condition, the author stated that he had no reservations against being placed in an adult facility. Although he was not at risk of self-harm, according to the records, he was placed in a “safe cell” (a facility for inmates who are at risk of self-harm)⁴ in

Head, Department of Behavioural Sciences in Medicine, University of Sydney, at p. 5.

³ Section 28 (A) (2) of the New South Wales Children (Detention Centres) Act (1987) reads: “(2) In any criminal proceedings against a child to whom this section applies a court may remand the child to a prison pending the commencement of the hearing of the proceedings or during any adjournment of the hearing, but only if: (a) the person by whom the proceedings were commenced or the Director-General applies for such remand, and (b) the child is not released on bail under the Bail Act 1978, and (c) the court is of the opinion that the child is not a suitable person for detention in a detention centre.”

⁴ Para. 12.19.2 of the New South Wales Department of Corrective Services Operational Procedure Manual provides that “(a) [t]he use of a safe cell is a short term management strategy. The purpose is to provide a safe,

a segregation area, to protect him from other prisoners.

2.6 The author soon experienced difficulty in coping with long periods of being locked in the safe cell. On 30 March 1999, a first instance of self harm was recorded. The author told a prison officer that “if I don’t get out of here, there will be another black death” (meaning suicide of an Aboriginal).

2.7 On 1 April 1999, after breaking a plate and shredding his mattress with a broken fragment, the author was moved from his safe cell to a “dry cell”,⁵ where he was confined for 48 hours.

2.8 On 7 April 1999, the author was observed obscuring one of the surveillance cameras. Officers came to his cell to remove all items that could be used to obscure the camera lenses and, when he refused to take off his clothes, they allegedly assaulted him below the rib area and removed his clothes except his underwear. The officers’ report on the incident reveals that four officers used reasonable force to restrain the author, who kicked one of the officers in the head during the struggle. He was allegedly confined to his cell for 72 hours, with lights on day and night. On 9 April, the author’s pillow and blanket were returned to him.

2.9 On 13 April 1999, the author attempted to break his cell lights to scratch the lens of a surveillance camera. There was a scuffle between the author and six to eight officers, resulting in minor injuries sustained by both the author and the officers.

2.10 On 15 April 1999, the author was placed in a dry cell, while the lights and camera in his safe cell were being repaired. The records indicate that he was returned to his safe cell that day. In the afternoon, he was allowed out of his cell for half an hour of exercise. When asked to return to his safe cell, he refused and a minimum amount of force was used to secure him. His clothes were removed and he was left with his underwear. Later, he was observed trying to hang himself with a noose made out of his underwear. Officers entered the cell and, when the author resisted, forcibly removed the noose. The Inmate Discipline Action Form of 17 April 1999

less stressful and more supervised environment where an inmate may be counselled, observed and assessed for appropriate placement or treatment. (b) The safe cell is not a punishment area and is not to be used as a sanction for breaches of Correctional Centre discipline or for segregation purposes. [...] (d) No inmate is to be held in a safe cell for longer than 48 hours without the approval of the Regional Commander.”

⁵ The State party defines a ‘dry cell’ as “a secure cell used for the short term containment of inmates, and is used only in the case where [inmates are] unable to provide a urine sample or are suspected of concealing contraband in their bodies.”

indicates that the author pleaded guilty to a charge of failing to comply with a reasonable order, and that he was sentenced to confinement to his cell for 48 hours.

2.11 The author was administered anti-psychotic medication (“Largactil”), without it being clear whether his condition had been assessed prior to the prescription of the drug. On 16 April 1999, the general practitioner at Parklea prescribed 50 mg of “Largactil” for the author each day until he could be examined by a psychiatrist. This treatment continued after the examination took place.

2.12 L.P., a caseworker of the Aboriginal Deaths in Custody Watch Committee, who visited the author several times in March and April 1999, reportedly observed that he was anxious, nervous, and insufficiently equipped with clothes and blankets to protect him from the cold.

2.13 New segregation orders were issued on 15 and 28 April 1999, on the ground that the author’s association with other inmates constituted a threat to the personal safety of the staff and to the order and discipline within the Correctional Centre.

2.14 A psychiatric assessment of the author dated 16 April 2002 states: “Unfortunately, Mr. Brough was not able to provide me with a history which in my view was determinative of [...] any emotional reaction which could be described as post traumatic following a period of about a month being isolated under 24 hour bright lights.”

The complaint

3.1 The author claims that he is a victim of violations of articles 2, paragraph 3, 7, 10 and, implicitly, of article 24, paragraph 1, of the Covenant, as he was transferred to an adult correctional facility despite his age, as the conditions of his detention at Parklea Correctional Centre amounted to cruel, degrading and inhuman treatment, and since he did not have access to an effective remedy. He alleges that his transfer to an adult institution violated article 10, paragraphs 2 (b) and 3, of the Covenant, since having regard to his age, disability and status as an Aboriginal, he was placed in a particularly vulnerable position which required special care and attention.

3.2 As regards the conditions of his detention, the author argues that the Committee found violations of article 7 and/or article 10 of the Covenant in what he considers to be similar cases.⁶

⁶ The author refers to communications No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994; No. 28/1978, *Weisz v. Uruguay*, Views adopted on 29 October 1980; No. 8/1975, *Weismann v. Uruguay*, Views adopted on 3 April 1980; No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002.

3.3 The author claims that his segregation and confinement for 72 and 48 hours, respectively, as punishment for his conduct, the absence of facilities in his cell, the lack of appropriate heating, the removal of his blanket and clothes, his camera surveillance and 24 hour exposure to artificial light, the use of force causing him physical injuries, and the prescription of medication without his free consent were unnecessary to ensure his safety or to secure order in the detention centre. The cumulative effect of these measures amounted to a violation of article 7, read in conjunction with article 10, of the Covenant.

3.4 By reference to a 1991 report of the Royal Commission into Aboriginal Deaths in Custody, the author submits that Aboriginal people are over-represented in the New South Wales prisons and that segregation, isolation and restriction of movement within prisons have more deleterious effects on Aboriginal than on other inmates, given the importance they attach to a high degree of mobility and to access to their family and community.

3.5 The author claims that he still suffers from the effects of his confinement in the safe cell. He sometimes wakes up sweating with his heart racing and experiences panic attacks when he is alone in his cell.

3.6 The author submits that article 2, paragraph 3, of the Covenant creates a substantive right which can be relied upon independently of other Covenant rights. The State party's failure to provide him with an effective remedy to secure his rights under articles 7 and 10 of the Covenant thus amounted to a violation of article 2, paragraph 3. In support, the author refers to the Committee's concluding observations on the State party's third and fourth periodic reports, in which it expressed its concern that "[t]here are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated."⁷

3.7 The author argues that, in the absence of available effective domestic remedies, he cannot be expected to pursue futile claims.⁸ In accordance with the Committee's jurisprudence,⁹ victims depending

on legal aid are not obliged to bring a complaint before superior courts in order to satisfy the requirement in article 5, paragraph 2 (b), if they have been advised that no reasonable prospects of appeal exist. The author submits that legal aid is no longer available to him.

3.8 The author notes that remedies to challenge prison discipline decisions are limited under Australian law. Common law remedies, such as duty of care on the part of custodial authorities, false imprisonment or habeas corpus, provide very limited relief for inmates who wish to challenge their conditions of detention. Judicial review is unavailable in cases where the nature of the conduct in question is administrative or managerial, rather than punitive or judicial.¹⁰

3.9 Although specific guarantees for prisoners exist in New South Wales under the Crimes (Administration of Sentences) Act 1999 and the Crimes (Correctional Centres Routine) Regulation 1995, complaints under these provisions can only be brought to the Minister or Commissioner, but not in a court of law. A complaint to the Minister would not provide the author with an enforceable right to compensation or any other form of relief and cannot, therefore, be considered an effective remedy.

3.10 As regards the complaint procedure under the Human Rights and Equal Opportunity Commission Act 1986 (Cth), the author states that this procedure applies only to acts or practices of the Commonwealth and not to acts of the New South Wales prison staff. The author also submits a report dated 7 May 2002 by a specialist on personal injury law, which states that he could not successfully make a claim in negligence, based on his treatment at Parklea.

State party's observations on admissibility and merits

4.1 On 3 May 2004, the State party challenged the admissibility and, subsidiarily, the merits of the communication, arguing that the author has failed to exhaust domestic remedies, that his communication is an abuse of the right of submission, that his allegations are unsubstantiated, incompatible with the provisions of the Covenant, and without merit.

4.2 On the facts, the State party submits that it has no record of the alleged incident of 1 April 1999. However, a very similar incident occurred on 13 April 1999, when the author was observed tearing his mattress and smashing his mug and cell light. He assaulted an officer who had entered to remove the items and was subsequently charged with assault and sentenced to two months imprisonment. The records

⁷ Human Rights Committee [69], Concluding observations on the third and fourth periodic reports of Australia, 28 July 2000.

⁸ In this regard, the author refers to communication No. 229/1987, *Reynolds v. Jamaica*, Views adopted on 8 April 1991; communication No. 253/1987, *Kelly v. Jamaica*, Views adopted on 8 April 1991; communication No. 240/1987, *Collins v. Jamaica*, Views adopted on 1 November 1991.

⁹ See communications No. 619/1995, *Fray Deidrick v. Jamaica*, Views adopted on 9 April 1998, at para. 6.1, and No. 680/1996, *Gallimore v. Jamaica*, Views adopted on 23 July 1999, at para. 6.5.

¹⁰ The author refers to *Vezitis v. McGeechan* (1974) 1 NSWLR 718.

for 14 April 1999 note that the author had insinuated that he would harm himself if he remained in such conditions.

4.3 The State party describes the events following 28 April 1999 as follows: On 11 May 1999, the author assaulted correctional officers while being strip-searched before being brought to court. On 17 May 1999, the Bidura Childrens' Court sentenced him to two two-month prison terms for assault and failure to appear in court. On 8 June 1999, he was released from Parklea and transferred to Minda Juvenile Justice Centre. He tried to escape from custody while at Bidura Children's Court on 17 October 1999. On 26 February 2000, he was transferred to Kariong High Security Unit after refusing to attend his trial for armed robbery. On 28 February 2000, the Director-General of the Department of Juvenile Justice requested the Bidura Childrens' Court to issue an order under section 28 (A) of the Children (Detention Centres) Act 1987, to keep the author in prison until completion of his trial. This application was initially refused, but a fresh application was granted by the Wyong Childrens' Court on 10 March 2000. The author committed further suicide attempts. At the time of submission of the State party's observations, he served a sentence for armed robbery.

4.4 On admissibility, the State party argues that the author has not substantiated any failure by the Australian authorities to treat him with humanity and with respect for his dignity. His claims under articles 7 and 10 are therefore unsubstantiated under article 2 and inadmissible *ratione materiae* under article 3 of the Optional Protocol.

4.5 For the State party, the author did not substantiate his claim under article 2, paragraph 3, of the Covenant, for purposes of admissibility, as he could have complained to the prison management at Parklea, the Minister or Commissioner for Corrective Services and the New South Wales Ombudsman, or to domestic courts about his treatment in prison. By reference to the Committee's jurisprudence¹¹ and to the wording of article 2, paragraph 3, the State party argues that due to its accessory character, its free-standing invocation by the author is inadmissible *ratione materiae* under article 3 of the Optional Protocol. Even if he based his claim on article 2, paragraph 3, read together with articles 7 and 10, it would have to be rejected because of the inadmissibility of his claims under articles 7 and 10 of the Covenant.¹²

¹¹ The State party quotes from communication No. 75/1980, *Fanali v. Italy*.

¹² Reference is made to communications No. 363/1989, *RLM v. France*, decision on admissibility adopted on 6 April 1992; No. 348/1989, *GB v. France*, decision on admissibility adopted on 1 November 1991; and

4.6 While conceding that the author was unable to access the Human Rights and Equal Opportunity Commission, the State party reiterates that other effective remedies were available to him, i.e., a complaint to the Minister or the Commissioner for Corrective Services, to Official Visitors appointed by the Minister for Corrective Services, with wide powers to address problems, and to the Inspector-General of Corrective Services, or an application for review of segregation or protective custody exceeding 14 days by the Serious Offenders Review Council.¹³ The latter may order the suspension of the segregation or protective custody or the removal of the inmate to a different correctional centre.¹⁴ These remedies are consistent with international standards, such as article 36 of the Standard Minimum Rules for the Treatment of Prisoners and Principles 33 (1) and (4) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. As such, they must be exhausted before a complaint can be brought before a judicial authority.

4.7 Regarding judicial remedies, the State party refers to recent jurisprudence that courts may examine purely administrative decisions by prison authorities, but that they will not interfere if the decisions are found to have been *bona fide*, if they have no punitive character, and if they are a reasonable use of the power of management.¹⁵ Prisoners subject to unlawful treatment may seek relief like any other person aggrieved by action of a public official. Whether the author could have produced sufficient evidence for an action for breach of duty of care by a prison officer or Governor,¹⁶ who may only be sued for damages if his action was both malicious and without reasonable and probable cause, was doubtful in view of the considerable evidence from various prison officers, welfare officers, medical officers and nurses. However, lack of evidence on the author's part was immaterial to the question of whether effective remedies were available.¹⁷

4.8 For the State party, the author could have filed a complaint with the NSW Ombudsman, who can

No. 347/1988, *SG v. France*, decision on admissibility adopted on 1 November 1991.

¹³ See Crimes (Administration of Sentences) Act 1999 (NSW), section 19 (1).

¹⁴ See *ibid.*, section 20 (1).

¹⁵ *Christopher Murielle et al. v. David Moore and Eric Holt* [2000], NZSC 23.

¹⁶ See Crimes (Administration of Sentences) Act 1999 (NSW), section 263 (1) and (2).

¹⁷ The State party refers to, *inter alia*, communications No. 224/1987, *A and SN v. Norway*, decision on admissibility adopted on 11 July 1988, at para. 6.2, and No. 397/1990, *PS v. Denmark*, decision on admissibility adopted on 22 July 1992.

investigate a complaint and send a report and recommendations to the principal officer of the appropriate authority.

4.9 The State party disputes that the author's treatment amounts to torture or cruel, inhuman or degrading treatment or punishment within the meaning of article 7 and 10, paragraph 1, arguing that he was not subjected to any particular hardship beyond what is strictly unavoidable in a closed environment.¹⁸ He failed to demonstrate any physical or mental harm sustained by him, in the absence of evidence of injuries or of a direct link between his emotional state and his confinement to a safe cell.¹⁹ Rather than being punitive, the measures imposed on him sought to protect him from further self-harm, to protect other prisoners, and to maintain the security of the correctional facility. They were proportionate and consistent with articles 7 and 10 of the Covenant, with applicable domestic law and with the Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment:

(a) The author's segregation and confinement to a safe cell was an inevitable security precaution, given that he had been involved in a riot at Kariong,²⁰ and fell short of solitary confinement within the meaning of clause 171²¹ of the 1995 Crimes (Correctional Centres Routine) Regulation; it was in conformity with the NSW Department of

¹⁸ The State party refers to communication No. 265/1987, *Voulanne v. Finland*, Views adopted on 7 April 1989.

¹⁹ By reference to communication No. 353/1988, *Grant v. Jamaica*, Views adopted on 31 March 1994 (at para. 8), the State party argues that the author's claims are not supported by the psychological reports submitted by him.

²⁰ See section 10 of the then applicable Crimes (Administration of Sentences) Act (1999): The Commissioner may direct that an inmate be held in segregated custody if of the opinion that the association of the inmate with other inmates constitutes or is likely to constitute a threat to: (a) the personal safety of any other person, or (b) the security of a correctional centre, or (c) good order and discipline within a correctional centre."

²¹ Regulation 171 of the then applicable Crimes (Correctional Centres Routine) Regulation (1995) states: "(1) An inmate must not: (a) be put in a dark cell, or under mechanical restraint, as a punishment, or (b) be subjected to: (i) solitary confinement, or (ii) corporal punishment, or (iii) torture, or (iv) cruel, inhuman or degrading treatment, or (c) be subjected to any other punishment or treatment that may reasonably be expected to adversely affect the inmate's physical or mental health. [...] (2) For the purposes of sub-clause (1) (b) (i): (a) segregating an inmate from other inmates under section 10 of the Act, and (b) confining an inmate to cell in accordance with an order under section 53 of the Act, and (c) keeping an inmate separate from other inmates under this Regulation, and (d) keeping an inmate alone in a cell, where the medical officer considers that it is desirable in the interest of the inmate's health to do so, are not solitary confinement."

Corrective Services Operational Procedures Manual,²² since the author was provided with daily exercise, food and water, and access to an Aboriginal delegate.

(b) The temporary removal of the author's clothes, blanket and pillow and the camera surveillance in his cell were necessary to observe and protect him from further self-harm. He was not exposed to the cold; his cell was sufficiently heated.

(c) There is no record of the use of lights for periods of more than 24 hours. Parklea officers may have considered the use of lights necessary to monitor the author, after he had tried to obscure the camera lenses in his cell.

(d) Physical force was used by officers on 7 and 15 April 1999, but only after the author had refused to comply with their orders, and was restricted to the minimum extent necessary, as reflected by the reported absence of injuries.

(e) The prescription of "Largactil" was intended to control the author's self-destructive behaviour; he later consented to the use of this medication.

(f) There is no record of the author being confined for 72 hours as of 7 April 1999. Rather, Parklea Clinical records indicate that he attended a case management meeting on 9 April 1999. Similarly, there is no record that he was subject to solitary confinement in a dry cell for 48 hours on 1 April 1999, or on 13 April 1999, when another incident occurred.

Author's comments

5.1 On 30 July 2004, the author commented on the State party's observations. He maintains that the measures imposed on him were disproportionate to the aim of protecting him, considering his age, disability and his Aboriginal status:

(a) The removal of his clothes was humiliating and degrading and subjected him to

²² Section 14.1.6 (on "Segregation of Aboriginal Inmates") of the then applicable Manual reads: "It is undesirable that an Aboriginal inmate should be placed in segregation. Segregation should only occur where there is no other means of managing the inmate in the circumstances. However, where segregation action is necessary, the Governor shall: (i) ensure that the inmate is provided with daily exercise, appropriate clothing, food water, and access to visits; (ii) ensure that the segregation cell has adequate lighting, sanitation facilities and heating; (iii) ensure that the relevant Regional Aboriginal Officer is informed; (iv) provide the segregated inmate with access to a member of the Aboriginal Inmate Committee or appropriate Aboriginal delegate. This access may assist inmates who are experiencing problems, which could lead to physical or mental harm. This procedure accords with Recommendations 181 and 183 of the Royal Commission into Aboriginal Deaths in Custody."

excessive cold, as his cell was not properly heated. The fact that his clothes had been removed, on 15 April 1999, before he had tried to hang himself with a noose made out of his underwear showed that such removal was not intended to protect him from self-harm, but rather to punish him for his refusal to return to his cell. Parklea psychological assessments indicated that he was not suicidal but experiencing difficulty in coping with confinement conditions.

(b) For the author, the absence of evidence for the continued use of lights in his cell does not rebut his claim. The fact that the State party could not exclude that the lights had been used for observation purposes showed that it did not fully investigate the claim. Such use was unnecessary, given his constant video surveillance; it was a punitive measure to cause humiliation and sleep deprivation.

(c) The author disputes the absence of records of injuries sustained by him. The NSW Health Department Incident/Assault Report confirmed small lacerations to his middle back and a laceration to the little finger of his right hand as a result of the incident of 13 April 1999. There were also records of bruises on his head, allegedly resulting from the incident on 11 May 1999, when he had assaulted two officers while being strip-searched.

(d) The author submits that he consented to the continued use of "Largactil" because he had been told that he would only be let out of the safe cell if he agreed to take the prescribed medicine.

(e) With regard to the State party's contention that no record exists of the alleged incident of 1 April 1999, or his subsequent confinement for 48 hours and for 72 hours on 7 April 1999, respectively, the author refers to the prison officer's report dated 1 April 1999, stating the he broke a dinner plate and used a fragment to cut the mattress, as well as to the Prison's Inmate Discipline Action Forms dated 4 and 11 April 1999, recording that he pleaded guilty to the charge of failing to comply with prison routine on 1 April 1999 and was confined to his cell for 48 hours, and that he pleaded guilty to the charge of assaulting a prison officer on 7 April 1999 and was confined to his cell for 72 hours as punishment.

5.2 On the issue of exhaustion of domestic remedies, the author reiterates that administrative²³ and judicial remedies available to him would be ineffective. While complaints within the prison are received by the prison governor, the very person

²³ The author claims that the ineffectiveness of administrative remedies was acknowledged by the Committee in communication No. 900/1999, *C. v. Australia*.

who authorized his conditions of detention, complaints to the Ombudsman could only result in the adoption of a report or recommendation to the Government, without providing any enforceable right or recourse. The *travaux préparatoires* of article 2, paragraph 3 (b), of the Covenant indicate the drafters' intention that States parties should progressively develop judicial remedies. More than 20 years after ratification of the Covenant in 1980, Australia should have complied with this obligation.

5.3 The author argues that the State party failed to rebut the expert advice he produced on the limited availability of civil remedies submitted by him. Legal action based on a breach of duty of care, under section 263, paragraphs 1 and 2, of the Crimes (Administration of Sentences) Act 1999 (NSW), would require (1) that the author's treatment was malicious, which is difficult to establish, as most of the impugned measures are permitted under domestic law; (2) that it was without reasonable and probable cause; and (3) that harm or injury be established. Any course of action requiring damage to be established would be futile, given that the psychiatrist was unable to determine the exact nature of any damage caused to the author as a result of his treatment.

5.4 While damages could be recovered in negligence only for a recognizable psychiatric injury (not for emotional distress), the author submits that his deprivation of human contact for considerable periods, his humiliation by removal of his clothes, exposure to the cold and to constant lightning, and the physical assaults against him resulted in anxiety, distress, recurring nightmares and panic attacks related to his time in the safe cell. In these circumstances, no medical evidence of distinct psychological or emotional injury arising from his treatment is required to establish a breach of articles 7 and 10 of the Covenant.

Additional observations by the State party

6.1 On 29 July 2005, in response to the Committee's request to provide detailed information on the deadlines for, and de facto accessibility of, the administrative and judicial remedies that the author had allegedly failed to exhaust, the State party made an additional submission on admissibility. It argues that the author could have availed himself of several administrative remedies during his period of segregation. Such remedies would have been easily accessible and could have provided effective and timely relief, in view of the inevitable delays in judicial proceedings. In addition, he could have brought a common law action in tort within three years from the date when the breaches of articles 7 and 10 of the Covenant had allegedly occurred.

6.2 The State party submits that all prisoners in New South Wales adult correctional facilities have

access to Official Visitors, who are appointed by the Minister for Corrective Services to visit correctional centres at least once per month and to receive complaints from prisoners. The Governor of the correctional centre must notify all inmates of the date and time of such visits and inform them about the possibility to complain to Official Visitors. Under the Crimes (Administration of Sentences) (Correctional Centre Routine) Regulation 1995, the Official Visitor is required to clarify the details of a case and to submit an Official Visitor's record form to the Commissioner of Corrective Services. He is also required to bring the complaint to the attention of the Governor of the correctional facility. The Regulation does not specify a deadline for bringing complaints to Official Visitors.

6.3 Moreover, the author could have requested permission to speak with the Governor of the correctional centre or with the Minister or the Commissioner for Corrective Services. Such requests must be conveyed to the Governor without unreasonable delay; the Governor is required to give the inmate an opportunity to speak on the matter or, respectively, to convey the request to the person with whom the inmate wished to speak during that official's next visit to the correctional facility.

6.4 The State party adds that an inmate may also directly complain, in writing, about his treatment in the correctional centre to the Minister or the Commissioner for Corrective Services. The complaint must be placed in a sealed envelope addressed to the Minister or the Commissioner and must not be opened, or its contents read or inspected. Although the Minister could not intervene personally, all complaints received by him were referred to the appropriate body, e.g., the Commissioner, who had the power to overrule or reverse any previously made decision.

6.5 The author also had the possibility of complaining to the Inspector-General of Corrective Services, whose mandate terminated on 30 September 2003. The Inspector-General was appointed by the Governor of New South Wales and was independent from the Department of Corrective Services. He was given full access to offenders held in custody, as well as to the premises and records of the Department, with a view to investigating and resolving complaints about the Department's conduct. This function could be exercised on his own initiative, at the request of the Minister for Corrective Services or in response to a complaint. Although no deadline for filing a complaint was specified, the Inspector-General had discretion to decide not to investigate complaints relating to incidents which had occurred too long ago or for which satisfactory alternative means of redress existed. He could recommend disciplinary action or

criminal proceedings against officers of the Department.

6.6 As regards the author's period of segregation, the State party submits that, under the Crimes (Administration of Sentences) Act 1999, any prisoner whose segregation exceeds fourteen days has the right to appeal to the Serious Offenders Review Council. Prisoners must be informed of their right to appeal and must sign a form stating that they have been so informed. Upon review, the Council may confirm, amend or revoke a segregation order. Pending the final outcome of a case, it may also order the suspension of the segregation or the prisoner's removal to another correctional centre.

6.7 Lastly, regarding judicial remedies, the State party reiterates that Australian courts consider themselves competent to deal with prisoners' challenges to the lawfulness of their confinement, including actions brought against acts in breach of a duty of care causing harm or injury to prisoners. The relevant cause of action was based on the tort of negligence in common law, subject to the Civil Liability Act 2002 (NSW), which provided for exclusion of personal liability for certain persons under certain circumstances. In accordance with the Crown Proceedings Act 1988 (NSW), the respondent party in proceedings commenced in common law tort against a Government agency, which was not a separate legal entity, was the State of New South Wales. However, the author had failed to bring a court action in common tort negligence.

Author's comments

7.1 On 14 September 2005, the author commented on the State party's additional observations, denying that any of the above administrative or judicial remedies would in practice have been available to him or that they would have provided him with an effective remedy at the relevant time. He had never been advised of possible complaint mechanisms upon being admitted to Parklea Correctional Facility. In addition, the treatment complained of was to a large extent compatible with the relevant Australian laws and regulations.

7.2 The author submits that he was never told whether or when an Official Visitor would visit Parklea during his time of incarceration. This had deprived him of an opportunity to complain to the Official Visitor who was, in any event, required not to "interfere with the management of discipline of the correctional centre, or give any instructions to correctional centre staff or inmates."²⁴

²⁴ Regulation 1333) of the Crimes (Administration of Sentences) (Correctional Centre Routine) Regulations 1995 (NSW).

7.3 The author contends that the Governor of Parklea Correctional Centre dismissed his repeated complaints about the conditions of his detention by replying: “You are not in a boy’s home anymore. This is the way we run the place.” Or: “Nothing will be done about it; this is how we run the place and how you will be treated.” Given that the decision whether or not to act on a complaint was within the Governor’s discretion,²⁵ such a complaint was not an effective remedy. This was reflected by the fact that the author’s file revealed that the Governor had approved of his segregation and confinement on six occasions during the relevant period.

7.4 The author claims that he had not been informed about the possibility of making a complaint to the Minister or Commissioner for Corrective Services, whether through the Governor or whether directly in writing. The fact that the Governor was not required to refer a complaint to the Minister or Commissioner but could dispose of the matter personally,²⁶ the purely recommendatory powers of the Commissioner, as well as the author’s difficulties to read and write and the absence of pens, pencils or paper in his dry cell, showed that such complaints were not an effective remedy.

7.5 Although a lawyer from the Sydney Regional Aboriginal Corporation Legal Service filed a complaint with the Minister for Juvenile Justice on the author’s behalf, following his release from segregation, no remedial action was taken on that complaint.

7.6 The author further submits that he was never informed about the possibility of complaining to the Inspector-General. Since the Inspector-General had discretion not to pursue complaints for which alternative means of redress existed, he could have dismissed his application on the ground that the author had already complained about his treatment to the Governor.

7.7 Similarly, he had never been advised that he could appeal his segregation to the Serious Offenders Review Council, nor had he signed a form stating that he had been so informed. Such an appeal would not have been an effective remedy, given that he was not a serious offender at the time of his segregation and that the Council had no competence to deal with issues other than segregation, such as, for example, his physical and medical treatment.

7.8 The author argues that, although he was aware that the Governor had authorized his treatment, as evidenced by his Department of Corrective Services file, he took all reasonable steps within the capacity of a 16-year-old Aboriginal child with an intellectual disability to seek a change of his treatment, i.e., by

complaining to his Aboriginal Deaths in Custody officer and to the Governor of the correctional centre.

7.9 By reference to the expert advice dated 7 May 2002, the author reiterates that any court action for breach of duty of care would have been futile.

Issues and proceedings before the Committee

Consideration of admissibility

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

8.2 The Committee considers that the author has failed to substantiate, for purposes of admissibility, that the prison officers’ attempts to secure him in April and May 1999 involved excessive use of force in violation of articles 7 and 10 and that his continuous camera surveillance was incompatible with these provisions.

8.3 With regard to the author’s claim that his transfer to Parklea Correctional Centre on 22 March 1999 violated his rights under article 10, paragraph 3, the Committee notes that the State party has not invoked its reservation, to the effect that the obligation to segregate in article 10, paragraphs 2 (b) and 3, “is accepted only to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned.” However, the Committee need not consider whether the State party’s reservation to article 10, paragraphs 2 (b) and 3, applies, since the author’s claims under these provisions are inadmissible on other grounds:

(a) As regards his claim that his transfer to Parklea Correctional Centre on 22 March 1999 violated article 10, paragraph 2 (b), the Committee recalls that this provision protects the right of accused juvenile persons to be separated from adults and to be brought as speedily as possible for adjudication. However, the author had the status of a convicted rather than an accused juvenile person at the time of his transfer to Parklea, since he was convicted of burglary, assault and causing bodily harm on 5 March 1999. His claim under article 10, paragraph 2 (b), is therefore inadmissible *ratione materiae* under article 3 of the Optional Protocol.

(b) As regards the claim under article 10, paragraph 3, the Committee notes that the author was in fact segregated from other inmates upon arrival at Parklea, where he was placed in a safe cell. The author has therefore not substantiated, for purposes of admissibility, how his transfer to Parklea Correctional Centre breached his right to be

²⁵ Ibid., Regulation 135 (3).

²⁶ Ibid., Regulation 136 (3).

segregated from adult prisoners, and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

8.4 As regards the author's claims relating to the periods of his solitary confinement, the removal of his clothes and blanket, his continued exposure to artificial light, and the prescription of Largactil, the Committee considers that he has sufficiently substantiated these claims, for purposes of admissibility. In particular, it considers that he has rebutted the State party's denial that he was placed in solitary confinement in a dry cell for 48 and 72 hours on 1 and 7 April 1999, respectively, by reference to Parklea Prison's Inmate Discipline Action Forms dated 4 and 11 April 1999, which confirm these alleged periods of solitary confinement.

8.5 With regard to exhaustion of domestic remedies, the Committee notes the State party's argument that the author has not exhausted administrative, judicial or other remedies available to him. It also notes the author's challenge to the effectiveness of complaints to the prison authorities or to the Ombudsman, as well as his doubts about the availability and the prospect of success of a court action for negligence.

8.6 The Committee recalls that the requirement, in article 5, paragraph 2 (b), of the Optional Protocol, to exhaust "all available domestic remedies" not only refers to judicial but also to administrative remedies, unless the use of such remedies would be manifestly futile or cannot reasonably be expected from the complainant.

8.7 As regards the possibility of complaining to the Ombudsman, the Committee recalls that any finding of this body would only have hortatory rather than binding effect so far as the authorities are concerned. It concludes that such a complaint cannot be considered an effective remedy,²⁷ which the author was required to exhaust, for purposes of article 5, paragraph 2 (b), of the Optional Protocol.

8.8 As regards the possibility of filing a complaint with the Minister for Corrective Services or with the Serious Offenders Review Council, the Committee notes the author's uncontested claim that he had not been informed about these or any other administrative remedies and that he was barely able to read or write at the time of his segregation at Parklea.

8.9 The Committee also recalls that the author made several attempts to change the conditions of his incarceration by complaining to his Aboriginal Deaths in Custody officer and to the Governor of the

correctional centre. It also notes the author's contentions as to the Governor's replies to his complaints and observes that the effect of these replies was to discourage the author from submitting further complaints to the prison authorities. Given the author's age, his intellectual disability and his particularly vulnerable position as an Aboriginal, the Committee concludes that he made reasonable efforts to avail himself of existing administrative remedies, to the extent that these remedies were known to him and in so far as they can be considered to have been effective.

8.10 The decisive question is therefore whether or not effective judicial remedies were available to, and have not been exhausted by, the author. In this regard, the Committee recalls the State party's contention that Australian courts will not interfere with administrative decisions of prison authorities, if such decisions are found to have been bona fide and if they constitute a reasonable use of power of management. It also recalls that the State party has argued, and the author has conceded, that most of the measures imposed on the author were consistent with the relevant domestic law. It is therefore hardly conceivable that the author could successfully have challenged the decisions of the Parklea authorities at court.

8.11 As regards the possibility of bringing a court action based on the tort of negligence in common law, the Committee acknowledges the State party's argument that lack of evidence on the author's part does not have a direct bearing on the question of whether or not effective judicial remedies were available to him. However, the lack of evidence for a recognizable psychiatric injury does have a bearing on the question of whether or not it would have been futile for the author to exhaust such remedies. In this regard, the Committee observes that to be contrary to articles 7 and 10 of the Covenant, treatment of a person deprived of liberty must not necessarily cause any recognizable psychiatric injury to that person, as seems to be the standard required for establishing a tort in negligence under Australian law. It considers that the author has sufficiently shown, and the State party has not refuted, that the emotional distress and anxiety allegedly suffered by the author would have constituted insufficient grounds for filing a court action based on a breach of duty of care.

8.12 Against this background, the Committee considers that, although in principle judicial remedies were available, in accordance with article 2, paragraph 3, of the Covenant, it would have been futile for the author, in the circumstances of his case, to commence court proceedings. It therefore concludes that he was not required, for purposes of article 5, paragraph 2 (b), of the Optional Protocol, to exhaust these remedies.

²⁷ See communication No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002, at para. 7.3.

8.13 The Committee concludes that the communication is admissible in so far as the author's claims raise issues under articles 7 and 10 of the Covenant, and to the extent that they relate to the periods of his solitary confinement, the removal of his clothes and blanket, his continued exposure to artificial light, and the prescription of Largactil to him.

Consideration of the merits

9.1 The Committee takes note of the author's allegation that his placement in a safe cell, as well as his confinement to a dry cell on at least two occasions, was incompatible with his age, disability and status as an Aboriginal, for whom segregation, isolation and restriction of movement within prison have a particularly deleterious effect. It notes the State party's argument that these measures were necessary to protect the author from further self-harm, to protect other inmates, and to maintain the security of the correctional facility.

9.2 The Committee recalls that persons deprived of their liberty must not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons.²⁸ Inhuman treatment must attain a minimum level of severity to come within the scope of article 10 of the Covenant. The assessment of this minimum depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age, state of health or other status of the victim.

9.3 The State party has not advanced that the author received any medical or psychological treatment, apart from the prescription of anti-psychotic medication, despite his repeated instances of self-harm, including a suicide attempt on 15 December 1999. The very purpose of the use of a safe cell "to provide a safe, less stressful and more supervised environment where an inmate may be counselled, observed and assessed for appropriate placement or treatment" was negated by the author's negative psychological development. Moreover, it remains unclear whether the requirements not to use confinement to a safe cell as a sanction for breaches of correctional centre discipline or for segregation purposes, or to ensure that such confinement does not exceed 48 hours unless expressly authorized, were complied with in the author's case. The Committee further observes that the State party has not demonstrated that by allowing the author's association with other prisoners of his age, their security or that of the correctional facility would

have been jeopardized. Such contact could have been supervised appropriately by prison staff.

9.4 Even assuming that the author's confinement to a safe or dry cell was intended to maintain prison order or to protect him from further self-harm, as well as other prisoners, the Committee considers that the measure incompatible with the requirements of article 10. The State party was required by article 10, paragraph 3, read together with article 24, paragraph 1, of the Covenant to accord the author treatment appropriate to his age and legal status. In the circumstances, the author's extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal. As a consequence, the hardship of the imprisonment was manifestly incompatible with his condition, as demonstrated by his inclination to inflict self-harm and his suicide attempt. The Committee therefore concludes that the author's treatment violated article 10, paragraphs 1 and 3, of the Covenant.

9.5 As regards the prescription of anti-psychotic medication ("Largactil") to the author, the Committee takes note of his claim that the medication was administered to him without his consent. However, it also takes note of the State party's uncontested argument that the prescription of Largactil was intended to control the author's self-destructive behaviour. It recalls that the treatment was prescribed by the general practitioner at Parklea Correctional Centre and that it was only continued after the author had been examined by a psychiatrist. In the absence of any elements which would indicate that the medication was administered for purposes contrary to article 7 of the Covenant, the Committee concludes that its prescription to the author does not constitute a violation of article 7.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 10 and 24, paragraph 1, of the Covenant.

11. In accordance with article 2, paragraph 3, of the Covenant, the author is entitled to an effective remedy, including adequate compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant,

²⁸ General comment 21, 1992 [44], article 10, at para. 3.

that State party has undertaken an obligation to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been

established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

Communication No. 1223/2003

Submitted by: Vjatseslav Tsarjov (not represented by counsel)

Alleged victims: The author

State party: Estonia

Date of adoption of Views: 26 October 2007

Subject matter: Arbitrary refusal of permanent residence permit and resulting inability to travel abroad and to take part in the conduct of public affairs.

Substantive issues: Equality before the law; prohibited discrimination; right to liberty of movement; right to leave any country, including his own; right to take part in the conduct of public affairs

Procedural issues: Abuse of the right of submission; non-exhaustion of domestic remedies

Articles of the Covenant: 2, para. 1; 12, paras. 2 and 4; 25; and 26

Articles of the Optional Protocol: 5, para. 2 (b); 3

Finding: No violation

1. The author of the communication is Vjatseslav Tsarjov, who claims to be stateless, born in the Russian Soviet Federative Socialist Republic on 7 December 1948 and currently residing in Estonia. He claims to be a victim of violations by Estonia of his rights under article 12, paragraphs 2 and 4; article 25; and article 26, read together with article 2, paragraph 1, of the International Covenant on Civil and Political Rights.¹ He is unrepresented.

The facts as presented by the author

2.1 Since 1956 the author has lived, studied and worked in Estonia. From October 1975 until August 1978 he had served as an operative worker in the National Security Committee (KGB) of the then Estonian Soviet Socialist Republic (ESSR). Then, until June 1981 he studied at the Higher School of the Soviet Union KGB in Moscow. From August 1981 until April 1986 he served as a senior operative

worker in the KGB of the Buryatia ASSR in the Russian Soviet Federative Socialist Republic. From April 1986 until December 1991, he served as a senior operative worker at the KGB of the ESSR. In 1971, the author was given the rank of a lieutenant. The author was a citizen of the Union of Soviet Socialist Republics (USSR or Soviet Union) until 1991 and was a bearer of the uniform USSR passport until 12 July 1996. After that date, he never applied for the citizenship of another country. Until 1996, he had legal grounds for permanent residency in Estonia (*propiska*). In 1995, he was forced by the authorities to apply for an official residence permit and, on 17 June 1995, he filed his application.

2.2 On 31 December 1996, the Government by its Order No.1024 (Order No. 1024), in accordance with article 12, section 5 of the Aliens Act, granted the author a temporary residence permit valid until 31 December 1998. On 14 September 1998, the author applied for a permanent residence permit on the basis of the Government Regulation No. 137 "On the conditions and procedure for applying for a permanent residence permit" of 16 June 1998 (Regulation No.137). On 5 November 1998, the Citizenship and Migration Board (Board) refused to grant a permanent residence permit to the author. The Board in its decision referred to the temporary residence permit granted to the author earlier. The Board based its decision on clauses 1 and 36 of the Government Regulation No. 368 "The procedure for the grant, extension and revocation of residence and work permits for foreigners" of 7 December 1995 (Regulation No. 368).

2.3 On 4 December 1998, the author appealed the Board's decision to the Tallinn Administrative Court, maintaining that he had applied for a residence permit for the first time before 12 July 1995. According to article 20, section 1 of the Aliens Act, an alien who applied for a residence permit before 12 July 1995 and who had a residence permit

¹ The Optional Protocol entered into force for the State party on 21 January 1992.

and who was not among the aliens specified in article 12, section 4 of the Aliens Act, retained the rights and duties provided for in earlier legislation of the Republic of Estonia. The author relied in his complaint on the Regulation No.137 and claimed that he does not belong to the group of aliens listed in article 12, section 4 of the Aliens Act, and that article 12, section 5 of the Aliens Act, was a wrong legal basis for the Order No.1024.

2.4 On 18 January 1999 and on 19 February 1999, the Tallinn Administrative Court heard the case. In court, the author disputed the data presented in his questionnaire annexed to the request for permanent residence permit. According to him, the Soviet Union became a foreign country after 20 August 1991 (after Estonia regained independence) and he worked in the KGB before the Soviet Union was declared to be a foreign State. He maintained that he has the right to apply for a permanent residence permit on the basis of article 20, section 1 of the Aliens Act, as he had applied for a residence permit before 12 July 1995. In Court, the Board contested the complaint and asked that it be denied. The Board explained that it issued a temporary residence permit to the author as an exception under article 12, section 5 of the Aliens Act. It took into account that he had served in an intelligence or security service of a foreign State and he was among the foreigners listed in article 12, section 4 of the Aliens Act, who cannot get a residence permit.

2.5 Tallinn Administrative Court by its judgement of 22 February 1999 granted the author's complaint and declared the Board's decision unlawful on procedural grounds. The Court stated that the Board refused to issue a permanent residence permit to the author by making a reference to the legal basis in clauses 1 and 36 of the Regulation No.368, whereas his application had to be reviewed on the basis of the Regulation No.137, which establishes a procedure for aliens who had requested a temporary residence permit before 12 July 1995 and who were granted such a permit and who are not among the aliens listed in article 12, section 4 of the Aliens Act. Since the Board reviewed the author's request for a permanent residence permit on the basis of a wrong legal act, the Court instructed the Board to review this case and make a new decision.

2.6 The Court agreed with the author's claim that provisions of article 20, section 1 of the Aliens Act, had to be applied with regard to him. He had applied for a residence permit before 12 July 1995 and he had been granted the permit. As the author disputed his classification among aliens listed in article 12, section 4 of the Aliens Act, in reviewing his application for a permanent residence permit a legal assessment had to be made whether his employment as a senior operative staff of the KGB of the ESSR from 1986 until December 1991 could be considered

as being employed by an intelligence or security service of a foreign State. In accordance with the new version of the implementing provision article 20, section 1 of the Aliens Act, the author's application for a permanent residence permit could not be based on the provisions of article 12, section 3 of the Aliens Act. Until 30 September 1999, the relevant section of the Act read as follows:

“§ 12. Bases for issue of residence permits

[...] (3) A permanent residence permit may be issued to an alien who has resided in Estonia on the basis of a temporary residence permit for at least three years within the last five years and who has a residence and employment in Estonia or other legal income for subsistence in Estonia, unless otherwise provided by this Act. A permanent residence permit shall not be issued to an alien who has received a residence permit in Estonia pursuant to clause (1) 1) or 2) of this section or to an alien who has received a residence permit as an exception pursuant to subsection (5) of this section.”

2.7 The Board filed an appeal to the Tallinn Court of Appeal. On 12 April 1999 the Tallinn Court of Appeal annulled the decision of Tallinn Administrative Court of 22 February 1999 and granted the Board's appeal. The Tallinn Court of Appeal found that the court of first instance had wrongly applied norms of substantive law. It found that the author belonged to one of the classes of aliens listed in article 12, section 4 of the Aliens Act, and therefore he was not subject to the application of article 20, section 1 of the Aliens Act, and the Regulation No.137. The Court noted that the Aliens Act does not specify the type of employment, when, and in which bodies that are considered as being employed by intelligence and security services of foreign countries. The Act “For the Procedure for Registration and Disclosure of Persons who Have Served in or Cooperated with Intelligence or Counter-intelligence Organizations of Security Organizations or Military Forces of States which Have Occupied Estonia” (Act on Registration and Disclosure), passed on 6 February 1995 defines the security and intelligence bodies of States that have occupied Estonia and defines the notion of persons who have been in the service of such bodies. In accordance with article 2, section 2 of the Act, the security and intelligence organizations of States that have occupied Estonia are the security organizations and intelligence and counter-intelligence organizations of the military forces of the Soviet Union, or bodies subordinate to them; according to subsection 6 of the above section, this includes also the KGB of the Soviet Union. According to article 3, section 2 of the Act, an alien who was in the service

of the security or intelligence body in the period between 17 June 1940 until 31 December 1991 and who lives on the territory under the jurisdiction of the Republic of Estonia is considered to be a person employed by the security or intelligence organizations.

2.8 On the basis of the above Act and in the light of the meaning of the Aliens Act, the Court found that the author's employment with the KGB of the ESSR and in the KGB of Buryatia ASSR, which he himself has confirmed in the questionnaire for his residence permit application, should be interpreted as being employed by an intelligence or security service of a foreign country within the meaning of article 12, section 4, clause 5 of the Aliens Act.² The Court noted that with the agreement concluded between the Prime Minister of the Republic of Estonia, Chairman of the KGB of the Soviet Union and Chairman of the Estonian National Security Committee on 4 September 1991, the Government of the Republic of Estonia undertook to guarantee social and political rights to workers of the KGB of the ESSR in accordance with generally recognized international rules and the legislation of Estonia. However, the agreement does not lend itself to interpretation that making of restrictions in issuing residence permits to aliens on the basis of article 12, section 4 of the Aliens Act would be in contradiction to the agreement.

2.9 In the light of the above, the Tallinn Court of Appeal found that although the author applied for a residence permit on 17 June 1995 and, as an exception, he was granted a temporary residence permit, he did not have the right to apply for a residence permit on the basis of article 20, section 1 of the Aliens Act, and his application for a permanent residence permit could not be dealt with on the basis of the Regulation No.137, as he belonged to the aliens listed in article 12, section 4 of the Aliens Act. The Court decided that in accordance with article 12, section 3 of the Aliens Act, a permanent residence permit may be issued to an alien who has resided in Estonia on the basis of a temporary residence permit for at least three years within the last five years and who has residence and employment in Estonia or other legal income for subsistence in Estonia, unless otherwise provided by the Aliens Act. A permanent residence permit shall not be issued to an alien who has received a residence permit in Estonia as an exception pursuant

² Article 12, section 4, clause 5 of the Aliens Act, referred to in the judgement of the Tallinn Court of Appeal of 12 April 1999 does not have an equivalent in the current version of the Act and read as follows:

“§ 12. Bases for issue of residence permits
[...] (4) A residence permit shall not be issued to an alien if: [...] 5) he or she has been or is employed by an intelligence or security service of a foreign State;

to article 12, section 5 of the Aliens Act. The author received a residence permit as an exception for two years by the Order No.1024 on the basis of article 12, section 5 of the Aliens Act. Therefore, the Court concluded that the Board had justifiably refused to grant a permanent residence permit to the author. Since the Regulation No.137 did not apply to him, the Board had correctly reviewed his application for a permanent residence permit on the basis of Regulation No.368.

2.10 On 10 May 1999, the author appealed in cassation the judgement of the Tallinn Court of Appeal to the Supreme Court. He claimed that the lower court had wrongly applied the law. His service in the KGB of the ESSR could not be considered as an employment in the foreign intelligence or security service and his inclusion in the list of persons specified in article 12, section 4 of the Aliens Act, violated articles 23 and 29 of the Estonian Constitution. Service within the borders of the former USSR could not be regarded as service abroad and one could not be convicted for employment in the security service. The author submitted that although there is not a subjective right to be granted a permanent residence permit, the refusal of a permanent residence permit should be well reasoned. The reasons for refusing to give a residence permit should be in accordance with the Constitution and may not violate the person's rights, for example, the right to equal treatment. As a result, he concluded that he was discriminated against on the basis of origin, contrary to article 26 of the Covenant, as he was denied a permanent residence permit for being a former employee of the foreign intelligence and security service. Leave to appeal to the Supreme Court was refused on 16 June 1999 on the ground that the appeal in cassation was manifestly ill-founded.

The complaint

3.1 The author claims that the refusal to grant him a permanent residence permit violates his rights under articles 12, paragraphs 2 and 4, of the Covenant, as the period of validity of his temporary residence permit is too short to allow him to obtain a travel visa for certain countries. The travel document for a stateless person is an alien's passport. According to article 27(1) of the Identity Documents Act, the alien's passport is issued if the person has a valid residence permit.³ Under article 28 of the same Act, the validity of an alien's passport cannot exceed

³ Article 27(1) provides:

§ 27. Basis for issue of alien's passport
(1) An alien's passport shall, on the basis of a personal application, be issued to an alien who holds a valid residence permit in Estonia if it is proved that the alien does not hold a travel document issued by a foreign State and that it is not possible for him or her to obtain a travel document issued by a foreign State. [...]

the period of validity of the residence permit issued to the alien.⁴ As the author's last residence permit was issued for two years, so was the validity of his alien's passport. If he wishes to travel to another country for a longer period of time, he might have problems to obtain an entry visa. Besides, if he wishes to travel for a longer period and does not manage to extend his residence permit beforehand, he might be refused re-entry to Estonia, as he would then have no legal basis for staying there.

3.2 The author further claims that the refusal to grant him a permanent residence permit violates his right to vote and to be elected under article 25, in so far as this right is vested only upon Estonian citizens or persons who are Estonian permanent residents. Article 60 (2) of the Estonian Constitution and article 4 (1) of the Parliament Election Act provide that every Estonian citizen entitled to vote who has attained 21 years of age may be a candidate for the Parliament. The author is deprived of the right to be elected in local elections, as he is not a citizen of Estonia or the European Union or to vote in local elections, as he does not have permanent residence permit. Under article 156 of the Estonian Constitution, all persons who have reached the age of 18 years and who reside permanently on the territory of that local government unit shall have the right to vote in the election of the local government council.

3.3 Finally, the author argues that he is a victim of discrimination on the grounds of ethnic and social origin and his association with a relevant status, namely the former military personnel of the former Soviet Union, contrary to article 26 read together with article 2, paragraph 1, of the Covenant. He contends that article 12, section 4, clause 7, of the Estonian Aliens Act⁵ is discriminatory as it restricts the issuance or the extension of a residence permit to an alien if he or she served as a member of the armed forces of a foreign State. The relevant provision of the Act states:

⁴ Article 28 provides:

§ 28. Period of validity of alien's passport
An alien's passport shall be issued with a period of validity of up to ten years, but the period of validity shall not exceed the period of validity of the residence permit issued to the alien. (17.05.2000 entered into force 01.08.2000 - RT I 2000, 40, 254)

⁵ The author challenges before the Committee article 12, section 4, clause 7, of the Aliens Act – 'he or she has served as a professional member of the armed forces of a foreign State or has been assigned to the reserve forces thereof or has retired therefrom', although the State party considers that he falls under the provision of article 12, section 4, clause 5, of the Aliens Act valid at the time of the consideration of the author's application for a permanent residence permit – 'he or she has been or is employed by an intelligence or security service of a foreign State'. There was no equivalent of the latter provision in the Aliens Act at the time of submission of the communication.

“§ 12. Basis for issue of residence permits

[...] (4) A residence permit shall not be issued to or extended for an alien if:

[...] (7) he or she has served as a professional member of the armed forces of a foreign State or has been assigned to the reserve forces thereof or has retired therefrom; [...]"

3.4 Under section 5 of the same article, as an exception, temporary residence permits may be issued to aliens listed, inter alia, under section 4, clause 7 of the Aliens Act, and such residence permits may be extended. At the same time, according to article 12, section 7, of the Act, the restriction of, inter alia, article 12, section 4, clause 7, does not extend 'to the citizens of the member States of the European Union or NATO'. The author claims that the law amounts to discrimination as it presumes that all foreigners, except citizens of EU and NATO member States, who have served in the armed forces pose a threat to Estonian national security, regardless of the individual features of the particular service in question. He argues that there is no proof either of any threat posed generally by military retirees, nor of any threat posed by himself. He also contends that the "threat" must be proven, for example, by an executive court sentence. He clarifies that he did not apply for Estonian citizenship; the permanent residence permit he applied for would have given him a more stable status in the only State in which he has reasons to stay.

The State party's observations on admissibility and the merits

4.1 By submissions of 1 June 2004, the State party contested both the admissibility and the merits of the communication. On admissibility, it argues that the communication should be considered an abuse of the right of communication. It further argues that the author has failed to exhaust domestic remedies. On the merits, the State party argues that the facts disclose no violation of the Covenant.

4.2 For the State party, the author did not explain why his communication was submitted to the Committee more than four years after the final national judicial decision. Although the Optional Protocol does not set any time limits for the submission of a written communication, it is up to the Committee to decide whether a substantial delay in submitting a communication does consist of an abuse of the right of submission,⁶ as prescribed by article 3 of the Optional Protocol. Estonia acceded to the Covenant and the Optional Protocol in 1991.

⁶ Reference is made to *Gobin v. Mauritius*, communication No. 787/1997, decision on inadmissibility adopted on 16 July 2001.

Article 3 of the Constitution states that generally recognized principles and rules of international law are an inseparable part of the Estonian legal system, and article 123 states that if laws or other legislation of Estonia are in conflict with international treaties ratified by the parliament, the provisions of the international treaty shall apply. The State party submits that the author should have known these principles. Any remedy that an individual seeks to pursue requires that the individual takes steps in order to bring his/her case before the relevant body within a reasonable time.

4.3 The author did not submit a request to the administrative court, seeking a constitutional review of the constitutionality of the Aliens Act. The State party refers to a decision of 5 March 2001 where the Constitutional Review Chamber, on reference from the administrative court, declared provisions of the Aliens Act, pursuant to which the applicant had been refused a residence permit, to be unconstitutional. The State party also observes that the Supreme Court does exercise its power to strike down domestic legislation inconsistent with international human rights treaties. It adds that, as equality before the law and protection against discrimination are protected both by the Constitution and the Covenant, a constitutional challenge would have afforded the author an available and effective remedy. In light of the Supreme Court's recent case law, the State party considers that such an application would have had a reasonable prospect of success and should have been pursued.

4.4 The author also did not pursue recourse to the Legal Chancellor to verify the non-conformity of the impugned law with the Constitution or Covenant. The Legal Chancellor may propose a review of legislation considered unconstitutional, or, failing legislative action, can make a reference to this effect to the Supreme Court. The Supreme Court has "in most cases" accepted such a reference. Accordingly, if the author considered himself incapable of lodging a constitutional challenge, he could have applied to the Legal Chancellor to take such a step.

4.5 The State party notes that the right to be granted a permanent residence permit and the ancillary rights are not guaranteed by the Covenant. Under international law, every State can decide on the entry to and stay of foreigners in the country, including the question of issuing residence permits. Estonian authorities have discretion to regulate these questions by national legislation. The restrictions on granting permanent residence permits is necessary for reasons of guaranteeing national security and public order. The State party refers to the Committee's decision in *V.M.R.B. v. Canada*,⁷

⁷ *V.M.R.B. v. Canada*, communication No. 236/1987, decision on inadmissibility adopted on 18 July 1988.

where the Committee observed that it could not test a sovereign State's evaluation of an alien's security rating. Accordingly, the State party argues that the refusal to grant a permanent residence permit to the author does not interfere with any of his Covenant rights.

4.6 On the merits of the article 26 claim, the State party invokes the Committee's established jurisprudence that not all differences in treatment are discriminatory; and that differences that are justified on a reasonable and objective basis are consistent with article 26. Differences in result arising from the uniform application of laws do not per se constitute prohibited discrimination.⁸ According to the Aliens Act, as a general rule, a residence permit is not granted to a person who served in the intelligence or security services of a foreign country; as an exception, they can be granted a temporary residence permit with the permission of the Government. The author was granted temporary residence permit on exceptional grounds and he was refused permanent residence permit in accordance with the provisions of the domestic law, as he had served in the intelligence and security service of a foreign State.

4.7 The State party argues that the restriction on granting a permanent residence permit is necessary for reasons of national security and public order. It is also necessary in a democratic society for the protection of State sovereignty and is proportional to the aim set out in the law. In refusing to grant the author a permanent residence permit, the Board justified its order in a reasoned fashion, which reasons, in the State party's view, were relevant and sufficient. In adopting the law in question, it was also taken into account that in certain conditions former members of the armed forces might endanger Estonian sovereignty from within. This particularly applies to persons who were assigned to the reserve, as they are familiar with Estonian circumstances and can be called to service in a foreign country's forces.

4.8 The State party maintains that the author was not treated unequally compared to other persons who served in the intelligence service of a foreign country, as the law does not allow granting permanent residence permit to such persons. With regard to the author's claim that article 12, section 5 of the Aliens Act, does not apply to citizens of EU and NATO, the State party recalls that the author's request was refused in 1998, but that the provision the author invokes entered into force only on 1 October 1999. The State party thus argues that the reasons to refuse the residence permit to the author were based on considerations of national security,

⁸ Reference is made to *F.H. Zwaan-de Vries v. the Netherlands*, communication No. 182/1984; *Hendrika S. Vos v. the Netherlands*, communication No. 218/1986; *A. Järvinen v. Finland*, communication No. 295/1988).

not on any circumstance relating to the author's social origin. The refusal, made according to law, was not arbitrary and had no negative consequences for the author.

4.9 According to the State party, the ancillary rights, which the author claims also to have been denied, are closely connected with the main issue at stake—the right to be granted a residence permit. They should be assessed as a whole. In any event, the State party argues, the alleged violations of article 12 are now moot, as the author was granted a temporary residence permit for a period of 5 years and was issued an aliens passport. An alien's passport is a travel document and its holder can cross the borders, although for entering some countries it is necessary to obtain a visa. Any complaint related to requirements for the issuance of such visas by foreign Governments cannot be directed against the Estonian Government.

4.10 The author's claim that he might lose the right to enter Estonia if he stays abroad for longer periods is without substance. It would be possible to ask for a prolongation of the residence permit and issue an alien's passport from the Board in writing. According to articles 42 and 44 of the Act on Consular Affairs, Estonian consulates can deliver an alien's passport and issue residence permits. The author could apply for an alien's passport or a residence permit from outside Estonia.

4.11 As to the claim that the author is denied the right to vote and to be elected, the State party recalls that the right to vote of aliens with a residence permit is not a right contained in the provisions of article 25, which guarantees these rights only to citizens of a State.

4.12 The State party notes that in addition to the temporary residence permit issued to the author on 31 December 1996 with the validity until 31 December 1998, he has been issued further temporary residence permits for the following periods of time: from 5 October 1999 to 1 February 2000, from 11 May 2000 to 31 December 2000, from 1 January 2001 to 31 December 2001, from 1 January 2002 to 31 December 2003 and from 1 January 2004 to 31 December 2008.

The author's comments on the State party's observations

5.1 On 20 and 30 July 2004, the author commented on the State party's observations. He recalls that he has lived in Estonia since the age of eight, was a USSR citizen until 1991 and benefited from permanent registration (*propiska*) in Estonia until 1996. Until 31 December 1996, when the Order was adopted, he was not considered to be a threat to Estonian national security. Former employees of the KGB of the ESSR, whose parents held Estonian

citizenship until 1940, obtained Estonian citizenship after independence, despite falling into the same category of being a threat to Estonian national security as the author.

5.2 The author further submits that the Act on Registration and Disclosure applied by the State party (para. 2.7 above) is contrary to article 23, part 1 of the Constitution, which states that no one may be found guilty of an act, if that act did not constitute a crime under a law which was in effect when the act was committed. The author's employment by the KGB between 1975 and 1991 did not constitute at that time either work in special services of a foreign State, or amounted to cooperation with the special services of an occupying State.

5.3 The author adds that the different periods of validity of his temporary residence permits—between four months and five years—prove that the State party's argument about national security is unfounded. The State party failed to demonstrate how and under which criteria the assessment of the author's threat to Estonian national security justified such significant discrepancy in the length of the permits' validity. The author also challenges the State party's argument that 'in certain conditions former members of the armed forces might endanger Estonian statehood from within' and 'can be called to service in a foreign country's forces', as in his case, both the USSR and ESSR ceased to exist, while Buryatia ASSR could hardly pose a threat to the Estonia's State interests.

5.4 The author quotes at length from a 1991 agreement between Estonia and the Russian Federation on the status of military bases and bilateral relations in support of his claim that this treaty did not exclude former KGB servicemen from the provisions of article 3, allowing the USSR citizens to freely choose between the Russian and Estonian citizenship. The author adds that his initial intention was to apply for Estonian citizenship after living in Estonia with a permanent residence permit for five years. However, as one of 175,000 stateless persons who are long-term residents of Estonia the author cannot obtain Estonian citizenship, since he belongs to a special group of the so-called former military personnel of the USSR.

5.5 The author denies that his case is an abuse of the right to submit a communication, since the Estonian Supreme Court did not inform him about further possibilities of redress after refusing his leave to appeal on 16 June 1999.

5.6 On the argument that he did not initiate constitutional review proceedings to challenge the constitutionality of the Aliens Act, the author submits that under article 6 of the Law on Constitutional Review Procedure (in force until 1 July 2002), only the President of Estonia, the Legal

Chancellor and the courts could initiate the constitutional review procedure. Contrary to the State party's claim, he unsuccessfully tried to raise the issue of unconstitutionality of the Aliens Act and its incompatibility with article 26 of the Covenant in the domestic courts.

5.7 As to the possibility of approaching the Legal Chancellor, the author observes that according to article 22(2) of the Law on the Legal Chancellor, the Chancellor must reject applications if the subject matter is, or has been, the subject of judicial proceedings. Given the limited effectiveness of the Legal Chancellor's competences, the author opted for judicial review of the Board's decision.

5.8 On 6, 12, 15 and 21 June 2007, the author submitted further comments on the State party's observations. In addition to reiterating his earlier claims, the author states that he was involved in other court proceedings in Estonia from 2004 to 2006, and that his complaint related to the latter proceedings was registered by the European Court of Human Rights in 2007. Moreover, in October 2006, he was granted a status of a 'long-term resident – EU' by the Board on the basis of his request submitted on 10 July 2006.⁹ A holder of this status does not need a work permit in Estonia; however, even this status does not give him the grounds to become a naturalized Estonian citizen due to the restrictions imposed by the Order No.1024.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's argument that the communication amounts to an abuse of the right of submission, given the excessive delay between the submission of the complaint and the adjudication of the issue by the domestic courts. As regards the supposedly excessive delay in submitting the complaint, the Committee points out that the Optional Protocol sets no deadline for

⁹ As of 1 June 2006, an alien holding a permanent residence permit issued by the Estonian authorities shall automatically be deemed as an alien holding the 'long-term resident – EU' status. It seems that the author was granted this status on an exceptional basis, as he never had a permanent residence permit issued by the Estonian authorities.

submitting communications, that the amount of time that elapsed before submission, other than in exceptional cases, does not in itself constitute an abuse of the right to submit a communication.¹⁰ In the circumstances of this particular case, the Committee does not find that a delay of 4 years between exhaustion of domestic remedies and presentation of the communication to the Committee amounts to an abuse of the right of submission.

6.4 On the requirement of exhaustion of domestic remedies in relation to the alleged violation of articles 12, paragraphs 2 and 4, and article 25, the Committee recalls that the author did not raise these issues before the domestic courts. It further recalls that an author is required to at least raise the substance of his or her claims in the domestic courts before submitting them to the Committee. As the author failed first to raise the alleged violations of his rights in the domestic courts, the Committee considers that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.5 As to the State party's contention that the claim under article 26 is likewise inadmissible, as a constitutional review could have been initiated, the Committee observes that the author has consistently argued, up to the level of the Supreme Court, that the rejection of a permanent residence permit on the grounds of social origin, as a former employee of a foreign intelligence and security service, violated the equality guarantee of the Estonian Constitution and article 26 of the Covenant. In light of the courts' rejection of these arguments, the Committee considers that the State party has not shown how such a remedy would have a reasonable prospect of success. This claim, therefore, is not inadmissible for failure to exhaust domestic remedies.

6.6 As to the State party's other arguments, the Committee notes that the author has not advanced any claim to a free-standing right to a permanent residence permit, but rather that he claims that the refusal to grant a permanent residence permit to him on the grounds of social origin as a former employee of a foreign intelligence and security service violates his right to non-discrimination and equality before the law. This claim falls within the scope of article 2, paragraph 1, read together with article 26, and is, in the Committee's view, sufficiently substantiated for purposes of admissibility.

Consideration of the merits

7.1 The Human Rights Committee has considered the communication in the light of all the information

¹⁰ See, *Gobin v. Mauritius*, supra note 6, and *Fillacier v. France*, communication No. 1434/2005, Views adopted on 28 April 2006, para. 4.3.

made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol.

7.2 The author claims that article 12, section 4, clause 7,¹¹ of the Estonian Aliens Act violates article 2, paragraph 1, read together with article 26 of the Covenant, so far as it restricts the issuance or the extension of a residence permit to an alien if he or she served as a professional member of the armed forces of a foreign State. At the same time, under article 12, section 7, of the Act, this restriction does not extend to citizens of EU or NATO member States. The author claims that the law is discriminatory as it presumes that all foreigners, except citizens of EU and NATO member States, who served in the armed forces pose a threat to Estonian national security, regardless of the individual features of the particular service or training in question. With regard to the latter, the Committee takes note of the State party's argument that while the author's request was refused in 1998, article 12, section 7, invoked by the author, only entered into force on 1 October 1999.

7.3 The Committee further observes that the State party invokes national security grounds as a justification for the refusal to grant a permanent residence permit to the author. The Committee refers to its jurisprudence that an individual may be deprived of his right to equality before the law if a provision of law is applied to him or her in arbitrary fashion, such that an application of law to an individual's detriment is not based on reasonable and objective grounds.¹² It also recalls its jurisprudence established in *Borzov v. Estonia*,¹³ that considerations related to national security may serve a legitimate aim in the exercise of a State party's sovereignty in the granting of citizenship or, as in the present case, of a permanent residence permit. It recalls that the invocation of national security on the part of a State party does not, ipso facto, remove an issue wholly from the Committee's scrutiny and recognizes that its own role in reviewing the existence and relevance of such considerations will depend on the circumstances of the case.¹⁴

7.4 Whereas article 19, article 21 and article 22 of the Covenant establish a criterion of necessity in respect of restrictions based on national security, the criteria applicable under article 26 and article 2, paragraph 1, are more general in nature, requiring reasonable and objective justification and a legitimate aim for distinctions that relate to an

¹¹ See footnote 5 above.

¹² *Kavanagh v. Ireland* (No. 1), communication No. 819/1998, Views adopted on 4 April 2001, and *Borzov v. Estonia*, communication No. 1136/2002, Views adopted on 26 July 2004.

¹³ *Supra*.

¹⁴ *V.M.R.B. v. Canada*, supra note 7, and *Borzov v. Estonia*, supra note 12.

individual's characteristics enumerated in article 26, including "other status". The Committee observes that enactment of the Aliens Act and, in particular, a blanket prohibition of the issue of a permanent residence permit to the 'former members of the armed forces' of a foreign State cannot be examined outside the historical context, that is, the historical relationship between the State party and the USSR. The Committee is of the view that although the above-mentioned blanket prohibition per se constitutes differentiated treatment, in the circumstances of the present case, the reasonableness of such differentiated treatment would depend on the basis for national security arguments invoked by the State party.

7.5 The State party has argued that legislation does not violate article 26 of the Covenant if the grounds of distinction contained therein are justifiable on objective and reasonable grounds. In the present case, it concluded that granting permanent residence permit to the author would raise national security issues on account of his former employment in the KGB. The Committee notes that neither the Covenant nor international law in general spell out specific criteria for the granting of residence permits, and that the author had a right to have the denial of his application for permanent residence reviewed by the State party's courts.

7.6 The Committee notes that the category of people excluded by the State party's legislation from being able to benefit from permanent residence permits is closely linked to the considerations of national security. Furthermore, where such justification for differentiated treatment is persuasive, it is unnecessary that the application of the legislation be additionally justified in the circumstances of an individual case. The decision in *Borzov*,¹⁵ decided on the basis of a different legislation, is consistent with the view that distinctions made in the legislation itself, where justifiable on reasonable and objective grounds, do not require additional justification on these grounds in their application to an individual. Consequently, the Committee does not, in the circumstances of the present case, conclude that there was a violation of article 26, read together with article 2, paragraph 1, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of article 26, read together with article 2, paragraph 1, of the Covenant.

¹⁵ *Supra* note 12.

Communication No. 1249/2004

Submitted by: Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (not represented by counsel)

Alleged victims: The authors

State party: Sri Lanka

Date of adoption of Views: 21 October 2005

Subject matter: Determination by Supreme Court that incorporation of religious order inconsistent with Constitution

Procedural issues: Exhaustion of domestic remedies – Substantiation, for purposes of admissibility

Substantive issues: Freedom of religious belief – Manifestation of religious belief – Freedom of expression – Permissible restrictions – Equality before the law – Discrimination on basis of religious belief

Articles of the Covenant: 2, para. 1; 18, para. 1; 19, para. 2; 26; and 27

Articles of the Optional Protocol: 2 and 5, para. 2 (b)

Finding: Violation (arts. 18, para. 1; and 26)

1. The author of the communication, initially dated 14 February 2004, is Sister Immaculate Joseph, a Sri Lankan citizen and Roman Catholic nun presently serving as Provincial Superior of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka ('the Order'). She submits the communication on her own behalf and on behalf of 80 other sisters of the Order, who expressly authorize her to act on their behalf. They claim to be victims of violations by Sri Lanka of articles 2, paragraph 1; article 18, paragraph 1; article 19, paragraph 2, article 26 and article 27 of the Covenant. The Optional Protocol entered into force for Sri Lanka on 3 January 1998. The authors are not represented by counsel.

The facts as presented by the authors

2.1 The authors state that the Order, established in 1900, is engaged, among other things, in teaching and other charity and community work, which it provides to the community at large, irrespective of race or religion. In July 2003, the Order filed an application for incorporation, which in Sri Lanka occurs by way of statutory enactment. The Attorney-General, who the authors maintain is required by article 77 of the Constitution to examine every Bill for consistency with the Constitution, made no report to the President. After the Bill was published in the Government Gazette, an objection to the constitutionality of two clauses of the Bill, when

read with the preamble,¹ apparently by a private citizen ('the objector'), was filed on 14 July 2003 in the original jurisdiction of the Supreme Court.

2.2 Without advice of the objection or hearing to the Order, the Supreme Court heard the objector and the Attorney-General on the matter. The authors state that the Attorney-General, who was technically the respondent to the proceedings, supported the objector's arguments. On 1 August 2003, the Supreme Court handed down its Special Determination upholding the application, for inconsistency with articles 9 and 10 of the Constitution. The Court held that the challenged provisions of the Bill "create a situation which combines the observance and practice of a religion or belief with activities which would provide

¹ The contested clauses of the Bill were clauses 3 and 5, read with the preamble. These provided:

Preamble.

"WHEREAS the Teaching Sisters of [the Order] have established themselves as a Congregation for the propagation of Religion by establishing and maintaining catholic schools and other schools assisted or maintained by the State and engaged in educational and vocational training in several parts of Sri Lanka and in establishing and maintaining orphanages and homes for children and for the aged:

AND WHEREAS it has become necessary for the aforesaid purposes to be more effectively prosecuted, pursued and attained to have the incorporation of the [the Order]:

AND WHEREAS it has become expedient to have [the Order] duly incorporated"

Clause 3.

(a) The general objects for which the Corporation is constituted are hereby declared to be –

(b) to spread knowledge of the Catholic religion;

(c) to impart religious, educational and vocational training to youth;

(d) to teach in Pre-Schools, Schools, Colleges and Educational Institutions;

(e) to serve in Nursing Homes, Medical Clinics, Hospitals, Refugee Camps and like institutions;

to establish and maintain Creches, Day Care Centres, Homes for the elders, Orphanages, Nursing Homes and Mobile Clinics for the infants, aged, orphans, destitutes and sick;

(g) to bring about society based on love and respect for one and all; and

(h) to undertake and carry out all such works and services that will promote the aforesaid objects of the Corporation.

Clause 5 gave the authority to the corporation to receive, hold and dispose of movable and immovable property for the purposes set out in the Bill.

material and other benefits to the inexperience [sic], defenceless and vulnerable people to propagate a religion. The kind of [social and economic] activities projected in the Bill would necessarily result in imposing unnecessary and improper pressures on people, who are distressed and in need, with their free exercise of thought, conscience and religion with the freedom to have or to adopt a religion or belief of his choice as provided in article 10 of the Constitution.” The Court thus considered that “the Constitution does not recognize a fundamental right to propagate a religion”. In reaching its conclusions, the Court referred to article 18 of both the Universal Declaration of Human Rights and the Covenant, as well as two cases decided by the European Court of Human Rights.²

2.3 The Court went on to examine the application in the light of article 9 of the Constitution, which provides that: “The Republic of Sri Lanka shall give Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the *Buddha Sasana*, while assuring all religions the rights granted by articles 10 and 14 (1) (e).” The Court held, “the propagation and spreading Christianity as postulated in terms of clause 3 [of the Bill] would not be permissible as it would impair the very existence of Buddhism or the *Buddha Sasana*”. In addition, subclauses 1 (a) and (b) of clause 3 concerned spreading knowledge of a religion, and were thus inconsistent with article 9 of the Constitution.

2.4 The authors point out that in reaching these conclusions the Court referred to decisions in two previous cases where similar bills for the incorporation of Christian associations had been found to be unconstitutional. The result of the decision, against which no appeal or review was possible, was that Parliament could not enact the Bill into law without a two-thirds special majority and approval by a popular referendum.

The complaint

3.1 The authors claim that the above facts disclose violations of article 2, paragraph 1, read with article 26, article 27, article 18, paragraph 1, and article 19, paragraph 2. As to article 2, paragraph 1, read with article 26, the authors argue that the Attorney-General’s submissions in opposition to the Bill and the Supreme Court’s determination violated these rights. The Attorney-General, not having recognized any constitutional infirmity under article 77, was obliged as a matter of equality of law to take the same position before the Court, doubly so given that the Order, although the

affected entity, was neither notified nor heard. The determination that Clause 3 of the Bill was incompatible with article 9 of the Constitution was moreover so irrational and arbitrary as to breach fundamental norms of equality protected by article 26. With reference to the Committee’s decision in *Waldman v. Canada*,³ the authors argue that to reject the Order’s incorporation while many non-Christian religious bodies with similar object clauses have been incorporated violates article 26. In support, the author provides a (non-exhaustive) list of 28 religious bodies that have been incorporated and their statutory objects, of which most have Buddhist orientation, certain Islamic, and none Christian.

3.2 In terms of article 27, the authors invoke the Committee’s general comment 22 to the effect that the official establishment of a State religion should not impair the enjoyment of others’ Covenant rights. The Court’s reliance on the Buddhism primacy clause in article 9 to reject the Bill’s constitutionality thus violated article 27. The authors emphasize that, like the lengthy list of other religious bodies receiving incorporation, the Order combined charitable and humanitarian activities (labelled social and economic activities by the Court) with religious ones, a practice common to all religions. To require a religious body’s adherents to limit good works would be discriminatory, and contrary also to the objects of the other religious bodies that received incorporation. Propagation of belief, moreover, is an integral part of professing and practicing religion; indeed, all major religions in Sri Lanka (Buddhism, Hinduism, Islam and Christianity) were introduced by propagation. In any event, the authors state that in the seventy years of the Order’s existence in Sri Lanka, there has neither been evidence nor allegation of inducements or allurements to conversion. This aspect of religious practice is thus protected by the rights of the Order’s members under article 27 Covenant.

3.3 In terms of article 18, paragraph 2, and 19, paragraph 2, the authors argue that the Court’s restrictions on social and economic activities of the Order breach its members’ rights under these provisions. The right to propagate and disseminate information about a religion is similarly covered by these articles, and is not limited to a State’s “foremost” religion. None of the Order’s activities are coercive, and thus paragraph 2 of article 18 has no application to the Order’s legitimate activities. Invoking article 6 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief as a guide to Covenant interpretation, the author goes on to argue that the inability to hold property in the

² *Kokkinakis v. Greece*, appln. 14307/88, judgement of 19 April 1993, and *Larissis v. Greece*, applns. 23372/94, 26377/94 and 26378/94, judgement of 24 February 1998.

³ Case No. 694/1996, Views adopted on 3 November 1999.

name of the Order sharply limits its effective ability to establish places of worship and charitable and humanitarian institutions. The Attorney-General's submissions and the Supreme Court's ascription to the Order of potentially coercive activities as a result of incorporation were wholly unsubstantiated and unfounded in fact.

The State party's submissions on admissibility and merits

4.1 By submissions of 15 April 2004 and 21 March 2005, the State party contested the admissibility and merits of the communication. At the outset, the State party described its understanding of the allegations as threefold: (a) that the author was not afforded an opportunity of being heard before the Supreme Court prior to the Court making its determination, (b) that the Attorney-General supported the petitioner's submissions before the Supreme Court, and (c) that the Supreme Court's determination itself violated the author's Covenant rights.

4.2 As to the allegation that the authors were not afforded an opportunity of being heard before the Supreme Court prior to the Court making its determination, the State party explains that under article 78 of the Constitution, any Bill shall be published in the Government gazette at least seven days before being placed on the Order paper of Parliament. The Constitution then lays down the procedure to be followed when a Bill is placed on the Order paper in Parliament. The Supreme Court is vested, under article 121 of the Constitution, with sole and exclusive jurisdiction to determine whether a Bill or any provision thereof is inconsistent with the Constitution. This jurisdiction may be invoked by the President by written reference to the Chief Justice, or by any citizen addressing the Court in writing. Either application must be filed within a week of the Bill being placed on the Order paper of Parliament.

4.3 When the Court's jurisdiction has thus been invoked, no Parliamentary proceedings may be held in relation to the Bill until three weeks have elapsed or the Court has determined the matter, whichever occurs first. The Court's proceedings take place in open court, and any person claiming to be interested in the determination of the question can make an application to the Court for intervenor status. The Court communicates its determination to the President or the Speaker within three weeks of the application. In the event that the Court finds an inconsistency, a special majority of two thirds of all members of Parliament must pass the Bill, while if the Bill is in relation to articles 1 to 3 or 6 to 11, a people's referendum must also approve the Bill. The members of Parliament are aware when any Bill has been placed on the Order paper in Parliament.

4.4 The State party explains that the current Bill was presented as a Private Member's Bill. As such, it had not been examined by the Attorney-General under article 77 of the Constitution, and the Attorney-General expressed no view on it. If the authors had wished to intervene in the proceedings, they should have been vigilant to check with the Court's Registry if any application had been filed with the Registry within a week of the Bill being placed upon the Parliamentary Order paper. Had such due diligence been exercised and an intervenor application been made, there is no apparent reason why the Court would have refused the application, which would have been unprecedented. Rather than being a situation of denial of an opportunity to be heard therefore, it was a clear case of an author not taking proper steps to avail herself of the opportunity and the authors are now estopped from claiming otherwise.

4.5 As to the allegation that the Attorney-General supported the petitioner's submissions before the Supreme Court, the State party observes that when article 121 of the Constitution is invoked, the Constitution provides for the Attorney-General to be notified and to be heard. At that point, s/he is expected to consider the objections raised to the constitutionality of the item under reference and assist the Court in its determination. While the Attorney-General had not previously expressed a view on the Bill's constitutionality, the Bill being a private Bill, even if s/he had, it would be manifestly wrong and untenable to suggest s/he would be bound by that earlier determination when addressing the issue in article 121 proceedings.

4.6 As to the contention that the Supreme Court's determination itself violated the authors' Covenant rights, the State party argues that the Supreme Court is not empowered to change the Constitution but only to interpret it within the framework of its provisions. The Court considered the submissions made, took into consideration previous determinations and gave reasons for its conclusions. In any event, the authors, having failed to exercise due diligence to secure their right to be heard, are stopped from contesting the Court's determination in another forum. As a result, with respect to all three allegations, the State party argues that the authors have failed to exhaust domestic remedies.

4.7 The State party goes on to argue that the Supreme Court's determination does not prevent the authors from carrying on their previous activities in Sri Lanka. The State party argues that the Court's determinations in article 121 proceedings do not bind lower courts, and thus lower courts will not be compelled to restrict their right to engage in legitimate religious activity. Nor, for its part, does the Supreme Court's determination do so.

4.8 Moreover, the Court's determination does not prevent Parliament from passing the Bill, which, while inconsistent with articles 9 and 10 of the Constitution could still be passed by a special majority and referendum. Alternatively, the constitutionally impugned provisions of the Bill could be amended and the Bill resubmitted.

Authors' comments on the State party's submissions

5.1 By letter of 30 May 2005, the authors argue that the State party has confined itself to responding to three incidental allegations which do not form the core of the author's case. The authors argue that the issue is not whether the Court's determination prevents her from carrying on her activities, but rather whether there was a violation of Covenant rights, for the reasons detailed in the complaint. There is no remedy in domestic law against the Supreme Court's determination, which is final and thus the merits thereof are appropriately before the Committee.

5.2 As to the State party's response concerning the opportunity of being heard, the authors emphasize that only the Speaker and Attorney-general receive mandatory notice of an article 121 application, with there being no requirement to notify affected parties such as, in the present case, those involved in a Bill to incorporate a body. In some cases of Private member's Bills, the Supreme Court has adjourned the hearing and notified the concerned member of Parliament if s/he wishes to be heard.⁴ In the present case, neither the relevant member of Parliament nor the authors were notified, amounting to a violation of article 2, paragraph 1, in connection with article 26 of the Covenant.

5.3 The authors argue that if the Attorney-General could deviate, in article 121 proceedings, from constitutional advice earlier provided, the whole purpose of the earlier advice would be rendered nugatory. The ability to change such opinions at will would leave room for gross abuse and undoubtedly affect the rights of individuals, contrary to article 21, in connection with article 26 of the Covenant. The authors go on to argue that the State party's response to the Covenant challenge to the Supreme Court's determination, to the effect that the Court made determination within the applicable legal framework, is insufficient answer to her complaint.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must,

⁴ The authors cite the example of a Bill entitled "Nineteenth amendment to the Constitution" presented by a private member inter alia to make Buddhism the State's official religion as an example.

in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 With respect to the exhaustion of domestic remedies, the Committee notes the State party's argument that the authors did not exercise due diligence with respect to confirming through the Parliamentary order paper and then Supreme Court's registry whether an application under article 121 of the Constitution had been lodged, and accordingly filing a motion wishing to be heard. The Committee considers that, exceptional *ex parte* circumstances of urgency apart, when a Court hears an application directly affecting the rights of a person, elementary notions of fairness and due process contained in article 14, paragraph 1, of the Covenant require the affected party to be given notice of the proceeding, particularly when the adjudication of rights is final. In the present case, neither members of the Order nor the member of Parliament presenting the Bill were notified of the pending proceeding. Given not least that in previous proceedings the Court, on the information before the Committee, had notified members of Parliament in such proceedings, the authors thus cannot be faulted for failing to introduce an intervenor's motion before the Court. The Committee observes that there may in any event be issues as to the effectiveness of this remedy, given the requirement that complex constitutional questions, including relevant oral argument, be resolved within three weeks of a challenge being filed, the challenge itself coming within a week of a Bill's publication in the Order paper. It follows that the communication is not inadmissible for failure to exhaust domestic remedies.

6.3 As to the claim that the authors' rights under articles 2 and 26 of the Covenant were violated by the Attorney-General contesting the constitutionality of the Bill before the Court in circumstances where s/he had previously expressed no view of constitutional infirmity, the State party has explained without rebuttal that the Attorney-General's duty to pass on the constitutionality of Bills at the initial stage does not apply to Private member's Bills such as the present. Accordingly, the Attorney-General's views expressed in the article 121 proceedings were his or her first formal views on the matter and were not precluded by a previously taken view. As a result, the Committee considers that this claim is insufficiently substantiated, for purposes of admissibility, and is accordingly inadmissible under article 2 of the Optional Protocol.

6.4 In the absence of any other objections to the admissibility of the communication, and recalling in particular that the Covenant guarantees in articles 18 and 27 freedom of religion exercised in community with others, the Committee considers the remaining

claims as pleaded to be sufficiently substantiated, for purposes of admissibility, and proceeds to their consideration on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 As to the claim under article 18, the Committee observes that, for numerous religions, including according to the authors, their own, it is a central tenet to spread knowledge, to propagate their beliefs to others and to provide assistance to others. These aspects are part of an individual's manifestation of religion and free expression, and are thus protected by article 18, paragraph 1, to the extent not appropriately restricted by measures consistent with paragraph 3.⁵ The authors have advanced, and the State party has not refuted, that incorporation of the Order would better enable them to realize the objects of their Order, religious as well as secular, including for example the construction of places of worship. Indeed, this was the purpose of the Bill and is reflected in its objects clause. It follows that the Supreme Court's determination of the Bill's unconstitutionality restricted the authors' rights to freedom of religious practice and to freedom of expression, requiring limits to be justified, under paragraph 3 of the respective articles, by law and necessary for the protection of the rights and freedoms of others or for the protection of public safety, order, health or morals. While the Court's determination was undoubtedly a restriction imposed by law, it remains to be determined whether the restriction was necessary for one of the enumerated purposes. The Committee recalls that permissible restrictions on Covenant rights, being exceptions to the exercise of the right in question, must be interpreted narrowly and with careful scrutiny of the reasons advanced by way of justification.

7.3 In the present case, the State party has not sought to justify the infringement of rights other than by reliance on the reasons set out in the decision of the Supreme Court itself. The decision considered that the Order's activities would, through the provision of material and other benefits to vulnerable people, coercively or otherwise improperly

⁵ See *Malakhovsky et al. v. Belarus*, case No. 1207/2003, Views adopted on 26 July 2005, and article 6 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, General Assembly resolution 36/55 of 25 November 1981, which provides: "... the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms: ... (b) the right to establish and maintain appropriate charitable or humanitarian institutions".

propagate religion. The decision failed to provide any evidentiary or factual foundation for this assessment, or reconcile this assessment with the analogous benefits and services provided by other religious bodies that had been incorporated. Similarly, the decision provided no justification for the conclusion that the Bill, including through the spreading knowledge of a religion, would "impair the very existence of Buddhism or the *Buddha Sasana*". The Committee notes moreover that the international case law cited by the decision does not support its conclusions. In one case, criminal proceedings brought against a private party for proselytization was found in breach of religious freedoms. In the other case, criminal proceedings were found permissible against military officers, as representatives of the State, who had proselytized certain subordinates, but not for proselytizing private persons outside the military forces. In the Committee's view, the grounds advanced in the present case therefore were insufficient to demonstrate, from the perspective of the Covenant, that the restrictions in question were necessary for one or more of the enumerated purposes. It follows that there has been a breach of article 18, paragraph 1, of the Covenant.

7.4 As to the claim under article 26, the Committee refers to its long standing jurisprudence that there must be a reasonable and objective distinction to avoid a finding of discrimination, particularly on the enumerated grounds in article 26 which include religious belief. In the present case, the authors have supplied an extensive list of other religious bodies which have been provided incorporated status, with objects of the same kind as the authors' Order. The State party has provided no reasons why the authors' Order is differently situated, or otherwise why reasonable and objective grounds exist for distinguishing their claim. As the Committee has held in *Waldman v. Canada*,⁶ therefore, such a differential treatment in the conferral of a benefit by the State must be provided without discrimination on the basis of religious belief. The failure to do so in the present case thus amounts to a violation of the right in article 26 to be free from discrimination on the basis of religious belief.

7.5 As to the remaining claim that the Supreme Court determined the application adversely to the authors' Order without either notification of the proceeding or offering an opportunity to be heard, the Committee refers to its considerations in the context of admissibility set out in paragraph 6.2. As the Committee observed in *Kavanagh v. Ireland*,⁷ the notion of equality before the law requires similarly situated individuals to be afforded the same

⁶ Op. cit.

⁷ Case No. 819/1998, Views adopted on 4 April 2001.

process before the courts, unless objective and reasonable grounds are supplied to justify the differentiation. In the present case, the State party has not advanced justification for why, in other cases, proceedings were notified to affected parties, whilst in this case they were not. It follows that the Committee finds a violation of the first sentence of article 26, which guarantees equality before the law.

7.6 In the Committee's view, the claims under articles 19 and 27 do not add to the issues addressed above and do need to be separately considered.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Sri Lanka of articles 18, paragraph 1, and 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 authors with an effective remedy giving full recognition to their rights under the Covenant. The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee expects to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

Communication No. 1296/2004

Submitted by: Aleksander Belyatsky et al. (not represented by counsel)

Alleged victims: The authors

State party: Belarus

Date of adoption of Views: 24 July 2007

Subject matter: Dissolution of human rights association by a court order of the State party's authorities.

Substantive issues: Equality before the law; prohibited discrimination; right to freedom of association; permissible restrictions; right to have one's rights and obligations in suit at law determined by a competent, independent and impartial tribunal.

Procedural issue: Lack of substantiation of claims.

Articles of the Covenant: 14, para. 1; 22, paras. 1 and 2; and 26

Article of the Optional Protocol: 2

Finding: Violation (art. 22, para. 1)

1. The author of the communication is Aleksander Belyatsky, a Belarusian citizen born in 1962, residing in Minsk, Belarus. The communication is presented in his own name and on behalf of 10 other Belarusian citizens, all members

of the non-governmental public association "Human Rights Centre 'Viasna'" (hereinafter, "Viasna"), residing in Belarus. He submits the signed authorization of all 10 co-authors. He author alleges that all are victims of violations by Belarus¹ of article 14, paragraph 1; article 22, paragraphs 1 and 2; and article 26 of the International Covenant on Civil and Political Rights. He is not represented.

The facts as presented by the author

2.1 The author is Chairperson of "Viasna"'s Council, a non-governmental association registered by the Ministry of Justice on 15 June 1999. By October 2003, it had more than 150 members in Belarus, 4 regional and 2 city registered branches. Its activities included monitoring the human rights situation in Belarus, and preparing alternative human rights reports on Belarus, which have been used and referred to by UN treaty bodies. "Viasna" monitored the Presidential elections of 2001, arranging for

¹ The Covenant and the Optional Protocol thereto entered into force for Belarus on 23 March 1976 and 30 December 1992 respectively.

some 2000 people to observe the voting process, as well as the 2003 municipal council elections. It also organized protests and pickets in relation to various human rights issues. “Viasna” was frequently subjected to the persecution by the authorities, including administrative detention of its members and thorough scheduled and spontaneous inspections of its premises and activities by the Ministry of Justice and tax authorities.

2.2 In 2003, the Ministry of Justice undertook an inspection of the statutory activities of “Viasna”’s branches and, on 2 September 2003, filed a suit in the Supreme Court of Belarus, requesting the dissolution of “Viasna”, because of several alleged offences committed by it. The suit was based on article 29, of the Law “On Public Associations” and article 57, paragraph 2, subparagraph 2, of the Civil Procedure Code.² “Viasna” was accused of the following: having submitted documents with forged founding member signatures in support of its application for registration in 1999; the Mogilev branch of “Viasna” having only 8, rather than the required 10 founding members at the time of registration; non-payment of membership fees envisaged by “Viasna”’s statutes and non-establishment of a Minsk branch; acting in the capacity of a public defender of the rights and freedoms of citizens who are not members of “Viasna” in the Supreme Court, contrary to article 72 of the Civil Procedure Code,³ article 22 of the

² Article 29 of the Law “On Public Associations” stipulates that an association can be dissolved by court order when: (1) it undertakes activities enumerated in article 3 [activities aimed at overthrowing or forceful change of the constitutional order; violation of the State’s integrity or security; propaganda of war, violence; incitation of national, religious and racial hatred, as well as activities that can negatively affect the citizens’ health and morals]; (2) it again undertakes, within a year, activities for which it had already received a written warning; and (3) the founding members committed offences of the present and other laws while at during the registration of the public association. Public association can be dissolved by court order for a single violation of the law on public actions in cases explicitly defined by the Belarus law. Article 57, paragraph 2, of the Civil Procedure Code envisages a procedure for dissolution of legal entity by court order when this entity is engaged in unlicensed activities or the activities prohibited by law or when it has repeatedly committed gross breaches of the law.

³ Article 72 of the Civil Procedure Code reads:

“A legally capable person that has duly legalized authority to conduct a case in court, except for those persons listed in article 73 of the same Code, can be a representative in court.

The following [persons] can be representatives in court:

- 1) attorneys at law;
- 2) staff members of legal entities – in cases involving these entities;

Law “On Public Association”⁴ and its own statutes; and offences against electoral laws allegedly carried out during its monitoring of the 2001 Presidential elections.⁵

2.3 On 10 September 2003, the Supreme Court opened a civil case against “Viasna” on the basis of the Ministry of Justice’s suit. On 28 October 2003, in a public hearing, a Supreme Court judge upheld the charges of breaching electoral laws but dismissed the other charges and ordered the dissolution of “Viasna”. With regard to the breaches of electoral law, the Supreme Court established that ‘Viasna’ did not comply with the established procedure of sending its observers to the meetings of the electoral commission and to the polling stations. The relevant paragraphs of the Supreme Court decision of 28 October 2003 read:

‘Namely, the association was sending empty forms of excerpts from the minutes of Rada’s meetings of 18 June, 1 and 22 July, 5 August 2001, to the Mogilev and Brest regions. Subsequently, these forms were arbitrarily filled in with the names of citizens with regard to whom no decisions on sending them as observers had been taken; and who were not the members of this association.

In Postav district, one of the association’s members offered pay to the citizens, who were neither “Viasna”’s nor the other public associations’ members, to be observers at the polling stations, and have been filling in in their presence the excerpts from the minutes of Rada’s meetings.

Similar breaches of the law in sending the public association’s observers occurred at the polling

3) authorized representatives of public associations (organizations) who are entitled by law to represent and defend in court the rights and legitimate interests of the members of these public associations (organizations) and of other persons;

4) authorized representatives of organizations who are entitled by law to represent and defend in court the rights and legitimate interests of the members of other persons;

5) legal representatives;

6) close relatives, spouses;

7) representatives appointed by court;

8) one of the procedural co-participants mandated by the latter.”

⁴ Article 22, paragraph 2, of the Law “On Public Associations” reads: ‘Public associations shall have a right to represent and defend the rights and legitimate interests of its members (participants) in the government, commercial and public bodies and agencies.’

⁵ Reference is made to the ruling of the Central Electoral Commission on Elections and Conduct of Republican Referendums of 8 September 2001.

stations Nos. 30 and 46 of the Novogrudok district.’

The court found that the breach of the electoral laws was ‘gross’ enough to trigger the application of article 57, paragraph 2, of the Civil Procedure Code.⁶ The court’s conclusion was corroborated by the written warning issued to “Viasna”’s governing body by the Ministry of Justice on 28 August 2001 and on the ruling of the Central Electoral Commission on Elections and Conduct of Republican Referendums (hereinafter, CEC) of 8 September 2001. The latter ruling was based on the inspections conducted by the Ministry of Justice and the Belarus Prosecutor’s Office.

2.4 The Supreme Court’s decision became executory immediately after its adoption. Under Belarus law, the Supreme Court’s decision is final and cannot be appealed on cassation. The Supreme Court decision can be appealed only through a supervisory review procedure and can be repealed by the Chairperson of the Supreme Court or the General Prosecutor of Belarus. The appeal of “Viasna”’s representatives to the Chairperson of the Supreme Court for a supervisory review of the Supreme Court’s decision of 28 October 2003 was rejected on 24 December 2003. There are no other available domestic remedies to challenge the decision to dissolve “Viasna”; domestic law outlaws the operation of unregistered associations in Belarus.

The complaint

3.1 The author submits that the decision to dissolve “Viasna” amounts to a violation of his and the co-authors’ right under article 22, paragraph 1, of the Covenant. He contends that contrary to article 22, paragraph 2, the restrictions placed on the exercise of this right by the State party do not meet the criteria of necessity to protect the interests of national security or public safety, order, health, or morals, nor the rights and freedoms of others.

3.2 The author claims that he and the other co-authors were denied the right to equality before the courts and to the determination of their rights and obligations in a suit at law (art. 14, para. 1, of the Covenant).

3.3 The author alleges that the State party’s authorities violated his and his co-authors’ right to equal protection of the law against discrimination (art. 26), on the ground of their political opinion.

3.4 The author further challenges the applicability of article 57, paragraph 2, of the Civil Procedure Code (paragraph 2.3 above) to the dissolution of “Viasna”. Under article 117, paragraph 3, of the Civil Procedure Code, the legal regime applicable to public associations in their capacity as participants in

civil relations, is subject to a *lex specialis*. Therefore, the scope of the ‘repeated commission of gross breaches of the law’ for which an association can be dissolved by court order under article 57 of the Civil Procedure Code, should be defined on the basis of this *lex specialis*. Under the Law “On Public Associations”, an association can be dissolved by court order if it undertakes again, within a year, activities for which it had already received a written warning. Under this Law and other relevant *lex specialis*, the list of the ‘repeated commission of gross breaches of the law’ is defined as follows: (1) activities aimed at overthrowing or forceful change of the constitutional order; violation of the State’s integrity or security; propaganda of war, violence; incitation of national, religious and racial hatred, as well as activities that can negatively affect the citizens’ health and morals; (2) a single violation of the law on public actions in cases explicitly defined by the Belarus law; (3) violation of the requirements of paragraph 4, parts 1–3, of Presidential Decree “On the Receipt and Use of Free Aid” of 28 November 2003. For the author, “Viasna”’s activities do not fall under any of the above categories. Moreover, by relying on the written warning of 28 August 2001 and on the CEC ruling of 8 September 2001 in its decision of 28 October 2003 to dissolve “Viasna”, the Supreme Court effectively penalized it twice for identical actions: the first time by the Ministry of Justice’s warning and the second time by the Supreme Court’s decision on the dissolution. The author concludes that the decision to dissolve “Viasna” was illegal and politically motivated.

State party’s observations on admissibility and merits

4.1 On 5 January 2005, the State party recalls the chronology of the case. It specifies that the decision to dissolve “Viasna” is based on article 57, paragraph 2, of the Civil Procedure Code. It further challenges the author’s claim that “Viasna” was penalized twice for identical actions and submits that the Ministry of Justice’s written warning of 28 August 2001 was issued in response to “Viasna”’s violation of record keeping and not because of the violation of electoral laws. For the State party, the forgery of member signatures and the violation of “Viasna”’s statutes were discovered during the association’s re-registration.

4.2 The State party further adds that the author’s claim under article 14, paragraph 1, of the Covenant is unsupported by the casefile of “Viasna”’s civil case. The case was examined in public hearing, at the request of “Viasna”’s representative it was conducted in the Belarusian language and the hearing was audio and video recorded. The hearing complied with the ‘equality of arms’ principle guaranteed by article 19 of the Civil Procedure

⁶ *Supra* note 2.

Code, which is illustrated by the fact that the Supreme Court did not uphold all charges identified in the Ministry of Justice's suit. For the State party, the decision to dissolve "Viasna" was adopted on the basis of a thorough and full analysis of the evidence presented by both parties, and the decision complied with the legal procedure of Belarus then in place.

Author's comments on the State party's observations

5.1 On 19 January 2005, the author submits that the Supreme Court and the State party's reference to article 57, paragraph 2, of the Civil Procedure Code is contrary to the provisions of article 117, paragraph 3, of the same Code (see para. 3.4 above). In the absence of what is referred to by the 'repeated commission of gross breaches of the law' in article 57 of the Civil Procedure Code, the court has wide discretion to determine this matter in the circumstances of each case. In "Viasna"'s case, the Supreme Court decided that the violation of the electoral laws allegedly carried out during its monitoring of the 2001 Presidential elections, was sufficiently 'gross' to warrant "Viasna"'s dissolution two years later. The author reiterates that this decision was politically motivated and is directly linked to "Viasna"'s public and human rights related activities.⁷

5.2 The author rejects the State party's argument that the Ministry of Justice's written warning of 28 August 2001 was issued purely in response to "Viasna"'s violation of record keeping and not because of the violation of electoral laws. He refers to the CEC ruling of 8 September 2001, which explicitly stated that the officers of the Ministry of Justice and of the Prosecutor's Office of Belarus inspected "Viasna"'s compliance with the law on sending the observers. The Ministry of Justice's written warning of 28 August 2001 was subsequently used as a basis for the CEC ruling of 8 September 2001. In turn, the Supreme Court's decision of 28 October 2003 to dissolve "Viasna" was based on the same facts as the Ministry of Justice's written warning of 28 August 2001.

5.3 The author refutes the State party's claim that the forgery of member signatures was discovered during the association's re-registration. As a public association registered on 15 June 1999, "Viasna" did not have to undergo a re-registration procedure. In its decision of 28 October 2003, the Supreme Court explicitly stated that it did not receive any evidence in support of the Ministry of Justice's claims that there had been any forged member signatures in "Viasna"'s 1999 application for registration. The

author adds that the Supreme Court did not uphold any of the other charges presented in the Ministry of Justice's suit, except for those related to the violation of article 57, paragraph 2, of the Civil Procedure Code.

5.4 On 5 October 2006, the author adds that since "Viasna"'s dissolution, the State party has introduced new legal provisions detrimental to the exercise of the rights to freedom of expression, peaceful assembly and association and representing a very serious risk for the existence of an independent civil society in Belarus. Among them are amendments to the Criminal Code of Belarus signed by the President on 13 December 2005 and in force since 20 December 2005, which introduced criminal sanctions for activities carried out by a suspended or dissolved association or foundation. The new article 193-1 of the Criminal Code stipulates that anyone who organizes activities in the framework of a suspended, dissolved or unregistered association may face a fine, arrest for up to six months or be subjected to a sentence "restricting his freedom" of up to two years. In 2006, four members of the non-governmental association "Partnership" were sentenced to different terms of imprisonment under article 193-1. He requests the Committee to examine his claim under article 22, paragraph 1, of the Covenant in the light of this new legislation which criminalizes the operation of unregistered associations in Belarus.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee has ascertained, as required under article 5, paragraph 2, of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement and notes that the State party did not contest that domestic remedies in the present communication have been exhausted.

6.3 In relation to the alleged violation of article 14, paragraph 1, and article 26 of the Covenant, in that the author was denied the right to equality before the courts, to the determination of his rights by a competent, independent and impartial tribunal, and to equal protection of the law against discrimination, the Committee considers that these claims have been insufficiently substantiated, for purposes of admissibility. They are thus inadmissible under article 2 of the Optional Protocol.

⁷ The author refers to the report of the FIDH/OMCT International Judicial Observation Mission "Belarus: The «liquidation» of the independent civil society", April 2004, pp. 12-16, in support of his claims.

6.4 The Committee considers the author's remaining claim under article 22 to be sufficiently substantiated and accordingly declares it admissible.

Consideration of the merits

7.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol.

7.2 The issue before the Committee is whether the dissolution of "Viasna" amounts to a violation of the author and his co-authors' right to freedom of association. The Committee notes that according to the author's uncontested information, "Viasna" was registered by the Ministry of Justice on 15 June 1999 and dissolved by order of the Supreme Court of Belarus on 28 October 2003. It recalls that domestic law outlaws the operation of unregistered associations in Belarus and criminalizes the activity of individual members of such associations. In this regard, the Committee observes that the right to freedom of association relates not only to the right to form an association but also guarantees the right of such an association freely to carry out its statutory activities. The protection afforded by article 22 extends to all activities of an association, and dissolution of an association must satisfy the requirements of paragraph 2 of that provision.⁸ Given the serious consequences which arise for the author, the co-authors and their association in the present case, the Committee concludes that the dissolution of "Viasna" amounts to an interference with the author's and his co-authors' freedom of association.

7.3 The Committee observes that, in accordance with article 22, paragraph 2, in order for the interference with freedom of association to be justified, any restriction on this right must cumulatively meet the following conditions: (a) it must be provided by law; (b) may only be imposed for one of the purposes set out in paragraph 2; and (c) must be "necessary in a democratic society" for achieving one of these purposes. The reference to the notion of "democratic society" indicates, in the Committee's opinion, that the existence and operation of associations, including those which peacefully promote ideas not necessarily favourably received by the Government or the majority of the population, is a cornerstone of a democratic society.⁹ The mere existence of reasonable and objective justifications for limiting the right to freedom of association is not sufficient. The State party must further demonstrate that the prohibition of an association is necessary to avert a real and not only

hypothetical danger to national security or democratic order, and that less intrusive measures would be insufficient to achieve the same purpose.¹⁰

7.4 In the present case, the court order which dissolved "Viasna" is based on perceived violations of the State party's electoral laws carried out during the association's monitoring of the 2001 Presidential elections. This de facto restriction on the freedom of association must be assessed in the light of the consequences which arise for the author, the co-authors and the association.

7.5 The Committee notes that the author and the State party disagree over the interpretation of article 57, paragraph 2, of the Civil Procedure Code, and its compatibility with the *lex specialis* governing the legal regime applicable to public associations in Belarus. It considers that even if "Viasna"'s perceived violations of electoral laws were to fall in the category of the 'repeated commission of gross breaches of the law', the State party has not advanced a plausible argument as to whether the grounds on which "Viasna" was dissolved were compatible with any of the criteria listed in article 22, paragraph 2, of the Covenant. As stated by the Supreme Court, the violations of electoral laws consisted of "Viasna"'s non-compliance with the established procedure of sending its observers to the meetings of the electoral commission and to the polling stations; and offering to pay third persons, not being members of "Viasna", for their services as observers (see para. 2.3 above). Taking into account the severe consequences of the dissolution of "Viasna" for the exercise of the author's and his co-authors' right to freedom of association, as well as the unlawfulness of the operation of unregistered associations in Belarus, the Committee concludes that the dissolution of the association is disproportionate and does not meet the requirements of article 22, paragraph 2. The authors' rights under article 22, paragraph 1, have thus been violated.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses a violation by the State party of article 22, paragraph 1, of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author and the co-authors are entitled to an appropriate remedy, including the re-registration "Viasna" and compensation. It is also under an obligation to take steps to prevent similar violations occurring in the future.

⁸ *Korneenko et al. v. Belarus*, communication No. 1274/2004, Views adopted on 31 October 2006, para. 7.2.

⁹ *Ibid.*, para. 7.3.

¹⁰ *Jeong-Eun Lee v. Republic of Korea*, communication No. 1119/2002, Views adopted on 20 July 2005, para. 7.2.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant

and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the Committee's Views.

Communication No. 1297/2004

Submitted by: Ali Medjnoune (represented by counsel, Rachid Mesli)

Alleged victim: Malik Medjnoune (the author's son)

State party: Algeria

Date of adoption of Views: 14 July 2006

Subject matter: Apprehension and continued captivity, incommunicado detention, detention without trial

Procedural issues: -

Substantive issues: Prohibition of torture and cruel, inhuman and degrading treatment; right to liberty and security of the person; arbitrary arrest and detention; respect for the inherent dignity of the human person; right to a fair trial; right to be promptly informed of the charges; right to be tried within a reasonable time

Articles of the Covenant: 7; 9, paras. 1, 2 and 3; 10, para. 1; 14, paras. 3 (a), (c) and (e)

Articles of the Optional Protocol: -

Finding: Violation (arts. 7; 9, paras. 1, 2 and 3; and 14, paras. 3 (a) and (c))

1. The author of the communication, dated 11 June 2004, is Mr. Ali Medjnoune, who submits the communication on behalf of his son Malik Medjnoune, born on 15 February 1974, who is an Algerian national currently detained in the civil prison at Tizi-Ouzou, Algeria. The author states that his son is a victim of violations by Algeria of articles 7; 9, paragraphs 1, 2 and 3; 10, paragraph 1; and 14, paragraphs 3 (a), (c) and (e), of the International Covenant on Civil and Political Rights. He is represented by counsel, Rachid Mesli. The Covenant and its Optional Protocol entered into force for the State party on 12 December 1989.

Facts as presented by the author

2.1 The author states that his son was abducted at 8.30 a.m. on 28 September 1999, on the public highway some 200 metres from his home, by three armed individuals in plain clothes (members of the

Intelligence and Security Department (DRS)) in a white Renault car.¹ They threatened him with their guns, fired a shot and forced him into the car in front of witnesses. He was first taken to a military barracks in the centre of Tizi-Ouzou, where he was beaten, and was then put in the boot of a car and taken to another barracks some 100 kilometres away, the "Antar" Centre in Ben-Aknoun (Algiers), a DRS facility. He was handed over to a Captain Z. and a colleague and tortured for two days by the Algerian security services: he was beaten all over his body with a pickaxe handle; subjected to the *chiffon* torture, whereby a rag is stuffed into the victim's mouth and their stomach filled with dirty water to cause a sensation of suffocation and drowning; tortured with electric shocks all over his body; etc.² He was also questioned about his time in prison (three years between 1993 and 1996) and the people he met there, and about whether he had kept in touch with them (particularly a person who had fled abroad), and whether he himself intended to go abroad.

2.2 The author states that he lodged a complaint concerning his son's disappearance with the prosecutor in Tizi-Ouzou on 2 October 1999. The complaint was registered as case No. 99/PG/3906. The prosecutor met the author on 15 October and 8 November 1999 and told him that he knew nothing of the abduction. Yet he did not order an investigation as required by law for an offence of that gravity. The son states that he was brought before the prosecutor on 4 March 2000, at the same

¹ Counsel has provided a written statement made by Malik Medjnoune on the occasion of a visit by counsel to his place of detention in May 2000.

² Counsel also refers to NGO reports describing the methods of torture commonly used by the Algerian secret police, and to the annual reports of the Special Rapporteur on the question of torture.

time as another person (C.H.).³ He appeared before the same prosecutor a second time on 6 March 2000, again with that person, after which he was taken back to the DRS facility at Ben-Aknoun, where he was held for nearly two months by order of the prosecutor who had received the complaint of disappearance on 2 October 1999. Under Algerian law this constitutes an offence, and complicity in an offence, of abduction and false arrest under the Criminal Code, articles 292, 293 and 293 bis.⁴ Throughout this period, the son was held incommunicado in particularly inhumane conditions, for a full 218 days up to 2 May 2000, when he appeared before the examining magistrate of the Tizi-Ouzou court. The author points out that the legal duration of police custody under Algeria's Code of Criminal Procedure is a maximum of 12 days.⁵ The author states that, on 2 May 2000, the examining magistrate charged his son with being an accessory to the murder of the Kabyle singer Matoub Lounès and with membership of an armed group, and that his son was placed in pretrial detention.

2.3 As regards domestic remedies, the author points out that he lodged a complaint in respect of his son's incommunicado detention, but that the prosecuting service, the only body with the power to take action, failed to do so. As to his son's detention

³ According to Malik Medjnoune's statement, he was taken in February 2000 to a hospital near Blida, where he met this person. He spent a month there, until his first appearance before the prosecutor.

⁴ Art. 292: "If the arrest or kidnapping is carried out by persons wearing or appearing to wear official uniform or insignia, as specified in article 246 of the Criminal Code, or persons assuming a false identity or using a bogus official order, the penalty shall be life imprisonment. The same penalty shall apply if the arrest or kidnapping is carried out using a motor vehicle or if the victim's life is threatened."

Art. 293: "If the victim of the kidnapping, arrest, detention or false imprisonment is physically tortured, the offenders shall be liable to the death penalty."

Art. 293 bis: "Any person who, using violence, threats or fraud, kidnaps another person or causes another person to be kidnapped, regardless of age, shall be sentenced to between 10 and 20 years' imprisonment. If the victim is physically tortured, the offender shall be liable to the death penalty. Similarly, if the purpose of the kidnapping was to secure payment of a ransom, the offender shall be liable to the death penalty."

⁵ Act No. 90-24 of 18 August 1990, art. 51: "If, for the purposes of the inquiry, the investigating officer is obliged to detain one or more of the persons referred to in article 50, he or she shall immediately inform the public prosecutor; police custody shall not exceed 48 hours.

Without prejudice to the confidentiality of the inquiry, the investigating officer shall allow the person in custody to make immediate and direct contact with their family by any means and receive visitors. [...] (Order No. 95-10 of 25 February 1995) All time limits set in this article shall be doubled in cases relating to attacks on State security. They may be extended to a maximum of 12 days in cases relating to offences constituting terrorist or subversive acts."

without trial since 2 May 2000 in the civil prison at Tizi-Ouzou, Algerian law provides that detention without trial may not exceed 16 months (four periods of four months each).⁶ After two extensions, this four-month period may, exceptionally, be extended by the indictments division for a further, non-renewable, four-month period.⁷ At the end of that time, the accused must be brought before the trial court at its next sitting.⁸ In the matter in question, since the investigation was completed in April 2001, the case should have been referred to the June 2001 sitting but was not. The author's son therefore wrote to the indictments division asking for provisional release under article 128 of the Code of Criminal Procedure,⁹ but his application was rejected by the indictments division of the Tizi-Ouzou court on 6 August 2001.¹⁰ The son applied several more times, to no avail, the last application having been denied on 28 December 2003.¹¹ All domestic remedies have thus been exhausted.

2.4 The author states that the case was submitted to Amnesty International on 9 December 1999 and to the United Nations Working Group on Enforced or Involuntary Disappearances in April 2000.

The complaint

3.1 The author claims that Malik Medjnoune is the victim of a violation of articles 7; 9, paragraphs 1, 2 and 3; 10, paragraph 1; and 14, paragraphs 3 (a), (c) and (e), of the International Covenant on Civil and Political Rights. His most basic rights have been violated, and in particular his right to liberty, to be informed at the time of arrest, to be brought promptly before a judge or other officer authorized

⁶ Act No. 86-05 of 4 March 1986, art. 125: "In other cases than those referred to in article 124, pretrial detention may not exceed four months; if an extension is required, detention may be extended by the examining magistrate, by reasoned order and in accordance with the procedural provisions set forth in a similarly reasoned request from the prosecutor:

- Once where the maximum penalty provided by law is more than three years' imprisonment;
- Twice in criminal cases.

No extension granted shall exceed a period of four months."

⁷ Act No. 86-05 of 4 March 1986, art. 125 bis: "Where the indictments division decides to extend pretrial detention, such extension may not exceed four months and is not renewable."

⁸ Act No. 86-05 of 4 March 1986, art. 279: "Any case that is ready for trial shall be brought before the court at its next sitting."

⁹ Act No. 82-03 of 13 February 1982, art. 128: "Where a trial court is seized of a case, it is for the court to rule on provisional release; ... prior to committal to the criminal court, and between sittings of the criminal court, such decision rests with the indictments division."

¹⁰ A copy of the notification of the decision can be found in the file, in Arabic with a translation into French.

¹¹ A copy of the notification of the decision can be found in the file, in Arabic with a translation into French.

by law to exercise judicial power, to challenge the legality of his detention, to be tried within a reasonable time and, lastly, to be treated with humanity while in detention and not subjected to torture.

3.2 With regard to the allegations under article 7, counsel states that there can be no question that Mr. Medjnoune was abducted by the Algerian security services on 28 September 1999, held incommunicado and tortured. He states that incommunicado detention in an unrecognized place of detention, without the slightest contact with the outside world and for a prolonged period, is considered to be an act of torture in itself, and that the cruel and inhuman treatment to which the son was subjected constitutes a violation of articles 7 and 10 of the Covenant.

3.3 Under article 9, counsel points out that the abduction of Malik Medjnoune and his detention for nearly eight months are not in accordance with domestic regulations, either as to substance or as to procedure, and constitute a violation of article 9, paragraph 1. Moreover, in violation of article 9, paragraph 2, the son was not informed of the facts or reasons behind his abduction or of the charges against him until he was brought before the examining magistrate eight months later. As to the alleged violation of article 9, paragraph 3, the son was not brought promptly before a judge¹² and was detained arbitrarily. The prosecutor refused to bring Mr. Medjnoune before an examining magistrate, instead sending him back to the security services. Furthermore, the son's continuing detention more than four years after his appearance before the examining magistrate on 2 May 2000 constitutes a violation of article 9, paragraph 3, of the Covenant. Lastly, counsel points out that Mr. Medjnoune was held incommunicado in utterly inhuman conditions for nearly eight months, during which time he suffered torture and brutality of the worst kind.

¹² Counsel claims that Algerian law does not comply with international standards and cites the Committee's comments to the effect that "delays must not exceed a few days" (general comment No. 8, para. 2); in counsel's view, the lapse of a week between arrest and appearance before a judge is not compatible with article 9, paragraph 3, of the Covenant (communication No. 702/1996, *McLawrence v. Jamaica*, Views adopted on 18 July 1997). Counsel also cites communication No. 44/1979, *Pietravoia v. Uruguay*, Views of 27 March 1981, involving a violation of the same article in respect of a person detained incommunicado for four to six months and then tried by a military court after eight months. Lastly, counsel notes that article 51 of the Algerian Code of Criminal Procedure (Act No. 90-24 of 18 August 1990, as amended by order No. 95-10 of 25 February 1995), which authorizes the security services to detain persons suspected of terrorist offences for 12 days incommunicado are contrary to the letter of the Covenant and the Committee's case law.

State party's submission on the admissibility and merits of the communication

4.1 By note verbale of 28 December 2004, the State party explains that, in the case of the murder of Matoub Lounès, a judicial investigation against a person or persons unknown on 30 June 1998 was opened by the examining magistrate in Tizi-Ouzou. After inquiries lasting several months, and partly on the basis of information provided by a former terrorist turned State's evidence, a number of people were arrested and brought before the courts, including Malik Medjnoune, who was charged with murder and membership of a terrorist organization. On completion of the judicial investigation, the examining magistrate, on 2 December 2000, ordered the file to be sent to the public prosecutor, who requested the referral of Malik Medjnoune and the co-perpetrators to the indictments division of the Tizi-Ouzou court. On 10 December 2000, the indictments division issued an order committing the accused for trial in the criminal court of Tizi-Ouzou on charges of membership of a terrorist organization and murder, which constitute offences under the Criminal Code, articles 87 bis and 255 ff. The accused applied to the Supreme Court for a judicial review of the order, but their application was denied on 10 April 2001. Hearings were then set for 5 May 2001 in the Tizi-Ouzou court, but adjourned because events in the region made it impossible to try the case in the conditions of calm required for proceedings of this nature. The case should very shortly be scheduled for trial in the Tizi-Ouzou criminal court, in accordance with the law.

4.2 With regard to the allegations of beatings and arbitrary detention in the course of police custody, the State party asserts that there is nothing in the complaint or in the supporting documentation to substantiate such allegations and they should therefore be rejected. As to the alleged violation of the provisions governing Malik Medjnoune's detention, articles 125 ff. of the Code of Criminal Procedure relate to provisional detention during the judicial investigation stage and not during the subsequent stage. Malik Medjnoune moved beyond that stage with the issuance of the 10 December 2000 order committing him for trial in the criminal court. The criminal court decided to adjourn the proceedings under article 278 of the Code of Criminal Procedure, which states that "the President of the Criminal Court may, either *proprio motu* or at the request of the Public Prosecutor's Office, adjourn to a later sitting any case that is not in his view ready to be tried at the sitting for which it has been scheduled". The complaint should therefore be rejected as groundless.

Author's comments on the State party's observations

5.1 On 31 January 2005, counsel for the author notes in the first place that the State party does not contest the admissibility of the communication, which should therefore be declared admissible as to the form since all domestic remedies have been exhausted and the State party has nothing to say on the matter. On the merits, counsel maintains that the State party's arguments to the effect that the arbitrary detention and beatings have not been substantiated do not warrant serious consideration, since the State party does not contest the abduction, the duration and place of incommunicado detention, the complaint lodged by the author or the communication received by the Working Group on Enforced or Involuntary Disappearances. There can thus be no reasonable doubt that Malik Medjnoune underwent torture and beatings while in incommunicado detention, this being a practice that is widespread in the State party and regularly reported by the Special Rapporteur and by human rights NGOs. Lastly, counsel argues that 218 days' incommunicado detention without the slightest contact with the outside world constitutes an act of torture in itself.

5.2 As to Malik Medjnoune's ongoing detention, counsel points out that the State party acknowledges that the investigation into the case ended on 2 December 2000 and that the trial date was set for 5 May 2001, yet claims that Mr. Medjnoune has not been in provisional detention since 10 December 2000. His continuing detention is said to be in accordance with article 278 of the Code of Criminal Procedure, a provision which, if so interpreted, would allow the Public Prosecutor's Office, where the investigation stage is complete but no trial date has yet been set, to continue to detain any person indefinitely on any grounds it pleased. Such an interpretation, counsel argues, would give rise to a clear violation of the right to liberty of the person under article 9, paragraph 1, of the Covenant. While it is also true that, under article 279 of the Code of Criminal Procedure, "any case that is ready to be tried shall be submitted to the court at its next sitting", judicial practice in Algeria is such that only the Public Prosecutor's Office has the discretion to schedule a case for a given sitting of the criminal court. In counsel's view, the State party should be required to bring its legislation into line with the Covenant, *inter alia* by establishing a legal maximum limit for detention between the date of committal for trial by the indictments division and the date of the trial itself. It seems clear that the delay in bringing the author's son to trial cannot be considered a reasonable time.

5.3 On 1 and 3 February 2006, counsel for the author provided a copy of the latest ruling of the Tizi-Ouzou indictments division, handed down on

19 September 2005 and again denying Malik Medjnoune provisional release after more than six years' pretrial detention. The ruling is based on the Code of Criminal Procedure, article 123.¹³ According to the indictments division, detention in this instance "is still necessary and his release would jeopardize the establishment of the truth", even though the investigation ended more than five years ago with an order committing the accused for trial in the Tizi-Ouzou criminal court, issued by that selfsame division on 10 December 2000. Yet the indictments division is reluctant to ask the prosecutor's office to set a trial date. Lastly, counsel states that the Algerian authorities are trying to intimidate the author's son into withdrawing his communication, and that he is under pressure to do so to have any hope of a trial.

State party's reply

6. By note verbale dated 23 May 2006, the State party repeats that Mr. Medjnoune's detention is not arbitrary, since articles 125 ff. of the Code of Criminal Procedure relate to provisional detention during the judicial investigation stage and not during the subsequent stage. Mr. Medjnoune's case has reached the criminal court, which has adjourned proceedings under article 278 of the Code of Criminal Procedure. The State party explains that, while awaiting trial, the accused may at any time submit a request for provisional release to the indictments division, which Mr. Medjnoune has done. With regard to the latest denial of application, the appropriateness of that decision is not open to discussion, since the court is sovereign in its evaluation of the facts of the case and the desirability or otherwise of granting a request submitted to it by an accused. The State party explains that the case should very shortly be scheduled for trial in the criminal court. Furthermore, if he meets the legal requirements, Mr. Medjnoune could avail himself of order No. 06-01 of 27 February 2006, on the implementation of the Peace and National Reconciliation Charter.¹⁴ He could then be granted either extinction of the public right of action before his case came to trial or, were he to be tried and

¹³ Article 123 (Act No. 90-24 of 18 August 1990):

"Preventive detention is an exceptional measure. However, where the constraints provided by judicial supervision are insufficient, preventive detention may be ordered or extended:

1. If it is the only means of preserving material proof or evidence or preventing pressure being exerted on witnesses or victims, or collusion taking place between the accused and their accomplices such as to jeopardize the establishment of the truth;

2. If it is necessary to protect the accused or halt the commission or prevent the recurrence of an infraction;

3. If the accused chooses to evade the obligations arising out of the measures of judicial supervision imposed."

¹⁴ The State party gives no further details.

convicted, a commutation of the sentence or a pardon. The order is in the process of being implemented. Lastly, the State party maintains that the allegation that pressure is being exerted on Mr. Medjnoune to withdraw his communication is too vague and meaningless to be entertained. It amounts to no more than an assertion and provides no further detail as to either the precise nature of this pressure or which “Algerian authorities” are exerting it.

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

7.3 On the question of exhaustion of domestic remedies, the Committee notes that, in respect of the son’s incommunicado detention with the Algerian security services from 28 September 1999 to 2 May 2000, a complaint was lodged on 2 October 1999 on which the prosecutor’s office failed to act despite being the only body with the power to do so. As to the son’s detention without trial since 2 May 2000, he has made several applications for provisional release, all of which have been rejected without him ever having been brought to trial. Consequently, the Committee is of the view that the application of domestic remedies has been unreasonably drawn out and that the author has therefore met the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

7.4 With regard to the complaints under articles 7; 9, paragraphs 1, 2 and 3; and 10, paragraph 1, the Committee notes that the author has presented detailed allegations regarding his son’s apprehension, incommunicado detention and conditions of imprisonment, and regarding the ill-treatment to which he was allegedly subjected. Rather than replying to the various allegations, the State party merely says they are not substantiated. In this case, the Committee takes the view that the facts described by the author are sufficient to substantiate the complaints under article 7, paragraphs 1, 2 and 3, article 9, paragraph 1, and article 10 for the purposes of admissibility. The Committee also finds that the complaints under article 14, paragraph 3 (a) and (c), are sufficiently substantiated. As to the complaint under article 14, paragraph 3 (e), the Committee

notes that the author’s son has not yet appeared before a judge to answer the charges against him. It accordingly considers that this complaint is incompatible *ratione materiae* under article 3 of the Optional Protocol. It therefore concludes that the communication is admissible under articles 7; 9, paragraphs 1–3; 10, paragraph 1; and 14, paragraph 3 (a) and (c), and proceeds to its consideration on the merits.

Consideration on the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

8.2 Concerning the complaint of incommunicado detention, the Committee notes the author’s assertion that his son was arrested on 28 September 1999 and was missing until 2 May 2000. The Committee notes that the State party has not replied to the author’s allegations, which are sufficiently detailed.

8.3 The Committee recalls¹⁵ that the burden of proof cannot rest solely on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to transmit to the Committee the information in its possession. In cases where the author has communicated to the State party allegations that are supported by credible testimony and where further clarification depends entirely on information the State party alone possesses, the Committee may consider the allegations substantiated if the State party fails to refute them by providing evidence and satisfactory explanations.

8.4 Concerning the complaint of violation of article 7 of the Covenant, the Committee is aware of the suffering entailed by detention without contact with the outside world for an indefinite period. In this connection, it recalls its general comment No. 20 (44) relating to article 7, in which it recommends States parties to take measures to

¹⁵ Communications Nos. 146/1983, *Baboeram Adhin et al. v. Suriname*, Views adopted on 4 April 1985, para. 14.2; 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 7.2; 202/1986, *Graciela Ato del Avellanal v. Peru*, Views adopted on 31 October 1988, para. 9.2; 30/1978, *Bleier v. Uruguay*, Views adopted on 29 March 1982, para. 13.3; 107/1981, *Elena Quinteros Almeida v. Uruguay*, Views adopted on 21 July 1983, para. 11; 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.4.

prohibit incommunicado detention. In these circumstances, the Committee concludes that the apprehension and continued captivity of the author's son, preventing him from communicating with his family and with the outside world, constitute a violation of article 7 of the Covenant.¹⁶ Moreover, the circumstances surrounding the apprehension and continued captivity of Malik Medjnoune and his testimony of May 2000 that he was tortured on several occasions constitute strong grounds for believing that he was subjected to such treatment. The Committee has received no information from the State party that contradicts that belief. The Committee concludes that the treatment to which Malik Medjnoune was subjected constitutes a violation of article 7.¹⁷

8.5 The information before the Committee shows that Malik Medjnoune was taken away by agents of the State party who were outside his house looking for him. In the absence of adequate explanations from the State party concerning the author's allegations that his son's apprehension and detention were arbitrary or illegal and that he was held incommunicado until 2 May 2000, the Committee finds a violation of article 9, paragraph 1.

8.6 With regard to the alleged violations of article 9, paragraph 2, and article 14, paragraph 3 (a), the Committee recalls that those provisions guarantee that anyone who was arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.¹⁸ The Committee notes that Mr. Medjnoune was arrested on 28 September 1999, a fact not disputed by the State party, and that he was held incommunicado for 218 days, a fact also not disputed by the State party. It also notes counsel's claim that Mr. Medjnoune was not promptly informed of the reasons for his arrest and that the State party has not refuted this claim. In the absence of any information from the State party showing that the author was promptly informed of the reasons for his arrest, the Committee must rely on the author's statement that his son was apprised of the reasons for his arrest only when he appeared before the examining magistrate on 2 May 2000. This delay is incompatible with article 9, paragraph 2, and article 14, paragraph 3 (a), and the Committee finds a violation of these provisions.

¹⁶ Communications Nos. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 8.5; 458/1991, *Mukong v. Cameroon*, Views adopted on 24 July 1994, para. 9.4; 440/1990, *El-Megreisi v. Libyan Arab Jamahiriyah*, Views adopted on 23 March 1994, para. 5.

¹⁷ Communications Nos. 449/1991, *Mójica v. Dominican Republic*, Views adopted on 10 August 1994, para. 5.7; 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 9.6.

¹⁸ See general comment No. 13 (21), para. 8.

8.7 As to the alleged violation of article 9, paragraph 3, the Committee recalls that the right to be brought "promptly" before a judicial authority implies that any delay should be no more than a few days, and that incommunicado detention may in itself constitute a violation of article 9, paragraph 3.¹⁹ It takes note of the testimony of the author's son that he was brought before the prosecutor on 4 and 6 March 2000, and the author's argument that his son was held incommunicado for 218 days until he was brought before the examining magistrate on 2 May 2000, and that he has been awaiting trial for more than six years. In the author's case, and in the absence of satisfactory explanations from the State party or any other justification in the file, the Committee finds that pretrial detention lasting more than five years constitutes a violation of the right under article 9, paragraph 3.

8.8 In the light of the above conclusions, the Committee is not required to consider the author's allegations under article 10 of the Covenant.

8.9 The Committee notes that Mr. Medjnoune is still in detention and is still awaiting trial. It notes that, according to the State party, the judicial investigation into the case was completed on 10 December 2000 and that the hearing was set for 5 May 2001 but subsequently adjourned. Today, nearly seven years after the start of the inquiry and more than five years after the first committal order, the author's son is still in prison and is still waiting to be tried. In respect of the excessive pretrial delay, the Committee recalls that, according to its case law, "in cases involving serious charges such as homicide or murder, and where the accused is denied bail by the court, the accused must be tried in as expeditious a manner as possible".²⁰ In the case at hand, given that the son was arrested on 28 September 1999 and charged on 2 May 2000 as an accessory to murder, among other things, the Committee believes compelling reasons would have been required to justify nearly six years' detention without trial or sentence. The State party has said that events in the region have made it impossible to try the case in the conditions of calm required for proceedings of this nature. It also informed the Committee on 28 December 2004 that the case should be scheduled for trial in the Tizi-Ouzou criminal court in the very near future. Yet nearly 18 months have passed since then without Mr. Medjnoune being brought to trial.

¹⁹ Communications Nos. 1128/2002, *Rafael Marques de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.3; 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.6. See also general comment No. 8 (16), para. 2.

²⁰ Communications Nos. 473/1991, *Barroso v. Panama*, Views of 19 July 1995, para. 8.5; 818/1998, *Sextus v. Trinidad and Tobago*, Views of 16 July 2001, para. 7.2.

Consequently, the Committee finds a violation of the rights under article 14, paragraph 3 (c).

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations by the State party of articles 7; 9, paragraphs 1, 2 and 3; and 14, paragraph 3 (a) and (c), of the Covenant.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide an effective remedy, which includes bringing Malik Medjnoune immediately before a judge to answer the charges against him or to release him, conducting a full and thorough investigation into the incommunicado detention and treatment suffered by Malik Medjnoune since 28 September 1999, and initiating criminal proceedings against the persons alleged to be responsible for those

violations, in particular the ill-treatment. The State party is also required to provide appropriate compensation to Malik Medjnoune for the violations. In addition, the State party is required to take steps to prevent further occurrences of such violations in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

Communication No. 1298/2004

Submitted by: Mr. Manuel Francisco Becerra Barney (not represented by counsel)

Alleged victim: The author

State party: Colombia

Date of adoption of Views: 11 July 2006

Subject matter: Trial and conviction of a person involved in the illegal financing of a presidential campaign

Procedural issues: Failure to exhaust domestic remedies, insufficiently substantiated claim

Substantive issues: Violation of the right to due process

Articles of the Covenant: 2 and 14

Articles of the Optional Protocol: 2 and 5, para. 2 (b)

Finding: Violation (art. 14)

1.1 The author of the communication, dated 11 April 2003, is Manuel Francisco Becerra Barney, a Colombian citizen born in 1951. He claims to be the victim of violations by Colombia of article 2, paragraphs 1 and 3 (a) and (c), and article 14 of the Covenant. He is not represented by counsel.

1.2 The Optional Protocol entered into force for the State party on 29 January 1970.

The facts as presented by the author

2.1 The author was Comptroller-General and former Colombian Minister of Education, at the time of the events he relates. After the 1994 presidential elections, the Colombian Prosecutor-General launched investigations into the financing of the election campaign run by the President-elect, Ernesto Samper Pizano, who was said to have received drug-trafficking money in the form of donations from members of the Cali cartel. The investigations, of ministers and members of Parliament for the most part, led to what became known as the "8000 trial". They included an inspection of the offices of Chilean citizen Guillermo Alejandro Pallomari González, the main person responsible for the financing of the Cali cartel, during which books were seized and the organization's financial movements were revealed. When questioned, Pallomari incriminated the author in the illegal funding of Ernesto Samper's presidential campaign.

2.2 On 31 January 1996, the author was detained by order of the Prosecutor-General. He states that he was questioned from behind mirrors and was never able to see the individuals questioning him. Once the

investigation phase was over, the case was forwarded to the competent Government prosecutor's office. By decision dated 26 September 1996, the prosecutor charged the author with receiving drug-trafficking money to finance the election campaign of the then presidential hopeful, accusing him of "illicit enrichment of individuals for the benefit of third parties" and impounding some of the property he owned.

2.3 By a collegial decision dated 22 August 1997, the Cali Regional Court, which was made up of faceless judges, found the author guilty of illicit enrichment of individuals for the benefit of third parties and sentenced him to 5 years and 10 months in prison, a fine of 300 million Colombian pesos (approximately US\$ 125,000), the equivalent of what he was said to have received unlawfully, and disqualification from public office or functions for the duration of his sentence. The author states that the trial was held behind closed doors in Cali, and that he was neither present nor represented there, being held in custody in Bogota, some 550 km away. He further states that, although the statements given under interrogation by prosecution witness Guillermo Pallomari were regarded as key evidence during the pretrial proceedings, that evidence has never been presented and his lawyer has, therefore, never been able to question the person who incriminated him. He states that the judge's identity was kept secret.

2.4 The author appealed his sentence before the National Court, claiming procedural irregularities, in particular the fact that the judgement was based on statements made by a witness who was not under oath and in disregard of the principle of adversarial proceedings, and that the trial had been conducted without proper guarantees of due process. He states that the National Court was also made up of faceless judges, that it did not consider the case in a public hearing, and that neither he nor his lawyer was present. By decision dated 24 July 1998, the National Court dismissed the appeal and increased the prison sentence handed down by the lower court to seven years. This, the author maintains, is contrary to the principle of *non reformatio in peius* acknowledged in article 31 of the Colombian Constitution, which prohibits any increase in the sentence handed down in first instance when, as in this case, the convicted individual is the only party to appeal.

2.5 The author applied to have the National Court's ruling quashed, again claiming procedural irregularities besides violation of the principle of *non reformatio in peius*. The Criminal Cassation Chamber of the Supreme Court dismissed the appeal on 2 October 2001.

2.6 On 19 November 2001, the author applied to the Constitutional Court for protection (*tutela*) against the sentences handed down by the appeal court and in cassation proceedings, claiming a violation of the right to due process, equality before the courts and access to the administration of justice. In a ruling dated 3 December 2001, the Disciplinary Jurisdictional Chamber of the Cundinamarca Division Council of the Judiciary granted *tutela* and revoked the sentence handed down by the Supreme Court in cassation proceedings on the grounds that the ban on *reformatio in peius* when the convicted individual is the only party to appeal had been broken. It gave the Cali Court 48 hours to return the case file to the Criminal Cassation Chamber of the Supreme Court for a fresh ruling that fully respected the principle of *non reformatio in peius*.

2.7 By decision dated 19 March 2002, the Supreme Court declined to give effect to the *tutela* ruling, arguing that since the Supreme Court was the highest court of ordinary jurisdiction its judgements had the force of *res judicata* and a remedy of *tutela* was not, therefore, competent. The author points out that this was the first time the Supreme Court had ever declined to give effect to a protective ruling, stressing that previously, in similar cases, the Court had always accepted applications for protection. This refusal to give effect to the ruling, the author says, led to what became known as the "train crash", a face-off between the different public powers, especially between the Supreme Court and a Constitutional Court, resulting from the entry into force of the new Colombian Constitution of July 1991.

2.8 On 17 May 2002 the Branch Council of the Judiciary declared it had no jurisdiction to consider the complaint for contempt of court which the author wished to lodge against the Criminal Cassation Chamber of the Supreme Court, and referred the application for disciplinary action to the House of Representatives in Congress. To date, the Charges Committee of the House of Representatives has not pronounced on the matter of what penalties, if any, should be imposed on the justices of the Criminal Cassation Chamber for failure to accept the protective ruling.

The complaint

3.1 The author claims to be a victim of a breach of article 14, since he was found guilty in first instance and on appeal by faceless judges, both trials were held behind closed doors and he was denied the right to be heard publicly, to defend himself and to question the prosecution witness.

3.2 The author also alleges a violation of article 2, paragraph 1, in the form of discrimination against him by the Supreme Court when it declined to accept

the protective ruling awarded in his favour, thereby departing from its previous practice in similar cases.

3.3 Lastly, the author alleges a violation of article 2, paragraph 3 (a) and (c), because the Supreme Court declined to accept the protective ruling, leaving the author without an effective remedy for the violation of his rights as acknowledged in the Covenant.

Observations by the State party on admissibility and comments by the author

4.1 In observations submitted on 1 November 2005, the State party comments that the House of Representatives has yet to pronounce on the complaint for contempt of court lodged by the author against the Criminal Cassation Chamber of the Supreme Court. It adds that a justice of the Supreme Court has lodged an appeal against the protection ruling before the Cundinamarca Division Council of the Judiciary but that appeal has not yet been settled, and as a result the protective ruling is not yet fully in effect. The State party claims that the remedies available under domestic law have not been exhausted, and the communication should therefore be declared inadmissible.

4.2 The State party further maintains that the author's allegations are not adequately grounded in any injury liable to be accepted as a violation of the human rights acknowledged in the Covenant and that, therefore, his complaint is inadmissible.

4.3 On the merits, the State party notes that the Committee has no jurisdiction to determine whether there has been a violation of article 2, paragraphs 1 and 3, since those paragraphs refer to a general commitment made by the State party upon signing the Covenant from which no specific right that individuals may invoke in isolation can be deduced.

4.4 In connection with the author's complaints relating to article 14, the State party asserts that there is not enough information to establish whether there has been a violation of the right to equality before the courts, the author having presented no evidence to indicate that the Supreme Court has actually taken a different course in applications for protection similar to those brought by the author: the allegation is thus baseless.

4.5 Regarding the alleged violation of the right to be publicly heard with all due safeguards, the State party refers to Constitutional Court ruling No. C-040 of 1997 on the legality of proceedings conducted by the regional courts operating at the time of the events in question, among them the proceedings against the author. The State party points out that the Court indicated at that time that a public hearing was not a constitutional requirement of proceedings and was not necessary or obligatory. The legislature was thus entitled to do away with that stage of a trial, as it

then did by adopting rules to govern the "Public Order Court" which allowed the court anonymity. The State party says that the expression "to be present" does not, in the Constitutional Court's interpretation, necessarily require the accused to be physically present at the proceedings but rather to be involved for the purpose of exercising the right to a defence. It concludes by saying that the judicial formalities both in first instance and on appeal were completed in the presence of the author's attorney, and the author's right to a defence was thus guaranteed.

5.1 In his comments of 4 January 2006, the author states that he has brought 10 different procedural actions since being convicted in 1996 (10 years ago), including all the ordinary and extraordinary remedies available, and the State party cannot claim that domestic remedies have not been exhausted. He points out that the complaint of contempt of court is not a domestic remedy but a disciplinary measure directed at justices who fail to uphold the constitutional rights to *tutela* or protection, the only effect of which would be to impose penalties on the justices concerned.

5.2 The author challenges the State party's claims that his representative was given a hearing during the trials in first instance and on appeal. He insists that both trials were held behind closed doors, that there was no oral or public hearing at any time, and that neither he nor his representative was allowed to be present, especially since the identity of the judges who handed down the various sentences was kept secret. He draws attention to the contradiction between the State party's claims acknowledging and justifying the practice of conducting trials without a public hearing and the later claim that his lawyer was given a hearing. He reaffirms, as stated in his initial claims, that his defence was always conducted in writing, that he never knew who his judges were, and that his lawyer was never permitted to question the prosecution witness.

Issues and proceedings before the Committee

Material issues and special pleas

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

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 On the exhaustion of domestic remedies, the Committee notes the State party's assurance that a

complaint of contempt of court against the justices of the Criminal Cassation Chamber of the Supreme Court is under consideration in the House of Representatives. However, the Committee also notes the author's statement that this complaint is a disciplinary measure directed against those justices and not an appeal which would allow his case to be reviewed. The State party cannot, therefore, claim that the author should wait for the House of Representatives in Congress to pronounce on his complaint before the Committee can consider the case under the Optional Protocol, especially when the complaint has been pending before the House for four years and does not afford a real opportunity for the author's case to be reconsidered.

6.4 The Committee further notes the State party's allegations that the protective ruling (*tutela*) has been challenged by a Supreme Court justice and that, therefore, domestic remedies have not been exhausted. The Committee observes that the challenged ruling granted protection to the author and that it is that very ruling which the Supreme Court declined to give effect to. That being so, the challenge to this ruling is irrelevant for the purpose of affording the author an effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

Consideration of the merits

7.1 The Committee has considered this communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee takes note of the author's claims that he was tried and convicted in first instance and on appeal by courts made up of faceless judges, without the due safeguards of a public hearing and adversarial proceedings, and in particular that he was not allowed to be present and defend himself during the trial, either personally or

through his representative, and had no opportunity to question the prosecution witness. It points out that, to satisfy the requirements of the right to defence guaranteed under article 14, paragraph 3, of the Covenant, all criminal proceedings must allow the accused the right to an oral hearing at which he or she can appear in person or be represented by legal counsel, submit such evidence as he or she deems relevant and question the witnesses.¹ Bearing in mind that the author was not given such a hearing during the proceedings which culminated in his conviction and sentencing, the Committee concludes that his right to a fair trial as established in article 14 of the Covenant was violated.

7.3 In light of the above findings, the Committee does not consider it necessary to deal with the complaint in respect of article 2, paragraph 3, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it constitute a violation of article 14.

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 and appropriate remedy.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to guarantee all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

¹ Communication No. 848/1999, *Rodríguez Orejuela v. Colombia*, decision dated 23 July 2002, para. 7.3.

Communication No. 1306/2004

Submitted by: Erlingur Sveinn Haraldsson and Örn Snævar Sveinsson (represented by Mr. Ludvik Emil Kaaber)

Alleged victim: The authors

State party: Iceland

Date of adoption of Views: 24 October 2007

Subject matter: Compatibility of fisheries management system with non-discrimination principle

Procedural issues: notion of *victim*, exhaustion of domestic remedies, compatibility with the provisions of the Covenant

Substantive issues: discrimination

Article of the Covenant: 26

Articles of the Optional Protocol: 1 and 5, para. 2 (b)

Finding: Violation

1.1 The authors of the communication are Mr. Erlingur Sveinn Haraldsson and Mr. Örn Snævar Sveinsson, both Icelandic citizens. They claim to be victims of a violation of article 26 of the International Covenant on Civil and Political Rights by Iceland.¹ The authors are represented by Mr. Ludvik Emil Kaaber.

1.2 The authors have been professional fishers since boyhood. Their complaints relate to the Icelandic fisheries management system and its consequences for them. The fisheries management system, which was created by legislation, applies to all fishers in Iceland.

The relevant legislation

2.1 Counsel and the State party refer to the *Kristjánsson case*² and their explanations provided in relation to that case, on the fisheries management system in Iceland. During the 1970s the capacity of Iceland's fishing fleet was surpassing the yield of its fishing banks and measures became necessary to safeguard Iceland's main natural resource. After several unsuccessful attempts to restrict the pursuit of particular species and to make fishing by certain types of gear or by type of vessel subject to licence, a fisheries management system was adopted by Act 82/1983, initially enacted for one year. It was based on the allocation of catch quotas to individual vessels on the basis of their catch performance,

generally referred to as "the quota system". The allocation of quotas had been employed to a considerable extent since the 1960s with regard to catches of lobster, shrimp, shellfish, capelin and herring, for which a quota system was established already in 1975.

2.2 In application of the Act, regulation No. 44/1984 (on the management of demersal fishing) provided that operators of ships engaged in fishing of demersal species during the period from 1 November 1980 to 31 October 1983 would be eligible for fishing licences. The ships were entitled to fishing quotas based on their catch performance during the reference period. Further regulations continued to build on the principles so established and these principles were transferred into statute legislation with Act No. 97/1985, which stated that no one could catch the following species without a permit: demersal fish, shrimp, lobster, shellfish, herring and capelin. The main rule was that fishing permits were to be restricted to those vessels that had received permits the previous fishing year. Accordingly, the decommissioning of a vessel already in the fleet was a prerequisite for the granting of a fishing permit to a new vessel. With the enactment of the Fisheries Management Act No. 38/1990 (hereafter referred to as the Act), with subsequent amendments, the catch quota system was established on a permanent basis.

2.3 The first article of the Act states that the fishing banks around Iceland are common property of the Icelandic nation and that the issue of quotas does not give rise to rights of private ownership or irrevocable domination of the fishing banks by individuals. Under article 3 of the Act, the Minister of Fisheries shall issue a regulation determining the total allowable catch (TAC) to be caught for a designated period or season from the individual exploitable marine stocks in Icelandic waters for which it is deemed necessary to limit the catch. Harvest rights provided for by the Act are calculated on the basis of this amount and each vessel is allocated a specific share of the TAC for the species, the so-called quota share. Under article 4(1) of the Act, no one may pursue commercial fishing in Icelandic waters without having a general fishing permit. Article 4(2) allows the Minister to issue regulations requiring special fishing permits for catches of certain species or made with certain type

¹ The International Covenant on Civil and Political Rights and the Optional Protocol entered into force for Iceland on 22 November 1979.

² See communication No. 951/2000, *Kristjánsson v. Iceland*, declared inadmissible on 16 July 2003.

of gear or from certain types of vessels, or in particular areas. Article 7 (1) provides that fishing of those species of living marine resources which are not subject to limits of TAC as provided for in article 3 is open to all vessels with a commercial fishing permit. Article 7 (2) establishes that harvest rights for the species of which the total catch is limited shall be allocated to individual vessels. When quota shares are determined for species that have not been previously subject to TAC, they are based on the catch performance for the last three fishing periods. When quota shares are set for species that have been subject to restricted fishing, they are based on the allocation in previous years. Under article 11 (6) of the Act, the quota share of a vessel may be transferred wholly or in part and merged with the quota share of another vessel, provided that the transfer does not result in the harvest rights of the receiving vessel becoming obviously in excess of its fishing capacity. If those parties who are permanently entitled to a quota share do not exercise their right in a satisfactory manner, this may result in their forfeiting the right permanently. The Fisheries Management Act also imposes restrictions on the size of the quota share that individuals and legal persons may own. The Act finally sets penalties for violations of the Act, ranging from fines of ISK 400 000 to imprisonment of up to six years.

2.4 The State party provides some statistics to illustrate that the fisheries sector constitutes a major component of the Icelandic economy. It points out that all changes in the management system may have immense effects on the economic well-being of the country. In the past few years, there has been intense public discussion and political argument about the right manner to build the fisheries management system in the most efficient way for the interests of both the nation as a whole, and those who are employed in the fisheries industry. Icelandic courts have examined the fisheries management system in the light of the constitutional principles of equality before the law (article 65 of the Constitution) and of freedom of occupation (article 75 of the Constitution), in particular in two cases.

2.5 In December 1998, the Supreme Court of Iceland delivered its judgement in the case of *Valdimar Jóhannesson v. the Icelandic State* (the *Valdimar* case), stating that the restrictions on freedom of employment involved in article 5 of the Fisheries Management Act were not compatible with the principle of equality under article 65 of the Constitution. It considered that article 5 of the Act imposed excluding restrictions in advance against individual persons' ability to make fishing their employment. It reasoned that under the restrictions in force at that time, fishing permits were granted only to certain vessels that had been in the fishing

fleet during a particular period, or new vessels that replaced them, and that these restrictions were unconstitutional. However it did not adopt a position on article 7 (2), regarding the restrictions on access by the holders of fishing permits to the fish stocks. Parliament then adopted Act No. 1/1999 which substantially relaxed the conditions for obtaining commercial fishing permits. With the adoption of this act, the decommissioning of a vessel already in the fleet was no longer a prerequisite for the granting of a fishing permit to a new vessel. Instead, general conditions were set for the issuance of fishing permits to all vessels.

2.6 The other relevant judgement of the Supreme Court, dated 6 April 2000, relates to the case of *the Directorate of Public Prosecutions v. Björn Kristjánsson, Svavar Gudnason and Hyrnó Ltd* (the *Vatneyri* case). With regard to article 7 of the Act, the Supreme Court found that restrictions on individuals' freedom to engage in commercial fishing were compatible with articles 65 and 75 of the Constitution, because they were based on objective considerations. In particular, the Court noted that the arrangement of making catch entitlements permanent and assignable is supported by the consideration that this makes it possible for operators to plan their activities in the long term, and to increase or decrease their catch entitlements in individual species as may suit them.

2.7 After the *Valdimar* case, a committee was appointed to revise the fisheries management legislation. Amendments corresponding to its recommendations were introduced by Act No. 85/2002. According to this Act, a fee, known as a "catch fee", should be charged for the use of the fishing grounds. The fee is based on the economic performance of the fishing industry. It consists of a fixed part based on the State's costs for managing fisheries, and a variable part reflecting the economic performance of the industry. In the State party's opinion, this legislative amendment shows that the Icelandic legislature is constantly examining what are the best means to achieve the goal of managing fishing in the most efficient way in view of the interests of the nation as a whole.

2.8 The authors state that in practice, and notwithstanding section 1 of the Act (providing that the fishing banks around Iceland are a common property of the Icelandic nation and that allocation of catch entitlements does not endow individual parties with a right of ownership of such entitlements), fishing quotas are treated as a personal property of those to whom they were distributed free of charge during the reference period. Other persons, such as the authors, must therefore purchase or lease a right to fish from the beneficiaries of the arrangement, or from others who have, in turn, purchased such a right from them. The authors

consider that Iceland's most important economic resource has therefore been donated to a privileged group. The money paid for access to the fishing banks does not revert to the owner of the resource—the Icelandic nation—but to the private parties personally.

The facts as presented by the authors

3.1 During the reference period, the authors worked as captain and boatswain. In 1998, they established a private company, Fagrimúli ehf, together with a third man, and purchased the fishing vessel *Sveinn Sveinsson*, which had a general fishing permit. The company was the registered owner of the ship. During the fishing year 1997–1998, when the ship was purchased, various harvest rights (catch entitlements) were transferred, but no specific quota share was associated with the ship. At the beginning of the fishing year 2001–2002, the *Sveinn Sveinsson* was allocated harvest rights for the first time for the species ling, tusk and monkfish, which amounted to very small harvest rights. The authors claim to have repeatedly applied for catch entitlements on various grounds, but unsuccessfully. In particular, the Fisheries Agency stated that there was no legal authorization for providing them with a quota. As a result, they had to lease all catch entitlements from others, at exorbitant prices, and eventually faced bankruptcy.

3.2 They decided to denounce the system, and on 9 September 2001, they wrote to the Ministry of Fisheries, declaring that they intended to catch fish without catch entitlements, in order to obtain a judicial decision on the issue and to determine whether they would be able to continue their occupation without paying exorbitant amounts of money to others. In its reply of 14 September 2001, the Ministry of Fisheries drew the authors' attention to the fact that under the penalty provisions of the Fisheries Management Act, No.38/1990, and the Treatment of Exploitable Marine Stocks Act, No. 57/1996, catches made in excess of fishing permits were punishable by fines or up to six years' imprisonment, as well as the deprivation of fishing permits.

3.3 On 10, 11, 13, 19, 20 and 21 September 2001, the first author, as managing director, board member of Fagrimúli ehf, owner of the company operating the *Sveinn Sveinsson* and captain of that ship, and the second author, as chairman of the board of that company, sent the ship to fish, and landed, without the necessary catch entitlements, a catch of a total of 5,292 kg of gutted cod, 289 kg of gutted haddock, 4 kg of gutted catfish and 606 kg of gutted plaice. Their only purpose in doing this was to be reported, so that their case could be heard in court. On 20 September, the Fisheries Agency received a report

that the *Sveinn Sveinsson* had landed a catch at Patreksfjörður on that day.

3.4 As a consequence, the Fisheries Agency filed charges against the authors with the commissioner of police at Patreksfjörður for violations of the Treatment of Exploitable Marine Stocks Act, No. 57/1996, the Fisheries Management Act, No. 38/1990, and the Fishing in Iceland Fisheries Jurisdiction Act, No. 79/1997. On 4 March 2002, the National Commissioner of Police brought a criminal action against the authors before the West Fjords District Court. The authors confessed the acts they were accused of, but challenged the constitutional validity of the penal provisions that the indictment relied on. On 2 August 2002, with reference to the precedent of the Supreme Court judgement of 6 April 2000 in the *Vatneyri case*, the District Court convicted the authors and sentenced them to a fine of ISK 1,000,000³ each or three months imprisonment, and to payment of costs. On appeal, the Supreme Court, on 20 March 2003, upheld the judgement of the District Court.

3.5 On 14 May 2003, the authors' company was declared bankrupt. Their ship was sold on auction for a fraction of the price the authors had paid for it four years earlier. Their bank then requested the forced sale of the company's shore facilities and of their homes. One of the authors was able to conclude an instalment agreement with the bank and started working as an officer on board a vessel used for industrial purposes. The other author lost his home, moved from his home community and started working as a mason. At the time of submission of the communication, he was unable to pay his debts.

The complaint

4.1 The authors claim to be victims of a violation of article 26 of the Covenant, because they are lawfully obliged to pay money to a privileged group of fellow citizens, in order to be allowed to pursue the occupation of their choice. The authors request, in accordance with the principles of freedom of employment and equality, an opportunity to pursue the occupation of their choice without having to surmount barriers placed in advance, which constitute privileges for others.

4.2 The authors claim compensation for the losses endured as a result of the fisheries management system.

The State party's observations

5.1 On 29 October 2004, the State party challenged the admissibility of the communication on three grounds: non-substantiation of the authors' claim that they are *victims* of a violation of article 26, non-exhaustion of domestic remedies, and the

³ Approximately US\$ 13,600.

communication's incompatibility with the provisions of the Covenant.

5.2 The State party argues that the authors have not shown how article 26 of the Covenant is applicable to their case, or how the principle of equality has been violated against them as individuals. They have not demonstrated that they were treated worse, or were discriminated against, as compared with other persons in a comparable position; or that any distinction made between them and other persons was based on irrelevant considerations. They merely make a general assertion that the Icelandic fisheries management system violates the principle of equality in article 26.

5.3 The State party notes that the authors have worked many years at sea, one of them as captain and the other as marine engineer. They worked as employees on ships whose catch performance was not of direct benefit to them, but to their employers, who, unlike the authors, had invested in ships and equipment in order to run fishing operations. One of the main reasons for the introduction of the Fisheries Management Act, No.38/1990, was that it would create acceptable operating conditions for those who had invested in fisheries operations, instead of their being subject to same catch restrictions as other persons who had not made such investments. The authors have not demonstrated how they were discriminated against when they were refused a quota, or whether other vessel captains or seamen in the same position received quota allocations. In addition they did not make any attempt to have these refusals reversed by the courts on the ground that they constituted discrimination in violation of article 65 of the Constitution or article 26 of the Covenant.

5.4 When they invested in the purchase of the *Sveinn Sveinsson* in 1998, the authors were aware of the system. They bought the ship without a quota, with the intention to rent it on the quota exchange, as a basis for their fishing operations. As a result of the increased demand of quotas on the market, the prices of quotas rose, which changed the economic basis for the authors' fishing operations. After they fished without a quota, they were tried and sentenced, as would have happened to any other person under the same circumstances. The State party concludes that the communication should be declared inadmissible *ratione personae* under article 1 of the Optional Protocol, as the authors have not sufficiently substantiated their claims that they are victims of a violation of the Covenant.

5.5 The State party argues that the authors failed to exhaust all available domestic remedies, because they did not make any attempts to have their refusal of a quota reversed by the courts. They could have referred these administrative decisions to the courts with a demand that they be set aside. The State party

indicates that this was done in the *Valdimar* case, where an individual who had been refused a fishing permit demanded the annulment of an administrative decision. His demand was accepted by the courts, which demonstrates that this is an effective remedy. The State party concludes that the communication should be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

5.6 Finally, the State party argues that the case hinges on whether the restriction in the authors' freedom of employment is excessive, as they consider that the prices of certain commercial catch quotas are unacceptable and constitute an obstacle to their right to choose freely their occupation. The State party points out that freedom of employment is not protected per se by the International Covenant on Civil and Political Rights and that in the absence of specific arguments showing that the restrictions of his freedom of employment were discriminatory the communication would be inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

5.7 The State party also provides observations on the merits of the communication. It argues that no unlawful discrimination was made between the author and those to whom harvest rights were allocated. What was involved was a justifiable differentiation: the aim of the differentiation was lawful and based on reasonable and objective grounds, prescribed in law and showing proportionality between the means employed and the aim. The State party explains that public interest demands that restrictions be imposed on the freedom of individuals to engage in commercial fishing in order to prevent overfishing. Restrictions aimed at this goal are prescribed by the detailed fisheries legislation. The State party further argues that the allocation of a limited resource cannot take place without some sort of discrimination and states that the legislature employed a pragmatic method in allocating the permits. The State party rejects the authors' view that the principle of equality protected by article 26 of the Covenant is to be interpreted in such a way as to entail a duty to allocate a share of limited resources to all citizens who are or have been employed as seamen or captains. Such an arrangement would violate the principle of equality with regards to the group of individuals who have, through extensive investment in vessel operations and the development of commercial enterprises, tied their fishing competence, assets and livelihood to the fisheries sector.

5.8 The State party emphasizes that the arrangement by which harvest rights are permanent and transferable is based mainly on the consideration that this enables individuals to plan their activities in the long term and to increase or reduce their harvest rights to particular species as best suits them, which

leads to the profitable utilization of the fish stocks for the national economy. The State party maintains that the permanent and transferable nature of the harvest rights leads to economic efficiency and is the best method of achieving the economic and biological goals that are the aims of the fisheries management. Finally, the State party points out that the third sentence of article 1 of the Fisheries Management Act states clearly that the allocation of harvest rights endows the parties neither with the right to ownership nor with irrevocable jurisdiction over harvest rights. Harvest rights are therefore permanent only in the sense that they can only be abolished or amended by an act of law.

5.9 The State party concludes that the differentiation that results from the fisheries management system is based on objective and relevant criteria and is aimed at achieving lawful goals that are set forth in law. In imposing restrictions on the freedom of employment, the principle of equality has been observed and the authors have not sufficiently substantiated their claim that they are victims of unlawful discrimination in violation of article 26 of the Covenant.

Authors' comments

6.1 On 28 December 2004, the authors commented on the State party's admissibility observations. On the State party's first argument, that the authors are not *victims* of a violation of the Covenant, the authors point out that they do not claim to have been treated unlawfully under domestic law, but under the Covenant. The authors maintain that the State party's action to close the fishing banks to persons not engaged in fishing during the "reference period" involved, in reality, a donation of the use of the fishing banks to the persons who were so engaged, and, as matters subsequently evolved, a donation of a personal right to demand payments from other citizens for fishing in the ocean around Iceland. These rights have the nature of property in practice. The authors' complaint relate to this action of donation, and the situation the authors have been placed in, as a result of it. They reiterate that they are brought up and trained as fishermen, have the cultural background of fishermen, and want to be fishermen. They must, if they are to pursue the occupation of their choice, surmount barriers that are not placed in the way of their fellow privileged citizens. They therefore maintain that they are victims of a violation of article 26 of the Covenant. That all Icelanders, except a particular group of citizens, share their situation, and that they would also be criminally indicted if not accepting this arrangement, is irrelevant. The authors acknowledge that most other Icelanders would be faced with the same obstacles as them. But they consider that their situation should not be compared

to other persons in their position, but to the group the members of which have been donated a privilege, and are entitled to monetary payments from any outsiders, like the authors, who want to work in the same field as the group members.

6.2 The authors recall that unlike Mr. Kristjánsson, whose case was declared inadmissible by the Committee, the authors were the owners of the enterprise operating the vessel they used. They had a direct, personal and immediate interest in being allowed to pursue the occupation of their choice, and they repeatedly applied for a quota.

6.3 The authors point out that at the time they decided to fish in violation of the enforced rules, the Icelandic society was divided in disputes and debates on the nature of the fisheries management system. The opinion held by the public and many politicians was that the Icelandic fisheries management system could not be upheld much longer, and that the use of the fishing banks should as soon as possible be admitted to every citizen fulfilling general requirements.

6.4 On the State party's argument that the authors have not exhausted domestic remedies, the authors note that constitutional provisions are superior to other sources of law. The incompatibility of a criminal provision with the Constitution is therefore a valid defence under Icelandic criminal law, and a finding of guilt affirms the constitutional validity of a criminal provision. It was for this reason that two out of seven Supreme Court judges wanted to acquit Mr. Kristjánsson in the *Vatneyri* case. The authors were sentenced with reference to that case. They emphasize that the matter they complain of to the Committee is the law of Iceland.

6.5 The authors refer to the State party's argument that they did not challenge their denials of a fishing quota in domestic courts, as Mr. Jóhanesson did in the *Valdimar* case, and therefore failed to exhaust domestic remedies. They note that it is for the legislature to lay down rules governing fisheries management, for the administrative authorities to administer those rules in practice, and for the courts to resolve disputes relating to the interpretation or implementation of those rules. They further note that, as was pointed out by the State party, the *Valdimar* judgement did not relate to the question of the donation of quotas to a privileged group and the subsequent requirement that others should pay them for a share of their gift. In the *Vatneyri* case, the Supreme Court declared the fisheries management system constitutionally valid. Under those rules, the authors could not be allocated quotas, as they did not fulfil the requirements.

6.6 As to the State party's contention that the complaint is incompatible with the provisions of the Covenant, the authors concede that measures to

prevent overfishing by means of catch limits are a necessary element in the protection and rational utilization of fish stocks, and that public interest demands that restrictions be imposed on the freedom of individuals to engage in commercial fishing. They can accept the assertion that the right of employment can only be conferred to a limited group. They maintain however, that such restrictions must be of general nature, and that all citizens fulfilling the relevant general requirements must have equal chances to enter the limited group. In their opinion, the requirement of having been donated a permanent personal quota, or having purchased or leased such a quota, is not a valid requirement.

Committee's admissibility decision

7.1 During its 87th session, on 5 July 2006, the Committee examined the admissibility of the communication. It noted that the State party had challenged the admissibility of the communication on the ground that the authors were not *victims* of a violation of the Covenant. The authors claimed to be victims of a violation of article 26 of the Covenant, because they were lawfully obliged to pay money to a privileged group of fellow citizens, in order to be allowed to pursue the occupation of their choice. The Committee noted the State party's argument that the authors were treated in the same manner as anyone in their position, i.e., fishermen having not acquired a quota during the reference period. However, the authors did in fact claim to have been treated differently in comparison with those who acquired a quota during the reference period. The Committee noted that the only difference between the authors, who owned the company which owned and operated the vessel *Sveinn Sveinsson* and who were denied a quota, and the fishermen who were actually granted a quota, was the period in which they were engaged in fishing. The Committee observed that the reference period requirement had since become a permanent one. This was confirmed by the fact that the authors had repeatedly applied for a quota, and that all requests had been denied. In these circumstances, the Committee considered that the authors were directly affected by the fisheries management system in the State party, and that they had a personal interest in the consideration of the case.

7.2 The Committee noted the State party's contention that the authors had not exhausted domestic remedies because they did not attempt to have their refusal of a quota reversed by the Icelandic courts. It considered the State party's reference to the *Valdimar case*, aimed at illustrating that the authors had an available and effective remedy. In that judgement, the Supreme Court found that:

“Although temporary measures of this kind to avert the collapse of fish stocks may have been justifiable, providing permanently by law for the discrimination ensuing from the rule contained in Section 5 of Act No. 38/1990 on the issue of fishing entitlements cannot be regarded as logically necessary. The respondent [the State party] has not demonstrated that other means cannot be employed for attaining the lawful objective of protecting the fish stocks around Iceland.”

The Court considered that Section 5 of Act No. 38/1990 was in conflict with the principle of equality. However, it concluded that:

“The Ministry of fisheries cannot be regarded as having lawfully denied the appellant's application for a general and special fishing licence on the grounds on which that denial was based. The Ministry's denial will therefore be invalidated. On the other hand a stand will not be taken in this case with respect to the question whether the Ministry was in this situation obliged to grant the appellant his petition, as the action is only brought for invalidation of the Ministry's decision, and not for a recognition of a right of the appellant to receive any particular catch entitlements.”

The Committee had not been informed whether the appellant in that case had later been allocated a quota, as a result of the Supreme Court annulling the administrative decision that denied him a quota. It considered that this example alone could not be used to demonstrate that the authors had an effective remedy.

7.3 The Committee further observed that the constitutional validity of the fisheries management system was subsequently affirmed by the Supreme Court, in the *Vatneyri case*, which was referred to as a precedent in the examination of the authors' case by the District Court and the Supreme Court. In these circumstances, and keeping in mind that the authors did not fulfil the legal and administrative requirements to be allocated a quota, the Committee found it difficult to conceive that the Supreme Court would have ruled in favour of the authors had they tried to appeal the administrative denials of a quota. The Committee therefore considered that the remedy referred to by the State party was not an effective one, for the purposes of article 5, paragraph 2 (b) of the Optional Protocol.

7.4 Finally, the Committee observed that the authors had repeatedly applied for a quota, and that all requests had been denied, because they did not fulfil the requirement for being allocated one, namely to have been active in the fishing industry between 1 November 1980 and 31 October 1983. In the Committee's opinion, the authors had no possibility of obtaining a quota from the State party, because, having attributed all available quotas in the beginning of the 1980s, and having made the then beneficiaries of the quotas permanent quota owners, the State party had in fact no more quotas to allocate. The Committee concluded that the authors had therefore no effective remedy to contest their denial of a quota, and that it was not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

7.5 As regards the State party's argument that the authors' complaint fell outside the scope of the Covenant, the Committee considered that the facts raised issues closely connected with the merits, and that these matters were more appropriately examined at the same time as the substance of the authors' complaint under article 26 of the Covenant. On 5 July 2006, the Committee declared the communication admissible.

State party's merits observations:

8.1 On 19 January 2007, the State party submitted its observations on the merits of the communication. It recalls the wording of articles 65,⁴ and 75, paragraph 1,⁵ of the Constitution, respectively relating to equality before the law and freedom of employment. With respect to the fisheries legislation, the State party points out that a uniform Individual Transferable Quotas (ITQ) system was introduced in 1991 by the Fisheries Management Act, No. 38/1990. Prior to this, many different fisheries management systems other than the ITQs were tried out, including: overall catch quotas, fishery access licences, fishing effort restrictions, and investment controls and vessel buy-back programmes. However, the experience with these various systems led to the adoption of the ITQ system in all fisheries.

8.2 The State party provides an update of the amendments in the fisheries management legislation. In 2006, the Fisheries Management Act was reissued *in toto* as Act No. 116/2006, replacing the earlier Act

No. 38/1990. The main provisions applying to the authors' case remain unchanged in substance.

8.3 On the merits, the State party claims that the authors have not provided substantiated arguments related to their claim under article 26 of the Covenant; rather, they have only claimed in general terms that an unlawful discrimination took place as they were not granted a quota share by the authorities in the same way as those fishing operators who received such harvesting rights according to Act No. 38/1990 based on their previous catch experience.

8.4 The State party considers that the restriction of the authors' employment did not constitute a violation of article 26. No unlawful discrimination was made between the authors and those to whom quota shares were allocated under article 7 of Act No. 38/1990. The differentiation between the authors who belonged to a large group of Icelandic seamen and the operators of fishing vessels was justifiable. The State party refers to the standards set by Icelandic courts and the European Court of Human Rights to assess whether a differentiation is justifiable. Firstly, the aim of the differentiation was lawful and based on objective and reasonable grounds. Secondly, it was prescribed by law. Thirdly, no excessive discrimination was practised against the authors when weighed against the overall objective of the fisheries legislation. The State party refers to the Committee's jurisprudence⁶ that not every distinction amounts to discrimination and that objective and reasonable differentiations are permitted. It argues that in the case of the authors, all conditions were fulfilled for the differentiation not to amount to a violation of article 26.

8.5 With reference to the aim of the differentiation, the State party observes that important evident public interests are tied to the protection and economical utilization of fish stocks. The State party has underwritten international legal obligations to ensure the rational utilization of these resources, in particular under the United Nations Convention on the Law of the Sea. The danger of overfishing in Iceland is real and imminent, due to advancement in fishing technology, higher catch yields and a growing fishing fleet. A collapse of fish stocks would have disastrous consequences on the Icelandic nation, for which fishing has been a fundamental occupation since the earliest times. Measures to prevent overfishing by means of catch limits are a necessary element in the protection and rational utilization of fish stocks. Therefore, public interest demands that restrictions be imposed on the freedom of individuals to engage in commercial

⁴ "All persons shall be equal before the law and shall enjoy human rights irrespective of their sex, religion, opinion, national origin, race, colour, property, birth or other status. (...)"

⁵ "All persons shall be free to engage in the employment of their choice. This freedom may nevertheless be restricted by law, providing that the public interest so demands."

⁶ The State party refers to communication No. 182/1984, *Zwaan de Vries v. the Netherlands*, Views adopted on 9 April 1987

fishing. Such restrictions are prescribed in law in detailed fisheries legislation. The State party raises the question of how the limited resources of the nation's fish stock were to be divided and considers that it was impossible to allocate equal shares to all citizens.

8.6 The State party argues that there are reasonable and objective grounds for the decision of the Icelandic legislature to restrict and control fish catches by means of a quota system in which harvesting rights are allocated on the basis of the previous catch experience of the fishing vessels rather than by other fisheries management methods. Reference is made to the Supreme Court judgement in the *Valdimar case*:

“The arrangement of making catch entitlements permanent and assignable is also supported by the consideration that this makes it possible for operators to plan their activities in the long term, and to increase or decrease their catch entitlements in individual species as may suit them at any particular time. In this respect, the Act is based on the assessment that the economic benefits leading from the permanent nature of catch entitlements and the possibilities for assignment of catch entitlements and quotas will lead to gainful utilization of the fish stocks for the benefit of the national economy.”

8.7 The State party refers to Act No. 85/2002, by which a special catch fee was imposed on vessel operators for their right of access to fishing areas, this being calculated to take account of the economic performance of fisheries. The catch fee has the same effects as a special tax imposed on vessel operators. This demonstrates that the legislature is constantly examining the best way of achieving the aim of efficiently controlling fishing and in the best interests of Iceland. The Parliament always further revises fisheries management arrangements and the right to make catches. It can also make this right subject to conditions or choose a better method of serving the public interest.

8.8 The State party notes that the comparison of various fisheries management systems in Iceland and abroad and the research findings of scientists in marine biology and economics have unequivocally concluded that a quota system such as the Icelandic one is the best method of achieving the economic and biological goals of modern fisheries management systems. Reference is made to a report entitled “On Fisheries and Fisheries Management in Iceland – A background report.”⁷ This report

outlines the basic features and advantages of the ITQ system, and the experience of the system in other countries. The State party also recalls the OECD report “Towards Sustainable Fisheries: Economic Aspects of the Management of Living Marine Resources”.

8.9 The State party points out that the objective and reasonable grounds that existed when the ITQ system was introduced still exist. If all Icelandic citizens, on the basis of equality before the law, had an equal entitlement to begin fishing operations and to have catch quotas allocated to them for this purpose, then the basis for Iceland's fisheries management system would collapse. Such a situation would undermine the system stability. The quota rights that were originally allocated on the basis of catch performance have since to a large extent passed into other ownership. Those who have subsequently acquired quotas have either bought them at their full market value or hired them. They do not constitute a “privileged group”. They have accepted the rules applying in Iceland's fisheries management system. If these entitlements were suddenly reduced or removed from their owners, to be equally distributed among all those who are interested in starting fishing operations, this would constitute a gross encroachment on the rights of those who have invested in these entitlements and have a legitimate expectation that they can continue to exercise them.

8.10 The State party demonstrates that the consequences of laws and regulations were not excessive for the authors and thus did not violate the principle of proportionality, in accordance with article 26 of the Covenant. The State party considers the authors' situation at two points in time: (a) at the time the Fisheries and Management Act No. 38/1990 was passed and harvest rights were initially allocated, and (b) at the time their request for a catch quota was rejected, as they did not fulfil the requirements of the Act.

8.11 Firstly, on 1 January 1991, when the Fisheries Management Act took effect, both authors were employed at sea on the same vessel, as captain and boatswain. They were in the same position as thousands of other vessel officers who had not invested any capital in the fishing vessels on which they based their livelihood. However, the catch performance history of the vessels on which they worked resulted in the vessels' receiving a quota share under the new fisheries management system. The new system did not alter anything in the context of the authors' employment as a vessel captain and boatswain. They were able to pursue their careers, and there were no excessive consequences for them. They did not have to discontinue the occupation for which they were educationally and culturally equipped, as claimed by them.

⁷ The report is enclosed in the State party's observations.

8.12 The State party rejects that article 26 of the Covenant prevented the authorities preparing the new legislation from making any distinction between persons who were the owners of fishing vessels (referred to by the authors as a “privileged group”) and other persons who worked in the fishing industry. It denies that harvest rights should have been allocated to them all equally. There was a fundamental difference between the owners of the fishing vessel on which the authors worked and the seamen who worked on the ship.

8.13 The State party therefore considers that the distinction which was drawn between the authors and the owners of fishing vessels when the Act was introduced cannot be considered to constitute unlawful discrimination under article 26.

8.14 Secondly, the State party considers the situation when the authors decided to become vessel operators and purchased a fishing vessel with limited catch entitlements. Their intentions, when they purchased the ship, were impracticable, partly because of the substantial reductions of certain endangered fish stocks. These reductions in the total catch were applied equally to all fishing vessels that held quota shares in the relevant species, and resulted in a temporary price increase in the market price of catch quotas for these species. The authorities’ decision not to award the authors a quota was foreseeable. The loss of property and income was the consequence of their own decision to stop working in their previous employment as wage earners in the fishing industry and to operate a vessel-operating company based on weak and risky premises. It was clear what legal conditions applied to those intending to start fishing-vessel operations at the time.

8.15 The State party argues that if the Committee accepts that, on the basis of their purchase of a fishing ship in 1998, the authors were entitled to have a quota allocated to them and to begin fishing operations, then it must also be accepted that at least all those persons who worked as vessel captains or crew members also had an equal right to start fishing operations and to have a quota share allocated to them. The consequences of the system are not more serious for the authors than for thousands of other seamen in Iceland who may wish to purchase fishing vessels and start fishing operations. The State party denies that it is justified for vessel operators to deliberately make unlawful catches of fish to protest against what they consider to be an unjust fishing management system. It is evident that those who break the law will be prosecuted. By doing so, they do not acquire the status of “victims” of unlawful discrimination.

8.16 Finally, the State party argues that if it were now decided to distribute equal fishing quotas to all

persons who work at sea or who are interested in purchasing and operating fishing vessel, this would result in serious consequences for those parties that are currently active in the fishing industry and have invested in such rights. Such a decision would have consequences for the interest that society as a whole has to preserve the stability of the fishing industry. With greater demand for shares in the fish stocks (a limited resource) and an obligation on the Government to allocate equal shares to all fishermen, the stability of these entitlements would be uncertain. The result would be that investments in fishing vessels would become unprofitable, the industry as a whole would run into difficulties and there would be a return to the situation which was in place before the current arrangements took effect.

8.17 The State party argues that none of the authors’ alleged financial losses can be attributed to the fisheries management system, but rather to their own decision to buy a fishing vessel without a quota share, knowing the legal requirements and foreseeable consequences of that situation.

Authors’ comments

9.1 On 23 March 2007, the authors commented on the State party’s merits observations. They argue that the State party has persistently upheld the policy adopted following the *Valdimar* judgement, disregarding every opportunity to institute a fisheries management system conforming to fundamental human rights principles. While the State party argues that the “vast majority” of the catch entitlements established by the system have now been sold, the authors agree that “many persons have become millionaires by selling their gift”. However, many persons and companies remain in possession of their gift, either leasing it to others or using it for themselves. No accounts or records of the sales have been kept. The authors claim that the State party has succeeded in persuading innocent persons to purchase unlawfully acquired valuables. They argue, however, that purchase of illegally obtained valuables does not give rise to a right of ownership.

9.2 The authors claim that human rights are not subject to statutes of limitation and can not be set aside by prescription. They indicate that they are not claiming a share in a privilege. They insist, on the contrary, that limitations to fishing must be imposed subject to generally applicable conditions. They maintain that it is illegal in every normal domestic legal system, to restrict ocean fishing permanently to a circumscribed group that has been granted such a right *gratis*, and to oblige others to purchase a share in the privileges of its members by payments to their personal benefit.

9.3 The authors argue that the equality principle prohibits discrimination on the grounds stated in article 26 of the Covenant, which include “status”.

For the purposes of these provisions, “discrimination” means treating a person less favourably than others on the basis of such grounds. If some persons are granted a privilege which is denied to others, a “status” is created, not only the status of the privileged, but also the status of the non-privileged. An alleged violator of article 26 cannot logically invoke as a defence that all persons who do not enjoy the privilege have the same status.

9.4 On the State party’s argument that no discrimination under article 26 took place, the authors agree that the aim of the differentiation, i.e., the preservation and protection of natural resources, was lawful. However, they recall that the method which was used to pursue this aim was the distribution of the entire TAC among operators active during a certain period. The decision was then taken to make the TAC shares a private, assignable property. The effect was the institution of privilege in the recipients’ favour at the expense of the civil rights of others. As a result, only the recipients could engage in fishing. All others, including the authors, must purchase from them a portion of their donated TAC share if they also want to engage in fishing. The authors argue that the legitimacy of preservation and protection is irrelevant because of the effect of the measure.

9.5 The authors consider that the institution of the privilege lacks a legal basis because of its unconstitutionality. They add that discrimination is never justified and that the meaning of the term “discrimination” is the failure of the State to apply advantageous rules to all, or the application of disadvantageous rules only to some.

9.6 With respect to the State party’s claim that it was necessary to respect the right to employment of persons active in the fisheries sector, the authors question the impartiality of this argument. They argue that with the advent and entrenchment of the fisheries management system, the idea has settled that employment, or the right to continue in the employment one is active in, is in fact property, protected as such by article 72 of the Icelandic Constitution. The argument was invented subsequently to provide a justification of the fisheries management system, by declaring that the beneficiaries of the limitation of the fishing banks must have their constitutional rights protected.

9.7 The authors recall that the Icelandic fisheries management system came into being by evolution, followed by a decision to make it permanent. The reason why it was tolerated at first was that individuals and companies who had invested in vessels and equipment had to be given a chance to recover their investment. The authors refer to *Valdimar* case, in which it was stated that:

“Although temporary measures of this kind to avert the collapse of fish stocks may have been justifiable, which question is not at issue, providing permanently by law for the discrimination ensuing from [...] the issue of fishing entitlements can not be regarded as logically necessary.”

9.8 The authors point out that the obligation of devising a fisheries management system that does not violate international human rights is the task of the Icelandic Government, not of the authors. What they claim is an opportunity to pursue the occupation of their choice under the same conditions as those that apply to others. It is for the Icelandic Government or legislature to decide how this requirement is to be fulfilled.

9.9 On the State party’s fear that “clearly the basis for Iceland’s fisheries management system would collapse”, the authors argue that the fear of the collapse of the system of donated privilege is what has kept that system alive. A dismal outcome in this respect would to some degree be offset by reintroduction of legal principles and improved respect for law afterwards.

9.10 With respect to the State party’s contention that the fisheries management system did not affect the authors, because they were able to continue to pursue their careers as they had done all their working lives, the authors invoke the principle of equality of opportunity: the possibility for persons of any rank or stature to rise in social standing and wealth by work of any kind has been Iceland’s strength until now.

9.11 The authors consider that in an environment challenged as unlawful, domestically or internationally, a person’s attempts to accommodate his/her activities to that environment should not be taken as recognition of its legality, or as a waiver of his/her right to denounce that environment as unlawful. The authors refer to the provision of paragraph 1 of the Act, recognizing the “common property of the nation”. Persons speaking for the Icelandic Government in public have increasingly taken the stand that this provision is meaningless. Such a statement insinuates that the provision was included in the Act for purposes of deception. In addition, the authors acted as they did because they felt a strong injustice.

9.12 The authors emphasize that their claim is not to have a quota share allocated to them by the authorities, but to be able to pursue the occupation of their choice on the same terms as others. It is not their task to say exactly how this requirement is to be fulfilled.

9.13 The authors explain that cod is, and always has been, by far the most common species of ocean catch in the waters around Iceland, and the species always yielding by far the highest export value. It is so widely distributed, and so common, that it generally accompanies any other ocean catches. A catch of any other species normally includes between 5 and 15 per cent of cod. Cod catches accompanying any other catch make it necessary for a fisherman to have a cod quota, even if he only intends to catch something else. To catch other species for which they had a quota, the authors would have had to receive or purchase a cod quota to cover the cod that was certain to be caught additionally. Since they had not been given any cod quota, they had to acquire it by lease or purchase.

9.14 The *Sveinn Sveinsson*, the authors' ship, was 24 gross tons in size. They wanted to make their careers in the operation of fishing vessels of about that size, or if anything much larger, that is, modern, ocean-going fishing ships. That is what they worked with, and that is what they trained for. The institution of the quota system in 1984 automatically encompassed all persons owning boats 10 gross tons and larger, but boats smaller than this limit were not brought under the system at once. This happened gradually, in various stages. By Act No. 97/1985, all fishing by net with boats less than 10 tons in size was brought under effort restrictions. By Act No. 8/1988, the limit set at 10 tons was reduced to 6 tons. Finally, Act No. 38/1990 provided for a continuation of the system instituted, for all boats larger than 6 tons. Even if it is correct that the process was only completed in 2004, this changes nothing as regards the authors' complaints.

9.15 On the protection of the right to freedom of employment, the authors argue that the purpose of article 75 of the Constitution is to keep employment open to all, subject to generally applicable requirements. Its purpose is not to protect the interests of people already employed. On the contrary, its purpose is to prevent interest groups from monopolizing occupations or preventing others from entering them.

9.16 Counsel concludes that control of ocean fishing by means of individual ownership of catch entitlements is sensible. It is therefore vital, if such a system is instituted, to institute it lawfully, without any violation of constitutional principles and international human rights instruments. This can not lawfully be done by representatives of the public limiting the use of the fishing banks to a particular group and turning the privileges of its members into their personal property to be sold or leased by them to the remainder of the population.

Consideration of the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

10.2 The main issue before the Committee is whether the authors, who are lawfully obliged to pay money to fellow citizens in order to acquire quotas necessary for exercising commercial fishing of certain fish species and thus to have access to such fish stocks that are the common property of the Icelandic nation⁸, are victims of discrimination in violation of article 26 of the Covenant. The Committee recalls its jurisprudence that under article 26, States parties are bound, in their legislative, judicial and executive action, to ensure that everyone is treated equally and without discrimination based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. It reiterates that discrimination should not only be understood to imply exclusions and restrictions but also preferences based on any such grounds if they have the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of rights and freedoms.⁹ It recalls that not every distinction constitutes discrimination, in violation of article 26, but that distinctions must be justified on reasonable and objective grounds, in pursuit of an aim that is legitimate under the Covenant.¹⁰

10.3 The Committee firstly notes that the authors' claim is based on the differentiation between groups of fishers. The first group received for free a quota share because they engaged in fishing of quota-affected species during the period between 1 November 1980 and 31 October 1983. Members of this group are not only entitled to use these quotas themselves but can sell or lease them to others. The second group of fishers must buy or rent a quota share from the first group if they wish to fish quota affected species for the simple reason that they were not owning and operating fishing vessels during this reference period. The Committee concludes that such distinction is based on grounds equivalent to those of property.

10.4 While the Committee finds that the aim of this distinction adopted by the State party, namely the

⁸ Formulation of article 1 Act 38/1990.

⁹ General comment No. 18 – Non-discrimination, para. 7.

¹⁰ See communications No. 1314/2004, *O'Neill and Quinn v. Ireland*, Views adopted on 24 July 2006; No. 1238/2004, *Jongenburger-Veerman v. The Netherlands*, Views adopted on 1 November 2005; No. 983/2001 *Love et al. v. Australia*, Views adopted on 25 March 2003.

protection of its fish stocks which constitute a limited resource, is a legitimate one, it must determine whether the distinction is based on reasonable and objective criteria. The Committee notes that every quota system introduced to regulate access to limited resources privileges, to some extent, the holders of such quotas and disadvantages others without necessarily being discriminatory. At the same time, it notes the specificities of the present case: On the one hand, the first article of the Fisheries Management Act No. 38/1990 states that the fishing banks around Iceland are common property of the Icelandic nation. On the other hand, the distinction based on the activity during the reference period which initially, as a temporary measure, may have been a reasonable and objective criterion, became not only permanent with the adoption of the Act but transformed original rights to use and exploit a public property into individual property: Allocated quotas no longer used by their original holders can be sold or leased at market prices instead of reverting to the State for allocation to new quota holders in accordance with fair and equitable criteria. The State party has not shown that this particular design and modalities of implementation of the quota system meets the requirement of reasonableness. While not required to address the compatibility of quota systems for the use of limited resources with the Covenant as such, the Committee concludes that, in the particular circumstances of the present case, the property entitlement privilege accorded permanently to the original quota owners, to the detriment of the authors, is not based on reasonable grounds.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including adequate compensation and review of its fisheries management system.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views.

APPENDIX

Dissenting opinion by Committee members Ms. Elisabeth Palm, Mr. Ivan Shearer and Ms. Iulia Antoanella Motoc

As the majority of the Committee has found, there is a differentiation between the group of fishers who received without payment a quota share and the other group of fishers who must buy or rent a quota share from the first group if they wish to fish quota affected species. We agree with the majority that the aim of this distinction, namely the protection of Iceland's fish stocks which constitute a limited resource, is a legitimate one. It rests to be decided if the distinction is based on reasonable and objective criteria.

In that respect we note that the Supreme Court in its judgement in 1998 in the Valdimir case considered that the economic benefits leading from the permanent nature of catch entitlements and possibilities for assignment of catch entitlements and quotas will lead to gainful utilization of the fish stocks for the benefit of the national economy. Moreover in the Vatnery case, of April 2000 the Supreme Court found that the restrictions on an individual's freedom to engage in commercial fishing was compatible with Iceland's constitution as they were based on objective considerations. In particular the Court noted that the arrangement of making catch entitlements permanent and assignable is supported by the consideration that this makes it possible for operators to plan their activities in the long term, and to increase or decrease their catch entitlements in individual species as may suit them.

It is also noteworthy that notwithstanding that particular boats benefit from quota entitlements they must, according to Act No. 85/2002, still pay a special catch fee for their right to access to fishing areas, this being calculated to take account of the economic performance of fisheries. According to the State party the catch fee has the same effect as a special tax imposed on vessel operators. In the State party's opinion a change of the fisheries management system would entail serious consequences for those who have bought quota shares from the initial quota holders and risk jeopardizing the stability of the fishing industry. According to the State party it would also have consequences for the State as a whole which has a legitimate interest in preserving the stability of the fishing industry. After several unsuccessful attempts to regulate the fisheries management, the current system was put into place and it has proved its economic efficiency and sustainability.

Taking into account all the factors mentioned above and the advantages which the current system offers for the fishing management in Iceland, notably the need to have a stable and robust system, as well as the disadvantages of the system for the authors i.e. the restrictions on the author's freedom to engage in commercial fishing we find that the State party has carried out a careful balance, through its legislative and judicial processes, between the general interest and the interest of the individual fishers. Moreover we find that the distinction between the two groups of fishers is based on objective ground and is proportionate to the legitimate aim

pursued. It follows that there has been no violation of article 26 in the present case.

[signed] Ms. Elisabeth Palm

[signed] Mr. Ivan Shearer

[signed] Ms. Iulia Antoanella Motoc

Dissenting opinion by Committee member Sir Nigel Rodley

I generally agree with the dissent of Mr. Iwasawa and with the joint dissent of Ms. Palm and Mr. Shearer. While I am sympathetic to the sense of unfairness that the authors must feel at the creation of a privileged class entitled to exploit a precious resource that is associated with their livelihood and at their exclusion of access to that resource, I cannot conclude that the State party has violated the Covenant in respect of the authors.

The State party has drawn attention to evidence supporting its contention that its ITQ system was the most economically effective (see para. 8.8) and, as such, reasonable and proportionate. These are practical arguments that the authors fail adequately to engage with in the reply (see para. 9.8). It was essential that they confront this issue, especially in the light of the difficulties for a non-expert international body itself to master the issues at stake and the deference to the State party's argument that is consequently required.

Also, the Committee's Views seem to be affected, perhaps decisively, by the contextual factor that the fisheries are the common property of the Icelandic nation. It is not clear to me how the same facts in another country not having adopted the 'common property' doctrine could then justify the Committee's arriving at a different conclusion.

[signed] Sir Nigel Rodley

Dissenting opinion by Committee member Mr. Yuji Iwasawa

According to the constant jurisprudence of this Committee, not every distinction constitutes discrimination in violation of article 26 of the Covenant; specifically, a distinction can be justified on reasonable and objective grounds in pursuit of an aim that is legitimate under the Covenant.

The Views of the majority of the Committee do not question that the State party was pursuing a legitimate aim in adopting a fisheries management system in order to safeguard its limited natural resource, but found that the quota system introduced by the State party was not justified on "reasonable" grounds and accordingly in breach of article 26 of the Covenant. I write separately to express my disagreement with that conclusion.

Article 26 of the Covenant lists a series of specific grounds such as race, colour, sex and the like upon which discrimination is prohibited and which warrant particularly careful scrutiny. It is certainly not an exhaustive list as is made clear by the phrase "such as" and the amorphous ground of "other status", but it is important to note that this case involves none of the explicitly listed grounds of prohibited discrimination.

Moreover, the right affected by the quota system is a right to pursue the economic activity of one's choice and goes to none of the civil and political rights which form the basis of a democratic society such as a freedom of expression or a right to vote. States should be allowed wider discretion in devising regulatory policies in economic areas than in cases in which they restrict, for instance, a freedom of expression or a right to vote. The Committee should be mindful of the limits of its own expertise in reviewing economic policies which had been formed carefully through democratic processes. The Committee should take these factors fully into account in evaluating whether a distinction can be justified on "reasonable" grounds.

"Property" is one of the prohibited grounds of discrimination, and the majority seems to assume that this case involves discrimination based on "property", stating—rather unclearly—that the distinction is based on "grounds equivalent to those of property". A quota system introduced by the State party in 1983, and made permanent in 1990, comprised an allocation of catch quotas to individual vessels on the basis of their catch performance during the reference period between 1 November 1980 and 31 October 1983. The distinction made on the basis of the catch performance of individual vessels during the reference period is, in my view, not a distinction based on "property", but rather an objective distinction based on the economic activities of a person undertaken during a specified period of time.

The capacity of Iceland's fishing fleet was surpassing the yield of its fishing banks and measures became necessary to safeguard its limited natural resource. The State party has argued—quite properly—that the public interest demands that restrictions be imposed on the freedom of individuals to engage in commercial fishing in order to prevent overfishing, as many other State parties to the Covenant have done. The establishment of permanent and transferable harvest rights was seen as necessary in the State party's circumstances to guarantee stability for those who have invested in fishing operations and to make it possible for them to plan their activities in the long term. In 2002, the scheme was modified so as to impose a special catch fee for vessel operators for their rights of access to fishing areas. The State party has explained that the catch fee has the same effect as a special tax imposed on vessel operators. The current system has proved its economic efficiency and sustainability. The State party has argued that if the system were to be changed at this juncture, this would result in serious consequences for those parties that are currently active in the fishing industry and have invested in fishing operations, and possibly jeopardize the stability of the fishing industry.

While fishers who had invested in fisheries operations and were owners of fishing vessels during the reference period were given a quota, other fishers are prevented from commercial fishing without purchasing or leasing a quota from holders of a quota and suffer corresponding disadvantages. However, a fishing management system must of necessity contain restrictions on the freedom of individuals to engage in commercial fishing in order to achieve its intended purpose. In view of the advantages offered by the current system, I am unable to find that the disadvantages resulting for the authors—the restrictions on their right to pursue the economic

activity of their choice to the extent they desire—are disproportionate. For these reasons, I am unable to share the conclusion of the majority that the distinction made by the State party on the basis of the catch performance of individual vessels during the reference period was “unreasonable” and in breach of article 26.

[Signed]: Mr. Yuji Iwasawa

Dissenting opinion by Committee member Ms. Ruth Wedgwood

I concur in the careful elucidation of the facts of this case, as set forth by my colleagues Elisabeth Palm and Ivan Shearer. The State party has provided an extended explanation of why Icelandic authorities concluded that a system of fishing quotas based upon historic catch would be the most feasible method for regulating and protecting Icelandic fisheries.

At the same time, I agree with my colleague Yuji Iwasawa on an important point of principle—namely, the Human Rights Committee has a distinctly limited scope of

review in economic regulatory matters pleaded under article 26.

The alleged discrimination here was between fishermen operating at an earlier or later date. There is no suggestion that the distinction among fishermen was based on ethnicity, religion, gender, or political affiliation, or any other characteristic identified in article 26 or otherwise protected by the Covenant. The grandfathering of prior industry participation remains a common practice among various States—including in the award of taxi medallions, agricultural subsidy allotments, and telecommunications spectra. Free entry into new economic sectors may be desirable, but the International Covenant on Civil and Political Rights was not a manifesto for economic deregulation. To effectively protect the important rights that fall within the aegis of the Covenant, the Committee also must remain true to the limits of its competence, both legal and practical.

[Signed]: Ms. Ruth Wedgwood

Communication No. 1314/2004

Submitted by: Michael O’Neill and John Quinn (represented by counsel, Mr. Michael Farrell)

Alleged victim: The authors

State party: Ireland

Date of adoption of Views: 24 July 2006

Subject matter: Discrimination by the executive with respect to the application of an early release scheme for prisoners

Procedural issues: None

Substantive issues: Equality before the law and equal protection of the law

Articles of the Covenant: 9, para. 1; 14, para. 1; 26; 2, paras. 1 and 3

Articles of the Optional Protocol: -

Finding: No violation

1. The authors of the communication are Michael O’Neill and John Quinn, both Irish nationals, born on 10 February 1951 and 8 November 1967, respectively. They claim to be victims of violations by Ireland of their rights under article 2, paragraphs 1 and 3; article 9, paragraph 1; article 14, paragraph 1; and article 26, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Ireland on 8 March 1990. They are represented by counsel, Mr. Michael Farrell, Solicitor.

The facts as presented by the author

2.1 On 3 February 1999, Michael O’Neill was convicted by the Special Criminal Court of the manslaughter of a police officer (Garda), Detective Garda Jerry McCabe (hereinafter referred to as “Garda McCabe”), the malicious wounding of another police officer and possession of firearms with intent to commit an offence. These offences arose out of an attempted robbery of a mail van in Adare, Co. Limerick, Ireland, on 7 June 1996. Mr. O’Neil pleaded guilty and he was sentenced to eleven years imprisonment on the charge of manslaughter and two terms of five years imprisonment on the other charges; all sentences to run concurrently. Although he had been in custody since 20 June 1996, the sentences were dated from February 1999 and he is due for release with full remission on 17 May 2007.

2.2 In February 1999, Mr. Quinn pleaded guilty to and was convicted of conspiring to commit the above mentioned robbery by the Special Criminal Court and was sentenced to six years imprisonment. He was released on 8 August 2003, after completing his sentence with normal remission. Three other persons were convicted of the manslaughter of Garda McCabe, the malicious wounding of the other

policeman, and possession of firearms with intent. They were sentenced to terms of imprisonment ranging from twelve to fourteen years.

2.3 The attempted robbery was carried out on behalf of the Provisional Irish Republican Army (IRA), an illegal paramilitary organization involved in the armed conflict in Northern Ireland, which frequently spilled over into Great Britain and the State party. The robbery and shooting were initially denied by the Provisional IRA but were subsequently admitted by it. All five persons convicted were recognized by the Irish Prison Authorities and the Department of Justice, Equality and Law Reform, (hereafter referred to as the Department of Justice), as belonging to the Provisional IRA and were held in a separate part of the prison reserved for such prisoners.

The Good Friday Agreement and the release of prisoners' scheme

2.4 There was a prolonged and violent conflict in Northern Ireland since the beginning of the 1970s. In August 1994, the Provisional IRA had declared a ceasefire followed by similar declarations by Loyalist paramilitary groups, i.e., groups supporting the continuance of the connection between Northern Ireland and the United Kingdom. The IRA resumed its violent campaign in February 1996, and it was during this period that the offence in question occurred. A ceasefire was declared in September 1997, which has lasted to date.

2.5 On 10 April 1998, a formal international agreement between the Governments of the United Kingdom and Ireland (the British-Irish Agreement) and a political agreement between the two Governments and the various political parties was reached (Multi-Party Agreement). Under the terms of the former agreement the two Governments, inter alia, undertake as a matter of international law "to support and, where appropriate implement, the terms of the Multi-Party Agreement". This package of agreements was formally known as the "Agreement reached in the Multiparty Negotiations", but is generally referred to as the Good Friday Agreement (hereinafter referred to as the "GFA").

2.6 One section of the GFA, entitled "Prisoners" provided that both the United Kingdom and Irish Governments would establish mechanisms to enable the early release of prisoners convicted of "scheduled offences" in Northern Ireland or similar offences committed elsewhere. "Scheduled offences" were offences committed by or on behalf of paramilitary organizations connected with the Northern Ireland conflict. Prisoners affiliated to organizations which were not maintaining complete and unequivocal ceasefires would not benefit from the early release provisions. It was envisaged under the GFA that all qualifying prisoners would be

released at the end of two years after commencement of the scheme if not before.¹

2.7 The Prisoner Release scheme was implemented in the State party by the Criminal Justice (Release of Prisoners) Act, 1998 (hereinafter referred to as "the 1998 Act"). The 1998 Act did not confer new release powers on the Minister for Justice, Equality and Law Reform (hereafter referred to as "the Justice Minister"). The releases were to be effected under existing discretionary powers (section 33 of the Offences against the State Act 1939, see para. 4.3 below), but the Act provided for the establishment of a Commission to advise the Justice Minister in relation to the release of prisoners pursuant to the GFA. The Act provided, however, that the Commission could only advise the Minister in relation to prisoners who had already been specified by him to be "qualifying prisoners for the purposes of the Good Friday Agreement". Accordingly, the key decision in relation to the release of any prisoner under the scheme was the decision as to whether or not that person was a "qualifying prisoner."² On 28 July 1998, the release scheme commenced. In a joint statement issued on 5 May 2000, the Prime Ministers of the United Kingdom and Ireland stated "It is intended that, in accordance with the GFA, all remaining prisoners qualifying for early release will be released by the 28th July 2000". Figures issued by the two Governments on 14 July 2001 confirmed that 444 qualifying prisoners had been released in Northern Ireland under the GFA, and 57 had been released in the State party.

The authors' requests for release

2.8 On 25 July 2000, the authors wrote to the Justice Minister requesting confirmation that he had specified them as "qualifying prisoners" for the

¹ In the "prisoners" section "of the GFA, it was stated that "... the intention would be that should the circumstances allow it, any qualifying prisoners who remained in custody two years after the commencement of the scheme would be released at that point".

² According to the 1998 Act, "qualifying prisoners" shall be construed in accordance with section 3 (2) of this Act". Section 3 (2) states, "The Minister shall from time to time, as he or she considers appropriate, request the Commission to give advice with respect to the exercise, by reference to the relevant provisions, of any power referred to in subsection (1) of this section in relation to persons specified by the Minister to be qualifying prisoners for the purposes of those provisions (in this Act referred to as "qualifying prisoners") and the Commission shall comply with such a request." "relevant provisions" mean "those provisions of the Agreement reached in the Multi-Party Talks which appear under the heading "Prisoners" in that Agreement..." Under the "prisoners" heading in the GFA, it stated inter alia that the prisoners must have been convicted of an offence similar to a scheduled offence in Northern Ireland and must not be affiliated to organizations that are not maintaining a complete and unequivocal ceasefire.

purpose of the early release scheme, and requesting their release pursuant to the GFA and the 1998 Act. They added that if the Minister did not intend to accede to this application, he should furnish them with the reasons for his decision and give them the opportunity to make representations in connection therewith. By 30 July 2001, and despite a number of further letters to the Minister, the authors had received only acknowledgements of receipt of these letters. During this period, the Justice Minister had made a number of statements, both publicly and in letters to private individuals, to the effect that prisoners convicted in connection with the death of Garda McCabe would not be released under the GFA. According to the authors, a number of prisoners had been released in the State party who had been convicted of offences as grave as or graver than those committed by the authors, including the Offence of Capital Murder of members of the police force.³ A large number of prisoners had been released in Northern Ireland, who had been convicted of the murder of police officers there.

2.9 In or around 2002, the authors obtained four documents from the Department of Justice, under freedom of information legislation. The first document dated, 4 October 2000, set out “the criteria for consideration under the provisions of the Good Friday Agreement” namely that the prisoners’ “offences pre-date the GFA and were committed on behalf of an organization to which the terms of the GFA apply”. The document gave a list of persons who had been sentenced to life imprisonment for murder and whom it recommended should be referred to the Release of Prisoners Commission. One of the persons listed had been convicted of the murder of a member of the police force (Garda Siochana), and the documents stated that other persons convicted with him for that murder had already been released under the terms of the GFA. The second document, undated, indicated that prisoners convicted before the Special Criminal Court in the State party, in respect of offences similar to scheduled offences in Northern Ireland, which had been committed before the signing of the GFA, and who were affiliated to the Provisional IRA or another paramilitary organization called the INLA, would qualify for release under the terms of the GFA. According to the authors, the offences committed by them clearly came within the criteria set out in these two documents.

³ The death penalty was retained in Ireland until 1990 for the murder of police officers on duty, known as “capital murder” but all such sentences were commuted to 40 years imprisonment without remission. In 1990 the death penalty was abolished for all offences but a mandatory minimum sentence of 40 years was prescribed for capital murder.

2.10 The third document was in question and answer form, and indicated that prisoners convicted after 10 April 1998, (the date of the conclusion of the GFA) for offences committed before that date would be covered by the early release scheme, with the exception of any persons “convicted of the murder” of Garda McCabe. The document went on to discuss how long prisoners convicted after 10 April 1998 of pre-GFA offences would have to serve before they would be released. This document acknowledged that an exception was being made in the case of persons convicted of the murder of Garda McCabe and said that “this was a political judgement made against the background of the need to ensure public support for the terms of the GFA”. . The document said that “persons convicted of the murder of other Gardai [police officers]—who have already served long sentences—will be covered by the prisoner release arrangements”. The fourth document, dated 17 August 2001, is a letter from the Irish Prisons Service, (then a division of the Department of Justice) addressed to the Governor of Portlaoise Prison and to a prisoner whose name had been erased, but who had sought early release under the GFA. It stated that the Minister was not inclined to specify the prisoner concerned as a qualifying prisoner and gave the Minister’s reasons for this. However, it invited the prisoner to make further representations if he so wished.

2.11 On 30 July 2001, as no reply had been forthcoming from the Justice Minister, the authors applied to the High Court and were granted leave to take judicial review proceedings seeking, inter alia, a declaration that they were “qualifying prisoners” for the purposes of the GFA and the 1998 Act. Judicial review in the State party proceeds by way of affidavit evidence. The respondents did not file any replying affidavits and did not contradict any of the evidence adduced on behalf of the authors. By letter of 5 June 2002, the Justice Minister replied to the authors’ request to be specified as qualifying prisoners, stating that they had not been specified and that any such decision referred “to privileges or concessions” and was not subject to the procedures that had been requested by the authors.

2.12 On 26 and 27 November 2002, the authors’ case was heard in the High Court and judgement was given on 27 March 2003. The judgement states that “...it seems clear and it is not in fact contested by the respondents, since they have filed no affidavit, that the applicants, were they to be considered for release by the Minister, do fall within the category of prisoner who would be eligible for release under the relevant provisions.” However, it was held that Section 3 (2), of the 1998 Act, gave the Minister “an absolute discretion” as to whether to request advice from the Release of Prisoners Commission about whether or not to release individual prisoners.

Accordingly, there was no obligation on the Minister to consider any particular person for release. Thus, he could not be said to have acted capriciously, arbitrarily or unjustly in refusing to specify the authors as qualifying prisoners. He dismissed their application for judicial review.

2.13 The authors appealed to the Supreme Court which gave judgement on 29 January 2004. The Court noted that although it was undisputed that at the time the offences were committed and the authors were convicted, they were affiliated to the Provisional IRA, “it is accepted that neither of the applicants is now affiliated to an organization which is not maintaining a complete and unequivocal ceasefire”. The Court referred to the Question and Answer document (para. 2.10 above). It held that the GFA had not been incorporated into Irish law and conferred no specific rights on individuals. The power to release prisoners was a “quintessentially executive function and a discretionary one.” However, it held that the High Court judge’s characterization of this discretion as “absolute” was too wide—any such power had to be exercised in good faith and not in an arbitrary, capricious or irrational manner.

2.14 In conclusion, the Court distinguished between the authors’ case and those of other prisoners who had been released after committing equally or more serious crimes, on the grounds that the latter group had all been tried and convicted at the time the GFA was concluded. Given this distinction, the Court held that to make a decision that no one convicted in connection with the murder in question should be released, was “a policy choice, which it was entirely within the discretion of the Executive to make, and could not be characterized as capricious, arbitrary or irrational”. It rejected the claim that the refusal to specify them as qualifying prisoners constituted unfair discrimination between them and others who had committed crimes of equal or greater gravity, and reiterated that, on the basis of the presumed distinction, the authors were not in the same position as those convicted of similar or graver offences. The Supreme Court rejected the authors’ appeal.

2.15 According to the authors, the distinction made by the Supreme Court between the authors and those convicted with them, and other persons released under the GFA, was not put to counsel for the authors during the hearing. They were given no indication that the Court regarded this as a significant issue. It was mentioned in one speculative query by the Chief Justice during a series of exchanges between members of the Court and counsel for the respondents, a query to which counsel did not respond. It was factually erroneous, too. The question and answer document obtained

under freedom of information legislation (para. 2.10 above) and referred to in both the High Court and Supreme Court judgements, had made it clear that the release provisions applied to persons convicted after the GFA as well as before it. In fact, two persons had been released in the State party who had been convicted after the GFA for offences committed before it, and at least eleven persons convicted after the GFA for pre-GFA offences had been released in Northern Ireland, confirming that the authorities there made no such distinction between convictions imposed before or after 10 April 1998. The cases in question had not been specifically drawn to the attention of the High Court as no one had sought to make such a distinction. It was undisputed in the High Court that, were the authors to be considered by the Minister, they would fall into the category of persons who would be eligible for release under the relevant provisions. This was not contested by the respondents. Similarly, this information had not been brought to the attention of the Supreme Court because, as an appellate Court, it proceeds on the basis of the evidence that was before the lower Court. In this case, neither side had sought to challenge the finding by the High Court that the authors met the criteria for eligibility for the early release scheme.

2.16 On 12 February 2004, the authors issued a motion seeking to have the judgement and order of the Supreme Court set aside or corrected and seeking a rehearing of their appeal. The grounding affidavit for the application gave details of the two persons who had been released in the State party following post GFA convictions, and also of a larger number of persons in similar circumstances who had been released in Northern Ireland. In a sworn affidavit of 4 March 2004, the respondents confirmed the release of the two individuals convicted after the GFA but denied that their cases were comparable to those of the authors. On 1 April 2004, the authors’ application was heard by the same panel of the Supreme Court, which held that the facts in relation to the point at issue, “were agreed and were not in issue at any stage in the case.” The Court was satisfied that counsel for the authors had every opportunity to deal fully with the matter and dismissed the application.

The complaint

3.1 The authors claim that they were discriminated against, under articles 2, paragraph 1, and 26, by the refusal of the Justice Minister to specify them as qualifying prisoners under the 1998 Act. They claim that they meet all the criteria for release under this scheme, set out in the four documents abovementioned, which originated from the Department of Justice, but that the Justice Minister arbitrarily refused to include them in the scheme. They claim that they are the only persons

meeting the criteria who have been excluded from the scheme and that other persons convicted of comparable and even graver offences were specified as qualifying prisoners.

3.2 The authors argue that the Justice Minister's discretion must not be exercised in an arbitrary, irrational or discriminatory manner, and must be exercised within the criteria used in administering the early release scheme. Prior to the judicial review proceedings, no reasons were given for the authors' exclusion. The reason given after the commencement of proceedings did not relate to the objectives of the scheme but to extraneous political considerations. Furthermore, the authors were not afforded the benefit of procedures that were afforded to other prisoners seeking early release, namely an invitation to make representations prior to determination of the applicant's claim. Thus, the authors were discriminated against in the way that their applications were dealt with and by the refusal to specify them as "qualifying prisoners", and to grant them release.

3.3 The authors claim a violation of article 9, paragraph 1, since although they were originally detained pursuant to a valid court decision, their continued detention became arbitrary, following the Justice Minister's refusal, on discriminatory grounds, to include them in the early release scheme. They also claim that they were denied a fair hearing under article 14, paragraph 1, in that the Supreme Court dismissed their appeal on grounds which were manifestly erroneous, not having afforded the authors' legal representatives an opportunity to make submissions on or to rebut the incorrect assumption upon which the Court based its decision. The denial of a fair hearing was compounded by the refusal of the Supreme Court to set aside or vary its decision when presented with evidence that that decision was based on an erroneous assumption.

3.4 The authors claim that they were denied an effective remedy, under article 2, paragraph 3, because the State party's courts failed to protect them against discrimination in the operation of the early release scheme, including the denial of procedures made available to other prisoners. They also claim that they were denied an effective remedy because there was no avenue of redress after the Supreme Court had rejected their appeal on clearly erroneous grounds, and failed to afford them fair procedures during the hearing of their appeal.

3.5 Finally, the authors claim that the decision of the Supreme Court to award costs against them in respect of their application to set aside the Court's decision or to agree to a rehearing of their appeal was a breach of their right to an effective remedy. It is argued that his decision penalized the authors for attempting to secure redress for a decision based on

incorrect facts. The authors claim that they should have been afforded a forum where this could be reasonably assessed and corrected if their contention was found to have merit. Instead, the same panel of the Supreme Court simply refused to reconsider the factual decision, suggesting instead that the authors' representatives had had adequate opportunity to rebut findings of fact.

The State party's submission on admissibility

4.1 On 22 December 2004, the State party contests the admissibility of the communication. It confirms the facts as set out by the authors with respect to the incident of which they were convicted. It submits that prior to commission of the offences, the State party had been engaging in difficult and sensitive negotiations, known as the "peace process", with the United Kingdom and a number of interested political parties in Northern Ireland. It states that the offences caused outrage throughout the State and that, during the trial, prosecution witnesses refused to give evidence or contended that they could not recall anything of the event. It submits that the GFA is a matter of considerable political, historical, constitutional and legal significance in Ireland. To consent to be bound by the British-Irish Agreement, and pursuant to its obligations under the Multi-Party Agreement, the State party's Government proposed amendments to the Irish Constitution, which were approved by referendum on 22 May 1998.

4.2 The State party submits that the authors were *never* deemed to come within the remit of the early release scheme. Before, during and after the negotiation of the GFA, the passage of the Amendment to the Irish Constitution and the introduction of the 1998 Act, the State party's Government repeatedly made clear that any provisions for the release of prisoners would not apply to any person convicted of involvement in the incident in which Garda McCabe was murdered. On successive occasions, members of the State party's Government made public pronouncements to this effect. The authors would have known that they would be excluded, through the negotiations of the GFA, the statements of members of Government in Parliament, in the print and other media and in the context of the referendum to amend the Constitution. At the time of submission, the State party stated that the negotiations of the GFA were at a critical point and that political representatives of the IRA were requesting the release of those convicted of involvement in the incident in question, under the provisions of the GFA. Without prejudice to its belief that these prisoners are not covered by the GFA, the State party's Government was prepared to consider their release as part of a final comprehensive agreement, which included independently verified decommissioning of all

weapons, a complete end to paramilitary activity and an unambiguous end to all forms of IRA criminality. It submitted that the fact that the peace process had reached such a critical phase rendered inappropriate the authors' communication to the Committee on what is essentially a political issue intrinsic to the current negotiations.

4.3 For the State party, all of the authors' claims are inadmissible for being outside the scope of the Covenant. Under Irish law there is no right to release and no obligation on the State party's Government to release prisoners. There is no such right conferred either by the GFA, or the 1998 Act and this conclusion was reached by the Supreme Court in *Doherty v. Governor of Portlaoise Prison*. The authors were convicted after a trial held in due course of law. They also had an opportunity to challenge the decision of the executive arm of State to refuse them early release proceedings in the High and Supreme Courts. The State party explains that the power of commutation and remission of sentence imposed by a Special Criminal Court is provided for by section 33 of the Offences against the State Act 1939 in the following terms:

"Except in capital cases, the Government may, at their absolute discretion, at any time, remit in whole or in part, or modify (by way of mitigation only) or defer any punishment imposed by a Special Criminal Court."

4.4 According to the State party, this discretion is to be exercised in broad terms. When the executive exercises such power or when discretion is conferred upon it, it is expected that the decision will be one of essentially political judgement, in contrast to a judicial or quasi judicial determination. It is something for which, under article 28.4 of the Constitution, the Government is primarily responsible to the Irish Parliament (the Dáil). Any exercise of discretion must, however, be within the confines of the Constitution either express or implied. The State party confirms that the enabling provisions of the 1998 Act allow a Minister to deem a person to be a "qualifying prisoner", but that the 1998 Act does not purport to confer any additional power of commutation or remission of sentence.⁴ The Advisory Commission, if requested, would provide non-binding advice to the Justice Minister. The mechanism created by the 1998 Act, thus creates, a further layer of discretion to be exercised by the Government under provisions such as Section 33 of the Offences against the State Act 1939.

4.5 According to the State party, the High Court and Supreme Court rejected the contention that the Justice Minister's discretion had been exercised in

⁴ *Doherty v. Governor of Portlaoise Prison* [2002] 2 IR 252.

an arbitrary or capricious manner. The Courts accepted the argument that, in the light of the clear policy expressed by the Government publicly, those persons convicted of involvement in the incident in which Garda McCabe was murdered, would not benefit from the early release provisions of the 1998 Act. Thus, it could not be said that a decision to implement that established Government policy was either arbitrary or capricious. The State party adds that its Government must retain an entitlement to adopt a political stance on what a quintessentially political issue. It was the Government's judgement that public support for the GFA would be undermined if the early release scheme was available to those who were involved in the incident in which Garda McCabe was murdered. According to the State party, the authors' claims are tantamount to suggesting that the Human Rights Committee should intervene in the political arrangements, agreements and understandings of the various parties involved in the attempted settlement of the Northern Ireland conflict. In its view, the parties involved ought to be afforded a degree of latitude to carry out their negotiations and mutual obligations.

4.6 More particularly, the State party submits that the claims are outside the scope of articles 26 and 2. It was successfully argued before the domestic courts that the essence of any equality claim is that like persons must be treated alike. All persons convicted in relation to the incident in question were treated alike with respect to the prisoner release scheme. Those involved in the murder of Garda McCabe were deemed to constitute a different group of prisoners to whom any arrangements made pursuant to the GFA would not apply. The authors were aware of this and pleaded guilty when the Government's policy had been clearly announced. They differ from other possible beneficiaries of the scheme because the State party's Government considered that their release would not be tolerated by the People of Ireland. The State party rejects the argument that the fact that a discretionary State privilege has been granted to others in comparable circumstances gives rise to a legally enforceable right; in this context, it refers to the United States Supreme Court's judgement in *Connecticut Board of Pardons v. Dumshcat*.⁵ It argues that discrimination is permitted under article 26 if reasonable and objective criteria are applied, as in this case. As regards the conduct of the State party in releasing prisoners under the 1998 Act, it is submitted that "an analysis of statistics and other material does not assist the authors."

4.7 The State party submits that the crimes and the issues surrounding them were not comparable to other crimes. The incident in question occurred

⁵ 452 US 458.

during a breakdown in the IRA ceasefire, at a stage when the State party's Government was involved in high level negotiations which would lead to the GFA. This was the first time anyone had been convicted of the murder of a police officer since the IRA's ceasefire. The violence used by the perpetrators was particular savage, the victims were members of the Irish police force and senior members of the provisional IRA were involved in the incident. As to the claim under article 9, the State party submits that it is outside the scope of the Covenant. It contests the claim that the authors' detention is/was arbitrary and invokes the Committee's jurisprudence that "arbitrariness is not to be equated with against the law but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability."⁶ The authors served a sentence handed down by the appropriate judicial authorities in Ireland and nothing in domestic law required them to be released before the expiry of their sentences. The requirement to complete their sentences was predictable in light of Government policy.

4.8 The State party submits that the claims are outside the scope of article 14, in that this provision deals with procedural guarantees for trials and not with the substance of judgements handed down by courts. Where judicial error occurs in relation to the evaluation of the factual material before the court, it is not cognisable within the protections of the Covenant. The Committee should not operate as a fourth instance court, with the competence to review or re-evaluate findings of fact.⁷ The authors' criticisms relate to what they perceive as erroneous findings of fact made by the Supreme Court in its determination of their application. The State party notes that the Court reviewed its judgement and was satisfied that the parties had had an opportunity to present and rebut all material before it. The same arguments apply to the claim under article 2.

4.9 The State party concludes that for these reasons, the communication should be declared inadmissible and requests that the admissibility of the communication be considered separately from the merits. On 28 December 2004, the Special Rapporteur on New Communications determined that the admissibility should be considered by the Committee at the same time as the merits.

The State party's submission on the merits

5.1 On 23 March 2005, the State party comments on the merits and largely reiterates its arguments made on admissibility. As to factual developments, it

⁶ *Von Alphen v. the Netherlands*, case No. 305/1988, Views adopted on 23 July 1990.

⁷ The State party refers to the case of *B.D.B v. The Netherlands*, case No. 273/1988, decision of 30 March 1989.

submits that negotiations have been ongoing for an agreement on the outstanding aspects of the GFA. As to the State party's indication that it would consider the authors' early release in the context of securing a comprehensive settlement, an announcement by the Prime Minister (Taoiseach) in the Parliament (Dáil) to this effect had provoked strong public criticism and much debate in early December 2004. On 20 December 2004, the Northern Bank in Belfast was robbed by, it is believed, the IRA. Since this event, it has been made clear by the State party's Government that the question of the early release of those involved in the incident in which Garda McCabe was murdered is no longer considered. In a statement on 13 March 2005, the prisoners themselves stated that they did not want their release to be part of any further negotiations with the State party's Government.

5.2 The State party confirms that 57 prisoners have been released to date in Ireland under the terms of the GFA. With the exception of those who were released earlier under temporary release, the cases of these prisoners were referred by the Minister to the Release of Prisoners Commission, for advice with respect to the exercise of the power of release, in accordance with Section 3(2) of the 1998 Act. Three of the prisoners released were convicted *after* the GFA and released in June, July and September 2000. The prisoners had been convicted of the possession of explosives, firearms and ammunition and had been sentenced for between four and seven years.

The authors' comments on the State party's submission

6.1 On 3 June 2005, the authors comment on the State party's submission. They consider the State party's political arguments irrelevant and inappropriate. The GFA goes to some lengths to stress that respect for human rights must be an integral part of the peace process. Such respect would not be enhanced if the Committee refrained from examining allegations of breaches of human rights at sensitive points during political negotiations. In any event, the authors confirm that neither they nor the State party's Government wish their release to be part of further negotiations. Thus, the State party's objection to the Committee considering this case on political grounds would appear to have lost its foundation. Further, they argue that the State party's Government did not suggest to the Irish Courts that it would be inappropriate or improper for them to consider the authors' judicial review application.

6.2 The authors argue that they are not claiming that they enjoy a right to early release. They claim that where a special scheme has been introduced to grant early release to a defined group of prisoners, and where the authors appear *prima facie* to belong

to that group, they have a right not to be discriminated against in the application of that scheme, unless reasonable and objective grounds are given for such discrimination. In this connection, the authors refer to the Committee's Views in *Kavanagh v. Ireland*.⁸ As to the State party's suggestion that decisions by the Minister in relation to this scheme may not generally be reviewed, the authors note that the Supreme Court expressly held that the Minister's discretion must be exercised in conformity with the Irish Constitution and in a manner which was not arbitrary, capricious or irrational. As the State party is party to the Covenant, the Minister's discretion must be exercised in a non-discriminatory way, save upon reasonable and objective grounds. The authors accept that the power to release prisoners early is contained in pre-existing legislation rather than in the 1998 Act. However, what distinguishes this matter from the general prisoner release regime is that the State party committed itself, by an international agreement, to release a specific category of prisoners and then, by legislative and administrative action, established the criteria and a defined procedure for doing so. The State party itself confirmed that "the enabling provisions of the 1998 Act allow a Minister to deem a person to be a 'qualifying prisoner'."

6.3 According to the authors, a special procedure was established for dealing with applications under the GFA early release scheme, the benefit of which was denied to the authors. The existence of this procedure is confirmed in at least three cases considered by the State party's courts.⁹ In these cases, the applicants for early release were afforded an opportunity to make representations before a negative decision was taken. In one of these cases, *O'Shea v. Ireland, the Government and the Attorney General*, Mr. Kenny of the Prisons Division of the Minister's Department stated in an Affidavit that: "It is clear that there was a procedure in place for determination of applications of this nature. It is also clear that this procedure has been put in train and that the applicant has been treated as having made an application under the 1998 Act". According to the authors, the existence of a procedure distinguishes the GFA early release scheme from the issue that arose in the case of *Connecticut Board of Pardons v. Dumschat*, which concerned general applications for parole. In addition, the authors point out that the United States Court's approach in *Dumschat* differs markedly from that of the European Court and

Commission of Human Rights, which is closely related to the Covenant.¹⁰

6.4 As to the State party's argument that the authors and others convicted with them were specifically excluded from the early release scheme by a series of Government pronouncements concerning them, the authors recall that the second named author was not convicted of the killing of Garda McCabe nor convicted "in connection with this murder." He was convicted of conspiracy to commit robbery and it was not alleged that he was even in the location of the murder at the time in question. The 1998 Act was couched in general terms and contained no provision excluding the authors or other persons who might be convicted in connection with the murder of Garda McCabe or the events in Adare. If it was (as is asserted) the Government's intention that such persons should be specifically excluded from the early release scheme, for which prima facie they fulfilled all the criteria, an express exception to that effect could have been inserted into the legislation, especially since, under Irish law, what is said by Government Ministers in parliament or elsewhere is not admissible for the purpose of interpreting legislation. In the circumstances, the pronouncements by the Minister and similar comments by the Prime Minister (An Taoiseach) had only the standing of opinions or interpretations of the early release scheme and the 1998 Act. Once the scheme was operative, it was for the Minister to administer it in accordance with the criteria laid down, and for the Courts to interpret it in case of dispute. It would not be unusual for Courts to interpret legislation differently from and sometimes in a manner contradictory to what the Government may assert. In the authors' view, it was quite improper for the Minister to repeatedly prejudge the position in relation to them, whose applications under the scheme he would, in due course, have to consider.

6.5 The authors clarify that their claim under article 9, paragraph 1, of the Covenant is dependent upon a finding that they were improperly discriminated against in being denied access to the early release scheme, and that they were not afforded a proper procedure for determining their entitlement to benefit from the scheme. In addition, the Minister had publicly prejudged their applications and they were denied access to an alternative decision maker who would employ fair procedures in determining their entitlement or reviewing the Minister's

⁸ Case No. No. 819/1998, Views adopted on 4 April 2001.

⁹ *Desmond O'Hare v. the Justice Minister, Equality and Law Reform and Ireland and the Attorney General*, No. 513JR/2000, *Henry Doherty v. the Governor of Portlaoise Prison and others*, [2000] IEHC107 and [2002] IESC8, *O'Shea v. Ireland, the Government and the Attorney General*, 418JR/1999.

¹⁰ The authors refer to the case of *Grice v. The United Kingdom*, application No. 22564/93, 14 April 1994, *Webster v. The United Kingdom*, application No. 12118/86, 4 March 1987, and *Weeks v. The United Kingdom* (9787) [1987] ECHR.

refusal.¹¹ In the authors' view, the Committee's Views in *Von Alphen v. the Netherlands*,¹² also referred to by the State party (para. 4.7) support the view that a detention, which was initially lawful, can become arbitrary due to a subsequent breach of the authors' rights. According to the authors, their claim under article 14, paragraph 1, is not, as suggested by the State party, a complaint primarily about the outcome of their case, nor does it request the Committee to act as a fourth instance over Irish Courts. Instead, it complains about the procedure in the domestic courts which led to the finding against the authors. The authors argue that this is not inconsistent with the Committee's Views cited by the State party (para. 4.8).

6.6 As to the references in the State party's submission on the merits to further political developments, the authors reiterate that such information is irrelevant. This information included developments which occurred many years after the imprisonment of the first named author, who has been in custody since 1996, and the second named author, who was imprisoned between 1999 and 2003. The authors had no involvement in these later events and the inclusion of references to a major bank robbery in Belfast in December 2004, is both irrelevant and highly prejudicial. As to the argument that this case was a unique incident in the history of the Northern Ireland conflict, the authors submit that none of the factors listed by the State party were unique, and the authors set out in their pleadings in the domestic courts details of a number of other persons convicted of very similar and equally grave offences who were granted early release. Moreover, this argument was not put to the domestic courts and is not sustainable. The effects of the Northern Ireland conflict over many years resulted in many brutal killings and a number of the persons responsible for those killings have been released by the Minister under the GFA. The authors confirm the State party's argument, that no one else has been convicted of the killing of a Garda related to the Northern Ireland conflict since the IRA ceasefire in 1994, but dismiss this argument as irrelevant. The Minister's criteria for qualifying prisoners did not set different qualifying dates for different types of offences.

¹¹ The authors refer to *Grice v. The United Kingdom*, supra, *Weeks v. The United Kingdom*, supra, *R v. Parole Board ex parte Smith* and *R v. Parole Board ex parte West* [2005] UKHL1, 27 January 2005, where the United Kingdom House of Lords, applying article 5.4 of the European Convention, held that prisoners contesting revocation of their release on licence were entitled to fair procedures which could, where appropriate, include an oral hearing.

¹² Supra, note 6.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the claim is admissible under the Optional Protocol to the Covenant.

7.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee notes the State party's general argument that the decision to exclude the authors (and those involved in the incident in which Garda McCabe was murdered) from the early release scheme was based on political concerns, at a critical time in the Northern Ireland peace process, and for this reason it would be inappropriate for the Committee to consider the communication. The Committee considers that its competence to consider individual communications is not affected by ongoing political negotiations in a State party or between States parties. It also notes that the State party's own Courts judicially reviewed the executive's decision and the political nature of the challenged decision does not appear to have been at issue. Indeed, the Supreme Court itself found that the Minister's power to release, although discretionary, must be exercised in good faith and not in an arbitrary, capricious or irrational manner. Thus, the Committee considers that it is not precluded from considering the communication on this ground.

7.4 The Committee considers that the other arguments advanced by the State party, that the claims are outside the scope of the Covenant, are inherently arguments relating to the substance of the communication and thus should be more appropriately dealt with under the merits. As the Committee finds no other reason to consider the claims raised by the authors inadmissible, it proceeds with its consideration on the merits.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee relies upon the following facts on the basis of which it will consider the authors' claims. A statutory-based scheme for the early release of prisoners was set up pursuant to the Multi-Party Agreement of the GFA and was implemented in the Criminal Justice (Release of

Prisoners) Act, 1998. The Multi-Party Agreement is a political agreement. It is undisputed that neither the GFA nor the Criminal Justice (Release of Prisoners) Act, 1998, which implemented the Agreement, conferred a general right of release on prisoners. It is also undisputed that, although the 1998 Act does not purport to confer any additional power of commutation or remission of sentence on the Minister, the Act empowers him/her to deem a person to be a “qualifying prisoner”. The criteria upon which the Minister was empowered to specify prisoners as “qualifying” were not incorporated in the Act but, and this is uncontested by the State party, it appears that certain criteria were established by the Minister to assess whether a prisoner should be so specified. From the State party’s point of view, the criteria established and applied by the Minister were not relevant to the circumstances of this case, as it was never intended to consider the authors under the scheme.

8.3 The authors claim that the Minister for Justice, Equality and Law Reform’s refusal to specify them as “qualifying prisoners” under the scheme for the early release of prisoners, pursuant to the GFA, was arbitrary and discriminatory. The Committee considers that under article 26, States parties are bound, in their legislative, judicial and executive action, to ensure that everyone is treated equally and without discrimination based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status any of the grounds enumerated in this provision. It recalls its constant jurisprudence that not every distinction constitutes discrimination, in violation of article 26, but that distinctions must be justified on reasonable and objective grounds, in pursuit of an aim that is legitimate under the Covenant¹³. As regards the prohibition of discrimination, the Committee notes that the distinction made by the State party between the authors and those prisoners who had been included in the early release scheme is not based on any of the grounds listed in article 26. In particular, the authors were not excluded because of their political opinions. However, article 26 not only prohibits discrimination but also embodies the guarantee of equality before the law and equal protection of the law.

8.4 The Committee observes that it was pursuant to the Multi-party Agreement—a political agreement—that the Release of Prisoners’ Scheme was enacted, and considers that it cannot examine this case outside its political context. It notes that the early release scheme did not create any entitlement

¹³ *Love v. Australia*, case No. 24/1977, Views adopted on 30 July 1982, *Tesdale v. Trinidad and Tobago*, case No. 677/1996, Views adopted on 1 April 2002, *Kavanagh v. Ireland*, supra.

to early release but left it to the discretion of the relevant authorities to decide, in the individual case, whether the person concerned should benefit from the scheme. It considers that this discretion is very wide and that, therefore, the mere fact that other prisoners in similar circumstances were released does not automatically amount to a violation of article 26. The Committee notes that the State party justifies the exclusion of the authors (and others involved in the incident in which Garda McCabe was murdered) from the scheme, by reason of the combined circumstances of the incident in question, its timing (in the context of a breach of a ceasefire), its brutality, and the need to ensure public support for the GFA. In 1996 when the incident occurred, the Government assessed the impact of the incident as exceptional. For this reason, it considered that all those involved would be excluded from any subsequent agreement on the release of prisoners. This decision was taken after the incident in question but before the conviction of those responsible, and thus, focused on the impact of the incident itself rather than on the individuals involved. All those responsible were made aware, from the outset, that if they were convicted of having had any involvement in the incident, they would be excluded from the scheme. The Committee also notes that, apparently, others convicted of killing Gardai who benefited from the early release scheme had already served long sentences (see para. 2.10). The Committee considers that it is not in a position to substitute the State party’s assessment of facts with its own views, particularly with respect to a decision that was made nearly ten years ago, in a political context, and leading up to a peace agreement. It finds that the material in front of it does not disclose arbitrariness and concludes that the authors’ rights under article 26 to equality before the law and to the equal protection of the law have not been violated.

8.5 As regards the authors’ claims that their continuing detention violated article 9, paragraph 1, of the Covenant, the Committee finds that in light of the finding above (para. 8.4), such detention did not amount to arbitrary detention.

8.6 Finally, the authors claim that they were denied an effective remedy, under article 2, paragraph 3, and suffered from a violation of article 14, paragraph 1, of the Covenant, because the State party’s courts failed to protect them against discrimination in the operation of the early release scheme, there was no avenue of redress after the Supreme Court had rejected their appeal on clearly erroneous grounds, and failed to afford them fair procedures during the hearing of their appeal and the consideration of their application to set aside the Court’s decision. The Committee notes that the authors had full access to the courts of their country, and that the Supreme Court considered this matter

on two occasions. Although it would now appear that the Court's decision was based on erroneous facts, on reviewing its decision on 1 April 2004, the Supreme Court found that the parties had agreed upon the facts in issue, thereby sustaining its prior decision. Thus, the Committee concludes that these decisions do not reveal any arbitrariness, and

therefore finds that articles 2 and 14 of the Covenant have not been violated in the present case.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any articles of the Covenant.

Communication No. 1320/2004

Submitted by: Mariano Pimentel et al. (represented by counsel, Mr. Robert Swift)

Alleged victim: The author

State party: The Philippines

Date of adoption of Views: 19 March 2007

Subject matter: Enforcement of a foreign judgement in the State party

Procedural issue: -

Substantive issues: Concept of "suit at law", reasonable delay

Articles of the Covenant: 2, para. 3 (a); and 14, para. 1

Article of the Optional Protocol: 5, para. 2 (b)

Finding: Violation (art. 14, para. 1, read in conjunction with art. 2, para. 3)

1. The authors of the communication are Mariano Pimentel, Ruben Resus and Hilda Narcisco, all Philippine nationals. The first author resides in Honolulu, Hawaii, and the others in the Philippines. They claim to be victims of violations by the Republic of the Philippines of their rights under article 2, paragraph 3 (a), of the International Covenant on Civil and Political Rights. The communication also appears to raise issues under article 14, paragraph 1, of the Covenant. The Covenant and the Optional Protocol entered into force for the State party on 23 January 1987 and 22 November 1989, respectively. The authors are represented by counsel; Mr. Robert Swift of Philadelphia, Pennsylvania.

The facts as presented by the authors

2.1 The authors claim to be members of a class of 9,539 Philippine nationals who obtained a final judgement in the United States for compensation against the estate of the late Ferdinand E. Marcos ("the Marcos estate") for having been subjected to

torture during the regime of President Marcos. 1 Ferdinand E. Marcos was residing in Hawaii at the time.

2.2 In September 1972, the first author was arrested by order of President Marcos two weeks after the declaration of martial law in the Philippines. Over the next six years, he was detained for a total of four years in several detention centres, without ever being charged. Upon return from his final period in detention, he was kidnapped by soldiers, who beat him with rifles, broke his teeth, his arm and leg, and dislocated his ribs. He was buried up to his neck in a remote sugar cane field and abandoned, but was subsequently rescued.

2.3 In 1974, the second author's son, A.S., was arrested by order of President Marcos and taken into military custody. He was tortured during interrogation and kept in detention, without ever being charged. He disappeared in 1977. In March

¹ United States District Court in Hawaii, Estate of Ferdinand E. Marcos Human Rights Litigation, MDL No. 840. [The authors' names are not mentioned in the judgement. There is a list of around 137 randomly selected "class claims" and the compensatory damages awarded to them (ranging from US\$ 10,000 to US\$ 185,000) is specified. Judgement for compensatory damages was also awarded to victims in three of the remaining plaintiff subclasses "of all current citizens of the Republic of the Philippines, their heirs and beneficiaries, who between September 1972 and February 1986 were tortured/ summarily executed/ disappeared and are presumed dead, while in the custody of the Philippine military or paramilitary groups, in the aggregate of US\$ 251,819,811.00, US\$ 409,191,760.00 and US\$ 94,910,640.00, to be divided pro rata. Judgement for US\$ 1,197,227,417.90 exemplary damages was also awarded to be divided pro rata among all members of the plaintiff class.]

1983, the third author was also arrested by order of President Marcos. She was tortured and gang-raped during her interrogation. She was never charged with nor convicted of any offence.

2.4 In April 1986, the authors, together with other class members, brought an action against the Marcos estate. On 3 February 1995, a jury at the United States District Court in Hawaii awarded a total of US\$ 1,964,005,859.90 to the 9,539 victims (or their heirs) of torture, summary execution and disappearance. The jurors found a consistent pattern and practice of human rights violations in the Philippines during the regime of President Marcos from 1972–1986. Where individuals were randomly selected, part of the amount of the judgement is divided per claimant. Individuals, who were not randomly selected but are part of the class, including the authors, will receive part of the award which was made to three subclasses². However, the amounts were not divided per claimant and it is only after collection (in whole or in part) of the judgement amount that the United States District Court of Hawaii will allocate amounts to each claimant. On 17 December 1996, the United States Court of Appeal for the Ninth Circuit affirmed the judgement.³

2.5 On 20 May 1997, five class members, including the third author, filed a complaint against the Marcos estate, in the Regional Trial Court of Makati City, Philippines, with a view to obtaining enforcement of the United States judgement. The defendants counter filed a motion to dismiss, claiming that the PHP 400 (US\$ 7.20) paid by each plaintiff was insufficient as the filing fee. On 9 September 1998, the Regional Trial Court dismissed the complaint, holding that the complainants had failed to pay the filing fee of PHP 472 million (US\$ 8.4 million), calculated on the total amount in dispute (US\$ 2.2 billion). On 10 November 1998, the authors filed a motion for reconsideration before the same Court, which was denied on 28 July 1999.

2.6 On 4 August 1999, the five class members filed a motion with the Philippine Supreme Court, on their own behalf and on behalf of the class, seeking a determination that the filing fee was PHP 400 rather than PHP 472 million. By the time of submission of the communication to the Committee (11 October 2004), the Supreme Court had not acted on this motion, despite a motion for early resolution filed by the petitioners on 8 December 2003. (see para. 4 below for an update).

2.7 According to the authors, since the five class members filed their motion with the Philippine Supreme Court, the same Court entered judgement for the State party against the Marcos Estate in a forfeiture action and directed enforcement of that judgement for over US\$ 650 million, even though that appeal was filed over two years after the authors' own petition.

The complaint

3. The authors claim that their proceedings in the Philippines on the enforcement of the United States judgement have been unreasonably prolonged and that the exorbitant filing fee amounts to a de facto denial of their right to an effective remedy to obtain compensation for their injuries, under article 2 of the Covenant. They argue that they are not required to exhaust domestic remedies, as the proceedings before the Philippine courts have been unreasonably prolonged. The communication also appears to raise issues under article 14, paragraph 1, of the Covenant.

The State party's submission on admissibility and merits

4. On 12 May 2005, the State party submitted that the communication is inadmissible for failure to exhaust domestic remedies. It submits that, on 14 April 2005, the Supreme Court handed down its decision in *Mijares et al. v. Hon. Ranada et al.*, affirming the authors' claim that they should pay a filing fee of PHP 410 rather than PHP 472 million with respect to their complaint to enforce the judgement of the United States District Court in Hawaii. The State party denies that the authors were not afforded an effective remedy.

The authors' comments on the State party's submission

5.1 On 12 January 2006, the authors submit that there has been no satisfactory resolution of their claims. They confirm that, on 14 April 2005, the Supreme Court decided in their favour with respect to the filing fee. However, despite the Supreme Court's view that there be a speedy resolution to their claim by the trial court, this court has not yet decided on the enforceability of the decision of the United States District Court of Hawaii.

5.2 In addition, the authors argue that an appeal in a parallel case, which is one year older than the appeal in the current case has been pending for over seven years in the Philippine Supreme Court.⁴

² The subclasses relate to those victims that had been (1) tortured, (2) summarily executed and (3) disappeared and are presumed dead.

³ United States Court of Appeals for the Ninth Circuit, *Hilao v. Estate of Marcos*, 103 F.3d 767.

⁴ This case relates to *Imelda M. Manotoc v. Court of Appeals*, which involves an interlocutory appeal from the lower court finding there was sufficient service on Imee Marcos-Manotoc, the daughter of Ferdinand E. Marcos, in an action to enforce a United States judgement against her for the torture and murder of a man.

Additional comments by the parties

6. On 1 June 2006, the State party submitted that, following the Supreme Court decision on the filing fee, the case was reinstated before the trial court. It adds that the authors of the current case are unrelated to the case referred to in paragraph 5.2.

7.1 On 15 June and 4 July 2006, in response to a request for clarification from the Secretariat regarding the authors' status as "victim[s]" for the purposes of article 1 of the Optional Protocol, the authors stated that a class action in the United States may be brought by any member of the class on behalf of a defined group, in this case, 9,539 victims of torture, summary execution and disappearance. All class members have standing in a class action once it is certified by a court and all have the right to share in a final judgement. A court is free to designate particular class members as "class representatives" for purposes of prosecuting the litigation, but the "class representative" has no more standing on his claim than any other individual class members. Thus, the use of different "class representatives" for the same class in lawsuits filed in the United States and the Philippines has no bearing on the authors' standing. The Philippine rule on class actions is derived from and based on the United States rule.

7.2 According to the authors, in a class action filed in the United States, it is not common to file a list of all class members. In this case, where the public record could be inspected by the Philippine Ministry, which might act in reprisal against the living torture victims, caution was exercised. The authors provide evidence to prove that they are members of the United States class action: an excerpt from Ms. Narcisco's testimony at the trial on liability in the United States; an excerpt from Mr. Pimentel's deposition in 2002 in the United States, and a United States judgement in which he was certified as a class representative in a subsequent case; and a claim form as required by the court with respect to Mr. Resus. The authors also confirm that there has been no action taken for the enforcement of the judgement.

Issues and proceedings before the Committee

Consideration of admissibility

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

8.2 The Committee notes that the claim relating to the enforcement of the United States District Court of Hawaii's judgement is currently pending before the State party's Regional Trial Court. Since the last hearing on the filing issue relating to this case, on 15

April 2005, in which the Supreme Court found in favour of the authors, the issue of the enforcement of the judgement has been reinstated before the Regional Trial Court. For this reason, and bearing in mind that the complaint relates to a civil claim for compensation, albeit for torture, the Committee cannot conclude that the proceedings have been so unreasonably prolonged that the delay would exempt the authors from exhausting them. Accordingly, the Committee finds that this claim is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

8.3 The Committee observes that since the authors brought their action before the Regional Trial Court in 1997, the same Court and the Supreme Court considered the issue of the required filing fee arising from the authors claim on three subsequent occasions (9 September 1998, 28 July 1999 and 15 April 2005) and over a period of eight years before reaching a conclusion in favour of the authors. The Committee considers that the length of time taken to resolve this issue raises an admissible issue under article 14, paragraph 1, as well as article 2, paragraph 3, and should be considered on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 As to the length of the proceedings relating to the issue of the filing fee, the Committee recalls that the right to equality before the courts, as guaranteed by article 14, paragraph 1, entails a number of requirements, including the condition that the procedure before the national tribunals must be conducted expeditiously enough so as not to compromise the principle of fairness.⁵ It notes that the Regional Trial Court and Supreme Court spent eight years and three hearings considering this subsidiary issue and that the State party has provided no reasons to explain why it took so long to consider a matter of minor complexity. For this reason, the Committee considers that the length of time taken to resolve this issue was unreasonable, resulting in a violation of the authors' rights under article 14, paragraph 1, read in conjunction with article 2, paragraph 3, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 14, paragraph 1, read in conjunction with article 2, paragraph 3, as it relates to the proceedings on the amount of the filing fee.

⁵*Perterer v. Austria*, communication No. 1015/2001, Views adopted on 20 July 2004, para. 10.7.

11. The Committee is of the view that the authors are entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy. The State party is under an obligation to ensure an adequate remedy to the authors including, compensation and a prompt resolution of their case on the enforcement of the United States judgement in the State party. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has

recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

Communications Nos. 1321/2004 and 1322/2004

Submitted by: Mr. Yeo-Bum Yoon and Mr. Myung-Jin Choi (represented by counsel, Mr. Suk-Tae Lee)

Alleged victims: The authors

State party: Republic of Korea

Date of adoption of Views: 3 November 2006

Subject matter: Conscientious objection on the basis of genuinely held religious beliefs to enlistment in compulsory military service

Procedural issues: Joinder of communications

Substantive issues: Freedom to manifest religion or belief – permissible limitations on manifestation

Article of the Covenant: 18, paras. 1 and 3

Articles of the Optional Protocol: -

Finding: Violation (art. 18, para. 1)

1.1 The authors of the communications, both initially dated 18 October 2004, are Mr. Myung-Jin Choi and Mr. Yeo-Bum Yoon, nationals of the Republic of Korea, born on 27 May 1981 and 3 May 1980, respectively. The authors claim to be victims of a breach by the Republic of Korea of article 18, paragraph 1, of the Covenant. The authors are represented by counsel, Mr. Suk-Tae Lee.

1.2 Pursuant to rule 94, paragraph 2, of the Committee's rules of procedure, the two communications are joined for decision in view of the substantial factual and legal similarity of the communications.

The facts as presented by the authors

Mr. Yoon's case

2.1 Mr. Yoon is a Jehovah's Witness. On 11 February 2001, the State party's Military Power Administration sent Mr. Yoon a notice of draft for military service. On account of his religious belief

and conscience, Mr. Yoon refused to be drafted within the prescribed period of time, whereupon he was arrested and charged under article 88 (section 1) of the Military Service Act.¹ In February 2002, Mr. Yoon was bailed.

2.2 On 13 February 2004, the Eastern Seoul District Court convicted Mr. Yoon as charged and sentenced him to one and a half years of imprisonment. On 28 April 2004, the First Criminal Division of the Eastern Seoul District Court upheld the conviction and sentence, reasoning inter alia:

“...it cannot be said that an internal duty of acting according to one's conscience motivated by an individual belief is greater in value than the duty of national defence, which is essential to protect the nation's political independence and its territories, the people's life, body, freedom and property. Furthermore, since whether there is an expectancy for compliance or not must be determined based on specific actors but on the average person in society, so-called 'conscientious decisions', where one objects to the duty of military service

¹ Article 88 of the Military Service Act provides as follows:

“Evasion of Enlistment

(1) Persons who have received a notice of enlistment or a notice of call (including a notice of enlistment through recruitment) in the active service, and who fails to enlist in the army or to comply with the call, even after the expiration of the following report period from the date of enlistment or call, without any justifiable reason, shall be punished by imprisonment for not more than three years: 1. Five days in cases of enlistment in active service [...].”

set by the law on grounds of religious doctrine, cannot justify acts of objection to military service in violation of established law.”

2.3 On 22 July 2004, a majority of the Supreme Court in turn upheld both the conviction and sentence, reasoning, *inter alia*:

“if [Mr. Yoon’s] freedom of conscience is restricted when necessary for national security, the maintenance of law and order or for public welfare, it would be a constitutionally permitted restriction Article 18 of the [Covenant] appears to provide essentially the same laws and protection as article 19 (freedom of conscience) and article 20 (freedom of religion) of the Korean Constitution. Thus, a right to receive an exemption from the concerned clause of the Military Service Act does not arise from article 18 of the [Covenant].”

2.4 The dissenting opinion, basing itself on resolutions of the (then) UN Commission on Human Rights calling for institution of alternative measures to military service as well as on broader State practice, would have held that genuinely held conscientious objection amounted to “justifiable reasons”, within the meaning of article 88 (1) of the Military Services Act, allowing for exemption from military service.

Mr. Choi’s case

2.5 Mr. Choi is also a Jehovah’s Witness. On 15 November 2001, the State party’s Military Power Administration sent Mr. Choi a notice of draft. On account of his religious belief and conscience, Mr. Choi refused to be drafted within the prescribed period of time, whereupon he was arrested and charged under article 88 (section 1) of the Military Service Act.²

2.6 On 13 February 2002, the Eastern Seoul District Court convicted Mr. Choi as charged and sentenced him to one and a half years of imprisonment. On 28 February 2002, Mr. Yoon was bailed. On 28 April 2004 and on 15 July 2004, the First Criminal Division of the Eastern Seoul District Court and the Supreme Court, respectively, upheld the conviction and sentence, on the basis of the same reasoning described above with respect to Mr. Yoon.

Subsequent events

2.7 On 26 August 2004, in a case unrelated to Messrs. Yoon or Choi, the Constitutional Court rejected, by a majority, a constitutional challenge to article 88 of the Military Service Act on the grounds

of incompatibility with the protection of freedom of conscience protected under the Korean Constitution. The Court reasoned, *inter alia*:

“the freedom of conscience as expressed in article 19 of the Constitution does not grant an individual the right to refuse military service. Freedom of conscience is merely a right to make a request to the State to consider and protect, if possible, an individual’s conscience, and therefore is not a right that allows for the refusal of one’s military service duties for reasons of conscience nor does it allow one to demand an alternative service arrangement to replace the performance of a legal duty. Therefore the right to request alternative service arrangement cannot be deduced from the freedom of conscience. The Constitution makes no normative expression that grants freedom of expression a position of absolute superiority in relation to military service duty. Conscientious objection to the performance of military service can be recognized as a valid right if and only if the Constitution itself expressly provides for such a right”.

2.8 While accordingly upholding the constitutionality of the contested provisions, the majority directed the legislature to study means by which the conflict between freedom of conscience and the public interest of national security could be eased. The dissent, basing itself on the Committee’s general comment No. 22, the absence of a reservation by the State party to article 18 of the Covenant, resolutions of the (then) UN Commission on Human Rights and State practice, would have found the relevant provisions of the Military Services Act unconstitutional, in the absence of legislative effort to properly accommodate conscientious objection.

2.9 Following the decision, the authors state that some 300 conscientious objectors whose trials had been stayed were being rapidly processed. Accordingly, it was anticipated that by the end of 2004, over 1,100 conscientious objectors would be imprisoned.

The complaint

3. The authors complain that the absence in the State party of an alternative to compulsory military service, under pain of criminal prosecution and imprisonment, breaches their rights under article 18, paragraph 1, of the Covenant.

² Ibid.

The State party's submissions on admissibility and merits

4.1 By submission of 2 April 2005, the State party submits that neither communication has any merit. It notes that article 18 provides for specified limitations, where necessary, on the right to manifest conscience. Although article 19 of the State party's Constitution protects freedom of conscience, article 37(2) provides that: "The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated." Accordingly, the Constitutional Court ruled that "the freedom of conscience prescribed in article 19 of the Constitution does not grant one the right to object to fulfilling one's military service duty" based on limitations of principle that all basic rights must be exercised within the boundary of enabling pursuit of civic engagement and keeping the nation's 'law order' intact. Hence, the freedom to manifest one's conscience may be restricted by law when it is harmful to public safety and order in pursuing civic engagement or when it threatens a nation's 'law order'.

4.2 The State party argues that in view of its specific circumstances, conscientious objection to military service needs to be restricted as it may incur harm to national security. Unlike the freedom to form or determine inner conscience, the freedom to object to fulfilling military service duty for reasons of religion may be restricted, as recognized in article 18 of the Covenant, for public causes in that it manifests or realizes one's conscience through passive non-performance.

4.3 Under the specific security circumstances facing a hostile Democratic People's Republic of Korea (DPRK), the State party, as the world's sole divided nation, adopted the Universal Conscription System, which recognizes all citizens' obligation to military service. Thus, the equality principle of military service duty and responsibility carries more meaning in the State party than in any other country. Considering the strong social demand and anticipation for the equality of the performance of military service duty, allowing exceptions to military service duty may prevent social unification, greatly harming national security by eroding the basis of the national military service system—the Universal Conscription System—especially considering the social tendency of attempting to evade military service duty by using any and every means.

4.4 The State party argues that a nation's military service system is directly linked to issues of national security, and is a matter of legislative discretion vested in the lawmakers for the creation of the

national army with the maximum capabilities for national defence, after considering a nation's geopolitical stance, internal and external security conditions, economic and social state and national sentiment, along with several other factors.

4.5 The State party contends that given its security conditions, the demand for equality in military service and various concomitant restricting elements in adopting an alternative service system, it is difficult to argue that it has reached the stage of improved security conditions that would allow for limitations to military service, as well as the formation of national consensus.

4.6 The State party concludes that the prohibition of conscientious objection to military service is justified by its specific security and social conditions, which makes it difficult to conclude that the decision violates the essential meaning of the freedom of conscience set out in paragraph 3 of article 18 of the Covenant. Considering the State party's security conditions, the demand for equality in military service duty, and the absence of any national consensus, along with various other factors, the introduction of any system of alternative service is unlikely.

The authors' comments on the State party's submission

5.1 By letter of 8 August 2005, the authors responded to the State party's submissions. They note that the State party does not identify which of the permissible restrictions in section 3 of article 18 is invoked, though accept that the general import of argument is on "public safety or order". Here, however, the State party has not identified why conscientious objectors can be considered to harm public safety or order. Strictly speaking, as conscientious objection has never been allowed, the State party cannot determine whether or not any such danger in fact exists.

5.2 The authors note a vague fear on the State party's part that allowing conscientious objection would threaten universal conscription. But such a fear cannot justify the severe punishments meted out under the Military Service Act to thousands of objectors and the discrimination faced by objectors after their release from prison. In any event, the authors question the real value of conscience, if it must be kept internal to oneself and not expressed outwardly. The authors note the long history, dating from the Roman Republic, of conscientious objection and the pacifist rejection of violence of objectors. Referring to the Committee's general comment No. 22, the authors argue that conscientious objectors, far from threatening public safety or order or others' rights, in fact strengthens the same, being a noble value based on deep and moral reflection.

5.3 On the aspect of the threat posed by the DPRK, the authors note that the State party's population is almost twice as large, its economy thirty times as large and its annual military spending over the last decade nearly ten times as large as that of its northern neighbour. That country is under constant satellite surveillance, and is suffering a humanitarian crisis. By contrast, the State party fields almost 700,000 soldiers, and 350,000 young people perform military service each year. The number of 1,053 imprisoned objectors, as of 11 July 2005, is a very small number incapable of adversely affecting such military power. Against this background, it is unreasonable to argue that the threat posed by the DPRK is sufficient justification for the punishment of conscientious objectors.

5.4 On the issue of equitability, the authors argue that the institution of alternative service arrangements would preserve this, if necessary by extending the term of the latter kind of service. The authors note the positive experience gained from the recent institution of alternative service in Taiwan, facing at least equivalent external threat to its existence as the State party, and in Germany. Such an institution would contribute to social integration and development and respect for human rights in society. The social tendency to avoid military service, for its part, is unrelated to the objection issue and stems from the poor conditions faced by soldiers. Were these improved, the tendency to avoid service would lessen.

5.5 The authors reject the argument that the introduction of alternative service is at the discretion of the legislative branch, noting that such discretion cannot excuse a breach of the Covenant and in any event little if any work in this direction has been done. Moreover, the State party has not observed its duty as a member of the UN Commission on Human Rights, and, whether deliberately or not, has failed to report to the Committee in its periodic reports on the situation of conscientious objectors.

Supplementary submissions of the State party

6.1 By submission of 6 September 2006, the State party responded to the authors' submissions with supplementary observations on the merits of the communications. The State party notes that under article 5 of its Constitution, the National Armed Forces are charged with the sacred mission of national security and defence of the land, while article 39 acknowledges that the obligation of military service is an important, indeed one of the key, means of guaranteeing national security, itself a benefit and protection of law. The State party notes that national security is an indispensable precondition for national existence, maintaining territorial integrity and protecting the lives and

safety of citizens, while constituting a basic requirement for citizen's exercise of freedom.

6.2 The State party notes the freedom to object to compulsory military service is subject to express permission of limitations set out in article 18, paragraph 3, of the Covenant. Allowing exceptions to compulsory service, one of the basic obligations imposed on all citizens at the expense of a number of basic rights to protect life and public property, may damage the basis of the national military service which serves as the main force of national defence, escalate social conflict, threaten public safety and national security and, in turn, infringe on the basic rights and freedoms of citizens. Hence, a restriction on the basis of harm to public safety and order or threat to a nation's legal order when undertaken in a communal setting is permissible.

6.3 The State party argues that while it is true that the situation on the Korean peninsula has changed since the appearance of a new concept of national defence and modern warfare, as well as a military power gap due to the disparities in economic power between North and South, military manpower remains the main form of defence. The prospect of manpower shortages caused by falling birth rates must also be taken into account. Punishing conscientious objectors, despite their small overall number, discourages evasion of military service. The current system may easily crumble if alternative service systems were adopted. In light of past experiences of irregularities and social tendencies to evade military service, it is difficult to assume alternatives would prevent attempts to evade military service. Further, accepting conscientious objection while military manpower remains the main force of national defence may lead to the misuse of conscientious objection as a legal device to evade military service, greatly harming national security by demolishing the conscription basis of the system.

6.4 On the authors' arguments on equality, the State party argues that exempting conscientious objectors or imposing less stringent obligations on them risks violating the principle of equality enshrined in article 11 of the Constitution, breach the general duty of national defence imposed by article 39 of the Constitution and amount to an impermissible awarding of decorations or distinctions to a particular group. Considering the strong social demand and anticipation of equality in performance of military service, allowing exceptions may hinder social unification and greatly harm national capabilities by raising inequalities. If an alternative system is adopted, all must be given a choice between military service and alternative service as a matter of equity, inevitably threatening public safety and order and the protection of basic rights and freedoms. The State party accepts that human rights problems are a major reason for

evasion of service and substantially improved barracks conditions. That notwithstanding, the two year length of service—significantly longer than that in other countries—continues to be a reason for evasion unlikely to fade even with improved conditions and the adoption of alternative service.

6.5 On the authors' arguments as to international practice, the State party notes that Germany, Switzerland and Taiwan accept conscientious objection and provide alternative forms of service. It had contacted system administrators in each country and gathered information on the respective practices through research and seminars, keeping itself updated on an ongoing basis on progress made and reviewing the possibility of its own adoption. The State party notes however that the introduction of alternative arrangements in these countries was adopted under their own particular circumstances. In Europe, for example, alternative service was introduced in a general shift from compulsory to volunteer military service post-cold war, given a drastic reduction in the direct and grave security threat. Taiwan also approved conscientious objection in 2000 when over-conscription became a problem with the implementation in 1997 of a manpower reduction policy. The State party also points out that in January 2006, its National Human Rights Commission devised a national action plan for conscientious objection, and the Government intends to act on the issue.

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2 In the absence of objection by the State party to the admissibility to the communication, as well as any reasons suggesting that the Committee should proprio motu, declare the communication inadmissible in whole or in part, the Committee declares the claim under article 18 of the Covenant admissible.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes the authors' claim that article 18 of the Covenant guaranteeing the right to freedom of conscience and the right to manifest one's religion or belief requires recognition of their religious belief, genuinely held, that submission to

compulsory military service is morally and ethically impermissible for them as individuals. It also notes that article 8, paragraph 3, of the Covenant excludes from the scope of "forced or compulsory labour", which is proscribed, "any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors". It follows that the article 8 of the Covenant itself neither recognizes nor excludes a right of conscientious objection. Thus, the present claim is to be assessed solely in the light of article 18 of the Covenant, the understanding of which evolves as that of any other guarantee of the Covenant over time in view of its text and purpose.

8.3 The Committee recalls its previous jurisprudence on the assessment of a claim of conscientious objection to military service as a protected form of manifestation of religious belief under article 18, paragraph 1.³ It observes that while the right to manifest one's religion or belief does not as such imply the right to refuse all obligations imposed by law, it provides certain protection, consistent with article 18, paragraph 3, against being forced to act against genuinely held religious belief. The Committee also recalls its general view expressed in general comment 22⁴ that to compel a person to use lethal force, although such use would seriously conflict with the requirements of his conscience or religious beliefs, falls within the ambit of article 18. The Committee notes, in the instant case, that the authors' refusal to be drafted for compulsory service was a direct expression of their religious beliefs, which it is uncontested were genuinely held. The authors' conviction and sentence, accordingly, amounts to a restriction on their ability to manifest their religion or belief. Such restriction must be justified by the permissible limits

³ In *Muhonen v. Finland* (case No. 89/1981), for example, the Committee declined to decide whether article 18 guaranteed a right of conscientious objection. In *L.T.K. v. Finland* (case No. 185/1984), the Committee declined to address the issue fully on the merits, deciding as a preliminary matter of admissibility on the basis of the argument before it that the question fell outside the scope of article 18. *Brinkhof v. The Netherlands* (case No. 402/1990) addressed differentiation between total objectors and Jehovah's Witnesses, while *Westerman v. The Netherlands* (case No. 682/1996) involved a procedure for recognition of conscientious objection under domestic law itself, rather than the existence of underlying rights as such. Although the statement was not necessary for its final decision, in *J.P. v. Canada* (case No. 446/1991) the Committee noted, without further explanation, that article 18 "certainly protects the right to hold, express and disseminate opinions and convictions, including conscientious objection to military activities and expenditures".

⁴ General comment No. 22 (1993), para. 11.

described in paragraph 3 of article 18, that is, that any restriction must be prescribed by law and be necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. However, such restriction must not impair the very essence of the right in question.

8.4 The Committee notes that under the laws of the State party there is no procedure for recognition of conscientious objections against military service. The State party argues that this restriction is necessary for public safety, in order to maintain its national defensive capacities and to preserve social cohesion. The Committee takes note of the State party's argument on the particular context of its national security, as well as of its intention to act on the national action plan for conscientious objection devised by the National Human Rights Commission (see para. 6.5, *supra*). The Committee also notes, in relation to relevant State practice, that an increasing number of those States parties to the Covenant which have retained compulsory military service have introduced alternatives to compulsory military service, and considers that the State party has failed to show what special disadvantage would be involved for it if the rights of the authors' under article 18 would be fully respected. As to the issue of social cohesion and equitability, the Committee considers that respect on the part of the State for conscientious beliefs and manifestations thereof is itself an important factor in ensuring cohesive and stable pluralism in society. It likewise observes that it is in principle possible, and in practice common, to conceive alternatives to compulsory military service that do not erode the basis of the principle of universal conscription but render equivalent social good and make equivalent demands on the individual, eliminating unfair disparities between those engaged in compulsory military service and those in alternative service. The Committee, therefore, considers that the State party has not demonstrated that in the present case the restriction in question is necessary, within the meaning of article 18, paragraph 3, of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, concludes that the facts as found by the Committee reveal, in respect of each author violations by the Republic of Korea of article 18, paragraph 1, of the Covenant.

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

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

APPENDIX

Dissenting opinion by committee member Mr. Hipólito Solari-Yrigoyen

While I agree with the majority's conclusion in paragraph 9 that the facts before the Committee reveal a violation of article 18, paragraph 1, I disagree with the reasoning of the majority, as will be apparent from the following observations:

Consideration of the merits

8.2 The Committee notes the authors' claim that the State party breached article 18, paragraph 1, of the Covenant by prosecuting and sentencing the authors for their refusal to perform compulsory military service on account of their religious beliefs as Jehovah's Witnesses.

The Committee also notes the comment by the State party that article 19 of its Constitution does not grant one the right to object to fulfilling one's military service duty. The State party also argues that conscientious objection may be "restricted" as it may harm national security. The State party concludes that the prohibition of conscientious objection to military service is justified and that, given the wording of article 18, paragraph 3, it does not violate the Covenant. The Constitutional Court (see para. 2.7, *supra*) would limit the right to freedom of conscience to a mere right to request the State to consider and protect the objector's right "if possible".

The fundamental human right to conscientious objection entitles any individual to an exemption from compulsory military service if this cannot be reconciled with that individual's religion or beliefs. The right must not be impaired by coercion. Given that the State party does not recognize this right, the present communication should be considered under paragraph 1 of article 18, not paragraph 3.

8.3 The right to conscientious objection to military service derives from the right to freedom of thought, conscience and religion. As stated in article 4, paragraph 2, of the Covenant, this right cannot be derogated from even in exceptional circumstances which threaten the life of the nation and justify the declaration of a public emergency. When a right to conscientious objection is recognized, a State may, if it wishes, compel the objector to undertake a civilian alternative to military service,

outside the military sphere and not under military command. The alternative service must not be of a punitive nature. It must be a real service to the community and compatible with respect for human rights.

In general comment No. 22, the Committee recognized this right “inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief”. The same general comment states that the right to freedom of thought, conscience and religion “is far-reaching and profound”, and that “the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief”.

Because of their religious beliefs, the authors invoked this right, established in article 18, paragraph 1, to avoid compulsory military service. The prosecution, conviction and prison term imposed on the authors directly violated this right.

The mention of freedom to manifest one’s religion or belief in article 18, paragraph 3, is a reference to the freedom to manifest that religion or belief in public, not to recognition of the right itself, which is protected by paragraph 1. Even if it were wrongly supposed that the present communication does not concern recognition of the objector’s right, but merely its public manifestation, the statement that public manifestations may be subject only “to such limitations as are prescribed by law” in no way implies that the existence of the right itself is a matter for the discretion of States parties.

The State party’s intention to act on the national plan for conscientious objection devised by the National Human Rights Commission (see para. 6.5, *supra*), which the Committee notes in paragraph 8.4, must be considered alongside the statement in paragraph 4.6 that the introduction of any system of alternative service is unlikely. Moreover, intentions must be acted upon, and the mere intention to “act on the issue” does not establish whether, at some point in the future, the right to conscientious objection will be recognized or denied.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, concludes that the Republic of Korea has, in respect of each author, violated the authors’ rights under article 18, paragraph 1, of the Covenant.

(Signed): Hipólito Solari-Yrigoyen

Dissenting opinion by Committee member Ms. Ruth Wedgwood

I concur with the Committee that a State party wishing to apply the principles of the International Covenant on Civil and Political Rights with a generous spirit should respect the claims of individuals who object to national military service on grounds of religious belief or other consistent and conscientious beliefs. The sanctity of religious belief, including teachings about a duty of non-violence, is something that a democratic and liberal State should wish to protect.

However, regrettably, I am unable to conclude that the right to refrain from mandatory military service is strictly required by the terms of the Covenant, as a matter

of law. Article 18 paragraph 1, of the Covenant states that “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”

Article 18 thus importantly protects the right to worship in public or private, to gather with others for worship, to organize religious schools, and to display outward symbols of religious belief. The proviso of article 18, paragraph 3—that the “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”—cannot be used by a State party as a backdoor method of burdening religious practice. The Human Rights Committee has appropriately rejected any attempt to limit the protections of article 18 to “traditional” religions or to use forms of administrative regulation to impede or deny practical implementation of the right to worship.

But article 18 does not suggest that a person motivated by religious belief has a protected right to withdraw from the otherwise legitimate requirements of a shared society. For example, citizens cannot refrain from paying taxes, even where they have conscientious objections to State activities. In its present interpretation of article 18, seemingly differentiating military service from other State obligations, the Committee cites no evidence from the Covenant’s negotiating history to suggest that this was contemplated. The practice of States parties may also be relevant, whether at the time the Covenant was concluded or even now. But we do not have any record information before us, most particularly, in regard to the number of parties to the Covenant that still rely upon military conscription without providing *de jure* for a right to conscientious objection.

To be sure, in the “concluding observations” framed upon the examination of country reports, the Human Rights Committee has frequently encouraged states to recognize a right of conscientious objection to military practice. But these concluding observations permissibly may contain suggestions of “best practices” and do not, of themselves, change the terms of the Covenant. It is also true that in 1993, the Committee stated in “general comment 22”, at paragraph 11, that a right to conscientious objection “can be derived” from article 18. But in the interval of more than a decade since, the Committee has never suggested in its jurisprudence under the Optional Protocol that such a “derivation” is in fact required by the Covenant.⁵ The language of article 8,

⁵ In the case of *J.P. v. Canada*, communication No. 446/1991, 7 November 1991, the Committee rejected the claim of a petitioner that she had a right to withhold taxes to protest Canada’s military expenditures. The Committee stated that “Although article 18 of the Covenant certainly protects the right to hold, express and disseminate opinions and convictions, including conscientious objection to military activities and expenditures, the refusal to pay taxes on grounds of conscientious objection clearly falls outside the scope of protection of this article.” In other words, an individual’s

paragraph 3 (c) (ii), of the Covenant also presents an obstacle to the Committee's conclusion.

This does not change the fact that the practice of the State party in this case has apparently tended to be harsh. The "stacking" of criminal sentences for conscientious objection, through repeated reissuance of notices for military service, can lead to draconian results. The prohibition of employment by public organizations after a refusal to serve also is a severe result.

In a recent decision of the Constitutional Court of Korea, the national defence minister suggested that "present conditions for life as a serviceman within the

military [are] poor" and therefore that "the number of objectors to military service will increase rapidly" if "alternative service is allowed in a country like ours."⁶ This may suggest the wisdom of seeking to ameliorate the living conditions of service personnel. In any event, many other countries have felt able to discern which applications for conscientious objection are based upon a bona fide moral or religious belief, without impairing the operation of a national service system. Thus, a State party's democratic legislature would surely wish to examine whether the religious conscience of a minority of its citizens can be accommodated without a prohibitive burden on its ability to organize a national defence.

(Signed): Ruth Wedgwood

conscientious objection to taxes for military activities did not require the State to refrain from collecting those taxes.

⁶ See 2002 HeonGal, Alleging Unconstitutionality of article 88, section 1, clause 1 of Military Service Act, Constitutional Court of Korea, in the case of Kyung-Soo Lee.

Communication No. 1325/2004

Submitted by: Mario Conde Conde (represented by José Luis Mazón Costa)

Alleged victim: The author

State party: Spain

Date of adoption of Views: 31 October 2006

Subject matter: Imposition of heavier penalties by the higher court; scope of review in cassation proceedings in the Spanish Supreme Court

Procedural issues: Failure to substantiate claims

Substantive issues: Right to have sentence and conviction reviewed by a higher court

Article of the Covenant: 14, para. 5

Article of the Optional Protocol: 2

Finding: Violation

1. The author of the communication, dated 7 January 2003, is Mario Conde Conde, a Spanish national born in 1948 and currently detained in Alcalá-Meco prison in Madrid. He claims to be a victim of a violation by Spain of article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel, José Luis Mazón Costa.

The facts as presented by the author

2.1 The author was President of the Banco Español de Crédito (Banesto) at the time the events took place. In early 1989, exercising the powers conferred on him by virtue of his office, but without the authorization of the Banesto administration, he disposed unilaterally of 300 million pesetas (€1,803,339) for purposes other than the proper business of the company. This incident was followed by a number of other corporate transactions and accounting fraud operations by companies with links to Banesto.

2.2 On 14 November 1994, the prosecutor's office attached to the National High Court brought criminal proceedings against 10 individuals, including the author, who was charged on eight counts relating to nine transactions: four counts of misappropriation, three of fraud and one of forgery of a commercial document. In addition to the proceedings brought by the Government Advocate, 14 *acusaciones particulares* (private prosecutions) and *acusaciones populares* (citizens' actions) were brought. In the course of the hearings, which lasted two years, statements were taken from 470 witnesses and expert witnesses. The case file consisted of 53 volumes of pretrial proceedings and 121 volumes of evidence.

2.3 On 31 March 2000, the National High Court:

(1) Found the author guilty of misappropriation in relation to the "Cementeras" operation and sentenced him to four years and two months' imprisonment and payment of joint and several compensation to Banesto in the amount of 1,556 million pesetas (€9,353,322);

(2) Found the author guilty of a continuing offence of fraud in relation to the Centro Comercial Concha Espina y Oil Dor operations and sentenced him to six years' imprisonment and payment of joint and several compensation to Banesto in the amount of 1,880,016,900 pesetas (€11,301,900);

(3) Found the author not guilty of misappropriation in relation to the Carbueros Metálicos operation;

(4) Found the author not guilty of misappropriation for the withdrawal of cash funds from Banesto (referred to as the "300 million in cash" operation). The court took the view that an offence of misappropriation had been committed, but classed it as a single offence and thus time-barred, five years having passed as required by the relevant law, and the author consequently incurred no criminal liability;

(5) Found the author not guilty on one count of misappropriation and one of fraud in relation to the Isolux operation;

(6) Found the author not guilty on one count of misappropriation and one of fraud in relation to the Promociones Hoteleras operation; and

(7) Found the author not guilty of forgery of a commercial document in relation to the accounting fraud operation.

2.4 The author submitted an appeal in cassation on 39 grounds, most of which alleged errors in the assessment of the evidence at trial and violations of the principle of presumption of innocence, maintaining that he had been convicted on the basis of insufficient incriminating evidence. Separate appeals in cassation were also lodged, one by the Government Advocate, three in the form of *acusaciones populares* and six as *acusaciones particulares*.

2.5 On 29 July 2002, the Supreme Court rejected the author's appeal and partially upheld the

Government Advocate's appeal, the *acusaciones populares* and two of the *acusaciones particulares*. The Court upheld the National High Court's sentence, except in relation to points (4) and (7) above:

With regard to point (4), the Supreme Court characterized the charge of misappropriation (the "300 million in cash" operation) as a continuing offence and therefore not time-barred. Consequently, the Court sentenced the author to six years and one day's imprisonment and payment of 300 million pesetas (€1,803,339) in compensation.

With regard to point (7), the Supreme Court found an offence of forgery of a commercial document in connection with the accounting fraud operation, and sentenced the author to four years' imprisonment and a fine of 1 million pesetas (€6,011).

The Supreme Court partially set aside the High Court sentence against the author and increased the penalty imposed in first instance, characterizing the charge of misappropriation (the "300 million in cash" operation) as a continuing offence and therefore not time-barred, and finding an offence of forgery of a commercial document in connection with the accounting fraud operation.

The complaint

3.1 The author alleges a violation of article 14, paragraph 5, of the Covenant, arguing that he was unable to secure a full review of the sentence handed down by the National High Court since the review in the higher court dealt only with points of law. He argues that the sentence was based on an evaluation of a great deal of evidence that the Supreme Court had been unable to reconsider.

3.2 The author alleges a second violation of article 14, paragraph 5, on the grounds that he was denied any kind of review in relation to his conviction and the increased sentence imposed by the Supreme Court. The author claims that Spain, unlike other States parties, did not enter reservations to article 14, paragraph 5, to ensure that this provision would not apply to first-time convictions handed down by an appeal court. He adds that the settled practice of the Constitutional Court is that there is no right of appeal for *amparo* in respect of a sentence handed down by the court of cassation, so it was futile to submit an application for *amparo* in this case.

State party's observations on admissibility and the merits

4.1 In its note verbale of 3 January 2005, the State party maintains that the communication is inadmissible under article 5, paragraph 2 (b), of the

Covenant because domestic remedies have not been exhausted. It argues that the author's appeal in cassation made no mention of the right to review of the sentence and did not invoke article 14, paragraph 5, of the Covenant or any similar provisions of domestic or international law. Furthermore, the author failed to submit an application for *amparo* to the Constitutional Court claiming a violation of his right to a review of the sentence.

4.2 The State party submits that, in contrast with past practice, as a result of the development of the Constitutional Court's case law and doctrine, there has been a considerable broadening of the scope of the remedy of cassation, which now permits a thorough review of the facts and the evidence. The State party cites as an example of that transformation the judgement in cassation in the author's own case, which ruled on many points of fact raised by the appellants in connection with the presumption of innocence and errors of fact in the evaluation of the evidence. The State party quotes from the judgement handed down by the Supreme Court, which reads: "...the various parties have had the opportunity to formulate more than 170 grounds for cassation, frequently invoking errors of fact in the assessment of evidence and the subsequent review of proven facts. The presumption of innocence is also invoked as grounds for challenging the rationality and logic applied in assessing the evidence. This implies that we are speaking of a remedy that goes beyond the strictly defined, formal limits of cassation in the conventional sense and satisfies the requirement of a second hearing."

4.3 As to the conviction and heavier sentence imposed on appeal, the State party points out that the Constitutional Court has established that "there is no denial of the right of appeal even where [the sentence] is handed down by exactly the same court as tried the case on appeal". Moreover, article 14, paragraph 5, cannot be interpreted as denying the prosecuting parties the right of appeal. In the State party's view, the fact that a number of States parties have made reservations to article 14, paragraph 5, of the Covenant, thereby excluding its application to cases in which a heavier sentence is handed down, does not imply that the provision itself precludes the imposition of a heavier sentence.

4.4 The State party argues that the author claimed only a violation of article 14, paragraph 5, yet the points raised, had they been borne out, would have constituted violations of numerous articles of the Covenant, which raises the question of what the real purpose of the communication is.

4.5 In a note verbale dated 10 January 2006, the State party repeats that the author's appeal in cassation included no claim of a violation of the right of appeal, and that he failed to apply for

amparo, which would have allowed him to make such a claim.

4.6 The State party also repeats that the Constitutional Court has developed its interpretation of the remedy of cassation in Spain, broadening it so that it now allows a thorough review of the facts and the evidence.

4.7 It further repeats that the author claimed only a violation of article 14, paragraph 5, even though the claims made in the communication would constitute a violation of a considerable number of articles of the Covenant.

Author's comments

5.1 On the question of exhaustion of domestic remedies, the author refers to the Committee's Views in *Pérez Escobar v. Spain* (communication No. 1156/2003), which relates to the same judicial proceedings and which the Committee found admissible since the remedy of *amparo* was ineffective.

5.2 The author repeats that the limitations of Spain's remedy of cassation precluded any review of the credibility of witnesses or reconsideration of the allegedly conflicting documentary evidence on which the conviction rested.

5.3 The author argues that he had been found not guilty by the lower court in the "accounting fraud" and "300 million in cash" operations but had been convicted by the higher court and sentenced by it to four years' imprisonment and to six years' imprisonment plus a fine of 300 million pesetas, respectively. He repeats that there was no possibility of review of the heavier sentence by a higher court. He recalls that, in its Views on *Gomariz v. Spain* (communication No. 1095/2002), the Committee found that the lack of a remedy in respect of a first-time sentence handed down on appeal with no possibility of review was a violation of article 14, paragraph 5, of the Covenant.

Issues and proceedings before the Committee

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

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee has noted the State party's argument that domestic remedies were not exhausted, since the alleged violations that were

referred to the Committee were never brought before the domestic courts. However, the Committee recalls its established jurisprudence that it is only necessary to exhaust those remedies that have a reasonable prospect of success.¹ An application for *amparo* had no prospect of success in relation to the alleged violation of article 14, paragraph 5, of the Covenant, and the Committee therefore considers that domestic remedies have been exhausted.

6.4 The author claims a violation of article 14, paragraph 5, of the Covenant, on the grounds that the evidence that proved decisive for his conviction was not reviewed by a higher court owing to the limited scope of Spain's remedy of cassation. However, the Committee finds from the judgement that the Supreme Court looked carefully and in detail at the trial court's evaluation of the evidence relating to the charges against him and that it did indeed diverge to some extent from the High Court's assessment in respect of two of the charges. The Committee finds that this complaint of a violation of article 14, paragraph 5, has not been sufficiently substantiated for the purposes of admissibility and declares it inadmissible under article 2 of the Optional Protocol.

6.5 The Committee finds that the author's complaint in respect of his conviction and the imposition of a heavier sentence on appeal with no possibility of review by a higher court raises issues under article 14, paragraph 5, of the Covenant, and declares it admissible.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee takes note of the author's contention that his conviction by the appeal court on two counts of which he had been cleared by the trial court, and the subsequent imposition of a heavier penalty, could not be reviewed by a higher court. It recalls that the absence of any right of review in a higher court of a sentence handed down by an appeal court, where the person was found not guilty by a lower court, is a violation of article 14, paragraph 5, of the Covenant.² The Committee notes that, in the present case, the Supreme Court found the author guilty of an offence of forgery of a commercial document, a charge of which he had been acquitted

¹ See, for example, communications Nos. 1095/2002, *Gomariz v. Spain*, Views of 22 July 2005, para. 6.4, and 1101/2002, *Alba Cabriada v. Spain*, Views of 1 November 2004, para. 6.5.

² In this context, see communications Nos. 1095/2002, *Gomariz v. Spain*, Views of 22 July 2005, para. 7.1, and 1421/2005, *Larrañaga v. Philippines*, Views of 7 July 2006, para. 7.8.

in the lower court, and that it characterized the offence of misappropriation as a continuing offence and thus not time-barred. On that basis the Supreme Court partially set aside the lower court's sentence and increased the penalty, with no opportunity for review of either the conviction or the sentence in a higher court in accordance with the law. The Committee finds that the facts before it constitute a violation of article 14, paragraph 5.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy which allows a review of his conviction and sentence by a higher

tribunal. The State party has an obligation to take the necessary measures to ensure that similar violations do not occur in future.

10. By becoming a party to the Optional Protocol, Spain recognized the competence of the Committee to determine whether there has been a violation of the Covenant. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to furnish them with an effective and applicable remedy should it be proved that a violation has occurred. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

Communication No. 1327/2004

Submitted by: Messaouda GRIOUA, née ATAMNA (represented by counsel, Nassera Dutour)

Alleged victims: Mohamed GRIOUA (the author's son) and the author herself

State party: Algeria

Date of adoption of Views: 10 July 2007

Subject matter: Disappearance, detention incommunicado

Procedural issues: None

Substantive issues: Prohibition of torture and cruel, inhuman and degrading treatment and punishment; right to liberty and security of person; arbitrary arrest and detention; respect for the inherent dignity of the human person; right to recognition before the law

Articles of the Covenant: 2, para. 3; 7; 9; and 16

Article of the Optional Protocol: 5, para. 2 (b)

Finding: Violation (arts. 7, 9 and 16, and art. 2, para. 3, in conjunction with arts. 7, 9 and 16, in respect of the author's son, and of art. 7 and art. 2, para. 3, in conjunction with art. 7, in respect of the author herself)

1.1 The author of the communication, dated 7 October 2004, is Ms. Messaouda GRIOUA, née ATAMNA, an Algerian national, who is acting on her own behalf and on behalf of her son, Mohamed GRIOUA, also an Algerian national, born on 17 October 1966. The author claims that her son is a victim of violations by Algeria of article 2, paragraph 3, and articles 7, 9 and 16 of the

International Covenant on Civil and Political Rights and that she herself is a victim of violations by Algeria of articles 2, paragraph 3, and 7 of the Covenant. She is represented by counsel, Nassera Dutour, spokesperson for the Collectif des Familles de Disparu(e)s en Algérie. The Covenant and its Optional Protocol entered into force for the State party on 12 December 1989.

1.2 On 11 July and 23 August 2005, counsel requested interim measures relating to the State party's draft *Charte pour la Paix et la Réconciliation Nationale*, which was submitted to a referendum on 29 September 2005. In counsel's view, the draft law was likely to cause irreparable harm to the victims of disappearances, putting at risk those persons who were still missing, and to deprive victims of an effective remedy and render the views of the Human Rights Committee ineffective. Counsel therefore requested that the Committee invite the State party to suspend its referendum until the Committee had issued views in three cases (including the *Grioua* case). The request for interim measures was transmitted to the State party on 27 July 2005 for comment. There was no reply.

1.3 On 23 September 2005, the Special Rapporteur on new communications and interim measures requested the State party not to invoke,

against individuals who had submitted or might submit communications to the Committee, the provisions of the law affirming “that no one, in Algeria or abroad, has the right to use or make use of the wounds caused by the national tragedy in order to undermine the institutions of the People’s Democratic Republic of Algeria, weaken the State, impugn the integrity of all the agents who served it with dignity, or tarnish the image of Algeria abroad”, and rejecting “all allegations holding the State responsible for deliberate disappearances. They [the Algerian people] consider that reprehensible acts on the part of agents of the State, which have been punished by law whenever they have been proved, cannot be used as a pretext to discredit the security forces as a whole, who were doing their duty for their country with the support of the general public”.

The facts as presented by the author

2.1 The author states that, between 5.30 a.m. and 2 p.m. on 16 May 1996, uniformed men and official vehicles of the “joint forces” (police, gendarmerie and Army) surrounded El Merdja, a large district of Baraki, in the eastern suburbs of Algiers, and conducted an extensive search operation which led to the arrest of some 10 people. At 8 a.m., several members of the National People’s Army in paratrooper uniforms came to the Grioua family’s door. They entered and searched the house from top to bottom without a warrant. Finding nothing, the soldiers arrested the author’s son in the presence of the family and informed his parents, of whom the author is one, that their son was being detained to help with inquiries; they produced no legal summons or arrest warrant.

2.2 The author states that she ran after the soldiers who had taken her son away and followed them to the house of her neighbours, the Chihoubs. There she saw the soldiers arrest Djamel Chihoub, whom they also took away, together with her son. She then saw the soldiers go to the home of the Boufertella family and arrest their son, Fouad Boufertella. Finally, the soldiers (and their three prisoners) entered the Kimouche family’s house and again arrested the son, Mourad Kimouche. The author provides several statements by individuals who have officially declared that they witnessed the events of 16 May 1996 and saw the author’s son being arrested at his home by soldiers and taken away in army vehicles. The author maintains that these statements confirm the circumstances surrounding her son’s arrest.

2.3 The soldiers handcuffed the prisoners in pairs and at 11 a.m. took them in a service vehicle to the Ibn Taymia school at the entrance to the Baraki district, which had been requisitioned as command headquarters. All those arrested that day were taken

to the Ibn Taymia school, where the joint forces proceeded to carry out identity checks. Some were released immediately, while others were taken to the Baraki gendarmerie, the Baraki military barracks or the Les Eucalyptus police station, in a district not far from Baraki.

2.4 The author says she began searching at 10 a.m. the same day, going first to the Baraki gendarmerie. The gendarmes told her that the people she had seen arrested and had herself identified had not been taken there. They advised her to try the Baraki police station, but there she was told by the officers that they had not arrested anyone and she should go to the Baraki barracks, where her son would be. At the Baraki military barracks the soldiers advised her to try the police station instead, but when she returned to the police station the police officers again told her her son was definitely at the barracks and the soldiers had been lying. The author continued to search until nightfall.

2.5 The next day, 17 May 1996, the author resumed her search and the gendarmes, police and military again sent her from pillar to post. From that day on, the author has not ceased in her efforts to locate her son. She has been to the barracks several times and each time has met with the same vague responses from the soldiers. She has constantly come up against the silence of the authorities, who refuse to give her any information on her son’s detention.

2.6 On the day of the raid, Fouad Boufertella was released at around 7 p.m. with injuries to one eye and a foot. He told the author that he had been released from the Baraki barracks, saying that the author’s son and the others arrested at the same time (Mourad Kimouche and Djamel Chihoub) had been held with him. He said that he and they had each been tortured, one by one, for 10 minutes. He said he had seen Djamel Chihoub being given electric shocks and had heard the torturers saying they would wait until that night to torture the author’s son.

2.7 The author states that she lodged several complaints with various courts, the first barely a month after her son’s disappearance.¹ Most were

¹ Complaint No. 849/96 dated 24 June 1996, lodged with the State prosecutor at the El Harrach Court; complaint No. 2202/96 dated 10 August 1996, lodged with the prosecutor at the Algiers Court; complaint referred on 28 August 1996 to the court prosecutor at Bir Mourad Rais, on 21 October 1996 to the court prosecutor at El Harrach and on 2 July 1997 to the Baraki gendarmerie; a new complaint dated 30 December 1996 lodged with the State prosecutor at the El Harrach Court; complaint dated 1 April 1998 lodged with the prosecutor at the Algiers Court; complaint dated 2 August 1999 lodged with the prosecutor at the Blida military court; complaint dated 2 January 2001 lodged with the State prosecutor at the El Harrach Court.

never acted upon.² The case was dismissed by the El Harrach Court on jurisdictional grounds on 29 October 1996 and the Algiers Court prosecutor replied on 21 January 1997, saying “I regret to inform you that inquiries into your son’s whereabouts have proved fruitless, but if we locate him we will inform you forthwith.” The examining magistrate at the El Harrach Court dismissed proceedings in the Grioua cases (Nos. 586/97 and 245/97)³ on 23 November 1997. Case No. 836/98 was transferred to the Algiers Court on 4 April 1998; lastly, in case No. 854/99, the examining magistrate at the El Harrach Court dismissed the proceedings on 28 June 1999, a decision against which the author lodged an appeal with the Algiers Appeal Court on 18 July 1999. The Indictments Division of the Algiers Court, with which the appeal was lodged, rejected the author’s petition on procedural grounds⁴ in a decision dated 17 August 1999. On 4 September 1999, again in relation to case No. 854/99, the author submitted an appeal in cassation within the legal time limits, but this was not forwarded to the Cassation Department of the Algiers Court until 20 July 2002, and to the Supreme Court of Algiers on 4 August 2002. The Supreme Court has still not handed down a judgement.

2.8 On the question of domestic remedies, the author recalls the Committee’s case law, which holds that only effective and available remedies need to be exhausted; she submits that, in the case under consideration, since it was her son’s fundamental rights that were violated, only remedies of a judicial nature need to be exhausted.⁵ She draws attention to the excessive delay (nearly three years) between the submission of her appeal in cassation and its referral to the Algiers Supreme Court. During that time, on 21 May 2000, the author sent a telegram to the Supreme Court asking how the case was progressing. Her appeal is still before the Supreme Court, its tardy referral having greatly delayed its consideration and put back the date of any decision indefinitely. In view of the delay incurred in the judicial proceedings, counsel argues that these have

² Counsel provides copies of several summonses instructing members of the Grioua family to go to the Baraki gendarmerie (5 February 1997, 21 February 1997, 10 May 1998, 9 July 1998), the Algiers *wilaya* offices (22 June 1997), the Baraki police station (7 November 1997), the El Harrach Court (12 November 1997, 24 May 1999) and the Algiers prosecutor’s office (date illegible).

³ Notification recorded 31 November 1997.

⁴ Under articles 170-174 ff. of the Code of Criminal Procedure.

⁵ Counsel cites communications Nos. 147/1983, *Lucia Arzuada Gilboa v. Uruguay*, Views adopted on 1 November 1985; 563/1993, *Bautista de Arellana v. Colombia*, Views adopted on 27 October 1995; 612/1995, *José Vicenté et al. v. Colombia*, Views adopted on 29 July 1997; and 778/1997, *Coronel et al. v. Colombia*, Views adopted on 24 October 2002.

been “unreasonably prolonged” within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, and that the requirement to exhaust domestic remedies no longer applies for the purposes of the Committee’s consideration of the case of the author’s son. Furthermore, every procedure initiated by the author in the past eight years has proved futile. The Algerian courts, notwithstanding the copious evidence in the file on the disappearance of the author’s son and the existence of corroborating testimony from several witnesses, have not exercised due diligence in ascertaining the fate of the author’s son or in identifying, arresting and bringing to trial those responsible for his abduction. Under the circumstances, the available domestic remedies of a judicial nature should be deemed exhausted.

2.9 On the question of administrative remedies, a review of the procedures undertaken shows that the State party has no desire to assist families in their inquiries, and highlights the many inconsistencies often to be found in the various State authorities’ handling of disappearance cases. The author has sent complaints by registered mail with recorded delivery to the State authorities at the highest level:⁶ the President, the Prime Minister, the Minister of Justice, the Minister of the Interior, the Minister of Defence, the Ombudsman, the President of the National Observatory for Human Rights and subsequently the President of the National Advisory Commission for the Promotion and Protection of Human Rights, which replaced the Observatory in 2001. The Observatory replied to the author on three occasions. On 17 September 1997, it wrote: “Following steps taken by the Observatory and according to information received from Police Headquarters, the individual in question faces proceedings under detention warrant No. 996/96 issued by the examining magistrate.” On 27 January 1999, the Observatory informed her it had “duly contacted the relevant security services. We undertake to forward to you any new information from the inquiry that we may receive”. Lastly, on 5 June 1999, the Observatory confirmed that “following steps taken by the Observatory and on the basis of information received from the security services, we can confirm that the individual in question is wanted by these services and is the subject of arrest warrant No. 996/96 issued by the El Harrach Court, which has territorial jurisdiction”. Yet the only military and judicial authorities in a position to provide the Observatory with such information have never acknowledged that the author’s son faced judicial proceedings. The file on the disappearance was lodged with the Office for Families of the Disappeared on 11 November 1998.

⁶ Counsel provides copies of letters, in Arabic, with proof of delivery.

2.10 The author states that the case was submitted to the United Nations Working Group on Enforced or Involuntary Disappearances on 19 October 1998, but counsel refers to the Committee's case law, which holds that "extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Economic and Social Council, and whose mandates are to examine and publicly report on human rights situations in specific countries or territories or on major phenomena of human rights violations worldwide, do not, as the State party should be aware, constitute a procedure of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol".⁷ Lastly, counsel emphasizes that the case of the author's son is not unique in Algeria. More than 7,000 families are searching for relatives who have disappeared, chiefly from police, gendarmerie and Algerian Army premises. No serious inquiry has been conducted to establish who was guilty of these disappearances. To this day, most of the perpetrators known to and identified by witnesses or family members enjoy complete impunity, and all administrative and judicial remedies have proved futile.

The complaint

3.1 The author claims that the facts as presented reveal violations of article 2, paragraph 3, and article 7, in respect of herself and her son, and of article 2, paragraph 3, and articles 9 and 16 of the Covenant in respect of her son.

3.2 As to the claims under article 7 in respect of the author's son, the circumstances of his disappearance and the total secrecy surrounding his highly probable detention are factors recognized by the Commission on Human Rights as constituting in themselves a form of inhuman or degrading treatment. The Committee has also accepted that being subjected to forced disappearance may be regarded as inhuman or degrading treatment of the victim.⁸ The author pursues her search every day, despite her age (65) and the difficulty she has in moving around. She suffers deeply from the constant uncertainty over her son's fate. This uncertainty and the authorities' refusal to divulge any information is a cause of profound and continuing anguish. The Committee has recognized that the disappearance of a close relative constitutes a violation of article 7 of the Covenant in respect of the family.⁹

⁷ Communication No. 540/1993, *Celis Lauréano v. Peru*, Views adopted on 25 March 1996, para. 7 (1).

⁸ Counsel cites communications Nos. 449/1991, *Mójica v. Dominican Republic*, Views adopted on 10 August 1994; 540/1993, *Celis Lauréano v. Peru*, Views adopted on 25 March 1996; 542/1993, *Tshishimbi v. Zaire*, Views adopted on 25 March 1996.

⁹ Counsel cites communication No. 107/1981, *Elena Quinteros Almeida v. Uruguay*, Views adopted on 21 July

3.3 As to article 9, the author's son was arrested on 16 May 1996 and his family has not seen him since. No legal grounds were given for his arrest and his detention was not entered in the police custody registers. Officially, there is no trace of his whereabouts or his fate. The fact that his detention has not been acknowledged and was carried out in complete disregard of the guarantees set forth in article 9, that the investigations have displayed none of the efficiency or effectiveness required in such circumstances, and that the authorities persist in concealing what has happened to him, means that he has been arbitrarily deprived of his liberty and the protection afforded by the guarantees specified in article 9. According to the Committee's case law, the unacknowledged detention of any individual constitutes a violation of article 9 of the Covenant.¹⁰ Under the circumstances, the violation of article 9 is sufficiently serious for the authorities to be required to account for it.

3.4 Article 16 establishes the right of everyone to be recognized as the subject of rights and obligations. Forced disappearance is essentially a denial of that right in so far as a refusal by the perpetrators to disclose the fate or whereabouts of the person concerned or to acknowledge the deprivation of liberty places that person outside the protection of the law.¹¹ Furthermore, in its concluding observations on the State party's second periodic report, the Committee recognized that forced disappearances might involve the right guaranteed under article 16 of the Covenant.¹²

3.5 With regard to article 2, paragraph 3, of the Covenant, the detention of the author's son has not been acknowledged and he is thus deprived of his legitimate right to an effective remedy against his arbitrary detention. For her part, the author has sought every remedy at her disposal, but has constantly run up against the authorities' refusal to acknowledge her son's arrest and detention. The

1983, and the Committee's concluding observations on Algeria in 1998 (CCPR/C/79/Add.95, 18 August 1998, para. 10).

¹⁰ Counsel cites communications Nos. 612/1995, *José Vicenté et al. v. Colombia*, Views adopted on 29 July 1997; 542/1993, *Tshishimbi v. Zaire*, Views adopted on 25 March 1996; 540/1993, *Celis Lauréano v. Peru*, Views adopted on 25 March 1996; 563/1993, *Bautista de Arellana v. Colombia*, Views adopted on 27 October 1995; 181/1984, *Sanjuan Arévalo v. Colombia*, Views adopted on 3 November 1989; 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985; and 56/1979, *Celiberti de Casariego v. Uruguay*, Views adopted on 29 July 1981.

¹¹ Counsel cites the third preambular paragraph of the Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992.

¹² CCPR/C/79/Add.95, para. 10.

State party had an obligation to guarantee her son's rights, and its denial that the security services were involved in his forced disappearance cannot be considered an acceptable and sufficient response to resolve the case of the author's son's forced disappearance. In addition, according to the Committee's general comment No. 31, the positive obligations on States parties, under paragraph 3, to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations, as a result of States parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent or punish such acts by private persons.

3.6 The author asks the Committee to find that the State party has violated article 2, paragraph 3, and articles 7, 9 and 16 of the Covenant and to request the State party to order independent investigations as a matter of urgency with a view to locating her son, to bring the perpetrators of the forced disappearance before the competent civil authorities for prosecution, and to provide adequate reparation.

State party's observations on the admissibility and merits of the communication

4.1 On 28 August 2005, the State party reported that inquiries by the clerk of the Supreme Court had not succeeded in locating the Grioua file. The State party therefore requested further details, including the number of the receipt issued upon deposition of the file with the Supreme Court. Considering the large number of cases before the Court, more specific information would help shed light on the case in question.

4.2 By note verbale dated 9 January 2006, the State party reported that the Grioua case had been brought to the police's attention by a complaint from Mohamed Grioua's brother Saad, alleging abduction on 16 May 1996 "by persons unknown". Charges of abduction, a punishable offence under article 291 of the Criminal Code, were filed by the prosecutor at El Harrach (Algiers) with the examining magistrate of the third division. Several months of inquiries having failed to identify the perpetrator of the alleged abduction, the examining magistrate decided on 23 November 1997 to dismiss the proceedings. An appeal was lodged with the Indictments Division of the Algiers Court, which in a ruling dated 17 August 1999 rejected it on procedural grounds as failing to comply with the provisions of the Code of Criminal Procedure governing appeals against decisions of examining magistrates. Upon appeal in

cassation, the Supreme Court handed down a judgement rejecting the application.

Author's comments on the State party's observations

5. On 24 February 2006, counsel argued that the State party was merely recapitulating the judicial procedure, not responding on the merits to either deny or accept responsibility for the forced disappearance of the author's son. According to the Committee's case law, the State party must furnish evidence if it seeks to refute claims made by the author of a communication: it is no use the State party merely denying them, whether explicitly or implicitly.¹³ In terms of procedure, counsel pointed out that all relevant effective remedies had been exhausted and drew attention to the time that had elapsed between the submission of the author's appeal and its referral to the Supreme Court.

Issues and proceedings before the Committee

Admissibility considerations

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

6.2 The Committee notes that the same matter is not being examined under any other procedure of international investigation or settlement, as required under article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With regard to exhaustion of domestic remedies, the Committee notes that the State party makes no comment on the admissibility of the communication. It notes that the author states that since 1996 she has lodged numerous complaints, the outcome of which was a dismissal of proceedings, upheld on appeal despite, the author says, the copious evidence in the file on her son's disappearance and the existence of corroborating testimony from several witnesses. The Committee also considers that the application of domestic remedies in response to the other complaints introduced repeatedly and persistently by the author since 1996 has been unduly prolonged. It therefore considers that the author has met the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 As to the claims under articles 7 and 9 of the Covenant, the Committee notes that the author has made detailed allegations about her son's disappearance and the ill-treatment he allegedly suffered. The State party has not replied to these

¹³ Counsel cites communication No. 107/1981, *Elena Quinteros Almeida v. Uruguay*, Views adopted on 21 July 1983.

allegations. In this case, the Committee takes the view that the facts described by the author are sufficient to substantiate the complaints under articles 7 and 9 for the purposes of admissibility. As to the claim under article 2, paragraph 3, the Committee considers that this allegation has also been sufficiently substantiated for the purposes of admissibility.

6.5 As regards the claims under article 16, the Committee considers that the question of whether and under what circumstances a forced disappearance may amount to denying recognition of the victim of such acts as a person before the law is intimately linked to the facts of this case. Therefore, it concludes that such claims are most appropriately dealt with at the merits stage of the communication.

6.6 The Committee concludes that the communication is admissible under article 2, paragraph 3, and articles 7, 9 and 16 of the Covenant, and proceeds to their consideration on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee recalls the definition of enforced disappearance in article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court: "Enforced disappearance of persons means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time." Any act leading to such disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to liberty and security of the person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10). It also violates or constitutes a grave threat to the right to life (art. 6).¹⁴ In the present case, the author invokes articles 7, 9 and 16.

7.3 With regard to the author's claim of disappearance, the Committee notes that the author and the State party have submitted different versions

of the events in question. The author contends that her son was arrested on 16 May 1996 by agents of the State and has been missing since that date, while according to the National Observatory for Human Rights her son is wanted under arrest warrant No. 996/96 issued by the El Harrach Court. The Committee notes the State party's indication that the examining magistrate considered the charge of abduction and, following investigations that failed to establish the identity of the perpetrator of the alleged abduction, decided to dismiss proceedings.

7.4 The Committee reaffirms¹⁵ that the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone has the relevant information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information exclusively in the hands of the State party, the Committee considers the author's allegations sufficiently substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party. In the present case, the Committee has been provided with statements from witnesses who were present when the author's son was arrested by agents of the State party. Counsel has informed the Committee that one of those detained at the same time as the author's son, held with him and later released, has testified concerning their detention and the treatment to which they were subjected.

7.5 As to the alleged violation of article 9, the information before the Committee reveals that the author's son was removed from his home by agents of the State. The State party has not addressed the author's claims that her son's arrest and detention were arbitrary or illegal, or that he has not been seen since 16 May 1996. Under these circumstances, due weight must be given to the information provided by the author. The Committee recalls that detention

¹⁴ See communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 31 July 2003, para. 9.3.

¹⁵ Communications Nos. 146/1983, *Baboeram Adhin et al. v. Suriname*, Views adopted on 4 April 1985, para. 14.2; 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 7.2; 202/1986, *Graciela Ato del Avellanal v. Peru*, Views adopted on 31 October 1988, para. 9.2; 30/1978, *Bleier v. Uruguay*, Views adopted on 29 March 1982, para. 13.3; 107/1981, *Elena Quinteros Almeida v. Uruguay*, Views adopted on 21 July 1983, para. 11; and 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.4.

incommunicado as such may violate article 9,¹⁶ and notes the author's claim that her son was arrested and has been held incommunicado since 16 May 1996, without any possibility of access to a lawyer, or of challenging the lawfulness of his detention. In the absence of adequate explanations on this point from the State party, the Committee concludes that article 9 has been violated.

7.6 As to the alleged violation of article 7 of the Covenant, the Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20, on article 7, which recommends that States parties should make provision against detention incommunicado. In the circumstances, the Committee concludes that the disappearance of the author's son, preventing him from contacting his family and the outside world, constitutes a violation of article 7 of the Covenant.¹⁷ Further, the circumstances surrounding the disappearance of the author's son and the testimony that he was tortured strongly suggest that he was so treated. The Committee has received nothing from the State party to dispel or counter such an inference. The Committee concludes that the treatment of the author's son amounts to a violation of article 7.¹⁸

7.7 The Committee also notes the anguish and distress caused to the author by her son's disappearance and her continued uncertainty as to his fate. It is therefore of the opinion that the facts before it reveal a violation of article 7 of the Covenant with regard to the author herself.¹⁹

7.8 As to the alleged violation of article 16 of the Covenant, the question arises as to whether and under what circumstances a forced disappearance may amount to denying the victim recognition as a person before the law. The Committee points out that intentionally removing a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person before the law if the victim was in the hands of the State authorities when last seen and, at the same

time, if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3) have been systematically impeded. In such situations, disappeared persons are in practice deprived of their capacity to exercise entitlements under law, including all their other rights under the Covenant, and of access to any possible remedy as a direct consequence of the actions of the State, which must be interpreted as a refusal to recognize such victims as persons before the law. The Committee notes that, under article 1, paragraph 2, of the Declaration on the Protection of All Persons from Enforced Disappearance,²⁰ enforced disappearance constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law. It also recalls that article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court, recognizes that the "intention of removing [persons] from the protection of the law for a prolonged period of time" is an essential element in the definition of enforced disappearance. Lastly, article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance mentions that enforced disappearance places the person concerned outside the protection of the law.

7.9 In the present case, the author indicates that her son was arrested together with other individuals by members of the National People's Army on 16 May 1996. After an identity check, he was allegedly taken to the Baraki military barracks. There has been no news of him since that date. The Committee notes that the State party has neither contested these facts nor conducted an investigation into the fate of the author's son, nor provided the author with any effective remedy. It is of the view that if a person is arrested by the authorities and there is subsequently no news of that person's fate, the failure by the authorities to conduct an investigation effectively places the disappeared person outside the protection of the law. Consequently, the Committee concludes that the facts before it in the present communication reveal a violation of article 16 of the Covenant.

7.10 The author has invoked article 2, paragraph 3, of the Covenant, which requires States parties to ensure that individuals have accessible, effective and enforceable remedies to uphold these rights. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. It refers to its general comment No. 31,²¹ which states that failure by a State party to investigate allegations of

¹⁶ Communication No. 1128/2002, *Rafael Marques de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.3. See also general comment No. 8, para. 2.

¹⁷ Communications Nos. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 8.5; 458/1991, *Mukong v. Cameroon*, Views adopted on 24 July 1994, para. 9.4; and 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya*, Views adopted on 23 March 1994, para. 5.

¹⁸ Communications Nos. 449/1991, *Mójica v. Dominican Republic*, Views adopted on 10 August 1994, para. 5.7; and 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 9.6.

¹⁹ Communications Nos. 107/1981, *Elena Quinteros Almeida v. Uruguay*, Views adopted on 21 July 1983, para. 14; and 950/2000, *Sarma v. Sri Lanka*, Views adopted on 31 July 2003, para. 9.5.

²⁰ See General Assembly resolution 47/133 of 18 December 1992.

²¹ Para. 15.

violations could in and of itself give rise to a separate breach of the Covenant. In the present case, the information before it indicates that neither the author nor her son have had access to an effective remedy, and the Committee concludes that the facts before it reveal a violation of article 2, paragraph 3, of the Covenant, in conjunction with articles 7, 9 and 16, in respect of the author's son, and a violation of article 2, paragraph 3, of the Covenant, in conjunction with article 7 of the Covenant, in respect of the author herself.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of articles 7, 9 and 16 of the Covenant, and of article 2, paragraph 3, in conjunction with articles 7, 9 and 16, in respect of the author's son, and of article 7 and article 2, paragraph 3, in conjunction with article 7, in respect of the author herself.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including a thorough and effective investigation into the disappearance and fate of her son, his immediate release if he is still alive, and the appropriate information emerging from its investigation, and to ensure that the author and her family receive adequate reparation, including in the form of compensation. While the Covenant does not give individuals the right to demand the criminal prosecution of another person,²² the Committee

nevertheless considers the State party duty-bound not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and violations of the right to life, but also to prosecute, try and punish the culprits. Thus, the State party is therefore also under an obligation to prosecute, try and punish those held responsible for such violations. The State party is further required to take measures to prevent similar violations in the future. The Committee also recalls the request made by the Special Rapporteur on new communications and interim measures dated 23 September 2005 (see para. 1.3 above) and reiterates that the State party should not invoke the *Charte pour la Paix et la Réconciliation Nationale* against individuals who invoke the provisions of the Covenant or have submitted or may submit communications to the Committee.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy where a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

²² Communications Nos. 213/1986, *H.C.M.A. v. The Netherlands*, Views adopted on 30 March 1989, para. 11.6; and 612/1995, *José Vicenté et al. v. Colombia*, Views adopted on 29 July 1997, para. 8.8.

Communication No. 1361/2005

Submitted by: X (represented by counsel)
Alleged victim: The author
State party: Colombia
Date of adoption of Views: 30 March 2007

Subject matter: Discrimination in granting pension transfer in the case of homosexual couples

Procedural issues: Failure to substantiate the alleged violations adequately

Substantive issues: Equality before the courts; arbitrary or unlawful interference in privacy; equality before the law and right to equal protection of the law without discrimination

Articles of the Covenant: 2, para. 1; 3; 5; 14, para. 1; 17; and 26

Articles of the Optional Protocol: 2 and 3

Finding: Violation (art. 26)

1. The author¹ of the communication dated 13 January 2001 is a Colombian citizen. He claims to be the victim of violations by Colombia of articles 2, paragraph 1, 3, 5, paragraphs 1 and 2, 14, paragraph 1, 17 and 26 of the Covenant. The Optional Protocol entered into force for Colombia on 23 March 1976. The author is represented by counsel. The facts as presented by the author

2.1 On 27 July 1993, the author's life partner Mr. Y died after a relationship of 22 years, during which they lived together for 7 years. On 16 September 1994, the author, who was economically dependent on his late partner, lodged an application with the Social Welfare Fund of the Colombian Congress, Division of Economic Benefits (the Fund), seeking a pension transfer.

2.2 On 19 April 1995, the Fund rejected the author's request, on the grounds that the law did not permit the transfer of a pension to a person of the same sex.

2.3 The author indicates that according to regulatory decree No. 1160 of 1989, "for the purposes of pension transfers, the person who shared married life with the deceased during the year immediately preceding the death of the deceased or during the period stipulated in the special arrangements shall be recognized as the permanent partner of the deceased"; the decree does not specify that the two persons must be of different sexes. He

¹ The name and surname of the author and his partner have been omitted in accordance with a request for confidentiality from one of the parties.

adds that Act No. 113 of 1985 extended to the permanent partner the right to pension transfer on the death of a worker with pension or retirement rights, thus putting an end to discrimination in relation to benefits against members of a de facto marital union.

2.4 The author instituted an action for protection (*acción de tutela*) in Bogotá Municipal Criminal Court No. 65, seeking a response from the Benefits Fund of the Colombian Congress. On 14 April 1995, the Municipal Criminal Court dismissed the application on the grounds that there had been no violation of fundamental rights. The author appealed against this decision in Bogotá Circuit Criminal Court No. 50. On 12 May 1995, this court ordered the modification of the earlier ruling and called on the Procurator-General to conduct an investigation into errors committed by staff of the Fund.

2.5 In response to the refusal to grant him the pension, the author instituted an action for protection in Bogotá Circuit Criminal Court No. 18. This court rejected the application on 15 September 1995, finding that there were no grounds for protecting the rights in question. The author appealed against this decision to the Bogotá High Court, which upheld the lower court's decision on 27 October 1995.

2.6 The author indicates that all the actions for protection in the country are referred to the Constitutional Court for possible review, but that the present action was not considered by the Court. Since Decree No. 2591 provides that the Ombudsman can insist that the matter be considered, the author requested the Ombudsman to apply for review by the Constitutional Court. The Ombudsman replied on 26 February 1996 that, owing to the absence of express legal provisions, homosexuals were not allowed to exercise rights recognized to heterosexuals such as the right to marry or to apply for a pension transfer on a partner's death.

2.7 The author instituted proceedings in the Cundinamarca Administrative Court, which rejected the application on 12 June 2000, on the grounds of the lack of constitutional or legal recognition of homosexual unions as family units. The author appealed to the Council of State, which on 19 July 2000 upheld the ruling of the Administrative Court, arguing that under the Constitution, "the family is formed through natural or legal ties ... between a man and a woman". This decision was notified by

edict only on 17 October 2000, and became final on 24 October 2000.

2.8 The author considers that he has exhausted domestic remedies. He emphasizes that all the actions for protection in the country are referred to the Constitutional Court for possible review, but that the present action was not considered by the Court.

2.9 The author asks for his personal data and those of his partner to be kept confidential.

The complaint

3.1 Regarding the alleged violation of article 2, paragraph 1, the author states that he has suffered discrimination owing to his sexual orientation and his sex. He states that Colombia has failed to respect its commitment to guarantee policies of non-discrimination to all the inhabitants of its territory.

3.2 The author alleges a violation of article 3, since a partner of the same sex is being denied the rights granted to different-sex couples, without any justification. He states that he fulfilled the legal requirements for receiving the monthly pension payment to which he is entitled and that this payment was refused on the basis of arguments excluding him because of his sexual preference. He points out that if the pension request had been presented by a woman following the death of her male partner, it would have been granted, so that the situation is one of discrimination. The author considers that the State party violated article 3 by denying a partner of the same sex the rights which are granted to partners of different sexes.

3.3 The author also claims a violation of article 5, paragraphs 1 and 2, of the Covenant, because the actions of the State party displayed a failure to respect the principles of equality and non-discrimination. According to the author, the State party ignored the Committee's decisions regarding the prohibition of discrimination on grounds of sexual orientation,² and Colombian law was applied restrictively, preventing the author from obtaining the transfer of his partner's pension, thus putting his means of subsistence and his quality of life at risk.

3.4 Regarding the alleged violation of article 14, paragraph 1, the author maintains that his right to equality before the courts was not respected, since the Colombian courts rejected his request on several occasions because of his sex. He refers to the dissenting opinion of Judge Olaya Forero of the Administrative Court in the case, in which she stated that the Court was subjecting homosexuals to unequal treatment.

² The author seems to be referring to the Committee's decisions in communications Nos. 488/1992, *Toonen v. Australia*, and 941/2000, *Young v. Australia*.

3.5 The author claims a violation of article 17, paragraph 1, alleging negative interference by the State party, which failed to recognize his sexual preference so that he was denied the fundamental right to a pension which would assure his subsistence. Regarding the alleged violation of article 17, paragraph 2, he maintains that his private life weighed more heavily in the decisions of the judicial authorities than the legal requirements for receipt of a pension. The judges had refused to grant protection or *amparo* on the sole grounds that he was a homosexual.

3.6 Regarding the violation of article 26, the author states that the State party, through the decision of the Benefits Fund and subsequently in the many court actions, had an opportunity to avoid discrimination based on sex and sexual orientation, but failed to do so. He claims that it is the duty of the State to resolve situations which are unfavourable to its inhabitants, whereas in his case the State had in fact worsened them by increasing his vulnerability in the difficult social circumstances prevailing in the country.

State party's observations on the admissibility and merits of the communication

4.1 In a note verbale dated 25 November 2005, the State party submitted its observations on the admissibility and merits of the communication.

4.2 Regarding the admissibility of the communication, the State party reviews in detail the remedies of which the author made use, concluding that these have been exhausted, with the exception of the special remedies of review or reconsideration, which he did not use in good time. The State party maintains that it is not for the Committee to examine the findings of fact or law reached by national courts, or to annul judicial decisions in the manner of a higher court. The State party considers that the author is seeking to use the Committee as a court of fourth instance.

4.3 Regarding domestic remedies, the State party notes that the Fund applied article 1 of Act No. 54 of 1990, which provides that "... for all civil law purposes, the man and the woman who form part of the de facto marital union shall be termed permanent partners". It concludes that Colombian legislation has not conferred recognition in civil law on unions between persons of the same sex. It also notes that the Cundinamarca Administrative Court considered that the systematic and consistent application of the 1991 Constitution together with other rules did not provide the administration with any grounds for granting the author's request. The State party points out that the system of administrative justice offers special remedies such as review and reconsideration, which the author could have sought, but which were

not used in good time, as the deadlines laid down for doing so had passed.

4.4 Regarding the actions for protection instituted by the author, the State party considers that the purpose of the application lodged in Municipal Criminal Court No. 65 was not to protect the right to transfer of the pension but to protect the right of petition. Consequently, it considers that that remedy should not be viewed as one of those which offered the State an opportunity to try the alleged violation. The second action for protection did have the purpose of protecting some of the allegedly violated rights, and was denied by the judge on the grounds that the author was not in imminent danger and had another appropriate means of judicial protection.

4.5 Regarding the review of the rulings on protection by the Constitutional Court, the State party confirms that the rulings were submitted to the Court but not selected. It confirms that review by the Court is not mandatory, since the Court is not a third level in the protection procedure. It also forwards the comments made by the Ombudsman, who did not insist that the Constitutional Court should review the rulings in question. The State party refers to the Constitutional Court's ruling on a constitutional challenge to articles 1 and 2 (a) of Act No. 54 of 1990, "defining de facto marital unions and the property regime between permanent partners", and attaches part of the ruling.³

4.6 The State party concludes that the author has exhausted domestic remedies and that his disagreement with the decisions handed down prompted him to turn to the Committee as a court of fourth instance. The State party seeks to show that the decisions taken at the domestic level were based on the law and that the judicial guarantees set out in the Covenant were not ignored.

4.7 On the merits, the State party presented the following observations. Regarding the alleged violation of article 2, paragraph 1, of the Covenant, the State party maintains that the Committee is not competent to make comments on the violation of this article, since this refers to a general commitment to respect and provide guarantees to all individuals. It refers to the Committee's jurisprudence in communication No. 268/1987, *M.B.G. and S.P. v. Trinidad and Tobago*, and concludes that the author cannot claim a violation of this article in isolation if there is no violation of article 14, paragraph 1.

4.8 Regarding the alleged violation of article 3, the State party holds that this article does not have the scope claimed by the author, since this provision is designed to guarantee equal rights between men and women, in the context of the historical factors of discrimination to which women have been subjected.

The State party refers to the ruling of the Constitutional Court in the case, and endorses the Court's observations, in particular the following. De facto marital unions of a heterosexual nature, in so far as they form a family, are recognized in law in order to guarantee them "comprehensive protection" and, in particular, ensure that "the man and the woman" have equal rights and duties (Constitution, arts. 42 and 43). A variety of social and legal factors were taken into account by the drafters of the law, and not only the mere question of whether a couple live together, particularly as living together may be a feature of couples and social groups of many different kinds or with several members, who may or may not be bound by sexual or emotional ties, and would not in itself oblige the drafters of the law to establish a property regime similar to that established under Act No. 54 of 1990. The legal definition of de facto marital union is sufficient to recognize and protect a group that formerly suffered from discrimination but does not create a privilege which would be unacceptable from the constitutional point of view. The State party also refers to the views of the Ombudsman along the same lines, and concludes that there has been no violation of article 3 of the Covenant.

4.9 Regarding the alleged violation of article 5, paragraphs 1 and 2, the State party maintains that it has not been expressly substantiated, as the author has not specified in what way a State, a group or person was granted the right to engage in activities or perform acts aimed at the destruction of any of the rights and freedoms recognized in the Covenant.

4.10 The State party reiterates the statement of the Constitutional Court to the effect that the purpose of the rules governing this regime was simply to protect heterosexual unions, not to undermine other unions or cause them any detriment or harm, since no intent to harm homosexuals may be found in the rules. Regarding article 5, paragraph 2, the State party points out that none of the country's laws restricts or diminishes the human rights set out in the Covenant. On the contrary, there are provisions which, like Act No. 54 of 1990, extend rights in respect of social benefits and property to the permanent partners in de facto marital unions, though this is not provided for in article 23 of the Covenant, which refers to the rights of the couple within marriage.

4.11 Regarding the alleged violation of article 14, paragraph 1, the State party points out that court orders handed down in the course of proceedings or an action for protection are valid only *inter partes*. It considers that these allegations lack substance because all the court decisions adopted in relation to the applications made by the author display equality not only before the law but also vis-à-vis the judicial system. At no time were restrictions placed on his ability to go to law and make use of all the

³ Constitutional Court, C-098 of 1996.

machinery available to him to invoke the rights he claimed had been violated. What the author calls violations do not represent some whim of the courts but the strict discharge of their judicial role under social security legislation, in which the duty of protection focuses on the family, viewed as a unit composed of a heterosexual couple, as the Covenant itself understands it in article 23.

4.12 Regarding the alleged violation of article 17, the State party maintains that the author has not explained the grounds on which he considers that this article was violated, or cited any evidence that he was the victim of arbitrary or unlawful interference with his privacy. Consequently, it considers that the author has not substantiated this part of his communication.

4.13 Regarding the alleged violation of article 26, the State party points out that it has already discussed the relevant points in relation to articles 3 and 14, since the same matters of fact and of law are involved. The State party concludes that no violation of the Covenant has taken place, and that the communication should be declared inadmissible under article 2 of the Optional Protocol.

4.14 The State party does not oppose the author's request for his identity and that of his late partner to be kept confidential, although it does not agree with the author that such action is necessary.

Comments by the author

5.1 In his comments dated 26 January 2006, the author states that it can be seen from the State party's observations that Colombian legislation does not recognize that a person who has cohabited with another person of the same sex has any rights in relation to social benefits. He refers to the rulings of the Administrative Court and the Council of State. Regarding the State party's observation that he should have sought the remedies of review and reconsideration, he indicates that the jurisdiction for such remedies is the Council of State itself, which had already examined the issue and clearly and categorically concluded that there were no grounds for a claim under Colombian law. However, the judicial remedies relating to fundamental rights or human rights had also been exhausted through the action for protection. The author points out that the Ombudsman had declined to request the Constitutional Court to review the application for protection on the grounds that the application was inadmissible. He maintains that the State party's reply shows that there is no possibility of protection in this case under the country's Constitution, laws, regulations or procedures.

5.2 The author states that article 93 of the Constitution acknowledges that the views and decisions of international human rights bodies

constitute guides to interpretation which are binding on the Constitutional Court. He maintains that under this provision the State party should have taken the Human Rights Committee into account as such a body, and in particular the Committee's decisions in case No. 488/1992, *Toonen v. Australia*, and case No. 941/2000, *Young v. Australia*.

5.3 The author concludes that domestic remedies have been exhausted and that Colombian legislation contains no remedy which would protect the rights of homosexual couples and halt the violation of their fundamental rights.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 The Committee notes that the State party considers that the author has exhausted domestic remedies.

6.2 Regarding the allegations relating to article 3, the Committee notes the author's arguments that a same-sex couple is denied the rights granted to different-sex couples, and that if the pension request had been submitted by a woman following the death of her male partner, the pension would have been granted—a discriminatory situation. However, the Committee points out that the author does not allege that discrimination is exercised in the treatment of female homosexuals in situations similar to his own. The Committee considers that the author has not sufficiently substantiated this complaint for the purposes of admissibility, and concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.3 Regarding the claims under article 5 of the Covenant, the Committee finds that this provision does not give rise to any separate individual right.⁴ Thus, the claim is incompatible with the Covenant and inadmissible under article 3 of the Optional Protocol.

6.4 As to the claim under article 14, the Committee finds that it is not sufficiently substantiated for the purposes of article 2 of the Optional Protocol and this part of the complaint must therefore be declared inadmissible under article 2 of the Optional Protocol.

6.5 The Committee considers that the remainder of the author's complaint raises important issues in relation to articles 2, paragraph 1, 17 and 26 of the Covenant, declares it admissible and proceeds to examine the merits of the communication.

⁴ See communications Nos. 1167/2003, *Rayos v. Philippines*, Views of 27 July 2004, para. 6.8, and 1011/2001, *Madafferi and Madafferi v. Australia*, Views of 26 July 2004, para. 8.6.

Consideration of the merits

7.1 The author claims that the refusal of the Colombian courts to grant him a pension on the grounds of his sexual orientation violates his rights under article 26 of the Covenant. The Committee takes note of the State party's argument that a variety of social and legal factors were taken into account by the drafters of the law, and not only the mere question of whether a couple live together, and that the State party has no obligation to establish a property regime similar to that established in Act No. 54 of 1990 for all the different kinds of couples and social groups, who may or may not be bound by sexual or emotional ties. It also takes note of the State party's claim that the purpose of the rules governing this regime was simply to protect heterosexual unions, not to undermine other unions or cause them any detriment or harm.

7.2 The Committee notes that the author was not recognized as the permanent partner of Mr. Y for pension purposes because court rulings based on Act No. 54 of 1990 found that the right to receive pension benefits was limited to members of a heterosexual *de facto* marital union. The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation.⁵ It also recalls that in previous communications the Committee found that differences in benefit entitlements between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry or not, with all the ensuing consequences.⁶ The Committee also notes that, while it was not open to the author to enter into marriage with his same-sex permanent partner, the Act does not make a distinction between married and unmarried couples but between homosexual and heterosexual couples. The Committee finds that the State party has put forward no argument that might demonstrate that such a distinction between same-sex partners, who are not entitled to pension benefits, and unmarried heterosexual partners, who are so entitled, is reasonable and objective. Nor has the State party adduced any evidence of the existence of factors that might justify making such a distinction. In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author's right to his life partner's pension on the basis of his sexual orientation.

⁵ See communication No. 941/2000, *Young v. Australia*, Views of 6 August 2003, para. 10.4.

⁶ See communications Nos. 180/1984, *Danning v. Netherlands*, Views of 9 April 1987, para. 14, and 976/2001, *Derksen and Bakker v. Netherlands*, Views of 1 April 2004, para. 9.2.

7.3 In the light of this conclusion, the Committee is of the view that it is not necessary to consider the claims made under articles 2, paragraph 1, and 17.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, considers that the facts before it disclose a violation by Colombia of article 26 of the Covenant.

9. In accordance with the provisions of article 2, paragraph 3 (a), of the Covenant, the Committee finds that the author, as the victim of a violation of article 26, is entitled to an effective remedy, including reconsideration of his request for a pension without discrimination on grounds of sex or sexual orientation. The State party has an obligation to take steps to prevent similar violations of the Covenant in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to these Views. The State party is also requested to publish the Committee's Views.

APPENDIX

Individual opinion (dissenting) by Mr. Abdelfattah Amor and Mr. Ahmed Tawfik Khalil

The author, X, lost his partner, who was of the same sex as him, after a 22-year relationship and having lived together for seven years. He considers that, like the surviving partners of heterosexual married or *de facto* couples, he is entitled to a survivor's pension, but the law of the State party does not allow this.

The Committee has upheld the author's claim, finding that he has suffered discrimination within the meaning of article 26 of the Covenant on grounds of sex or sexual orientation, inasmuch as the State party has failed to explain how "a distinction between same-sex partners and unmarried heterosexual partners is reasonable and objective" and has not "adduced any evidence of the existence of factors that might justify making such a distinction".

On the basis of the Committee's conclusion, there is apparently no distinction or difference between same-sex couples and unmarried mixed-sex couples in respect of survivor's pensions, and for the State party to make such a distinction, unless it can be explained and substantiated, constitutes discrimination on grounds of sex or sexual orientation and amounts to a violation of article

26. Not surprisingly, then, the Committee calls on the State party to reconsider the author's request for a pension "without discrimination on grounds of sex or sexual orientation". The State party is further required, in the standard wording, "to take steps to prevent similar violations of the Covenant in the future".

The Committee's decision in fact repeats the conclusion reached in 2003 in *Young v. Australia* (communication No. 941/2000), in what is clearly a perspective of establishment and consolidation of consistent case law in this area, binding on all States parties to the Covenant.

We cannot subscribe either to this approach or to the Committee's conclusion, for several legal reasons.

In the first place article 26 does not explicitly cover discrimination on grounds of sexual orientation. Such discrimination might—conceivably—be covered, but only by the phrase "other status" at the end of article 26. Hence matters involving sexual orientation can be addressed under the Covenant only on an interpretative basis. Clearly any interpretation within reasonable limits, and to the extent that it does not distort the text or attribute to the text an intent other than that of its authors, can be derived from the text itself. There is reason to fear, as will be seen below, that the Committee has gone beyond mere interpretation.

Secondly, and still by way of introductory remarks, no interpretation, even one grounded in legal experience at the national level, can ignore current enforceable international law, which does not recognize any human right to sexual orientation. That is to say, the scope of the Committee's pioneering and standard-setting role should be circumscribed by legal reality.

The main point is that, whatever interpretation is given to article 26, it must relate to non-discrimination and not to the creation of new rights which are by no means clearly implied by the Covenant, not to say precluded given the context in which the instrument was conceived.

The Committee has always taken a very rigorous line in its efforts to interpret the concept of non-discrimination. Thus it finds that "not every differentiation based on the grounds listed in article 26 of the Covenant amounts to discrimination, as long as it is based on reasonable and objective grounds" (*Jongenburger-Veerman v. Netherlands*, communication No. 1238/2004). In *O'Neill and Quinn v. Ireland* (communication No. 1314/2004) the Committee recalled its settled case law (see communications Nos. 218/1986 *Vos v. Netherlands*; 425/1990 *Doesburg Lannooij Neefs v. Netherlands*; 651/1995 *Snijders v. Netherlands*; and 1164/2003 *Abad Castell-Ruiz et al. v. Spain*), "that not every distinction constitutes discrimination, in violation of article 26, but that distinctions must be justified on reasonable and objective grounds, in pursuit of an aim that is legitimate under the Covenant".

It is not always easy to assess whether the grounds for distinction or differentiation are reasonable and objective or whether the aim is legitimate under the Covenant, and the difficulties involved are naturally of varying magnitude. This is an area where interpretation is dogged by the risk of subjectivity, particularly when—consciously or not—it is locked into a teleological

approach, for the issues that arise may then be only marginal to the Covenant or even, in some cases, lie outside it, which may mean that legal discourse gives way to other types of discourse that legitimately belong in non-legal domains or at best on the boundaries of the legal domain. Thus the establishing of similarities, analogies or equivalences between the situation of heterosexual married or de facto couples and homosexual couples may well entail not only observation of facts but also interpretation, and can therefore be of no help in construing the law in a reasonable and objective manner.

Provisions of the Covenant cannot be interpreted in isolation from one another, especially when the link between them is one that cannot reasonably be ignored, let alone denied. Thus the question of "discrimination on grounds of sex or sexual orientation" cannot be raised under article 26 in the context of positive benefits without taking account of article 23 of the Covenant, which stipulates that "the family is the natural and fundamental group unit of society" and that "the right of men and women of marriageable age to marry and found a family shall be recognized". That is to say, a couple of the same sex does not constitute a family within the meaning of the Covenant and cannot claim benefits that are based on a conception of the family as comprising individuals of different sexes.

What additional explanations must the State provide? What other evidence must it submit in order to demonstrate that the distinction drawn between a same-sex couple and a mixed-sex couple is reasonable and objective? The line of argument adopted by the Committee is in fact highly contentious. It starts from the premise that all couples, regardless of sex, are the same and are entitled to the same protection in respect of positive benefits. The consequence of this is that it falls to the State, and not to the author, to explain, justify and present evidence, as if this was some established and undisputed rule, which is far from being the case. We take the view that in this area, where positive benefits are concerned, situations that are widespread can be presumed to be lawful—absent arbitrary decisions or manifest errors of assessment—and situations that depart from the norm must be shown to be lawful by those who so claim.

Similarly, and still in the context of interpreting Covenant provisions in the light of other Covenant provisions, we would point out that article 3, on equality between men and women, must be interpreted in the light of article 26, but cannot be applied to equality between heterosexual couples and homosexual couples.

On the other hand, there is no doubt that article 17, which prohibits interference with privacy, is violated by discrimination on grounds of sexual orientation. The Committee, both in its final comments on States parties' reports and in its Views on individual communications, has rightly and repeatedly found that protection against arbitrary or unlawful interference with privacy precludes prosecution and punishment for homosexual relations between consenting adults. Article 26, in conjunction with article 17, is fully applicable here because the aim in this case is precisely to combat discrimination, not to create new rights; but the same article cannot normally be applied in matters relating to benefits such as a survivor's pension for someone who has lost their same-sex partner.

The situation of a homosexual couple in respect of survivor's pension, unless the problem is viewed from a cultural standpoint—and cultures are diverse and even, as regards certain social issues, opposed—is neither the same as nor similar to the situation of a heterosexual couple.

In sum, the law's flexibility yields many good things, but it can at times lead to extremes that strip an instrument of its substance and substitute something other, a content different from that intended by the author and different from that reflected in the spirit and letter of the

text. The choices made in the process of interpretation are valid only in the context and within the limits of the provision being interpreted. Of course States still have the right and the capacity to establish new rights for the benefit of those under their jurisdiction. It is not for the Committee, in this regard, to substitute itself for States and make choices it is not entitled to make.

(Signed): Abdelfattah Amor

(Signed): Ahmed Tawfik Khalil

Communication No. 1416/2005

Submitted by: Mohammed Alzery (represented by counsel, Ms. Anna Wigenmark)

Alleged victim: The author

State party: Sweden

Date of adoption of Views: 25 October 2006

Subject matter: Expulsion on national security grounds, immediately executed following unreviewable executive decision and abusive "security" treatment, of an Egyptian national from Sweden to Egypt with the involvement of foreign agents

Substantive issues: Torture or cruel, inhuman or degrading treatment or punishment – exposure to a real risk of torture or cruel, inhuman or degrading treatment or punishment and/or manifestly unfair trial in a third State – no respect for due process in process of expulsion of an alien – ineffective domestic remedies against alleged violations – frustration of the right to effective complaint

Procedural issues: Proper authorization of counsel – examination by another international procedure of investigation or settlement – applicability of State party's procedural reservation – abuse of rights of submission – undue delay in submission of communication – substantiation, for purposes of admissibility

Articles of the Covenant: 2, 7, 13 and 14

Articles of the Optional Protocol: 1, 2, 3 and 5, para. 2 (a)

Finding: Violation (art. 7, read alone and in conjunction with art. of the Covenant)

1. The author of the communication, dated 29 July 2005, is Mr. Mohammed Alzery, an Egyptian national born on 23 September 1968. He claims to be victim of violations by Sweden of articles 2; 7; 13

and 14 of the Covenant, and of article 1 of the First Optional Protocol. He is represented by counsel (see, however, paras. 4.1 and 5.1 *et seq.*, *infra*).

Interlocutory decisions

2.1 On 24 October 2005, the Committee, through its Special Rapporteur on New Communications, decided to separate consideration of the admissibility and merits of the communication. In order to be in a position appropriately to resolve the admissibility issues raised, counsel was also requested to demonstrate, in the light of the State party's submissions set out in paragraph 4.1, *infra*, that the power of attorney dated 29 January 2004, in conjunction with the power of attorney dated 7 April 2004, continued to subsist and authorize prosecution of the communication before the Committee.

2.2 The Committee, acting through its Special Rapporteur on New Communications, also decided to direct counsel, further to the powers conferred by rule 102, paragraph 3, of the Committee's rules of procedure, to maintain the confidentiality of certain of the State party's submissions, until further decision of the Special Rapporteur, the Committee's Working Group or the plenary Committee.

2.3 On 16 January 2006, the Committee, through the Special Rapporteur on New Communications, in the light of counsel's comments on the State party's submissions (see paras 5.1 *et seq.*, *infra*) and of the material before the Committee related to the author's situation, requested, pursuant to rule 92 of its rules of procedure, that the State party take necessary measures to ensure that the author was not exposed to a foreseeable risk of substantial personal harm as

a result of any act of the State party in respect of the author.

The facts as presented by the author

3.1 The author, a chemistry and physics teacher, received his education at Cairo University. During his studies he was active in an organization involved in Islamist opposition inter alia distributing flyers, participating in meetings and lectures and read the Koran for the children in his village. The author acknowledges opposition to the Government but disputes any contention he supported violence. In 1991, he completed his studies and decided the same year to leave the country, having been harassed and repeatedly arrested by the Egyptian Security Services because of his activities in the organization. At one point, he contends he was seized and tortured (hung upside down by the ankles, beaten and "dipped" head first in water). Before being released, he states he was forced to sign an agreement forswearing future involvement in the organization, failing which the next arrest would be "forever".

3.2 The author states that he left Egypt in order to avoid being arrested and tortured. Using his own passport but a false visa, he entered Saudi Arabia where he lived until 1994 when he in turn departed for Syria. In 1999, he felt forced to leave Syria since a number of Egyptian nationals had been extradited back to Egypt. He obtained a false Danish passport and departed for Sweden where he arrived [on] 4 August 1999. He immediately sought asylum in his own name and admitted to having used a false passport in order to be able to enter the country. The author submitted in support of his claim for asylum that he had been physically assaulted and tortured in Egypt; that he had felt that he was being watched and his home had been searched; that after his departure from Egypt (to Saudi Arabia and then Syria) he had been sought at his parents' home; that he feared being brought before a military court if returned to Egypt on charges of being member of an illegal organization; and that he was afraid that he would be arrested and tortured. He was detained from 4 to 18 August 1999 due to uncertainty as to his identity. Deciding not to prolong detention, the then Immigration Board decided that although there was uncertainty as to the author's identity and he had utilized a false passport which created a risk of absconding, his placement under surveillance would suffice in lieu of detention.

3.3 In order to establish his identity, the author states that he indirectly contacted an Egyptian lawyer who procured a high school report, which was faxed to the authorities in Sweden. In the same facsimile message, the lawyer provided an affidavit to the effect that the author was one of the accused in 1996 proceedings concerning membership in a forbidden organization likely to be handled by a

military tribunal. An article in the newspaper al-Sharq al-Awsat described the case and named the author, stating that he had been charged in his absence. The article stated that the organization in question supported a continued armed struggle against the Egyptian Government and that members would be tried before a military court, depriving them the right to a fair trial, inter alia as a conviction in a military court could not be appealed. The author denied any ties to the organization, but states that he feared arrest on false accusations if returned to Egypt. He also states that the Swedish Embassy in Cairo could not confirm that there was such a case as the newspaper had alleged or that Mr. Alzery was one of the suspects.

3.4 The Swedish Migration Board considered the author's application for asylum and permanent residence on first instance. On 31 January 2001, a statement was requested from the Swedish Security Police, whose functions include assessment of whether asylum cases are of a nature that consideration must be given to national security before a residence permit is granted. In April 2001, the Security Police commenced an investigation, and interviewed the author in June 2001. During the interview, he stated that he had never been involved with the movement he was accused of being involved in, and that he strongly rejected any violence as a mean to reach any political goal. He however believed that he would be arrested and tortured if returned to Egypt because of these wrongful accusations. The author was allowed to read the transcript of the hearing in September 2001, but was not informed of the conclusions drawn from this interview.

3.5 On 30 October 2001, the Security Police submitted its report, recommending that the application for permanent residence permit be rejected "for security reasons". On 12 November 2001, the Migration Board, while of the view that the author could be considered in need of protection, referred the matter to the Government for a decision pursuant to the Aliens Act, given the security issues involved. Having received the Migration Board's case file, the Aliens Appeals Board, while sharing the Migration Board's view of the merits, also considered that the Government should decide the case.

3.6 On 12 December 2001, a senior official of the Swedish Ministry for Foreign Affairs met with a representative of the Egyptian Government. The purpose was to determine whether it would be possible, without violating Sweden's international obligations, including under the Covenant, to order the author's return to Egypt. Having considered the option of obtaining assurances from the Egyptian authorities in respect of his future treatment, the Government had made the assessment that it was

both possible and meaningful to inquire whether guarantees could be obtained that the author would be treated in accordance with international law upon his return to Egypt. Without such guarantees, his expulsion to Egypt would not have been an alternative. The State secretary of the Swedish Ministry for Foreign Affairs presented an aide-memoire to the official which read:

“It is the understanding of the Government of the Kingdom of Sweden that [the author and another individual] will be awarded a fair trial in the Arab Republic of Egypt. It is further the understanding of the Government of the Kingdom of Sweden that these persons will not be subjected to inhuman treatment or punishment of any kind by any authority of the Arab Republic of Egypt and further that they will not be sentenced to death or if such a sentence has been imposed that it will not be executed by any competent authority of the Arab Republic of Egypt. Finally, it is the understanding of the Government of the Kingdom of Sweden that the wife and children of [another individual] will not in anyway be persecuted or harassed by any authority of the Arab Republic of Egypt.”

3.7 The Egyptian Government responded in writing: “We herewith assert our full understanding to all items of this memoire, concerning the way of treatment upon repatriate from your Government, with full respect to their personal and human rights. This will be done according to what the Egyptian constitution and law stipulates.” In oral discussions with representatives from the Egyptian Government, the Swedish Government also requested that the Embassy would be allowed to attend the trial. The author states that it remains unclear what other kind of follow-up mechanisms were discussed and decided upon prior to the expulsion. While the Swedish Government had since indicated that there had been discussions about the right to visit the author in prison, this remained unconfirmed.

3.8 On 18 December 2001, the Government decided that the author should not be granted a residence permit in Sweden on security grounds. The Government noted the content of the guarantees that had been issued by a senior representative of the Egyptian Government. Although in the light of the circumstances and the author’s contentions as to his past conduct, his fear of persecution was considered to be well founded, entitling him protection in Sweden, the Government considered that he could be excluded from refugee status. In its decision, the Government concluded on the basis of intelligence services information that the author was involved, in

a leading position and role, in the activities of an organization implicated in terrorist activities, and that he should be refused protection.

3.9 The Government separately assessed whether there was a risk that the author would be persecuted, sentenced to death, tortured or severely ill-treated if returned, such circumstances constituting an absolute statutory bar to removal. The Government was of the view in this respect that the assurances procured were sufficient to comply with Sweden’s obligations of *non-refoulement*. The Government ordered the author’s immediate expulsion.

3.10 In the afternoon of 18 December 2001, a few hours after the decision to expel was taken, Swedish Security Police detained the author. According to the State party, no force was used in the arrest. He was informed that his application for asylum had been rejected and was then brought to a Stockholm remand prison. At the time of his arrest, the author was on the phone with (then) legal counsel, but the call was cut short. In the detention centre, he allegedly asked permission to call his lawyer but this request was rejected. After a few hours in detention, he was transferred by vehicle to Bromma airport. He was then escorted to the police station at the airport, where he was handed over to some ten foreign agents in civilian clothes and hoods. Later investigations by the Swedish Parliamentary Ombudsman, disclosed that the hooded individuals were United States’ and Egyptian security agents.

3.11 The author states that the hooded agents forced him into a small locker room where they exposed him to what was termed a “security search”, although Swedish police had already carried out a less intrusive search. The hooded agents slit the author’s clothes with a pair of scissors and examined each piece of cloth before placing it in a plastic bag. Another agent checked his hair, mouths and lips, while a third agent took photographs, according to Swedish officers who witnessed the searches. When his clothes were cut off his body, he was handcuffed and chained to his feet. He was then drugged per rectum with some form of tranquillizer and placed in diapers. He was then dressed in overalls and escorted to the plane blindfolded, hooded and barefooted. Two representatives from the Embassy of the United States of America were also present during the apprehension and treatment of the applicant. In an aircraft registered abroad, he was placed on the floor in an awkward and painful position, with chains restricting further movement. The blindfold and hood stayed on throughout the transfer including when he was handed over to Egyptian military security at Cairo airport some five hours later. According to his (then) Swedish counsel, the blindfold remained on until 20 February 2002, and was only removed for a few days in connection with visits by the Swedish Ambassador on 23 January

2002 and an interview with a Swedish journalist in February 2002.

3.12 When the author's (then) counsel met State Secretary Gun-Britt Andersson in January 2002, after the visit by the Ambassador, she assured him that the men had not complained of any ill-treatment. In a hearing before the Swedish Standing Committee on the Constitution in April 2002, the (then) Foreign Minister stated that: "I still believe that we can trust the Egyptian authorities. If (it turns out that) they cannot be trusted, we will have to get back to this issue. But everything we have seen so far indicates that we can trust them." In its follow-up report of 6 May 2003 to the Human Rights Committee, the Swedish Government also stated that it: "[i]s the opinion of the Swedish Government that the assurances obtained from the receiving State are satisfactory and irrevocable and that they are and will be respected in their full content. The Government has not received any information which would cast doubt at this conclusion."¹

3.13 The visit of the Ambassador to the author at the Tora prison was not in private, neither were any of the subsequent visits undertaken during the author's time in that prison. The author advanced complaints about the treatment in the presence of not only the Ambassador but also of the warden and five other Egyptian men. Egyptian personnel took notes, in the Ambassador's view in order to assess the interpretation from Arabic to English. It was regularly the case, and accepted by the visitors from the Embassy, that prison security personnel or the warden were present and even participated in the discussions with the author. On many occasions, the Swedish representatives asked direct questions of the Egyptian prison personnel present, or they spontaneously commented on the author's statements.

3.14 Shortly after the first meeting, the Ambassador asked for a meeting with the Egyptian Security Services to discuss the allegations of ill-treatment made. The interlocutor rejected the accusations as something to be expected from "terrorists". Swedish authorities accepted this explanation and did not act on it any further. The next visit occurred after the passage of five weeks. In a diplomatic report of 2 February 2002 from the Swedish Ambassador to his Ministry for Foreign Affairs, he informed: "We agreed about the following routines for the visits by the Embassy: Visits shall take place once a month at a time to our own choice. We shall inform [redacted] a few days in advance that we want to conduct the visit so that his office can arrange the technical details. [Redacted] stated in this regard that if the rumours about torture etc. continue we will have to jointly

discuss different ways to have such rumours refuted." The letter also disclosed that the UN Special Rapporteur on torture had approached the Swedish Government in a letter asking for information about the monitoring system put in place in order to secure the rights of the author and another individual.

3.15 After the January meeting, the author was transferred to another section of the Tora prison controlled by the Egyptian Security Services (rather than General Intelligence). He states that for a further five weeks he was interrogated and this time harshly ill-treated, including electric shocks applied to genitals, nipples and ears. The torture was monitored by doctors who also put ointment on the skin after torture in order not to leave any scars. He was forced to confess to crimes he had not committed, and was questioned about activities such as arranging meetings for the forbidden organization he was active for and opposing "the system". Despite the reprisals, the author continued to attempt to convey information as to the treatment suffered, as detailed in the Ambassador's report following a second visit on 7 March 2002:

"At the next meeting none of the men spoke out about the torture. They did however give signals and indications that something was not right: I therefore wanted to ask: Had they been tortured or maltreated since my last visit? [Another individual] replied evasively that it would be good if I could come as often as possible. I then asked him to take off his shirt and undershirt and turn around. No signs of maltreatment were visible. [The other individual] then explained that there were no marks on his body. One of the Egyptian officials observed afterwards that [the other individual] was clearly trying to hint by means of his evasive formulations that he had in fact been maltreated, without coming out and saying so directly.... The following can be noted from the other information the two men provided during the conversation:.... They both avoided answering my question concerning their daily routine. In conclusion I asked whether there was anything else they wished to say to me. The answer was a hope that I would come back soon, along with the comment that "it's hard being in prison. In summary, nothing emerged to change my judgement from my first visit that [the author and the other individual] are doing reasonably well under the circumstances. There was nothing to suggest torture or ill-treatment."

¹ CCPR/CO/74/SWE/Add.1.

3.16 The author states that, for an extended period, he and the other individual were not allowed to meet other prisoners and were kept in isolation in cells continually deprived of light. On 20 February 2002, he was moved to another correction centre where he was kept in small isolation cell measuring 1.5 by 1.5 metres until the second week of December 2002. On three or four occasions in 2002, he was called to hearings before a prosecutor for decision on his continued detention. At the first hearing in March 2002, the author complained of the torture and ill-treatment that he had suffered. He was not provided with hearing records. Although represented by a lawyer at the time, the latter did not react to his statement, which left the author to speak on his own behalf at subsequent hearings. According to Embassy records, between October 2002 and May/June 2003, the author met the prosecutor every fourteen days and thereafter every 45 days. The decision to keep him in detention was always upheld, the prosecutor relying on emergency laws but without formally charging the author.

3.17 On 16 June 2002, the author's (then) Swedish counsel communicated to the European Court of Human Rights that he intended to file a complete application on the author's behalf within a reasonable time. On 9 September 2002, the Swedish Ambassador, during a visit to the author, requested the prison authorities to allow the author to sign a power of attorney sent to the Embassy by the author's then Swedish counsel, for purposes of an application to the European Court of Human Rights. On 26 September 2002, the Ambassador informed counsel by fax that as the author was detained, he did not have a right to sign the power of attorney. The Egyptian Embassy, for its part, did however not answer a request by counsel for assistance. In late 2002, the author was partially informed of the reason for his detention. He was alleged to be one of some 250 members of a forbidden organization, with respect to which criminal proceedings had been instituted in 1993. According to the author, many co-accused had been in detention for years without trial, a number of them had been sentenced to death and executed and others had not been freed even after an acquittal in court. He feared he would suffer similar fate. From December 2002 until October 2003, the Ministry of Interior ordered his detention.

3.18 On 27 October 2003, he was released from detention without charge. According to the Swedish Embassy, an Egyptian court directed release, but the author was not present and cannot corroborate the matter. Since his release, the author's physical health has improved, he has completed complementary university studies in pedagogy that he commenced in prison and he has married. Deciding to go into business, he built a small breeding farm.

3.19 In early 2004, the author's (then) Swedish counsel provided the Swedish Foreign Ministry with allegations that the author had provided him concerning his subjection to, inter alia, torture in Egypt both before and after the Embassy's first visit on 23 January 2002. There had however been no incidents of torture or other cruel treatment after 20 February 2002. Moreover, during a visit by Embassy staff in early 2004, the author made similar allegations. According to the Embassy's report from that visit, the incidents of torture had occurred after the Embassy's first visit to him in detention. He had not provided any information regarding the treatment prior to the Embassy's first prison visit. On 19 March 2004, the author's (then) Swedish counsel lodged an application with the European Court of Human Rights, arguing that the author's expulsion had resulted in his being tortured and ill-treated and faced the risk of being sentenced to death or killed during the torture. He further argued that he had not had access to court or an effective remedy with respect to the allegations of terrorist activities against him, and that his expulsion order had not been examined by a court. On 26 October 2004, a Chamber of the European Court, by a majority, declared the case inadmissible on the basis that it had been introduced out of time.² In the absence of a satisfactory explanation by counsel for the delay in filing, the Court took 19 March 2004 as the date of introduction of the complaint and declared it inadmissible accordingly.

3.20 With respect to post-expulsion proceedings in Sweden, the Ministry of Justice, on 12 April 2002, conducted a judicial appraisal of the way in which the Security Police had dealt with the enforcement and accepted, in principle, the Security Police's procedures. In a complaint on 25 May 2004, an investigation was filed with the Stockholm district prosecutor as to whether representatives of the Swedish Government had committed a criminal offence in connection with the Government's decision on 18 December 2001 to expel inter alia Mr. Alzery, and whether any offence had been committed when the decision was enforced. As far as the complaint concerned Ministerial representatives of the Government, it was handed over to the Parliament's Standing Committee on the Constitution, which has jurisdiction to lodge criminal charges, such as serious neglect of Ministerial duties, before the Supreme Court. On 17 February 2005, the Committee decided that the portion of the complaint that had been referred to it by the Stockholm district prosecutor required no action.

3.21 As to the remaining issues, the Stockholm district prosecutor decided on 18 June 2004 not to

² *Alzery v. Sweden*, application No. 10786/04.

initiate a preliminary investigation regarding whether a criminal offence had been committed in connection with the enforcement of the expulsion decision. The reasons adduced for the decision were that there was no ground for assuming that a criminal offence under public prosecution had been committed by a member of the Swedish police in connection with the enforcement. The district prosecutor referred the case to the Prosecutor-Director at the Stockholm Public Prosecution Authority for a decision on whether to initiate a preliminary investigation regarding events taking place on an aircraft registered abroad.

3.22 On 3 November 2004, the Prosecutor-Director's declined to take further action. He noted that the Security Police had been tasked with the enforcement of the expulsion decision and carried the responsibility for it. It was therefore up to the Security Police to ensure that the security measures that were taken, either by the Security Police or those who assisted it, were compatible with the applicable Swedish legal provisions. The question was therefore whether representatives of the Security Police had failed in their exercise of public authority, which effectively amounted to a review of the district prosecutor's decision. The Prosecutor-Director's referred to the anti-terrorism mandate of the Security Police, considering that to be able to perform its task, other methods than those used in regular police service were sometimes required. The expulsion had been decided upon by the Government and the persons concerned had been deemed by it to present a risk to the security of the realm. Considering that, particularly at the time in question, there were strict requirements in respect of security and protective measures, what had occurred could not be considered to be in breach of the general principles applying to police interventions. The Prosecutor-Director therefore shared the opinion of the district prosecutor that there were no grounds for assuming that a criminal offence under public prosecution had been committed by Swedish police personnel. The decision was deemed to include measures taken by foreign personnel in view of the fact that such personnel had not been engaged in any independent activities.

3.23 With respect to acts occurring on a foreign registered aircraft, the Prosecutor-Director considered that, according to the Act on Air Traffic, a pilot on an aircraft registered abroad was obliged to supervise the capacity of the aircraft to operate also in Swedish territory. The supervision entailed a right to take measures motivated by security concerns. There was no reason to assume that a criminal offence under public prosecution had been committed by the pilot of the foreign aircraft.

3.24 In an effort to clarify the facts transpiring after the author's return, the State party advises that

on 18 May 2004, it raised allegations of ill-treatment with the Egyptian authorities at the highest level. An envoy voiced Swedish concerns as to the alleged ill-treatment suffered in the early weeks following return and requesting an inquiry including international medical expertise. The Egyptian Government dismissed the allegations but agreed to undertake an investigation. In June 2004, the then Swedish Minister for Foreign Affairs wrote to the Egyptian authorities, suggesting that the investigation be carried out with or by an independent authority, involving the judiciary and medical expertise and preferably international expertise in the area of torture investigations. She also offered the assistance of Swedish expertise. In July 2004, the Egyptian authorities rejected the allegations of ill-treatment and referred to Egyptian investigations. In December 2004, the issue was discussed of a possible international inquiry under the auspices of the United Nations High Commissioner for Human Rights. On 11 May 2005 the Swedish Foreign Minister addressed a letter to the High Commissioner, describing inter alia unsuccessful efforts that had been undertaken on the Swedish part to bring about an investigation in Egypt for the purpose of independently establishing the facts in view of the allegations of torture and ill-treatment that followed on the expulsion of the two Egyptian nationals to that country. A request was directed to the High Commissioner that her Office carry out an investigation into the matter as a basis for an assessment of the effectiveness and implementation of the diplomatic assurances provided by Egypt. The Minister declared that the Government was prepared to lend its full support to the investigation and to provide financial resources, if need be. The High Commissioner responded by letter of 26 May 2005. Referring to the decision of the Committee against Torture in the case of *Agiza v. Sweden*,³ the High Commissioner stated inter alia that she found no grounds on which her Office could possibly supplement that Committee's assessment and findings in any meaningful way. In conclusion, the High Commissioner stated that she was not prepared to undertake the proposed investigation. The State party details a number of further Ministerial and senior official contacts with Egyptian counterparts in ongoing attempts to procure independent, impartial investigation of the facts.

3.25 On 21 March 2005, the Parliamentary Ombudsman reported on his *proprio motu* investigation into pre-expulsion aspects of the author's case, revealing serious shortcomings in the way the case was handled by the Security Police, in respect of whom the Ombudsman expressed

³ Committee against Torture, communication No. 233/2003, Views adopted on 20 May 2005.

extremely grave criticism.⁴ The author himself was not a party to this investigation, but his former Swedish counsel was interviewed by the Ombudsman. The mandate of the Ombudsman was to investigate if the Swedish Security Police had committed any crime or in any other way acted unlawfully during the execution of the expulsion order. Early in the proceedings the Ombudsman elected not to conduct a criminal investigation. The Ombudsman does not give reasons for this decision but the State party suggests that the reasons seem related to the fact that there was no senior official of the Security Police who had been assigned command of the Bromma operation, that the officials present had relatively subordinate ranks and that none of them felt that they bore the ultimate responsibility for the operation and that they might have felt under pressure given the urgency accorded by the Cabinet to prompt execution the day the decision had been taken. Counsel disagrees, citing media comments by the Ombudsman that the earlier prosecutorial decision not to initiate criminal proceedings had been an important factor in his own decision. Whatever the reason, due to the election not to conduct a criminal investigation, the Ombudsman was able to procure compulsory testimony for informational purposes from police officers, whose testimony could otherwise have been withheld on grounds of the right to be free from criminal self-incrimination.

3.26 In his conclusions, the Ombudsman criticized the failure of the Security Police to maintain control over the situation at Bromma airport, allowing foreign agents free hand in the exercise of public authority on Swedish soil. Such relinquishment of public authority was unlawful. The expulsion was carried out in an inhuman and unacceptable manner. The treatment was in some respects unlawful and overall had to be characterized as degrading. It was questionable whether there was also a breach of article 3 of the European Convention. In any event, the Security Police should have intervened to prevent the inhuman treatment. In the Ombudsman's view, the way in which the Security Police had dealt with the case was characterized throughout by passivity—from the acceptance of the offer of the use of an American aircraft until completion of the enforcement. One example cited was the failure of the Security Police to ask for information about what the security check demanded by the Americans would involve. The Ombudsman also criticized inadequate organization, finding that none of the officers present at Bromma airport had been assigned command of the operation. The officers from the Security Police who were there had relatively subordinate ranks. They acted with

remarkable deference to the American officials. Regarding the foreign agents, the Ombudsman considered that he lacked legal competence for initiating prosecution.

3.27 On 4 April 2005, the Swedish Prosecutor-General decided not to resume the preliminary investigation, following a complaint from the Helsinki Committee for Human Rights (Swedish Section). With reference *inter alia* to the powers of the Parliamentary Ombudsmen to prosecute, the obligation of courts, administrative authorities and State/municipal officials to provide the Ombudsmen with any requested information and the powers of the Prosecutor-General to *inter alia* review the decisions of a subordinate prosecutor, the conclusion was reached that it was not possible to review the Parliamentary Ombudsman's decision to refrain from using his powers to prosecute. It could also be seriously questioned whether the Prosecutor-General could make a new assessment of the issue of whether to start or resume a preliminary criminal investigation when the matter had already been determined by the Parliamentary Ombudsman. This was the situation, particularly if no new circumstances were at hand. The Prosecutor-General went on to state that, in any event, several of the persons that would have to give statements within the framework of a resumed preliminary criminal investigation had already been interviewed by the Parliamentary Ombudsman and submitted information under the obligation to state the truth provided by Swedish law for such proceedings. Therefore, the option to conduct a preliminary investigation under the Code of Judicial Procedure was no longer available.

3.28 On 21 September 2005, Parliament's Standing Committee on the Constitution reported on an investigation that had been initiated in May 2004 at the request of five members of Parliament that the Committee examine the Government's handling of the matter that led to, *inter alia*, Mr. Alzery's expulsion to Egypt. With respect to the assurances procured, the Committee was of the view that a more detailed plan for a monitoring mechanism had not been agreed with the Egyptian authorities and appears not to have existed at all prior to the decision to expel. This shortcoming was reflected in the actual monitoring of the guarantee, which was not consistent with the recommendations issued later on by the UN Special Rapporteur on issues relating to torture or the practice established by the Red Cross. A major flaw was naturally that the first visit to the men was not carried out earlier. However, the shortcomings in the actual monitoring were, in the Committee's opinion, mainly a consequence of the lack of planning in advance. The prerequisites for meaningful monitoring would have been better in place, if appropriate monitoring had been planned

⁴ Report No. 2169-2004.

and agreed upon with the Egyptian authorities before the men were expelled. The difficulties that the monitoring would entail should reasonably have been anticipated prior to the decision to rely on the guarantee and, as a consequence, to expel the men to their home country. The Committee noted that an essential element for the assessment that the guarantee should be relied on, the Government had stressed its confidence in Egypt's intention to demonstrate that it is a serious participant in the international community by living up to the obligations it had assumed, including under Security Council resolution 1373 adopted weeks prior to the expulsion. The Committee further noted that it lacked the opportunity to assess whether the men were subjected to torture or other treatment in breach of the conventions. However, a great deal implied that such treatment took place. It concluded that in any event the assurances should not have been accepted.

3.29 With respect to the immediate execution of the expulsion order, the Committee noted that while such a process had been provided by law, it had questioned whether fears that the men would request interim measures before an international body before there was time to enforce the expulsion decisions influenced the decision-making. Such concerns could naturally not be allowed to come into play. The Committee noted that the decisions had been notified to the expellees through the enforcement authority, while counsels had been notified by registered letters. This procedure was considered satisfactory provided that decisions were provided to counsel in a more rapid manner.

3.30 With respect to events at Bromma airport, the competence of the Committee did not extend to investigation of the actions of the Security Police; rather, the Committee focused on whether the (then) Foreign Minister, Anna Lindh, exerted undue influence on the Security Police at the time of the expulsion by indicating a preference for a certain course of action. The Committee noted that the Foreign Minister, at the presentation of the matter at the Foreign Ministry on 17 December 2001, was informed of the alternative that entailed that an American aircraft was used in the enforcement, and the Security Police, when deciding on the choice of transport, also took into account what they had come to believe was the Foreign Minister's position in that regard. It had not been possible to establish with complete clarity whether the Foreign Minister was provided with the said information during the presentation, or whether the information was available at that time in other parts of the Government Offices. The Security Police had kept a journal of its meetings with the Ministries. No corresponding documentation existed within the Government Offices.

3.31 According to the Committee, it was not satisfactory that the procedures for preparing Government matters left room for considerable uncertainty as to what happened. Since this was the case, subsequent scrutiny was made considerably more difficult. However, it did not seem in dispute that an opportunity of foreign assistance, if with nothing other than so-called slot-times, had been mentioned during the presentation to the Foreign Minister, which raised an issue of the administrative authorities' independence. Under Swedish law, no authority (including Parliament) may determine how an administrative body shall decide in a particular case in a matter concerning the exercise of public authority against an individual. At the same time, Swedish law requires that the head of the Foreign Ministry shall be kept informed when a question of importance for the relations to another State or to an intergovernmental organization is raised at another State authority.

3.32 Concerning the Government's decision that expulsions be enforced immediately, the Committee noted that it had been questioned if the Foreign Minister, by voicing during the presentation prior to the Cabinet meeting her preference for enforcement on the same day that the decisions were issued, encroached on the rule of independence of administrative bodies. In the Committee's view, this was essentially a question of what the Foreign Minister heard and said, what she meant and how that should be perceived. Given that due to her death, her opinion could no longer be obtained, the Committee therefore lacked the opportunity to determine the issue. It emphasized that the Security Police bore responsibility for how the enforcement came to be conducted.

3.33 As to exhaustion of domestic remedies, the author notes that there was no possibility in law of appealing or reviewing the expulsion decision of 18 December 2001. As to the claim submitted to the European Court, the author argues, not least given the general importance of the case, that the procedural delays by his lawyer and the inadmissibility decision by the European Court should not be a reason for the Human Rights Committee to reject the case. The result would be that no review of the case by an international human rights body would be possible. In any event, it is submitted that there are strong reasons justifying the delay in submission of the claim. Upon return to Egypt, the author was at once imprisoned, interrogated and tortured, first by Egyptian general intelligence and later by State security services. When the European Court claim was first filed in 2002, then counsel was not only of the view that he required a written power of attorney due to the language on the application form, but also he wanted to be certain that the author approved of such a

course. There were serious security issues to consider, as an international complaint implicating Egypt could expose Mr. Alzery to further ill-treatment and torture. Counsel had neither access to the author nor wished to enmesh the latter's family, of simple background, in a vulnerable and potentially dangerous situation. After meeting with the author subsequent to his release, then counsel sought to procure permission of the author to return to Sweden, given that no charges were filed, as there would be little possibility for him of an ordinary life in Egypt. Unsuccessful negotiations to this end prolonged the delay in filings to the European Court.

The complaint

4.1 The author claims to be victims of violations of articles 2, 7, 13 and 14 of the Covenant, and of article 1 of the Optional Protocol.

4.2 The author's principal claims, under article 7 of the Covenant, are twofold. Firstly, his expulsion breached article 7 on the basis that Sweden was or should have been aware that he faced a real risk of torture in the circumstances, notwithstanding the assurances procured. Second, he argues that the treatment he was subjected to within Swedish jurisdiction violated this article and that the ineffectiveness of the subsequent investigations failed to comply with the procedural obligations imposed by that article.

- Breach of the prohibition of refoulement (article 7 of the Covenant)

4.3 The author argues that, in the circumstances of the case, Sweden was in breach of its obligation under article 7 not to expose an individual to a real risk of torture at the hands of third parties. He observes that the existence of such a real risk is made out at the time of expulsion, and does not require proof of actual torture having subsequently occurred although information as to subsequent events is relevant to the assessment of initial risk. In his case, he argues that the evidence as to subsequent treatment was strongly probative of the initial existence of a real risk of torture. He argues that the assurances procured, coupled with monitoring mechanisms insufficient to protect him against, or even detect, ill-treatment, were insufficient protection against the risk of harm. He contends that the prohibition on refoulement is absolute, and not subject to balancing against countervailing considerations of national security or the kind of conduct an individual is suspected of. For these conclusions, the author refers to the judgement of the European Court of Human Rights in *Chahal v. United Kingdom*⁵ and the Decision of the United

Nations Committee against Torture in *Agiza v. Sweden*.⁶

4.4 As to the actual or constructive knowledge of Sweden at the time of removal, the author argues that Sweden was well aware of the human rights situation in Egypt. In its annual reports thereon, the Swedish Government expresses concerns as to torture of suspected terrorists in particular by the security police. It also criticizes the use of military tribunals for civilians. Other sources credibly contend that the police and security service practise torture of detainees with virtually complete immunity and that suspected terrorists run a particularly high risk of being subjected to torture or cruel or inhuman treatment or punishment. The author refers to the concluding observations on related matters in Egypt by the Human Rights Committee and the Committee against Torture covering an extended period of years,⁷ as well as critical reports from national human rights organizations and international sources. The Government was also aware that the Egyptian President had declared, and continually renewed, a state of emergency dating from 1981, and that numerous laws protecting human rights were set aside, inter alia permitting trial of civilians by military tribunal. The Government was also aware that Egypt had not accepted the individual complaint jurisdiction of any treaty body, or the invitation of any international monitoring bodies, including the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

4.5 In his January 2001 report to the Commission on Human Rights,⁸ the Special Rapporteur cited thirty-two cases of death in custody, apparently as a result of torture, occurring between 1997 and 1999. Confessions extracted under torture were commonly used as evidence in political trials and form the basis for convictions. Victims of torture had no effective remedy and little opportunity for redress: most applied for and received financial compensation from civil courts, in effect an admission on the part of the authorities that torture has taken place. But very few victims could convince the authorities to institute criminal proceedings against their torturers: in the handful of such cases reaching the courts in recent years almost all resulted in acquittals or derisory punishments. Finally, according to the Special Rapporteur, while reports of torture of political detainees had decreased recently, torture of ordinary criminal offenders in police stations remained rife.

⁶ Op.cit.

⁷ CCPR/CO/76/EGY (2002), A/54/44 (1999) and CAT/C/CR/29/4 (2002).

⁸ E/CN.4/2001/66.

⁵ Application No. 70/1995/576/662, Grand Chamber judgement of 15 November 1996.

4.6 The author argues that Sweden was aware not only of a general risk of torture, ill-treatment and unfair trial, but of a personal risk in the author's case. The case material is clear that the Swedish Government was aware that it would be in breach of its *non-refoulement* obligation if it expelled the author without more—it was on precisely this basis that the Swedish Government decided to engage in negotiations with representatives from the Egyptian Government, and, after having received the assurances in question from Egypt, decided to reject the request for asylum and to execute the expulsion order immediately. According to the author, the assurances procured were not sufficiently effective, even to theoretically protect him from torture or ill-treatment. In addition to the Government's knowledge of the human rights situation in Egypt, the author was being expelled for being a security risk and under accusation of being responsible for terrorist acts in Egypt, exposing him to clear risk of torture and incommunicado detention. He argues that Sweden was also aware of Egypt's rejection to other States' attempts to procure analogous assurances and establish effective follow-up mechanisms in expulsion cases according to the principles laid out in the *Chahal* decision.⁹

4.7 In addition, the decision to expel the author was taken not only after negotiations with the Egyptian authorities on the content of the assurances, but also after having sought the opinion of the British, United States and German Embassies in Cairo. Nor did Sweden seek to propose any amendments to the draft assurances proposed by the Egyptian side after the December meeting. Sweden ought also to have been aware of the fact that a number of other persons of Egyptian origin had been returned to and held in Egypt. In October 2001, for example, two inhabitants in Bosnia with dual Bosnian and Egyptian citizenship were deprived of their citizenship and deported from Bosnia to Egypt where they were sentenced to long imprisonments and allegedly subjected to torture. The author argues that it is thus unclear what real value the Government could in fact afford the assurances since they did not afford him any special, positive, treatment, as compared with other suspected terrorists. Rather, he was to be treated like any one else suspected of being threat to national security. All laws in force, including State security laws, were thus fully applicable to Mr. Alzery.

4.8 The author contends that the assurances were deficient in a number of specific respects. They did not provide for legal counsel to be appointed immediately upon return, for counsel to be present during interrogations, for sufficiently frequent

private and unmonitored independent meetings or for access to independent medical examinations. By contrast, upon return to Egypt, the author was handed over to the Egyptian General Intelligence with five weeks elapsing prior to the first visit. The Ambassadorial visit was then agreed with the prison commandant in advance when the visits should take place. Visits were less frequent during the summer vacation months and Christmas when there were intervals of two months. None of the visits in prison took place in private. Rather, the author was taken to the commandant's office, with up to ten officials present. On numerous occasions, officials were invited to participate in the conversation with the men, on other occasions they spontaneously commented on what had been said. The Embassy did not insist that the author be examined by a physician, much less one with specific experience of torture victims. Nor did it ask for permission to bring a doctor to the prison to perform any medical examination. The author was forced to speak with the Embassy staff through an interpreter, despite speaking Swedish almost fluently. Nor were Embassy staff allowed to visit him in the cell where he was being held. The author also claims that it was also clear from the Embassy reports that Embassy officials lacked experience and knowledge of how a torture victim behaves and speaks, what questions should be asked, overall of how to get as true a picture as possible. The author contends that it was careless of the Swedish authorities to approach the Egyptian authorities for an assessment of the veracity of the statements claiming ill-treatment. The Embassy visits aside, the author was only visited once by an attorney—in relation to his first appearance before a prosecutor.

4.9 After the first Ambassadorial visit when the author and the second detainee had complained of the treatment to the Swedish ambassador, the author contends that they were subjected to cruel and inhuman treatment as soon as the ambassador had left the prison. In consequence, they did not further raise the issue of ill-treatment until March 2003. During the winter of 2002–2003, the Swedish Ministry for Foreign Affairs appointed a special envoy, with responsibility for follow-up concerning the cases. When visiting the author and the second detainee in March 2003, ill-treatment allegations were renewed by the second detainee. Speaking thereafter, separately, to the author, the latter did not make any statement about the treatment but according to the Embassy report only asked if he had to answer the questions posed to him and that he already had said all the wanted to say.

4.10 The author thus argues that there were no real follow-up procedures in place at the time of the expulsion, and no adequate mechanisms were established afterwards that could protect him from

⁹ *Hani El Sayed Sabaei Youssef v. Home Office* [2004] EWHC 1884 (Queens Bench, Field J.)

ill-treatment. In the author's view, Sweden in fact did not even seek the opportunity to effectively monitor the agreement. The only thing that was agreed upon between Sweden and Egypt was the right for Swedish representatives to be present in any new trials that might take place. There is nothing in the agreements describing the right to visits in prison, or the regularity of such visits, nor how these visits were to take place or what would happen, what mechanisms would be put in place, if there were any signs of a violation of the agreement. In the author's view, the State party lacked both the competence and desire to appropriately monitor the author's situation, despite the concerns expressed from a variety of national and international quarters. Instead of remedying the situation, the Swedish Government contended that the monitoring was functioning and that there was nothing to suggest that Egypt had breached the agreement.

4.11 The author suggests that the reason for the lack of follow-up mechanism was that Sweden believed it could rely merely on the good faith of the Egyptian Government to avoid being criticized for violating its international obligations. In the hearing before the Committee on the Constitution, the Swedish State Secretary expressly stated that Sweden, after the expulsion, could not interfere in what Sweden believed was the internal concern of a State as the author was an Egyptian national, detained in Egypt. The Ambassador had earlier explained that the reason he did not ask to visit the men until five weeks after they returned to Egypt was that if he did, it would be seen as a sign of lack of confidence in Egypt respecting the agreement. The author argues that since Sweden had entered an agreement with Egypt, it not only felt obliged to trust that it would be respected, but also acted in a manner so that the weaknesses in agreement would not be exposed. The behaviour shows the inherent deficiencies in diplomatic agreements regarding the protection of the human rights of the individual. Diplomacy cannot effectively protect against illegal ill-treatment of an individual. And as mentioned above, since both States risk being accused of having violated the absolute prohibition against torture, there is no incitement to reveal indications or information about ill-treatment. In May 2004, when Sweden unsuccessfully sought an investigation, the Egyptian authorities were unsympathetic to the suggestion that the claims of mistreatment be investigated by any foreign independent person or body. The Swedish authorities, while expressing their disappointment, were unable to further act. The author notes in this regard that the assurance is of no legal value in Egypt and cannot be enforced or utilized as a legal document by him.

4.12 The author questions whether the Swedish Government acted in good faith in expelling him. In

addition to the immediate execution of the expulsion order, which denied recourse to international remedies, shortly after the terrorist attacks of 11 September 2001, the author notes that the Swedish Government had little hesitation in permitting a covert Central Intelligence Agency (CIA) operation to occur on Swedish soil. The Swedish security police was informed that there would be a security check of the men, but they did not ask what this would entail. They were also informed, and accepted, that the CIA agents would be masked and hooded. There were no senior Swedish officers present at Bromma airport, and those who were assigned to carry out the expulsion, relinquished authority and control to the foreign agents involved. The author adopts the view of the Parliamentary Ombudsman that the treatment already suffered on Swedish soil could have been anticipated because of the then global situation. He also emphasizes that the operation he was subjected to was a joint Egyptian and United States' operation, with United States and Egyptian agents both at Bromma airport and on the aircraft. The author suggests that the risk of ill-treatment was thus already wholly clear and realized on Swedish territory, and accordingly the need for prompt and effective follow-up upon arrival was vital.

- Treatment suffered at Bromma airport (article 7 of the Covenant)

4.13 The author alleges that the treatment he suffered at Bromma airport, as described in paragraph 3.11, supra, was imputable to Sweden by the latter's failure to prevent it though within its power, and further violated his rights under article 7 of the Covenant. Moreover, the deficient and ineffective investigation of the treatment constituted a procedural violation of the same article. As to whether the treatment was imputable to Sweden, he notes that Swedish authorities allowed the treatment to take place, without seeking to prevent or stop it.

- Inadequate investigation of alleged violations of torture or other cruel, inhuman or degrading treatment or punishment (article 7 of the Covenant)

4.14 As to the investigation, the author argues that the treatment was not investigated promptly and independently, and allocated no individual responsibility, even at the level of a reprimand, upon conclusion. The unlawful acts by the foreign agents had not been subjected to any criminal investigation, despite complaints to the appropriate authorities. For his part, the Ombudsman's mandate did not extend to investigation or prosecution of foreigners' illegal acts on Swedish territory. The author notes that the criminal complaint lodged in 2004 covered all possible criminal acts taking place at Bromma airport, including by foreign agents and, by way of command, the Swedish Government. The prosecutor

however promptly terminated the investigation. The previous investigation by the Ministry of Justice in April 2002 had also drawn the conclusion that nothing criminal had taken place at Bromma airport. Despite the investigation and findings presented by the Ombudsman in March 2005, the prosecuting authorities stood by their previous legal assessment and refused to reopen the investigation, arguing that it could not overrule the decision by the Ombudsman not to press charges against any Swedish law enforcement personnel. The main reason however for the Ombudsman not prosecuting was that because the prosecutor previously had decided not to press charges, he had conducted the investigations as an open investigation and not a criminal investigation, and had thus not informed the police officers who gave statements that what they said could be used against them in a court of law. Further, as the Ombudsman stated, he considered the Security police to have learned from the experience and thus in the course of the investigation not to change his investigation from a purely informative one to a criminal proceeding.

4.15 The author observes that the Ombudsman's investigation did not examine the issue of the command responsibilities of senior officials. Nor did the Ombudsman hear any foreign agents, as this was not his mandate. In the author's view, the Ombudsman's criticisms of illegality—specifically of foreign agents acting on Swedish soil without the proper consent and the treatment amounting at least to degrading treatment under international law—should have been sufficient for the Prosecutor-General to reopen the criminal investigation.

- *Exposure to risk of a manifestly unfair trial (article 14 of the Covenant)*

4.16 The author argues that his expulsion further violated article 14 of the Covenant, on the basis that in the circumstances of the case he was exposed to a risk of an unfair trial. The author recalls that he had left Egypt in 1991 on account of the persecution of individuals involved with organizations involved in Islamist opposition and the treatment he had already been subjected to. He feared that he would be detained under the emergency laws in place and interrogated under torture as many others in such situation had been. The author argues that the Swedish Government sought to exclude him from refugee protection on the grounds of his alleged association with Islamist groups in Egypt, although the Government could not prove such a connection.

4.17 The author contends that, at the time of his expulsion, the Swedish Government was unaware of his legal status in Egypt, believing for reasons unknown to the author that he had been convicted and sentenced to seven years in prison. Only in March 2003 did the Embassy report to the

Government that it believed to have received information as to the author's correct status, specifically, that dating from 1993 he was suspected along with 250 others of being a member in a forbidden organization that engages in terrorist activities. He recalls that he was himself not informed about the case until late 2002, and was never prosecuted or tried for any criminal or security threatening activities.

4.18 The author argues that despite these facts, the Swedish Government has both publicly and in closed hearings consistently maintained that the author did in fact have terrorist links and responsibility for serious crimes, also raising issues under the presumption of innocence. Before the Parliamentary Committee on the Constitution, it was suggested that the author held a leading position in a terrorist organization in Egypt and was involved in serious crimes. He suggests that he was caught up in a general anti-terror hysteria, noting that has never seen the full security police evaluation of his case. The author argues that his release without charge, despite interrogation and torture upon his return to Egypt, confirms his innocence of the terrorist association claimed.

4.19 The author notes that in its negotiations with Egypt, the Swedish Government never demanded that the author should be tried in a civilian court, only that he would be given a fair trial. He suggests this resulted from previous experiences where Egypt had resisted attempts of other States seeking to procure assurances of a civilian court trial.¹⁰ The mechanics of how a fair trial could be secured were not discussed, with Sweden simply requesting to attend any new trial. The author notes that the person expelled at the same time as he had been and covered by the same assurance subsequently received a trial in a military court in patently unfair circumstances, which Sweden was not permitted to monitor. Nor was any Swedish representative present at the hearings before the prosecutor regarding the author. In the author's view, Sweden was well aware that there was no other legal avenue for him to have his case heard than before a military tribunal or an emergency court, with an attendant real risk of unfair trial. Such trials, routinely utilized since 1992 in terrorism-related cases, are sometimes held en masse and routinely fail to meet international fair trial standards even where the death penalty resulted. Evidence, including confessions, procured under duress, threats and torture is permitted, while individuals detained under emergency laws who do not receive a trial are only released after having confessed or given the requested information, often of names of other individuals, who are in turn

¹⁰ See, for example, *Bilasi-Ashri v. Austria*, European Court of Human Rights, 26 November 2002.

arrested and interrogated. The author argues that a 2005 statement by the Swedish Minister for Foreign Affairs to the effect that the person expelled with Mr. Alzery should be given a trial in a civilian court as the military proceedings had not been fair shows that Sweden had originally accepted that military tribunals in Egypt could be fair and that the author would be tried before such a court.

4.20 The author acknowledges that the Committee's jurisprudence to date has not extended protection against refoulement to circumstances of unfair trial, but invites the Committee to follow the approach of the European Court of Human Rights which has done so.¹¹ He emphasizes that there is a close link between the right to a fair trial and the right not to be tortured as prolonged detention, often incommunicado, prior to trial carries an acknowledged heightened risk of torture. This is particularly so where, as in this case, evidence extracted under torture is routinely utilized in subsequent proceedings. He recalls that although he received visits by Swedish representatives while in custody, this did not eliminate the risk and actual torture he was subjected to during the first two months.

4.21 In light of the foregoing, the author argues that Sweden, by expelling him on the basis of unfounded allegations of terrorist activities not provided to him for a response and failing to secure that he would in fact be provided a fair, non-military trial violated his rights under article 14 of the Covenant. In conclusion, he notes that his case could readily have been handled as an extradition, which would have provided review in the Swedish courts. He also contends that due to the seriousness of the alleged crimes, he could also have been prosecuted in Sweden under its personal and universal jurisdiction for such crimes.

- Inadequate process of expulsion of an alien and insufficient, ineffective remedy (articles 2 and 13 of the Covenant)

4.22 The author argues that the procedure followed in his expulsion violated articles 13 and 2 of the Covenant. The author notes that under the Aliens Act, as it then stood, an asylum matter may be referred to the Government if it is judged to be a matter of public or national security or if the matter may be of importance for the nation's relationship with a foreign power or an intergovernmental organization. Such reference provides the Government complete discretion to weighing

¹¹ See *Colozza v. Italy*, judgement of 12 February 1985, Series A No. 89, p 16, § 32; *Soering v. United Kingdom*, application No. 1/1989/161/217, judgement of 7 July 1989, at 113; and *Mamatkulov et al. v. Turkey*, applications Nos. 46827/99 and 46951/99, Grand Chamber judgement of 4 February 2005.

considerations of national security and the individual's right to protection. The national security issue is not adjudged by any court of law or other independent body before the Government's decision. The Government is the first and last instance – its decision cannot be appealed. Since matters dealt with under this procedure are classified, the information on which the decision is based (the evaluation by the Security Police) is normally withheld from the asylum seeker, counsel and the general public. While selected information can be revealed to the asylum seeker and his attorney, under strict non-disclosure orders, the grounds for the assessment are often only described in generalities and are not revealed to such an extent that they can be met or challenged by the individual. In the author's case, the only portion of the assessment by the Security Police provided, under non-disclosure order, was information he had given himself when being interviewed by the Security police. Nor, as a rule, does the affected individual have any right to present his case to the ministers or those Government officials who take the decision, further curtailing his opportunities to submit any reasons against expulsion. The author specifically asked for a private meeting in order to present his case to the Government, but this request was rejected.

4.23 With reference to the Committee's previous criticism of such a denial of hearing in the context of the examination of the State party's fourth periodic report,¹² the author argues that this process fails to satisfy the requirements of article 13 of the Covenant. While acknowledging that article 13 permits States parties to expel an asylum seeker without an opportunity to submit the reasons against expulsion and without having an opportunity to have the case reviewed if there are "compelling reasons of national security", the author argues that such an exception should be construed narrowly in order to respect the purpose and spirit of the Covenant. It should also be read in conjunction with the established principles regarding procedural right for the individual asylum-seeker deriving from the Convention on the Status of Refugees 1951 and its Protocols. In its Handbook and in recently developed guidelines concerning the expulsion rules in the convention, the Office of the UN High Commissioner for Refugees (UNHCR) sets out minimum procedural safeguards to which asylum seekers should be entitled to, even if suspected of the most serious crimes. These guidelines set out that given the severe consequences of exclusion for an individual and its exceptional nature, it is essential that rigorous procedural safeguards in relation to this issue are built into the refugee status determination procedure. Reference should be made to the procedural safeguards considered necessary in

¹² CCPR/C/79/Add.58 (1995), para. 16.

refugee status determination in general, which include the consideration of each case; opportunity for the applicant to consider and comment on the evidence on the basis of which exclusion may be made; provision of legal assistance; availability of a competent interpreter, where necessary; reasons for exclusion to be given in writing; right to appeal an exclusion decision to an independent body; and no removal of the individual concerned until exhaustion of all legal remedies against decision to exclude.

4.24 The author argues that these standards were not met in his case, and that the information on which the Government based its security assessment must have been false. Nor is membership of a criminal organization—which the author denies—in itself a sufficient ground to impute acts of the organization, without more substantiation, to an individual and oust refugee protection. The author notes that prior to arrest and expulsion on 18 December 2001 he had not been detained, subjected to particular security controls or otherwise treated as a real security risk : he had been legally in Sweden and allowed to work and could in principle live a free and normal life in that country. The Migration Board referred his asylum claim to the Government after the Security Police made the assessment that he was considered to constitute a security risk. However, the dominant portion of the information concerning his alleged dangerousness was withheld from him and counsel. Without access to the full assessment by the Security Police, the author suggests that the only reason he was expelled was because he was on a form of “wanted” list in Egypt, and presumably also in the United States of America. Since the nature of the accusations was never revealed and it was not known what information the Swedish Security Police in Sweden believed to be credible, it was very difficult for the author to refute the accusations, including raising concerns about the risk of information being compromised for example by being procured through torture. Emphasizing that even after lengthy detention in Egypt he was never charged, the author suggests that the Swedish Government relied too readily on information from its security services, which had itself relied on foreign intelligence, without exercising due diligence in its use. At the time of expulsion and to this day, the author remains unaware as to why he was considered to constitute a security risk in Sweden.

4.25 The author describes as “one-sided” the Government’s general competence in matters of national security in connection with an application for asylum, even if the individual faces a risk of torture or other cruel or inhuman punishment, the death penalty or other persecution. In the drafting history of the current Aliens Act, as well as in the Government commission report presented in 1999

proposing a change in the jurisdiction and rules of procedure in asylum matters, reviewers warned that: “If ... a person can present an arguable claim of a violation of Covenant rights, and if the Government has then made the decision as the first and only instance, the individual has been deprived of the right to an effective remedy prescribed in article 13 (of the European Convention).”¹³

4.26 Inviting the Committee to take an analogous approach, the author further refers to Recommendation 98(13) of the Committee of Ministers of the Council of Europe, which described article 13 (right to an effective remedy) in relation to article 3 (prohibition against torture) as follows:

“1. An effective remedy before a national authority should be provided for any asylum seeker, whose request for refugee status is rejected and who is subject to expulsion to a country about which that person presents an arguable claim that he or she would be subjected to torture or inhuman or degrading treatment or punishment.

2. In applying paragraph 1 of this recommendation, a remedy before a national authority is considered effective when:

2.1. that authority is judicial; or, if it is a quasi-judicial or administrative authority, it is clearly identified and composed of members who are impartial and who enjoy safeguards of independence;

2.2. that authority has competence both to decide on the existence of the conditions provided for by article 3 of the Convention and to grant appropriate relief;

2.3. the remedy is accessible for the rejected asylum seeker; and

2.4. the execution of the expulsion order is suspended until a decision under 2.2 is taken.”

4.27 The author commends to the Committee the approach on this issue taken by the Committee against Torture in the companion case of *Agiza v. Sweden*, where the Committee stated (at 13.8):

“The Committee observes that, in the normal course of events, the State party provides, through the operation of the Migration Board and the Aliens Appeals Board, for review of a decision to expel

¹³ SOU 1999:16 Ökad rättssäkerhet i asylärenden (“Protection of individual rights in asylum matters”). Final report of committee on new jurisdiction and rules of procedure in alien matters (NIPU), pages 330-331.

satisfying the requirements of article 3 of an effective, independent and impartial review of a decision to expel. In the present case, however, due to the presence of national security concerns, these tribunals relinquished the complainant's case to the Government, which took the first and at once final decision to expel him. The Committee emphasizes that there was no possibility for review of any kind of this decision. The Committee recalls that the Convention's protections are absolute, even in the context of national security concerns, and that such considerations emphasize the importance of appropriate review mechanisms. While national security concerns might justify some adjustments to be made to the particular process of review, the mechanism chosen must continue to satisfy article 3's requirements of effective, independent and impartial review. In the present case, therefore, on the strength of the information before it, the Committee concludes that the absence of any avenue of judicial or independent administrative review of the Government's decision to expel the complainant does not meet the procedural obligation to provide for effective, independent and impartial review required by article 3 of the Convention [against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment]."

4.28 In addition to failing to meet the requirements of article 13, the author argues that the Government's competence as the first and last decision-making body in his case, including where issues of torture are in play, breaches article 2 of the Covenant, as interpreted in general comments 20 and 31, which requires an effective remedy. The exclusion of review possibility falls short of the requirement for accessible, effective and enforceable remedy for breach of a Covenant right.

- Violation of the right to effective individual complaint (First Optional Protocol, article 1)

4.29 The author argues that the execution of the Government's decision within a matter of hours, and without advice to either the author or counsel, both denied him the effective exercise of the right of complaint, including seeking interim measures of protection, guaranteed by article 1 of the Optional Protocol. In consequence, irreparable harm resulted. The author points out that on 14 December 2001 his (then) Swedish counsel had advised the Government of his intention to pursue international remedies in the event of an adverse decision. He argues that the precipitate haste of the expulsion was intended to

avoid such an eventuality. He adds that in the days prior to expulsion, counsel was not provided with full security reports, any detail as to the negotiations with Egypt or the timetabling of the Government's decision; indeed, officials specifically declined to acquiesce to counsel's requests for relevant records. When counsel's call with the author was cut off on 18 December 2001, the former was advised upon contacting the Ministry of Foreign Affairs that no decision had been taken. Advice by certified letter of the decision only reached counsel after the expulsion.

4.30 The Security Police, for its part, had also planned the swiftest possible execution of the expulsion order. Although the Security Police had informed the Ministry of Foreign Affairs that it had an aircraft ready to transport the author to Egypt on 19 December 2001, this was rejected by Government as not prompt enough. The Security Police then presented the Government with a proposal it had received from the United States, namely that the Central Intelligence Agency had an aircraft that had airspace clearance to Cairo on 18 December, which could be utilized by Sweden. The author argues that it was thus clear that the Security Police both knew that the decision to expel was going to be taken that day and were ready to act as soon as it was taken. Taking these facts together, and relying on the decision in *Agiza v. Sweden* that equivalent events constituted a breach of the right to exercise effective complaint under article 22 of the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Convention against Torture"), the author argues that a parallel violation of article 1 of the Optional Protocol is disclosed.

State party's submissions on admissibility

5.1 By note verbale of 10 October 2005, the State party disputed the admissibility of the communication on three bases. Firstly, it questioned whether the communication was in fact submitted on behalf of the alleged victim, suggesting that Mr. Alzery might only have recently become aware that a communication had been filed in his name. It remained unclear whether current counsel for the author had been properly authorized by her client to bring his case before the Committee. (infra, para. 7)

5.2 Secondly, the State party argued that the communication was inadmissible by virtue of its reservation in respect of communications where the same matter was being or had been examined under another procedure of international investigation or settlement. The State party noted that the author submitted claims of torture, ill-treatment and death, as well as absence of access to court and to effective remedies to the European Court of Human Rights, which declared the case inadmissible for introduction out of time. The State party argued that

both complaints concerned the same matter, based on the same facts and the same legal arguments. The reservation was further intended to avoid “appeal” from the European Court to the Committee. In the State party’s view, it might be questioned whether a decision by the Committee not to consider the present communication inadmissible on this basis might not undermine respect for the Court and its decision. In contrast to the situation in *O.F. v. Norway*,¹⁴ where the Committee had found that a procedural reservation did not preclude a communication where the European Commission’s Secretariat had advised of likely admissibility problems, the European Court here had explained at length its decision to declare the case inadmissible.

5.3 Thirdly, the State party raised the issue of delay in submission of the communication amounting to an abuse of process. It noted that while delay per se did not amount to abuse, in certain circumstances, the Committee expected reasonable justification for delay.¹⁵ The State party drew the Committee’s attention to the fact that the author appeared to have waited until the decision of the Committee against Torture in the parallel case of *Agiza v. Sweden* on 20 May 2005 before submitting the case. In the State party’s view, the delay between the expulsion on 18 December 2001 and submission of the communication on 29 July 2005 was excessive and without acceptable justification. This was particularly so with regard to the time period between the author’s release in October 2003 and July 2005, and even more so for the period between the European Court’s decision in October 2004 and July 2005. The State party saw no apparent reason why the Committee was not approached as soon as possible after the European Court’s decision—the facts of his case had already been presented to the Court and the legal arguments made before the Court could also have been used before the Committee.

5.4 The State party also recalled the detailed reasoning of the European Court analysing the delay before it, and suggested that this reasoning had bearing in the present context. Against this background and considering that the Committee’s jurisprudence had accepted that a communication can be time-barred, the State party contended that there was a risk of undermining respect for the European Court and its decisions if the communication is proceeded with. In the interests of legal certainty and avoiding a state of uncertainty, therefore, the State party argued that an abuse of submissions is disclosed.

¹⁴ Communication No. 158/1983, decision of 26 October 1984.

¹⁵ See *Gobin v. Mauritius*, communication No. 787/1997, inadmissibility decision of 16 July 2001.

5.5 In addition, as to the claims concerning alleged failure to take necessary measures in respect of events at Bromma airport (article 7) and concerning the treatment of torture in domestic legislation (article 7), the State party argued that these claims are insufficiently substantiated, for purposes of admissibility. As to the claim under article 14, the State party failed to understand the lack of fair trial given that no trial took place, in Egypt or in Sweden. The claim was thus hypothetical and the author had insufficient status as a victim. Moreover, as no charge was laid which could attract the application of article 14, the claim was inadmissible *ratione materiae*.

Counsel’s comments on State party’s submissions on admissibility

6.1 By letter of 10 January 2006, counsel for the author responded, disputing the State party’s submissions. As to the question of ongoing authority to act, counsel argued that she retains plenary power to advance the communication on Mr. Alzery’s behalf. She argued that the power of attorney of January 2004 to Mr. Alzery’s former Swedish counsel granted him the right to act in all cases and instances on behalf of Mr. Alzery and to appoint any person whom he wished to represent Mr. Alzery. Any objection to the existing counsel’s power of attorney therefore had to invalidate the original January 2004 authority. Counsel argued however that it is a general principle of law that a power of attorney was valid until it had been withdrawn, as demonstrated by sufficient, objective evidence, which had not been shown in the present case. Counsel further argued that the onus of proof should be on the State party to demonstrate such a change in circumstances. In any event, she supplied a written declaration from Mr. Alzery’s original counsel confirming current counsel’s continuing authority to act.

6.2 Counsel went on to question the propriety of the State party contacting an opposing applicant in an ongoing legal matter in order to ask sensitive questions about the complaint, rather than to turn to that person’s legal representative. Counsel argued that such conduct put Mr. Alzery “at great risk”, and argued that the State party thus sought to put pressure on Mr. Alzery and to determine whether and, if so, how he remained in contact with his lawyer. The circumstances of Mr. Alzery’s release militated against the possibility of accurately demonstrating Mr. Alzery’s intent without risk to him, particularly with reference to events transpiring when Swedish counsel visited (see para 3.19, supra). In light of circumstances, counsel’s willingness and ability to contact him was also substantially restricted. Counsel disputed, moreover, that the Swedish Embassy had been in regular contact with Mr. Alzery.

6.3 Counsel argued that once Mr. Alzery's former counsel was informed by the Ministry of Foreign Affairs of its contact with Mr. Alzery concerning the communication (see para 4.1, supra), a senior Ministry official confirmed that he believed that it was probable that Mr. Alzery's phone was tapped but that the Embassy had made the assertion that discussing these matters over the phone was without risk for Mr. Alzery. In October 2005, in what counsel believed to be a safe communication with Mr. Alzery, Mr. Alzery's former counsel asked about the telephone call from the Embassy and whether it was true that Mr. Alzery had stated that he did not know of and did not want any examination by the Committee. After having been assured that Mr. Alzery wanted to pursue his complaint to the Human Rights Committee, Mr. Alzery advised that the person who called him was the interpreter employed by the Embassy. The men thus spoke Arabic but, according to Mr. Alzery, the interpreter was not translating their conversation into Swedish, which Mr. Alzery spoke well. He could not hear anyone asking questions or talking in the background. According to Mr. Alzery, the interpreter brought up the *Agiza* decision of the Committee against Torture, suggesting that decision could be a "good opportunity" also for him. The interpreter then pursued the subject by asking if Mr. Alzery had any plans on using the decision by the Committee against Torture, to which Mr. Alzery responded that his lawyer in Sweden took care of all his legal matters.

6.4 As to the argument that the Committee's competence to consider the communication was precluded by the State party's reservation, counsel referred to the Committee's jurisprudence that dismissal of a case on purely procedural grounds, such as the six month rule applied by the European Court in this case, did not amount to an "examination" of the case within the meaning of such a reservation. In any event, the current communication raised claims with respect to articles 13 and 7 of the Covenant (in relation to treatment at Bromma airport and the State party's alleged failure to promptly and independently investigate the violations) that had not been raised by the European Court. The complaint also elaborated much further on articles 2, 14 and 7 of the Covenant (concerning the *non-refoulement* principle) than had been possible before the European Court. Counsel rejected that Mr. Alzery had ever sought or intended to use the international complaints mechanisms in a fashion inconsistent with the object and purposes of the treaties, or that a decision by the Committee would in any way undermine respect for the European Court.

6.5 With respect to the argument of an unjustified delay in submission of the communication, counsel

argued that in the circumstances of the case, it had been submitted in timely fashion. Counsel noted at the outset that Mr. Alzery was expelled unexpectedly and without the possibility to turn to any national or international body to challenge or stay execution of the expulsion. Mr. Alzery had, through his then lawyer, made clear to the Swedish Government that if a decision to expel were to be taken he would turn to an international body such as the European Court. The possibility that the Government would decide to execute an expulsion decision immediately, without informing counsel, was at the time so unorthodox that it was entirely unforeseeable. Equally atypical was the decision to use and rely on diplomatic assurances. Counsel contends that had Mr. Alzery or his lawyer been informed of the use of diplomatic assurances before the expulsion, he would immediately have sought interim measures at the international level.

6.6 Counsel argued that ever since the decision of 18 December 2001, the circumstances of the Mr. Alzery's case had been exceptional and surrounded by secrecy and clandestine behaviour, with none of a number of international and national investigations undertaken since then having been able to investigate in full all dimensions of the case. Neither had Mr. Alzery been accepted as a complainant or party to any investigation. Some of these examinations were also flawed because of misinformation or unwillingness on the Swedish Government's part to submit information, creating an uncertain legal situation for Mr. Alzery. Counsel emphasizes that Mr. Alzery was only released in October 2003, with the strict limits on communication making contact by counsel risky, difficult and infrequent. In addition, counsel sought to exhaust alternatives to a national or international complaint that would not be as intrusive or dangerous for Mr. Alzery, including the effort to procure an investigation of the High Commissioner for Human Rights and to reach an agreement for his return to Sweden. The decision to turn to the Committee thus had to be considered with due diligence for Mr. Alzery's well being, in the light of the investigations concluding after the European Court's decision of October 2004.

Supplementary submissions of the parties on the admissibility of the communication

7. By note verbale of 10 February 2006, the State party advised that in light of counsel's comments upon its submission on the admissibility of the communications, it saw no reason to maintain the doubt expressed as to whether counsel had been actually authorized by her client to advance the communication. It accordingly withdrew its objection in this regard.

Decision on admissibility

8.1 At its eighty-sixth session, on 8 March 2006, the Committee considered the admissibility of the communication. Firstly, with respect to the State party's argument that the Committee's jurisdiction to consider the case was excluded by the terms of the State party's reservation, the Committee recalled its constant jurisprudence that where a complaint to another international instance, such as the European Court of Human Rights, was dismissed on procedural grounds without examination of the merits, it could not be said to have been "examined", so as to exclude the Committee's competence.¹⁶ In the present case, the European Court having dismissed the application on the procedural ground of failure to comply with the six-month rule for submission of the application, the Committee was likewise not precluded from further consideration of the communication. The Committee further observed that, contrary to the State party's suggestion, such a conclusion involves no disrespect for the European Court, on the basis that the Committee's admissibility criteria did not include the basis upon which the European Court based its decision. It follows that the communication was not inadmissible on this ground.

8.2 Secondly, with respect to the State party's argument that the communication should be dismissed as an abuse of process on the grounds of being time-barred, the Committee noted that the author's (then) counsel had initiated correspondence with the European Court of Human Rights, a choice of forum appropriately and properly open to him, less than six months after the expulsion. In view of the complexities of the case, including the scarcity of detail known about his treatment, general condition and willingness to proceed with a complaint, that period could not be viewed as undue. From the decision of inadmissibility rendered by the European Court of Human Rights in October 2004 to the submission of the communication to the Committee in July 2005, a further eight months had elapsed. In the circumstances and in light of the Committee's previous practice with respect to passage of time, the Committee was not persuaded that the lapse of time was sufficiently egregious or otherwise defined by extraordinary circumstances (such as the intervening election in *Gobin v. Mauritius*¹⁷) to amount to an abuse of process. The complaint was thus not inadmissible on this ground.

8.3 Thirdly, the State party raised the issue as to whether the communication was properly submitted

on behalf of Mr. Alzery. The Committee noted that the State party subsequently withdrew its objection to this aspect of the admissibility of the communication. The Committee observed, moreover, with respect to the terms of the authorization, that its practice was not to construe powers of authority in strict or formalistic terms. Rather, it sought to give effect to the de facto authority which the complainant sought to confer on counsel. Applying such an approach, there can be little doubt that Mr. Alzery had conveyed an authority to act sufficiently wide at the time it was given to encompass a communication to the Committee. At the same time, a power of authority could be revoked either explicitly or implicitly by subsequent events which were inconsistent with the original conferral of authority.

8.4 As to whether such a revocation had occurred in the present case, the Committee noted that the State party's original argument rested on what Mr. Alzery was said to have confided to an Arabic-speaking member of the Swedish Embassy's staff speaking to him by telephone for the first occasion in a considerable period of time. In view of the strictness of the conditions of his release and, in particular, events following apparent monitoring of Mr. Alzery's previous telephone contact with a national human rights organization (see para 3.19, supra), Mr. Alzery's statement as a reflection of his true intent had to be treated with considerable caution. Taking into account both the gravity of the alleged violations, as well as the importance for international review of the merits of such a case should the national investigations undertaken be shown, on the merits, to have been inadequate or ineffective, the Committee considered that the State party had not discharged its burden of demonstrating that the power of attorney originally conferred no longer continued to subsist. It followed that, even if the State party had not withdrawn this objection to admissibility, the Committee would not have considered the communication inadmissible on the basis of counsel not having been properly authorized by Mr. Alzery.

8.5 The Committee further considered that the author had substantiated, for purposes of admissibility, his arguments related to breach of the prohibition of refoulement, his treatment suffered at Bromma airport and inadequate investigation of alleged violations of torture or other cruel, inhuman or degrading treatment or punishment (all article 7 of the Covenant); exposure to risk of a manifestly unfair trial (article 14 of the Covenant); inadequate process of expulsion of an alien and insufficient, ineffective remedy (articles 2 and 13 of the Covenant); and violation of the right to effective individual complaint (First Optional Protocol, article

¹⁶ See, for example, *Weiss v. Austria*, communication No. 1086/2002, Views adopted on 3 April 2003, and *Linderholm v. Croatia*, communication No. 744/1997, decision adopted on 23 July 1999.

¹⁷ *Op. cit.*

1). On 8 March 2006, it therefore declared the communication admissible.

State party's submissions on the merits

9.1 By submissions of 10 October 2005 and 5 May 2006, the State party addressed the merits of the communication. As to the claim of a breach of article 7 on account of the author's refoulement to Egypt and exposure to a real risk of torture and other ill-treatment, the State party refers to the decision of the Committee against Torture in the companion case of *Agiza v. Sweden*, where that Committee found a breach of article 3 of the Convention against Torture. The State party accepts that finding and sees no reason to contest the corresponding claim under the Covenant, without however conceding that the author was in fact tortured or ill-treated. If such treatment occurred, primary responsibility lay with the Egyptian authorities and represented a breach of their bilateral undertakings. The State party, referring to its desire to ascertain what actually took place, however invokes the fruitless efforts at the highest levels to achieve an impartial, independent investigation with international expertise into the course of factual events in Egypt subject to the expulsion (*supra*, at para 3.24). The State party observes that it is not content with the responses of the Egyptian Government, but that, in the process of carefully considering what possible further action to take, it is of the utmost importance that some confirmation is received that such action is in line with the author's own wishes. To date, the State party has received contradictory information about these wishes. Naturally, further measures must not risk affecting or jeopardizing the author's safety or welfare in any way, and it is necessary, in the circumstances, that the Egyptian Government cooperates and concurs in any further investigative efforts. In addition, the State party refers to the findings of its Parliamentary Committee on the Constitution and its efforts to develop an instrument within the Council of Europe on appropriate use of diplomatic assurances. After the relevant body of the Council of Europe decided not to pursue work in this area, the State party has no intention of further pursuing this issue of a formal instrument on assurances internationally. In the light of these efforts, the State party leaves to the Committee the question of whether there has been a violation of article 7 in this respect.

9.2 Concerning the claims under article 7 concerning the alleged ill-treatment at Bromma airport, the State party refers to the findings of the Parliamentary Ombudsman (*supra*, para 3.23 *et seq*) expressing extremely grave criticism of the Security Police and serious shortcomings in the way the case was handled. It notes however that the Parliamentary Ombudsman found that degrading treatment had taken place and not torture, though his criticism

nonetheless remained valid. The State party also rejects that what transpired amounted to torture as defined by article 1 of the Convention against Torture.¹⁸ The State party notes that after the release of the Parliamentary Ombudsman's findings, an independent "Enforcement Committee" concluded that there was a need for clear guidelines for enforcement of expulsion orders of aliens. This was followed in October 2004 circular memorandum of the National Police Board, which in February 2005 was incorporated into the Board's regulations with immediate effect. These regulations require, *inter alia*, a police officer in charge of enforcement to intervene immediately if an alien is treated by foreign authorities in breach of Swedish notions of justice. Swedish police are explicitly held responsible for enforcement when assisted by a foreign authority, while security checks carried out on Swedish territory must be carried out by Swedish police. Further, the State party details training and reorganization of the Security Police, strengthening of specialist resources for such situations and clarifying lines of responsibility. While unable to report or comment on reasons for foreign officials' actions in this case, the State party accepts that certain steps taken at Bromma airport were too far-reaching in relation to the actual risks involved. On this basis, the State party leaves to the Committee the assessment of this article 7 issue.

9.3 As to the alleged failure, also in breach of article 7, properly and independently to investigate the treatment at Bromma airport, to hold any individual responsible or to investigate acts of foreign agents, the State party observes that these events were considered by the ordinary apparatus of criminal prosecution, referring to the three sets of reasoned decisions by the Stockholm district prosecutor, the Prosecutor-Director and the Prosecutor-General. Special measures of investigation by bodies with competence to engage criminal proceedings were also taken by the Parliamentary Ombudsman, who decided not to initiate a preliminary criminal investigation, and the Parliamentary Standing Committee on the Prosecution, which decided not to take further action on criminal complaints against relevant Ministers. In

¹⁸ Article 1 of the Convention provides as follows:
1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

accordance with Swedish law, these proceedings were undertaken promptly and independently after complaints were filed, and thus there is no violation of article 7 in this respect.

9.4 Concerning the claim that torture and other ill-treatment are insufficiently proscribed in Swedish law, the State party recalls that the Covenant does not require specific definitions of these notions to be incorporated. After careful assessment of Swedish criminal law, the State party concluded that the Convention against Torture did not require amendments to domestic criminal legislation. All acts of (as well as attempts of and complicity in) torture and cruel, inhuman or degrading treatment or punishment are offences under domestic law, punished appropriately grave penalties, consistent with article 7 of the Covenant. On the alleged lack of fair trial, the State party notes that no criminal charges were brought against the author after his return, nor did he stand trial there. There was thus no violation of his rights under article 14.

9.5 As to the lack of an effective remedy against the Cabinet-level decision on the author's asylum application, the State party accepts the finding of the Committee against Torture in *Agiza* that this amounted to a breach of the procedural obligation in article 3 of the Convention against Torture and thus does not contest the corresponding claim under the Covenant. The State party notes, however, that as from 31 March 2006, a new system for judicial examination of asylum claims has been established in the form of Migration Courts and a Supreme Migration Court. Under this system, the Supreme Migration Court, on oral hearing, may determine the existence of an impediment to enforcement of the expulsion decision, such as a risk of torture, which would be binding on the Government. The new legislation also provides for automatic issuance of a residence permit, absent extraordinary circumstances, to an alien where an international body deciding on an individual complaint concludes the individual cannot be removed. On the claim that the author's expulsion was inconsistent with article 13 as he was not permitted to present his case to the Ministers and/or officials who took the decision, the State party notes that the expulsion decision was reached according to law, and that article 13 affords an exception for national security circumstances, which existed in the present case. There was thus no violation of article 13 of the Covenant.

9.6 On the alleged lack of opportunity to seize the Committee of the case, in breach of article 1 of the Optional Protocol, the State party accepts the finding of the Committee against Torture in the *Agiza* case that immediate execution of the expulsion order frustrated the effective right of communication and thus it sees no reason to contest the corresponding claim before the Committee. It notes the Standing

Committee's conclusions in its report of 21 September 2005 on this matter that concerns an individual might seek interim measures before an international body could not be allowed to come into play and that expulsion decisions being notified to expellees by the enforcement authority, while counsel was notified by letter, was acceptable provided that counsel was notified more quickly.

Counsel's comments on the State party's submissions on the merits

10.1 On 16 June 2006, counsel responded to the State party's submissions on the merits. As to the sufficiency of the investigations undertaken with respect to the treatment at Bromma airport, counsel notes that the Swedish Government was aware from an early stage as to what had transpired at the airport, indeed the Ministry of Justice had compiled a report on the matter. The State party however kept these issues confidential and out of public and parliamentary domain for several years. It was only until the 2004 transmission of a television programme providing details on these matters that a criminal complaint was first lodged and formal criminal investigations began. It is thus misleading to speak of prompt investigations. Furthermore, counsel argues that even accepting the State party's reasons for the Ombudsman's decision not to initiate a criminal investigation (see *supra*, para 3.27), this represents a systemic lack of control for which the Security Police is organizationally responsible. The Ombudsman's decision to undertake an investigation of informational nature, with officials required to give testimony, also meant that not only the Ombudsman but also other prosecuting authorities were unable to prosecute the officials responsible, on account of self-incrimination.

10.2 Concerning the State party's suggestions of wariness as to further action vis-à-vis the Egyptian authorities (see *supra*, para 9.1), counsel states the author already informed the Swedish Government of his willingness to participate in a full and comprehensive investigation if performed independently and capable of guaranteeing his safety. This remains the position, although the author has always declined, on grounds of personal safety, an investigation being carried out by Egyptian police, particularly if it had as its object of punishment of individual officers. He is concerned that bilateral negotiations between Sweden and Egypt, anyway initiated late, are not in his interest and that a bilateral investigation could expose him to great risk, with the State retaining the legal power to arbitrarily detain him on security grounds.

10.3 As to the argument under article 14, counsel argues that the fact that the author did not in fact receive a trial is no answer to his claims. He suffered interrogation and abuse in detention, meeting only

repeatedly a prosecutor who ordered further imprisonment. There was no presence or monitoring by the Embassy of these sittings, nor did the Embassy establish contact with a national human rights group engaged in monitoring the proceedings, despite being made aware of this fact. He was provided a lawyer for the first such hearing, but was not allowed to meet him before. A privately retained lawyer was not able to visit him in prison. Egyptian law only allows public counsel after formal charges are laid. He was never presented with any evidence he could examine or informed in detail about the accusations against him. Counsel argues that the State party was aware of the serious risk that his legal rights as an accused would not be respected and that there were no follow-up mechanisms in place to exercise already minimal control over proceedings after the author was returned.

10.4 As to the argument under article 13 and the State party's invocation of the national security exception, counsel argues this provision was inapplicable in this case. Referring to the Swedish Government's recent grant of visas to Hamas politicians, its belief at the time (*supra*, para 4.17), that Mr. Alzery was subject to a relatively low possible sentence of seven years imprisonment under Egyptian law for the offence that the author was suspected of and that there was never sufficient evidence for him to be charged, let alone convicted, of an offence, counsel argues that no case for the national security exception in article 13 could be made out. In any event, the lack of due diligence in investigating the case and reliance on international intelligence for justification of the expulsion failed to meet even the basic level of due process afforded by article 13.

10.5 Finally, counsel submits that torture rather than any lesser form of ill-treatment was suffered at each stage of the author's forcible return (treatment at Bromma airport, silently consented to by the Swedish police, treatment in flight and treatment in Egypt upon return). In any event, counsel observes that the assessment of qualification of severity lies independently with the Committee rather than any domestic authorities, and that the Committee has consistently been reluctant to distinguish strictly between categories of ill-treatment.

Consideration of the merits

11.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

11.2 The Committee notes at the outset that, with respect to a number of claims, the State party concedes violations of the Covenant or the Optional Protocol, on the basis of parallel findings of the

Committee against Torture in the case of *Agiza v. Sweden* made with respect to substantially similar provisions of the Convention against Torture. While such a concession is relevant to the Committee's determination, it must nevertheless independently ascertain that in the circumstances of the case violations of the relevant provisions of the Covenant or the Optional Protocol occurred.

11.3 The first substantive issue before the Committee is whether the author's expulsion from Sweden to Egypt exposed him to a real risk of torture or other ill-treatment in the receiving State, in breach of the prohibition on refoulement contained in article 7 of the Covenant. In determining the risk of such treatment in the present case, the Committee must consider all relevant elements, including the general situation of human rights in a State. The existence of diplomatic assurances, their content and the existence and implementation of enforcement mechanisms are all factual elements relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment exists.

11.4 The Committee notes that, in the present case, the State party itself has conceded that there was a risk of ill-treatment that—without more—would have prevented the expulsion of the author consistent with its international human rights obligations (see *supra*, at para 3.6). The State party in fact relied on the diplomatic assurances alone for its belief that the risk of proscribed ill-treatment was sufficiently reduced to avoid breaching the prohibition on refoulement.

11.5 The Committee notes that the assurances procured contained no mechanism for monitoring of their enforcement. Nor were any arrangements made outside the text of the assurances themselves which would have provided for effective implementation. The visits by the State party's ambassador and staff commenced five weeks after the return, neglecting altogether a period of maximum exposure to risk of harm. The mechanics of the visits that did take place, moreover, failed to conform to key aspects of international good practice by not insisting on private access to the detainee and inclusion of appropriate medical and forensic expertise, even after substantial allegations of ill-treatment emerged. In light of these factors, the State party has not shown that the diplomatic assurances procured were in fact sufficient in the present case to eliminate the risk of ill-treatment to a level consistent with the requirements of article 7 of the Covenant. The author's expulsion thus amounted to a violation of article 7 of the Covenant.

11.6 On the issue of the treatment by the author at Bromma airport, the Committee must first assess whether the treatment suffered by the author at the hands of foreign agents is properly imputable to the

State party under the terms of the Covenant and under applicable rules of State responsibility. The Committee notes that, at a minimum, a State party is responsible for acts of foreign officials exercising acts of sovereign authority on its territory, if such acts are performed with the consent or acquiescence of the State party (see also article 1 of the Convention against Torture). It follows that the acts complained of, which occurred in the course of performance of official functions in the presence of the State party's officials and within the State party's jurisdiction, are properly imputable to the State party itself, in addition to the State on whose behalf the officials were engaged. In so far as the State party accepts the finding of its Parliamentary Ombudsman that the treatment suffered was disproportionate to any legitimate law enforcement purpose, it is evident that the use of force was excessive and amounted to a breach of article 7 of the Covenant. It follows that the State party violated article 7 of the Covenant as a result of the treatment suffered by the author at Bromma airport.

11.7 As to the claim under article 7 relating to the effectiveness of the State party's investigation into the treatment suffered at Bromma airport, the Committee notes that the State party's authorities were aware of the mistreatment suffered by the author from the time of its occurrence; indeed its officials witnessed the conduct in question. Rather than submit conduct whose criminal character was plainly well arguable to the appropriate authorities, the State party waited over two years for a private criminal complaint before engaging its criminal process. In the Committee's view, that delay alone was insufficient to satisfy the State party's obligation to conduct a prompt, independent and impartial investigation into the events that took place. The Committee further notes that as a result of the combined investigations of the Parliamentary Ombudsman and the prosecutorial authorities, neither Swedish officials nor foreign agents were the subject of a full criminal investigation, much less the initiation of formal charges under Swedish law whose scope was more than capable of addressing the substance of the offences. In particular, the Committee notes that the decision of the Parliamentary Ombudsman to effect an informational investigation including substantial compelled testimony. While the thoroughness of the investigation for that purpose is not in doubt, the systemic effect was to seriously prejudice the likelihood of undertaking effective criminal investigations at both command and operational levels of the Security Police. In the Committee's view, the State party is under an obligation to ensure that its investigative apparatus is organized in a manner which preserves the capacity to investigate, as far as possible, the criminal responsibility of all relevant officials, domestic and foreign, for conduct

in breach of article 7 committed within its jurisdiction and to bring the appropriate charges in consequence. The State party's failure to so ensure in this case amounts to a violation of the State party's obligations under article 7, read in conjunction with article 2 of the Covenant.

11.8 As to the claim concerning the absence of independent review of the Cabinet's decision to expel, given the presence of an arguable risk of torture, the Committee notes that article 2 of the Covenant, read in conjunction with article 7, requires an effective remedy for violations of the latter provision. By the nature of refoulement, effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning. The absence of any opportunity for effective, independent review of the decision to expel in the author's case accordingly amounted to a breach of article 7, read in conjunction with article 2 of the Covenant.

11.9 Regarding the claim under article 14 concerning exposure to a risk of a manifestly unfair trial, the Committee notes that the State party sought to rely simply on the receiving State's incorporation, in the diplomatic assurances, of an undertaking to afford the author a fair trial. Given both that no trial in fact occurred and in view of the Committee's findings set out above that State party exposed the author at the point of expulsion to grave violations of the Covenant, the Committee does not consider it necessary to make a separate finding on this issue.

11.10 Concerning the claim under article 13, the Committee accepts that the decision to expel the author was reached in accordance with the State party's law as it then stood and was thus "in pursuance of a decision reached in accordance with law", within the meaning of article 13 of the Covenant. The Committee notes that in the assessment of whether a case presents national security considerations bringing the exception contained in article 13 into play allows the State party very wide discretion.¹⁹ In the present case, the Committee is satisfied that the State party had at least plausible grounds for considering, at the time, the case in question to present national security concerns. In consequence, the Committee does not find a violation of article 13 of the Covenant for the author's failure to be allowed to submit reasons against his expulsion and have the case reviewed by a competent authority.

11.11 Inasmuch as the claim of a breach by the State party of its obligations under the Optional Protocol

¹⁹ See, for example, *Borzov v. Estonia*, communication No. 1136/2002, Views adopted on 26 July 2004.

is concerned, the Committee refers to its established jurisprudence that a State party is obliged, upon adhering to the Optional Protocol, to permit the exercise in good faith of the right of complaint to the Committee conferred by the Optional Protocol, and to refrain from steps which would render decision on the communication nugatory and futile.²⁰ In the present case, the Committee notes that the author's (then) counsel had expressly advised the State party in advance of the Government's decision of his intention to pursue international remedies in the event of an adverse decision (see *supra*, para. 4.29). Counsel was incorrectly advised after the decision had been taken that none had been reached, and the State party executed the expulsion in the full knowledge that advice of its decision would reach counsel after the event. In the Committee's view, these circumstances disclose a manifest breach by the State party, of its obligations under article 1 of the Optional Protocol.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Sweden of article 7, read alone and in conjunction with article 2 of the Covenant. The Committee reiterates its conclusion that the State party also breached its obligations under article 1 of the Optional Protocol.

13. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. The State party is also under an obligation to avoid similar violations in the future. In this respect, the Committee welcomes the institution of specialized independent migration courts with power to review decisions of expulsion such as occurred in the present case.

14. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

²⁰ *Piandiong et al. v. The Philippines*, communication No. 869/1999, Views adopted on 19 October 2000, and *Weiss v. Austria*, communication No. 1086/2001, Views adopted on 3 April 2003.

Communication No. 1421/2005

Submitted by: Francisco Juan Larrañaga (represented by counsel, Ms. Sarah de Mas and Mr. Faisal Saifee)

Alleged victim: The author

State party: The Philippines

Date of adoption of Views: 24 July 2006

Subject matter: Death sentence following unfair trial

Procedural issues: Interim measures

Substantive issues: Mandatory imposition of the death penalty, reintroduction of the death penalty, arbitrary deprivation of life, impartiality of the tribunal, failure to be presumed innocent, inadequate time and facilities to prepare defence, right to examine witnesses, right to choose counsel of own choosing, heavier sentence imposed on appeal, right to have sentence and conviction reviewed by a higher tribunal, right to be tried without undue delay

Articles of the Covenant: 6, 7, 9 and 14

Articles of the Optional Protocol: -

Finding: Violation (art. 6, para. 1; art. 7; and art. 14, paras. 1, 2, 3 (b), (c), (d), (e), and 5)

1.1 The author of the communication, dated 15 August 2005, is Francisco Juan Larrañaga, a Filipino and Spanish national, born on 27 December 1977. He is sentenced to death and currently imprisoned at New Bilibid Prison, in the Philippines. He claims to be a victim of violations of article 6; article 7; article 9, and article 14 of the Covenant by the Philippines. The Optional Protocol entered into force for the State party on 22 November 1989. The author is represented by counsel, Ms. Sarah de Mas and Mr. Faisal Saifee.

1.2 In accordance with rule 92 of the Committee's Rules of Procedure, the Committee, acting through its Special Rapporteur for New Communications, requested the State party on 19 August 2005 not to carry out the death sentence against the author so as to enable the Committee to examine his complaint.

The facts as presented by the author

2.1 On 5 May 1999, the author, along with six co-defendants, was found guilty of kidnapping and serious illegal detention of Jacqueline Chiong by the Special Heinous Crimes Court in Cebu City and was sentenced to *reclusion perpetua*. On 3 February 2004, the Supreme Court of the Philippines found the author also guilty of kidnapping and serious illegal detention with homicide and rape of Marijoy Chiong and sentenced him to death. He was also

sentenced to *reclusion perpetua* for the simple kidnapping and serious illegal detention of Jacqueline Chiong.

2.2 According to the prosecution, the author, along with seven other men, kidnapped Marijoy and Jacqueline Chiong in Cebu City on 16 July 1997. On the same day, the two women were allegedly raped. Marijoy Chiong was then pushed down into a ravine, while Jacqueline Chiong was beaten. Jacqueline Chiong's body remains missing.

2.3 According to the author, he travelled from Cebu City to Quezon City on 8 June 1997 to pursue a Diploma at the Centre for culinary arts in Quezon City. On 16 July 1997, he was taking examinations during the entire day and then went to a restaurant in the evening. He stayed with friends until the next morning. On 17 July 1997, he took another examination before taking a plane back to Cebu City at 5pm.

2.4 On 15 September 1997, the police tried to arrest the author without a warrant. On 17 September 1997, author's counsel made a request to the prosecutor that the author be given a preliminary investigation and that he be granted a period of twenty days to file the defence affidavit. The prosecutor denied this request, arguing that the author was entitled only to an inquest investigation. On 19 September 1997, author's counsel appealed to the Court of Appeals to prevent the filing of criminal information against the author. However, criminal charges had already been filed on 17 September 1997 with the Regional Trial Court of Cebu City. On 22 September 1997, counsel filed a petition with the Court of Appeals requesting that the Regional Trial Court of Cebu City prevent the author's arrest. Nevertheless, he was arrested on that day with a warrant issued by that court. He remains incarcerated ever since. Another petition was filed in the Court of Appeals against his arrest and dismissed on 25 September 1997. This decision was appealed to the Supreme Court. Despite this pending appeal, the author was brought before a judge on 14 October 1997. He did not enter a plea and the judge thus entered a plea of not guilty to two counts of kidnapping with serious illegal detention. On 16 October 1997, the Supreme Court temporarily restrained this judge from proceeding with the case to prevent the issues before the court from becoming moot. On 27 October 1997, the Supreme Court set

aside the inquest investigation and held that the author was entitled to a proper preliminary investigation.

2.5 The trial began on 12 August 1998 in the Special Heinous Crimes Court in Cebu City. The prosecution presented its first and main witness, the defendant Davidson Valiente Rusia, who was promised immunity from prosecution if he told the truth. The prosecution witness was induced by the judge to testify against the author and his co-defendants. This cross-examination took place on 13 and 17 August 1998. During the hearings, the witness admitted for the first time that he had raped Marijoy Chiong. However, on the second day, the cross-examination was cut short just after the witness admitted that he lied about his previous convictions, which should have disentitled him from immunity, and claimed to feel dizzy. The witness was brought back to court on 20 August 1998, but his cross-examination was cut short again in the light of allegations that he had been bribed. On the same day, the trial judge thus decided that, in view of time constraints and to avoid the possibility of the witness being killed, kidnapped, threatened, or bribed, further cross-examination would be terminated at 5pm that day. In response, author's counsel refused to participate in the trial and asked the trial judge to recuse himself. On 24 August 1998, he was summarily found guilty of contempt of court, arrested and imprisoned. The trial was suspended.

2.6 The author gave written consent to the withdrawal of his counsel and requested three weeks to hire a new counsel. On 31 August 1998, the court refused to adjourn the trial any further, and offered the defendants the opportunity to rehire their counsel, who were in prison, as the trial was due to restart on 3 September 1998. On 2 September 1998, the court ordered the Public Attorney's Office to assign to the court a team of public attorneys who would act temporarily as defence counsel until the defendants hired new counsel. On 3 September 1998, the trial resumed and the court appointed three attorneys of the Public Attorney's Office as defence counsel for all the defendants who were without legal counsel, including the author. The author reiterated that he wanted to choose his own counsel.

2.7 From 3 to 18 September 1998, twenty-five prosecution witnesses testified while the author was represented by counsel from the Public Attorney's Office. By Order of 8 September 1998, the court deferred the cross-examination of several other prosecution witnesses in view of the defendants' insistence that the lawyer whom they had yet to choose would conduct the cross-examination. On 24 September 1998, the author's newly appointed counsel appeared in the proceedings and asked that the prosecution witnesses be re-examined. The court refused. It also refused to grant the author's new

counsel an adjournment of either twenty or thirty days to acquaint himself with the case file and effectively conduct the cross-examination of the witnesses. Instead, the court ordered that the cross-examination would start on 30 September 1998, because the trial should be terminated within sixty days. From 1 to 12 October 1998, author's counsel cross-examined again the main prosecution witness Rusia. However, in response to a motion from the prosecution, he was discharged as a witness on 12 November 1998 and was granted immunity from prosecution. By Order of 8 October 1998, the trial court had given the new counsel only four days to decide whether to cross-examine the prosecution witnesses who had testified while the author was assisted by a counsel from the Public Attorney's Office. On 12 October 1998, counsel refused, in protest, to cross-examine these prosecution witnesses. By Order of 14 October 1998, the trial court decided that all the defendants had waived their right to cross-examine prosecution witnesses.

2.8 On 23 November 1998, fourteen witnesses testified in favour of the author and confirmed that he was in Quezon City immediately before, during and after the alleged crime committed in Cebu City, more than 500 kilometres away. Several pieces of evidence were presented to the court to the same effect. On 9 December 1998, the trial judge refused to hear other witnesses on the ground that their testimony would be substantially the same as the author's other witnesses. On 6, 12, 18, 20, and 25 January 1999, he refused to hear evidence from other defence witnesses on the ground that the evidence was "irrelevant and immaterial", whereas the author believes that it was of crucial importance to the defence of alibi. The transcripts reveal that, for example, the judge refused to hear a defence witness on 12 January 1999, since it would not prove that it was "physically impossible" for the author to be in Cebu City at the time of the commission of the crimes. On 1 February 1999, the author was not allowed to testify either. On 2 February 1999, the trial court issued an Order under which any further evidence on the author's alibi would only be cumulative or superfluous because he had already presented fourteen witnesses. On 3 February 1999, the trial court confirmed its refusal to allow the author to testify.

2.9 On 5 May 1999, the Special Heinous Crimes Court found the author guilty of the kidnapping and serious illegal detention of Jacqueline Chiong and sentenced him to *reclusion perpetua*. It decided that there was insufficient evidence to find him guilty of the kidnapping and serious illegal detention with homicide and rape of Marijoy Chiong. On 10 May 2000, the author appealed to the Supreme Court. This appeal raised four issues: (i) violations of rights of due process, including the right to choose counsel,

the right to effective counsel, the refusal to hear the author's testimony, the refusal to allow the author to call defence witnesses, and the denial of an impartial trial through the actions of the presiding judge; (ii) improper handling of the main prosecution witness's evidence; (iii) insufficient prosecution evidence to convict him; and (iv) inappropriate standard of proof required for presenting alibi evidence.

2.10 While the Supreme Court has the power to conduct hearings under the Rules of Court, it followed its usual practice of not hearing the testimony of any witnesses during the review process, relying solely upon the lower court's appreciation of the evidence. On 3 February 2004, it found the author guilty not only of the kidnapping and serious illegal detention of Jacqueline Chiong, but also of the complex crime of kidnapping and serious illegal detention with homicide and rape of Marijoy Chiong. The author was sentenced to death by lethal injection. A motion for reconsideration was lodged with the Supreme Court on 2 March 2004; this was rejected on 21 July 2005.

The complaint

3.1 The author alleges a violation of article 6 of the Covenant because the State party reintroduced the death penalty after abolishing it.¹ He claims that the death penalty was abolished when the new Constitution came into force on 2 February 1987 (article 3 (19) (1)). On 13 December 1993, Congress adopted the Republic Act No.7659 which allowed the death penalty to be imposed again for a number of crimes. The author recalls that, while the majority in the Supreme Court has held that new laws authorizing capital punishment were not unconstitutional, a minority stated that "the Constitution did not merely suspend the imposition of the death penalty, but in fact completely abolished it from the statute books."² The minority view was reiterated when deciding the author's case.

3.2 The author alleges a violation of article 6 on the ground that the Supreme Court automatically sentenced him to capital punishment under article 267 of the Revised Penal Code. Therefore, it did not

take into account any possible mitigating circumstances which may have benefited him, such as his relative youth. He argues that mandatory death penalty violates his right not to be arbitrarily deprived of his life.³

3.3 The author alleges a violation of article 14, paragraph 2, and that the evaluation of facts and evidence by the Special Heinous Crimes Court and the Supreme Court were manifestly arbitrary and amounted to a denial of justice, in violation of his right to be presumed innocent until proved guilty.⁴ Firstly, he claims that there was insufficient evidence of homicide or rape. He recalls that the trial court found that there was insufficient evidence of homicide or rape of either Marijoy or Jacqueline Chiong, and that the main prosecution witness did not even implicate the author in the homicide of Marijoy Chiong. Serious doubts were expressed by a forensic pathologist as to the evidence provided in court. However, the Supreme Court found the author guilty of homicide and rape of Marijoy Chiong by relying solely on the evidence before the trial court. Secondly, the prosecution was based on the testimony of one witness who had been charged with the same crimes. This witness gave evidence against the author in return for his own release and acquittal.⁵ He recalls that the trial judge accepted that the witness had lied, but considered that his testimony was not entirely false. The Supreme Court did not consider the witness's motives for testifying against his co-accused, nor did it assess the weight attributed to his testimony. Finally, the author argues that both the trial court and the Supreme Court incorrectly shifted the burden of proof on to him to prove that it was "physically impossible" for him to have been at the scene of the crime. The sole evidence against the author was given by prosecution witnesses identifying him, whereas he had to provide "clear and convincing evidence" that he was not at the scene of the crime. He thus argues that he was not presumed innocent because of the reversal of the burden of proof.

¹ Communication No. 1110/2002, *Rolando v. The Philippines*, Views adopted on 3 November 2004, individual opinion by Mr. Martin Scheinin, Ms. Christine Chanet and Mr. Rajsoomer Lallah; and communication No. 869/1999, *Piandong et al. v. The Philippines*, Views adopted on 19 October 2000, para.7.4. See also No. 829/1998, *Judge v. Canada*, Views adopted on 5 August 2003, para.10.4; communication No. 470/1991, *Kindler v. Canada*, Views adopted on 30 July 1993, individual opinions by Mr. Fausto Pocar and Mr. Bertil Wennergren; and No. 539/1993, *Cox v. Canada*, Views adopted on 31 October 1994, individual opinions of Ms. Christiane Chanet, Mr. Fausto Pocar, and Mr. Francisco Jose Aguilar Urbina.

² *People of the Philippines v. Echegaray*, GR No.117472, 7 February 1997.

³ Communication No. 806/1998, *Thompson v. Saint Vincent and the Grenadines*, Views adopted on 18 October 2000, para.8.2; communication No. 845/1998, *Kennedy v. Trinidad and Tobago*, Views adopted on 26 March 2002, para.7.3; communication No. 1077/2002, *Carpo et al. v. The Philippines*, Views adopted on 28 March 2003, para.8.3; communication No. 1167/2003, *Rayos v. The Philippines*, Views adopted on 27 July 2004, para.7.2; and communication No. 1110/2002, *Rolando v. The Philippines*, Views adopted on 3 November 2004, para.5.2. See also *Concluding Observations of the Human Rights Committee on the Philippines*, CCPR/CO/79/PHL, 1 December 2003, para.10.

⁴ General comment 13/21 of 13 April 1984, para.7.

⁵ Communication No. 971/2001, *Arutyuniantz v. Uzbekistan*, Views adopted on 30 March 2005, para.6.4.

3.4 The author alleges a violation of article 14, paragraph 1,⁶ and article 14, paragraph 2,⁷ because both the trial court and the Supreme Court were subject to outside pressure from powerful social groups, especially the Chinese-Filipino community, of which the victims are members and which argued for the execution of the defendants. The aunt of the victims was the secretary of President Estrada who called for the execution of the author after the judgement of the trial court. The defendants were subject to many negative media reports before judgement which led the judges to have preconceptions about the case. Finally, the author finds evidence of these preconceptions in the judgements.

3.5 The author alleges violations of article 14 because the convictions and sentences imposed by the Special Heinous Crimes Court were premised on serious procedural irregularities which either individually or cumulatively constitute violations of this provision.⁸ Firstly, he was prevented from testifying at his own trial in violation of article 14, paragraphs 1,⁹ 3 (d)¹⁰ and 3 (e).¹¹ He argues that he had the right to present his case in the best manner possible, which means in practice the right of the accused to counter the prosecution's allegations and to provide evidence of his own innocence. In its judgement, the Supreme Court merely noted the trial court's refusal to allow the author to testify.

3.6 Secondly, the author argues that there was no equality to call and examine witnesses in violation of article 14, paragraph 3 (e).¹² The trial judge refused to hear several defence witnesses and effectively withheld evidence indicating that another person or persons may have committed the crimes of which the author was accused.¹³ Indeed, the author recalls that, on 25 January 1999, the trial court refused to issue a subpoena to hear the testimony of the director

of the National Bureau of Investigation for Cebu, because the prosecution had questioned the relevance of such testimony. In fact, the director's testimony would have established that there were initially twenty-five suspects for the kidnapping and that the author was not one of them. The evidence was presented to the Supreme Court, but the Court determined that it was immaterial in its judgement of 3 February 2004.

3.7 Thirdly, the author argues that his right to cross-examine prosecution witnesses was unfairly restricted in violation of article 14, paragraph 3 (e). He recalls that the trial judge was obstructive when author's counsel sought to cross-examine the main prosecution witness (see para. 2.5 above). While his new counsel refused to cross-examine the prosecution witnesses, the author argues that this decision not to cross-examine was not a tactical consideration, but a decision not to accede to an unfair process, and that he should not be penalized for his insistence on the right to cross-examine prosecution witnesses in a fair way. He adds that his new counsel was unable to cross-examine the witnesses because he had not heard the examination-in-chief of the same witnesses. If he had cross-examined the witnesses, he would have been in an unequal position vis-à-vis the prosecution, which would have heard both the examination-in-chief and the cross-examination of the witnesses. The Supreme Court failed to correct these errors.

3.8 Fourthly, the author argues that bearing in mind the irreversible nature of the death penalty and the ineffectiveness of court-appointed lawyers in these cases,¹⁴ his counsel did not have sufficient time to prepare the defence, in violation of article 14, paragraph 3 (b),¹⁵ and that he could not choose an effective counsel, in violation of article 14, paragraph 3 (d).¹⁶ The decision to send his counsel to jail for contempt of court constitutes a violation of the Covenant.¹⁷ He adds that the refusal to grant a reasonable adjournment to find a new counsel was also unlawful,¹⁸ and recalls that on 2 September 1998, the trial judge ordered a lawyer from the Public Attorney's Office to represent the author

⁶ Communication No. 263/1987, *González del Rio v. Peru*, Views adopted on 28 October 1992, para. 5.2.

⁷ Communication No. 5/1977, *Ambrosini et al. v. Uruguay*, Views adopted on 15 August 1979, para. 10; and communication No. 8/1977, *Weismann and Perdomo v. Uruguay*, Views adopted on 3 April 1990, para. 16.

⁸ Communication No. 815/1998, *Dugin v. Russian Federation*, Views adopted on 5 July 2004, para. 9.3.

⁹ Communication No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 10; and communication No. 32/1978, *Touron v. Uruguay*, Views adopted on 31 March 1981, para. 12.

¹⁰ General comment 13/21 of 13 April 1984, para. 11.

¹¹ *Ibid.*, para. 12.

¹² Communication No. 480/1991, *Fuenzalida v. Ecuador*, Views adopted on 12 July 1996, para. 9.5; communication No. 1117/2002, *Khomidov v. Tajikistan*, Views adopted on 29 July 2004, para. 6.5; and communication No. 353/1988, *Grant v. Jamaica*, Views adopted on 31 March 1994, para. 8.5.

¹³ Communications No. 464/1991 and 482/1991, *Peart and Peart v. Jamaica*, Views adopted on 19 July 1985, para. 11.5.

¹⁴ Communication No. 330/1988, *Berry v. Jamaica*, Views adopted on 7 April 1994, para. 11.4; and communication No. 1167/2003, *Rayos v. The Philippines*, Views adopted on 27 July 2004, para. 7.3.

¹⁵ Communication No. 49/1979, *Marais v. Madagascar*, Views adopted on 24 March 1983, para. 19; and communication No. 283/1988, *Little v. Jamaica*, Views adopted on 1 November 1991, para. 8.3.

¹⁶ Communication No. 253/1987, *Kelly v. Jamaica*, Views adopted on 8 April 1991, para. 5.10.

¹⁷ Communication No. 1189/2003, *Fernando v. Sri Lanka*, Views adopted on 31 March 2005, para. 9.2.

¹⁸ Communication No. 232/1987, *Pinto v. Trinidad and Tobago*, Views adopted on 20 July 1990, para. 12.5; and communication No. 223/1987, *Robinson v. Jamaica*, Views adopted on 30 March 1989, para. 10.3.

despite his insistence on an adjournment to seek his own counsel and the fact that he had the means to do so.¹⁹ As a result, between 3 and 23 September 1998, the author was represented by a lawyer from the Public Attorney's Office who had had less than a day to prepare his defence and was denied any further time to prepare in violation of the Covenant.²⁰ During that period, twenty-five prosecution witnesses gave evidence and the author's appointed counsel did not object to any of the evidence. Lawyers from the Public Attorney's Office even complained that they had a conflict of interest since they had at one stage represented the main prosecution witness, who was one of the defendants, and were now representing the other defendants. The author argues that his new counsel should have been given sufficient time to acquaint himself with the case file. While these issues were raised on appeal, the Supreme Court failed to correct the irregularities which took place during the trial.

3.9 Fifthly, the author argues that he was not tried by an independent and impartial tribunal in violation of article 14, paragraph 1. He recalls that the trial judge led the main prosecution witness to testify against the author and that his counsel objected to this on several occasions. The trial judge obstructed the cross-examination of this witness on 13 August 1998, and made disrespectful remarks about the defence witnesses. In addition, the trial judge was the same judge who had evaluated the preliminary charges against the author on 14 October 1997; he should thus not have been involved in the trial.²¹ Again, the issue was raised before the Supreme Court which failed to respond adequately.

3.10 The author alleges violations of article 6 (2) and article 14 because the Supreme Court failed to correct any of the irregularities of the proceedings before the lower court.²² Firstly, the Supreme Court judges harboured preconceptions about the trial, in

violation of article 14 (1).²³ He notes that two judges of the Court of Appeals who had evaluated the preliminary charges against the author in 1997 sat on the Supreme Court when deciding the author's case on 3 February 2004 and dismissing his motion for reconsideration on 21 July 2005. He argues that they did so in violation of Rule 137 of the Philippine Rules of Court. Another judge, whose wife was the great-aunt of the victims, also sat on the Supreme Court deciding the author's case on 3 February 2004 and dismissing the motion for reconsideration on 21 July 2005. Secondly, the Supreme Court violated the principle of *ex officio reformatio in peius* enshrined in article 14 (1)²⁴ and his right to appeal as defined in article 14 (5). He recalls that the Supreme Court found him guilty of the homicide and rape of Marijoy Chiong and sentenced him to death.²⁵ Thirdly, the author argues that the Supreme Court violated his right to a public hearing as protected by article 14,²⁶ and in particular 14 (1),²⁷ 6 (2) and 14 (2), and 14 (5),²⁸ and his right to be present during the hearing as protected by article 14, paragraph 3 (d).²⁹ He recalls that the Supreme Court did not hear oral testimony and that he was prevented from attending his appeal. There was no justification for refusing him an oral hearing,³⁰ especially since judgement on appeal was given four years and nine months later and expedition was therefore not a factor. Finally, the author argues that the Supreme Court violated his right to appeal to a higher tribunal according to law as required by article 14 (5). He notes that he was convicted of homicide and rape and sentenced to death for the first time at last instance,³¹ and could not appeal to a higher tribunal.³² He also notes that his motion for reconsideration was considered on 21 July 2005 by twelve of the same judges who had sentenced him to

¹⁹ Communication No. 52/1979, *Sadiás de Lopez v. Uruguay*, Views adopted on 29 July 1981, para. 13; communication No. 74/1980, *Estrella v. Uruguay*, Views adopted on 29 March 1983, para. 10; communication No. 232/1987, *Pinto v. Trinidad and Tobago*, Views adopted on 20 July 1990, para. 12.5; and communication No. 677/1996, *Teesdale v. Trinidad and Tobago*, Views adopted on 1 April 2002, para. 9.6.

²⁰ Communication No. 796/1998, *Reece v. Jamaica*, Views adopted on 14 July 2003, para. 7.2; and communication No. 775/1997, *Brown v. Jamaica*, Views adopted on 23 March 1999, para. 6.6.

²¹ Communication No. 240/1987, *Collins v. Jamaica*, Views adopted on 1 November 1991, individual opinion by Ms. Christine Chanet, Mr. Kurt Herndl, Mr. Francisco José Aguilar Urbina and Mr. Bertil Wennergren; and communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, para. 7.2.

²² Communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, para. 7.3.

²³ Communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 August 2004, para. 10.2; and communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, para. 7.2.

²⁴ Communication No. 207/1986, *Moraël v. France*, Views adopted on 28 July 1989, para. 9.3.

²⁵ General comment 13/21 of 13 April 1984, para. 19.

²⁶ Communication No. 848/1999, *Orejuela v. Columbia*, Views adopted on 23 July 2002, para. 7.3.

²⁷ Communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, para. 7.3.

²⁸ General comment 13/21 of 13 April 1984, para. 17.

²⁹ Communication No. 232/1987, *Pinto v. Trinidad and Tobago*, Views adopted on 20 July 1990, para. 12.5.

³⁰ Communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, individual opinion by Mr. Bertil Wennergren.

³¹ Communication No. 973/2001, *Khalilov v. Tajikistan*, Views adopted on 30 March 2005, para. 7.5; and communication No. 1073/2002, *Terrón v. Spain*, Views adopted on 5 November 2004, para. 7.4.

³² Communication No. 64/1979, *Salgar de Montejó v. Colombia*, Views adopted on 24 March 1982, paras. 9.1 and 11.

death. He therefore argues that resolution on the motion cannot be said to have been impartial.

3.11 The author alleges violations of articles 9 (3), 14 (3) (c) and 14 (5), because there were undue delays in the proceedings. The proceedings as a whole were conducted with undue delay,³³ as were the individual stages. The author recalls that information charging him with kidnap and serious illegal detention was filed on 17 September 1997, that his trial began eleven months later on 12 August 1998, and that judgement was delivered one year and eight months after charge, namely on 5 May 1999.³⁴ He filed his appeal on 10 May 2000 and the Supreme Court decided about three years and nine months later, on 3 February 2004.³⁵ Accordingly, the delay between charge and the Supreme Court decision was six years and five months. The author filed a motion for reconsideration on 2 March 2004, which was decided on 21 July 2005, after a delay of one year and four months. Therefore, the delay between charge and final decision was seven years and ten months.³⁶ For the author, such delay is inexcusable since there was little investigation required, and the evidence consisted merely of direct eyewitness testimony and forensic evidence.

3.12 The author alleges a violation of article 6(1) because the imposition of the death penalty on him at the end of a process in which his fair trial guarantees were violated constitutes an arbitrary deprivation of life.³⁷

³³ General comment 13/21 of 13 April 1984, para. 10; communication No. 43/1979, *Caldas v. Uruguay*, Views adopted on 21 July 1983, paras.12.1 and 14; communication No. 864/1999, *Agudo v. Spain*, Views adopted on 31 October 2002, para. 9.1; and communication No. 203/1986, *Hermoza v. Peru*, Views adopted on 4 November 1988, para. 11.3.

³⁴ Communication No. 677/1996, *Teesdale v. Trinidad and Tobago*, Views adopted on 1 April 2002, para. 9.3; and communication No. 56/1979, *de Casariego v. Uruguay*, Views adopted on 29 July 1981, para. 11.

³⁵ Communication No. 938/2000, *Siewpersaud et al. v. Trinidad and Tobago*, Views adopted on 29 July 2004, para. 6.2; communication No. 683/1996, *Wanza v. Trinidad and Tobago*, Views adopted on 26 March 2002, para.9.4; communication No. 580/1994, *Ashby v. Trinidad and Tobago*, Views adopted on 21 March 2002, para. 10.5; communication No. 677/1996, *Teesdale v. Trinidad and Tobago*, Views adopted on 1 April 2002, para. 9.4; communications No. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989, para.13.4; and communication No. 27/1977, *Pinkney v. Canada*, Views adopted on 29 October 1981, para. 22.

³⁶ Communication No. 203/1986, *Hermoza v. Peru*, Views adopted on 4 November 1988, para. 11.3; and communication No. 43/1979, *Caldas v. Uruguay*, Views adopted on 21 July 1983, para. 12.1.

³⁷ Communication No. 250/1987, *Reid v. Jamaica*, Views adopted on 20 July 1990, para. 11.5; communication No. 16/1977, *Mbenge v. Zaire*, Views adopted on 25 March 1983, para. 17; and communication No. 349/1989,

3.13 The author alleges a violation of article 7, because he is being subject to a prolonged period of detention on death row.³⁸ He argues that the compelling circumstances are present³⁹ because of the trauma of other violations of the Covenant and the real risk that he will ultimately be wrongfully executed.⁴⁰ Indeed, the fear and uncertainty generated by a death sentence and exacerbated by the undue delay, in circumstances where there is a real risk that the sentence is enforced, give rise to much anguish.⁴¹ The author recalls that he has not caused any of the delay,⁴² and argues that there is a real risk of execution because executions continue to be scheduled. Although a moratorium on execution was announced by the President on 17 September 2002, the General Guidelines for recommending executive clemency were amended on 26 June 2003, so that petitions for clemency are not favourably recommended where the person was under the influence of drugs at the time of committal of the crimes. The author recalls that the Supreme Court found that he and his co-defendants had consumed marijuana before committing the alleged crimes.

3.14 The author alleges a violation of article 9 because in the light of the violations detailed above, he has not been deprived of his liberty on such grounds and in accordance with such procedures as are established by law. He argues that his guilt was not proven beyond reasonable doubt, and that he therefore should not have been imprisoned.

3.15 With regard to exhaustion of domestic remedies, the author argues that he has made several complaints on all the violations detailed above. All procedural irregularities encountered in the trial were raised in the appeal before the Supreme Court, while those procedural irregularities encountered

Wright v. Jamaica, Views adopted on 27 July 1992, para. 8.7.

³⁸ Communication No. 470/1991, *Kindler v. Canada*, Views adopted on 30 July 1993, paras. 15.2 and 15.3; and communications No. 270-271/1988, *Barrett and Sutcliffe v. Jamaica*, Views adopted on 30 March 1992, para. 8.4.

³⁹ Communications No. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989, para. 13.6; communication No. 599/1994, *Spence v. Jamaica*, Views adopted on 18 July 1996, para. 7.1; and communication No. 720/1996, *Morgan and Williams v. Jamaica*, Views adopted on 3 November 1998, para. 6.3.

⁴⁰ Communication No. 1110/2002, *Rolando v. The Philippines*, Views adopted on 3 November 2004, individual opinion by Mr. Martin Scheinin, Ms. Christine Chanet and Mr. Rajsoomer Lallah.

⁴¹ Communication No. 1167/2003, *Rayos v. The Philippines*, Views adopted on 27 July 2004, para.7.1; and communication No. 1110/2002, *Rolando v. The Philippines*, Views adopted on 3 November 2004, para. 5.4.

⁴² Communications No. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989, para. 13.4.

before the Supreme Court were raised in the motion for reconsideration. The author argues that a second motion for reconsideration cannot be regarded as an “effective” remedy.⁴³

State party’s submission on admissibility and merits

4.1 On 3 March 2006, the State party commented on the admissibility and merits of the communication. With regard to the reintroduction of the death penalty, it argues that the death penalty was never abolished by the 1987 Constitution. It recalls that article III, section 19 (1) of the Constitution provides that the death penalty shall not be imposed “unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it”. It refers to the drafting history of the provision in order to demonstrate that the provision was never meant to suppress the right of the State to impose capital punishment. It also refers to a decision of the Supreme Court in which the Court confirmed that there is nothing on article III, section 19 (1) which expressly abolishes the death penalty.⁴⁴ It recalls that the imposition of the death penalty for certain crimes is purely a matter for domestic discretion, save for the limitation that it be imposed only for the “most serious crimes”. It also recalls that it is not a party to the Second Optional Protocol to the Covenant. While it acknowledges that there is a current trend toward the abolition of the death penalty even for the most serious crimes, it argues that this consideration is insufficient to entirely bar the imposition of the penalty. Accordingly, article 6 should be interpreted to mean that for countries which have abolished the death penalty, it cannot be reinstated, and that for countries which continue to impose it, its abolition is not compulsory, albeit highly encouraged.

4.2 With regard to the allegation that the imposition of death penalty on the author was mandatory, by operation of law, without regard to possible mitigating circumstances, the State party recalls that the Revised Penal Code provides that a person may be convicted for the criminal act of another where, between them, there has been conspiracy or unity of purpose and intention in the commission of the crime. Therefore, the conspirators are held liable for acts committed by each of them and the degree of actual participation of each is immaterial. In the present case, the author and his co-defendants were found by the Supreme Court to have the same objective to kidnap and detain the Chiong sisters. Conspiracy having been established,

⁴³ Communication No. 1073/2002, *Terron v. Spain*, Views adopted on 5 November 2004, para. 6.5; and communication No. 1101/2002, *Cabriada v. Spain*, Views adopted on 1 November 2004, para. 6.5.

⁴⁴ *People of the Philippines v. Echeagaray*, GR No.117472, 7 February 1997.

the author was thus liable for the complex crimes of kidnapping and serious illegal detention with homicide and rape, regardless of who in the group actually pushed Marijoy Chiong into the ravine. With regard to the author’s relative youth, the State party notes that while the death penalty cannot be imposed on persons below the age of 18 at the time of the commission of the offence, the author was already 20 when he committed the offences. The State party recalls that “relative youth” is not a mitigating circumstance under domestic penal law, nor in the Committee’s jurisprudence.

4.3 The State party recalls that the death penalty was imposed by virtue of article 267 of the Revised Penal Code, but that even then, the imposition of such a sentence took into consideration the circumstances of both the offender and the offence. For capital crimes, the sole mitigating circumstances which can be raised are minority, incomplete justifying circumstances and incomplete exempting circumstances. The State party recalls that one of the author’s co-defendants was not sentenced to death on the ground that he was a minor at the time of the commission of the offences. It also recalls that adequate safeguards have been put in place before the imposition of the death penalty, and that these have worked well since 1993. The State party thus argues that “mandatory” is in no way synonymous with “arbitrary”, and that there is no violation of article 6 (1). It refers to the Committee’s jurisprudence and argues that a death sentence becomes mandatory (understood, in this sense, as arbitrary) when it is imposed without due regard to the circumstances of both the offence and the offender, i.e., by virtue of an undifferentiated murder statute or in disregard of the offender’s participation in the commission of the offence.⁴⁵ It invokes general comment No. 14 [23] of 2 November 1984 on article 6 of the Covenant, in which the Committee elaborates on the notion of arbitrary deprivation of life. It also refers to two individual opinions appended to the Committee’s Views in *Carpo*.⁴⁶

4.4 With regard to the allegation that the evaluation of facts was manifestly arbitrary and constituted a denial of justice, the State party argues that the Supreme Court judgement demonstrates that there was clear evidence of homicide and rape. It recalls that a criminal appeal opens up the entire case for review and that to have oral arguments before the Supreme Court is not a matter of right. The Supreme

⁴⁵ Communication No. 806/1998, *Thompson v. Saint Vincent and the Grenadines*, Views adopted on 18 October 2000, para. 8.2; and communication No. 845/1998, *Kennedy v. Trinidad and Tobago*, Views adopted on 26 March 2002, para. 7.3.

⁴⁶ Communication No. 1077/2002, Views adopted on 28 March 2003, individual opinions of Mr. Nisuke Ando and Ms. Ruth Wedgewood.

Court carefully assessed the evidence before it and decided to disagree with the trial court's imposition of a life sentence on the author and his co-defendants.

4.5 With regard to the allegation that the prosecution was based on evidence from an accomplice charged with the same crime, the State party recalls that the trial court chose to give credence to his testimony. His testimony was corroborated by disinterested witnesses and compatible with the physical evidence. Both the trial court and the Supreme Court were satisfied with his testimony.

4.6 On the alleged incorrect standard and burden of proof, the State party argues that while it is the duty of the prosecution to prove the allegations in the indictment regarding the elements of the crime, it is the duty of the defence to prove the existence of an alibi, or of justifying or exempting circumstances. As to the motives of the main prosecution witness, the State party recalls that the Supreme Court could not discern any motive on the part of the witnesses why they should testify falsely against the defendants. It concludes that the author was not deprived of his right to be presumed innocent, and that the prosecution was able to satisfy the burden of proving each element of the crimes charged beyond reasonable doubt.

4.7 With regard to the alleged outside pressure on specific judges, the State party notes that the decision of the Supreme Court was rendered by the court as a whole, rather than by specific Justices. In any case, President Estrada was ousted from power in January 2001 and the author was sentenced to death three years later. It is therefore inconceivable that the Supreme Court could have been pressured by an ousted president to convict the author. As to the allegation that both the trial court and the Supreme Court had preconceptions about the case, it argues that this is grounded on speculation and conjectures, and that the judiciary has maintained its independence in the present case.

4.8 With regard to the allegation that fair hearing violations invalidate the decision of the Special Heinous Crimes Court, the State party argues that the author was not prevented from testifying, since the prosecution and the defence agreed to dispense with his testimony, as mentioned in the author's own submission to the Committee. The author cannot thus attribute his failure to testify to the trial court. The State party recalls that domestic courts, subject to the agreement of the prosecution and the defence, may admit in evidence the testimony of a witness even if that person was not placed in the witness stand, and that this is especially true if the testimony to be presented would be merely corroborative, as was in the present case.

4.9 With regard to the allegation that there was no equality of arms to call and examine witnesses, the State party recalls that it is the responsibility of the trial judge to ensure that there is an orderly and expeditious presentation of witnesses and that time was not wasted. Therefore, the trial court may dispense with the testimony of witnesses who would offer the same testimonies given by witnesses who already testified. The State party argues that the circumstances surrounding the trial court's decision to dispense with the testimonies of some of the defence witnesses have been sufficiently justified: such witnesses would only have confirmed what the trial court had already heard.

4.10 With regard to the allegation that the right to cross-examine prosecution witnesses was unfairly restricted, the State party refers to the judgement of the Supreme Court of 3 February 2004 in which the Court denied that the defendants had not been given sufficient opportunity to cross-examine the main prosecution witness during the trial. The Supreme Court also argued that it was the right and duty of the trial court to control the cross-examination of witnesses, both for the purpose of conserving time and protecting the witnesses from prolonged and needless examination.

4.11 With regard to the allegation that counsel did not have sufficient time to prepare the defence and that the author's right to choose effective counsel was violated, the State party recalls that the author's counsel was found guilty of direct contempt of court and hence imprisoned. It explains that direct contempt of court is committed in the presence of or near a court or judge and can be punished summarily without hearing. It distinguishes the Committee's Views in *Fernando* from the present situation because, in that case, the summary conviction for contempt of court had been made without the court citing any reason for it.⁴⁷ In response to the allegation that the appointed counsel was inadequately prepared, the State party recalls that the Supreme Court argued that the trial court can appoint a counsel whom it considers competent to enable the trial to proceed. The State party explains that there was no conflict of interest since Rusia's lawyer, who was also from the Public Attorney's Office, never participated in the prosecution of the author and that his participation was merely to obtain immunity from prosecution for his client. It refers again to the judgement of the Supreme Court, where the Court argued that the decision to grant an adjournment is made at the discretion of the court, and that a refusal is not ordinarily an infringement of the defendant's right to counsel.

⁴⁷ Communication No. 1189/2003, *Fernando v. Sri Lanka*, Views adopted on 31 March 2005, para. 9.2.

4.12 With regard to the allegation that the author's right to an impartial tribunal was violated, the State party argues that the trial judge has the power to ask questions to witnesses, either directly or on cross-examination. There is no basis for the claim of partiality and bias on the part of the trial judge because he was the same judge who had informed the author of the charges against him and asked him to enter his plea. In addition, it was the prosecutors of the Department of Justice, and not the trial judge, who conducted the preliminary investigation of the case.

4.13 With regard to the alleged violations of the Covenant by the Supreme Court, the State party explains that former Chief Justice Davide took no part in the case, as indicated in the notation in the decision next to his name. As for the two other judges referred to by the author, it explains that neither of them presided over the trial court which convicted the author. As to the principle of *ex officio reformatio in peius*, the State party argues that it provides that an appellate court cannot aggravate an earlier verdict without inviting the parties to present their observations. The proceedings before the Supreme Court are adversarial in nature, although the number of pleadings to be filed is at the discretion of the Court. An appeal in a criminal case opens up the entire case for review, and that it becomes the duty of the appellate court to correct any error in the judgement appealed. The author was given ample opportunity to present his arguments and observations before the Supreme Court. As to the right to a public hearing, the State party argues that the right to a public hearing at the appeal stage is not absolute, and that this right applies only to proceedings at first instance. In the present case, the Supreme Court did not consider it necessary to hear the parties orally.⁴⁸

4.14 With regard to the alleged violation of the right to appeal to a higher tribunal according to law, the State party recalls that the author appealed his conviction pronounced by the trial court to the Supreme Court, and argues that his claim has no merit.

4.15 With regard to the allegation of undue delay, the State party argues that the initial delay was due to the fact that the author sought to annul the charges filed against him. During the course of the trial, the author alone presented fourteen witnesses and the defence employed "strategic machinations" to delay the proceedings. It explains that each defendant filed a separate appeal and that the Supreme Court had to first dispose of all collateral issues which had been raised by the author and his co-defendants before it

could finally rule on their appeal. It submits that, given the complexity of the case and the fact that the author availed himself of all the remedies available, the courts have acted with all due dispatch. As to the issue of bail, the State party explains that no bail shall be granted where an accused is charged with an offence punishable by death or life imprisonment, and the evidence of guilt is strong.

Author's comments

5.1 On 10 May 2006, the author commented on the State party's submission. He takes note of the recent State party decision to commute all death sentences to life imprisonment, announced on 16 April 2006. However, he remains on death row and has received no documents from the President's Office indicating that his death sentence has been commuted. Moreover, he argues that the President's decision could be overturned by herself or her successor. In any case, he argues that there would still be a violation of the principle of *ex officio reformatio in peius* because life imprisonment constitutes a heavier sentence than *reclusion perpetua* under domestic law.⁴⁹

5.2 The author reiterates that the death penalty was abolished and subsequently reintroduced in the Philippines. He also argues that he was not found guilty of a "most serious crime", since the Supreme Court did not find that the author either committed, was complicit in or even anticipated that Marijoy Chiong would be pushed into a ravine. He submits that on the basis of the facts accepted by the Supreme Court, he could have been convicted only of kidnapping, false imprisonment and rape, which do not constitute "most serious crimes" for the purposes of article 6, paragraph 2.

5.3 The author reiterates that the mandatory imposition of the death sentence constitutes a violation of article 6 of the Covenant. He also argues that it violates the prohibition of cruel and unusual punishment in article 7.

5.4 On the State party's argument that the author had the same objective as his co-defendants to kidnap and detain the Chiong sisters and is thus guilty of conspiracy, he argues that there was no direct evidence of conspiracy and that neither the trial court, nor the Supreme Court found that he had any knowledge of the elements of the offence. He reiterates that there were serious procedural irregularities in his trial. In response to the claim that he dispensed with his testimony, he emphasizes that he never agreed to do so and that the trial judge refused to hear it. With regard to the refusal to hear more defence witnesses, he recalls that more than

⁴⁸ Communication No. 1110/2002, *Rolando v. the Philippines*, Views adopted on 3 November 2004, para. 4.5.

⁴⁹ *Reclusion perpetua* means imprisonment for between 20 and 40 years, with a possibility of parole after 30 years, whereas life imprisonment means life without parole.

twenty-two prosecution witnesses were allowed by the court to testify and corroborate the evidence given by the main prosecution witness, whereas the author's right to call those witnesses who would have corroborated his version of events was unfairly restricted.

5.5 With regard to the State party's suggestion that the Supreme Court was entitled to increase the penalty imposed by the trial court and even reverse its decision, the author argues that this is mistaken because an appeal to the Supreme Court is primarily for the protection of the accused. Under domestic law, the prosecution is not entitled to appeal an acquittal or sentence imposed by a trial court. Therefore, he insists that the principle of *ex officio reformatio in peius*, which is applied in many countries, was violated.

5.6 With regard to the State party's claim that delays were due to the author, he argues that delays were caused by the lack of judicial discipline, including long and unnecessary annual leave by the presiding judge. As for the claim that delay in the appeal proceedings was partly due to the fact that each defendant filed a separate appeal, he recalls that all appeals were consolidated.

Issues and proceedings before the committee

Consideration of admissibility

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

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The Committee notes that the State party has not raised any objections to the admissibility of the communication. On the basis of the material before it, it concludes that there are no obstacles to the admissibility of the communication, and declares it admissible.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided under article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes from the judgements of both the trial Court and the Supreme Court, that the author was convicted of kidnapping and serious illegal detention with homicide and rape under article 267 of the Revised Penal Code which provides that "when the victim is killed or dies as a

consequence of the detention or is raped [...], the maximum penalty shall be imposed". Thus, the death penalty was imposed automatically by the operation of article 267 of the Revised Penal Code. The Committee recalls its jurisprudence that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence.⁵⁰ It follows that his rights under article 6, paragraph 1, of the Covenant were violated. At the same time, the Committee notes that the State party has adopted Republic Act No. 9346 prohibiting the imposition of death penalty in the Philippines.

7.3 The Committee has noted the arguments of the author that the reintroduction of the death penalty for "heinous crimes", as set out in Republic Act No. 7659, constitutes a violation of article 6 of the Covenant. In the light of the State party's recent repeal of the death penalty, the Committee considers that this claim is no longer a live issue and that it need not consider it in the circumstances of the case.

7.4 With regard to the allegation of a violation of the presumption of innocence, the author has pointed to a number of circumstances which he claims demonstrate that he did not benefit from this presumption. The Committee is cognizant that some States require that a defence of alibi must be raised by the defendant, and that a certain standard of proof must be met before the defence is cognizable. However, here, the trial judge did not show sufficient latitude in permitting the defendant to prove this defence, and in particular, excluded several witnesses offered in the alibi defence. A criminal court may convict a person only when there is no reasonable doubt of his or her guilt, and it is for the prosecution to dispel any such doubt. In the present case, the trial judge put a number of leading questions to the prosecution which tend to justify the conclusion that the author was not presumed innocent until proven guilty. Moreover, incriminating evidence against a person provided by an accomplice charged with the same crime should, in the Committee's opinion, be treated cautiously, particularly where the accomplice was found to lie about his previous criminal convictions, was granted immunity from prosecution, and eventually admitted to raping one of the victims. In the present case, it considers that, despite all the issues mentioned

⁵⁰ Communication No. 806/1998, *Thompson v. St. Vincent and The Grenadines*, Views adopted on 18 October 2000; communication No. 845/1998, *Kennedy v. Trinidad and Tobago*, Views adopted on 26 March 2002; and communication No. 1077/2002, *Carpo v. the Philippines*, Views adopted on 28 March 2003.

above having been raised by the author, neither the trial court nor the Supreme Court addressed them appropriately. Concerning the public statements made by senior officials portraying the author as guilty, all of which were given very extensive media coverage, the Committee refers to its general comment No.13 on article 14, where it stated that: ‘it is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial’. In the present case, the Committee considers that the authorities failed to exercise the restraint that article 14, paragraph 2, requires of them, especially taking into account the repeated intimations to the trial judge that the author should be sentenced to death while the trial proceeded. Given the above circumstances, the Committee concludes that the author’s trial did not respect the principle of presumption of innocence, in violation of article 14, paragraph 2.⁵¹

7.5 The Committee notes that the information before it reveals that the author’s appointed counsel requested the court to allow him an adjournment, because he was unprepared to defend his client, since he had been appointed on 2 September 1998 and the trial resumed on 3 September 1998. Similarly, the author’s chosen counsel also requested the court to allow him an adjournment, because he was unprepared to defend his client, since he made his first appearance in court in this case on 24 September 1998 and the trial resumed on 30 September 1998. The judge refused to grant the requests allegedly because the trial had to be terminated within sixty days. The Committee considers that in a capital case, when counsel for the defendant requests an adjournment because he was not given enough time to acquaint himself with the case, the court must ensure that the defendant is given an opportunity to prepare his defence. In the instant case, both the author’s appointed and chosen counsel should have been granted an adjournment. In the circumstances, the Committee finds a violation of article 14, paragraph 3 (b) and (d), of the Covenant.⁵²

7.6 As to the author’s representation before the trial court, the Committee reiterates that it is axiomatic that legal representation must be made available in capital cases. In the instant case, it is uncontested that counsel was assigned to the author when his previous counsel was found guilty of contempt of court and jailed. From the material before the Committee, it is clear that the author did not wish his court-appointed counsel to represent

him and requested an adjournment to hire a new counsel, which he had the means to do. In the circumstances, and bearing in mind that this is a case involving the death penalty, the trial court should have accepted the author’s request for a different counsel, even if this entailed an adjournment of the proceedings. To the extent that the author was denied effective representation by counsel of his own choosing and that this issue was raised before the Supreme Court which failed to correct it, the requirements of article 14, paragraph 3 (d), have not been met.⁵³

7.7 Concerning the author’s claim that there was no equality of arms because his right to cross-examine prosecution witnesses was restricted, the Committee notes that the cross-examination of the main prosecution witness was repeatedly cut short by the trial judge and prematurely terminated to avoid the possibility of harm to the witness (see para.2.5 above). The Committee also notes that the trial judge refused to hear the remaining defence witnesses. The court refused on the ground that the evidence was “irrelevant and immaterial” and because of time constraints. The Committee reaffirms that it is for the national courts to evaluate facts and evidence in a particular case. However, bearing in mind the seriousness of the charges involved in the present case, the Committee considers that the trial court’s denial to hear the remaining defence witnesses without any further justification other than that the evidence was “irrelevant and immaterial” and the time constraints, while, at the same time, the number of witnesses for the prosecution was not similarly restricted, does not meet the requirements of article 14. In the above circumstances, the Committee concludes that there was a violation of article 14, paragraph 3 (e), of the Covenant.

7.8 As to the author’s claim that his rights were violated under article 14, in particular paragraphs 1 and 5, because the Supreme Court did not hear the testimony of the witnesses but relied on the first instance interpretation of the evidence provided, the Committee recalls its jurisprudence that a “factual retrial” or “hearing de novo” are not necessary for the purposes of article 14, paragraph 5.⁵⁴ However, in the present case, the Committee notes that whereas the author’s appeal to the Supreme Court concerned the decision at first instance to find him guilty of kidnapping and serious illegal detention of

⁵¹ Communication No. 971/2001, *Arutyuniantz v. Uzbekistan*, Views adopted on 30 March 2005, para. 6.4.

⁵² Communication No. 594/1992, *Philip v. Trinidad and Tobago*, Views adopted on 20 October 1998, para. 7.2; and communication No. 913/2000, *Chan v. Guyana*, Views adopted on 31 October 2005, para. 6.3.

⁵³ Communication No. 232/1987, *Pinto v. Trinidad and Tobago*, Views adopted on 20 July 1990, para. 12.5.

⁵⁴ Communication No. 536/93, *Perera v. Australia*, Views adopted on 28 March 1995, para. 6.4; communication No. 534/1993, *H.T.B. v. Canada*, Views adopted on 19 October 1993, para. 4.3; and communication No. 1110/2002, *Rolando v. the Philippines*, Views adopted on 3 November 2004, para. 4.5.

Jacqueline Chiong, the Supreme Court found him guilty also of kidnapping and serious illegal detention with homicide and rape of Marijoy Chiong, a crime for which he had been acquitted at first instance and for which the prosecutor did not request any change of the sentence. The Supreme Court, which did not find it necessary to hear the parties orally, sentenced the author to death. The Committee considers that, as the Supreme Court in the present case, according to national law, had to examine the case as to the facts and the law, and in particular had to make a full assessment of the question of the author's guilt or innocence, it should have used its power to conduct hearings, as provided under national law, to ensure that the proceedings complied with the requirements of a fair trial as laid down in article 14, paragraph 1.⁵⁵ The Committee further notes that the Supreme Court found the author guilty of rape and homicide after he had been acquitted of the same crime at first instance. As a result, the author had no possibility to have the death sentence reviewed by a higher tribunal according to law, as required by article 14, paragraph 5.⁵⁶ The Committee concludes that the facts before it disclose a violation of article 14, paragraphs 1 and 5, of the Covenant.

7.9 As to the author's claim that his rights were violated under article 14, paragraph 1, because the trial court and the Supreme Court were not independent and impartial tribunals, the Committee notes that the trial judge and two Supreme Court judges were involved in the evaluation of the preliminary charges against the author in 1997. In the present case, the involvement of these judges in the preliminary proceedings was such as to allow them to form an opinion on the case prior to the trial and appeal proceedings. This knowledge is necessarily related to the charges against the author and the evaluation of those charges. Therefore, the involvement of these judges in these trial and appeal proceedings is incompatible with the requirement of impartiality in article 14, paragraph 1.

7.10 The Committee has noted the State party's explanations concerning the delay in the trial proceedings against the author. Nevertheless, it finds that the delay was caused by the authorities and that no substantial delay can be attributable to the author. In any case, the fact that the author appealed cannot be held against him. Article 14, paragraph 3 (c), requires that all accused shall be entitled to be tried without undue delay, and the requirement applies equally to the right of review of conviction and

sentence guaranteed by article 14, paragraph 5. The Committee considers that a delay of seven years and ten months from the author's arrest in September 1997 to the final decision of the Supreme Court dismissing his motion for reconsideration in July 2005 is incompatible with the requirements of article 14, paragraph 3 (c).⁵⁷

7.11 With regard to the alleged violation of article 7, the Committee considers that to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. In circumstances where there is a real possibility that the sentence will be enforced, that fear must give rise to considerable anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence. Indeed, as the Committee has previously observed⁵⁸, the imposition of any death sentence that cannot be saved by article 6 would automatically entail a violation of article 7. The Committee therefore concludes that the imposition of the death sentence on the author after the conclusion of proceedings which did not meet the requirements of article 14 of the Covenant amounts to inhuman treatment, in violation of article 7.⁵⁹

7.12 In the light of the finding in 7.11 above, the Committee need not consider whether, since the author's death sentence was affirmed upon conclusion of proceedings which did not meet the requirements of article 14, his rights under article 6 were also violated because of the imposition of the death penalty on him (see para.3.12 above). Nor does it consider it necessary to address the author's claim under article 9 (see para.3.14 above).

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of article 6, paragraph 1; article 7; and article 14, paragraphs 1, 2, 3 (b), (c), (d), (e), 5, of the Covenant.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including commutation of his death sentence and early consideration for release on parole. The State party is under an obligation to take measures to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized

⁵⁵ Communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, para. 7.3. See also European Court of Human Rights, *Ekbatani v. Sweden*, application No.10563/83, 26 May 1988, para. 32.

⁵⁶ Communication No. 973/2001, *Khalilov v. Tajikistan*, Views adopted on 30 March 2005, para. 7.5.

⁵⁷ Communication No. 390/1990, *Lubuto v. Zambia*, Views adopted on 31 October 1995, para. 7.3.

⁵⁸ Communication No. 588/1994, *Errol Johnson v. Jamaica*, Views adopted on 22 March 1996, paras. 8.2 and 8.3.

⁵⁹ European Court of Human Rights, *Öcalan v. Turkey*, application No.43221/99, 12 May 2005, paras. 167–175.

the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

APPENDIX

Individual opinion by Committee member Mr. Nisuke Ando

1. Reference is made to my individual opinion in case *Carpo et al. v. The Philippines* (case No. 1077/2002).
2. I do not think it proper for the Committee to quote here a judgement of the European Court of Human Rights in footnote 59.

[signed] Nisuke Ando

Individual opinion by Committee member Ms. Ruth Wedgwood

There is a lawyer's adage, of grave moral import, that "Death is different." When a capital penalty for a criminal act may be pronounced on a defendant, every trial court and appellate court bears an especially weighty obligation to assure that the adjudicative process has been fair. In the present case, the trial conducted by the Philippines' Special Heinous Crimes Court and the review by the Philippines' Supreme Court involved a number of decisions that were taken without a wise latitude towards the defence.

Nonetheless, the opinion of the Human Rights Committee, in finding violations of the Covenant by the State party, offers a number of sweeping conclusions that are not adequately supported in its explication of the trial record. Were we appointed as the trial judges, we might decide an issue of case management in a different way. But we cannot find a violation of the Covenant on that basis alone. At a minimum, it is our obligation to show how, in the context of a particular trial and its development of the facts, the matter violated a rule of the Covenant.

For example, in paragraph 7.4, the Committee expresses concern about the admission of accomplice testimony and the use of leading questions, in the development of the State's case against the defendant for "kidnapping and serious illegal detention with homicide and rape." See paragraph 7.2. The Committee says that these two issues were not "addressed ... appropriately" and suggests that they contributed to a violation of the presumption of innocence, in violation of article 14 (2). But leading questions are permitted in many trial systems, and judges are often permitted to ask questions of witnesses. The Philippines judicial system entrusts fact-

finding to the judge, and does not provide for a jury, so there is no issue of potentially influencing the views of a jury by the court's intervention. And if the issue is instead styled as sufficiency of the evidence, one is obliged to note the State's uncontested assertion that 25 other prosecution witnesses testified at trial, and physical evidence was offered, and that the witnesses included "disinterested" persons.

The Committee has also concluded, in paragraph 7.5, that the defendant's rights under article 14 (3) (b) and (d) of the Covenant were violated, because various requests for adjournments in the middle of the trial were denied by the trial judge. But the defendant was on trial with six co-defendants, and any delay granted to one defendant would also have affected the speedy trial rights of other defendants. Defendant's initial counsel could have preserved for appeal his complaint about the scope of cross-examination of the major accomplice, instead of refusing to participate further in the trial. The trial court gave the defendant a week to hire new counsel, or to rehire prior counsel, and thereafter appointed public defenders to conduct cross-examination of the prosecution witnesses. The author has not suggested, and the committee has not found, any way in which that cross-examination was inadequate. When the defendant hired new private counsel three weeks later, this counsel requested 20 to 30 days to review the case. But there are very few trial judges who would permit such an extended interruption of a viva voce trial, and the author has not offered any account of why such a lengthy period was required in preparing, or any avenue that new counsel failed to pursue in his defence. The judge set a deadline for counsel's decision whether to cross-examine prior prosecution witnesses, but this was a full eighteen days after his appointment. There has been no suggestion why this length of time was inadequate to get ready, such as, inter alia, any absence of written transcripts or other specific impediments.

As another example, the Committee asserts in paragraph 7.9 that the defendant's rights under article 14 (1) to a "competent, independent and impartial tribunal" were violated because "the trial judge and two Supreme Court judges were involved in the evaluation of the preliminary charges against the author in 1997." But many legal systems provide for preliminary proceedings in criminal cases, in which a defendant may contest issues concerning arrest, probable cause, and the rendering of charges for trial. The idea of prejudice in a judge usually refers to some extraneous matter that might bias him against a particular party. It does not refer to his review of the case in prior proceedings. Indeed, some court systems choose to assign any related criminal cases to the same judge, in order to benefit by the judge's familiarity with the issues. It would be radical, indeed, to suggest that because a judge had passed on an issue of bail or remand, or the adequacy of an indictment, that he was thereafter barred from any further participation in the case. There is no suggestion of why, in this particular case, there was any prejudice formed from the earlier judgements undertaken in prior professional review.

Nor has the Committee, in regard to this claim under article 14 (1), attempted to justify the departure from our settled jurisprudence. The Committee's opinion, at paragraph 7.9, footnote 21, cites our prior decision in

Collins v. Jamaica, communication No. 240/1987, Views adopted on 1 November 1991, and in particular, the concurring views of four members. But it is well to recall that the majority of the committee, in the *Collins* case, took the opposite view to that adopted by the Committee today. In the *Collins* case, a Magistrate had heard and granted an application for a change of venue for the conduct of a preliminary hearing in a criminal case, and allegedly remarked “as an aside, that if he were to try the author he would ensure that a capital sentence be pronounced.” See *Collins v. Jamaica*, supra, paragraph 2.3. After a hung jury occurred in the initial trial of the case, the matter was set for retrial. The same Magistrate who made prejudicial remarks at the preliminary hearing, was remarkably assigned to hear the second trial of the merits.

Even on these aggravated facts, the Committee stated that “[a]fter careful consideration of the material before it, the Committee cannot conclude that the remark attributed to Justice G. [the magistrate] in the committal proceedings before the Portland Magistrates Court resulted in a denial of justice for [the defendant] during his retrial ...”, noting as well that defence counsel had concluded that “it was preferable to let the trial proceed.” See *Collins v. Jamaica*, supra, paragraph 8.3. The separate opinion of four members of the Committee also noticed “[l]es remarques attribuées au Juge G.”, although they noted as well that “Il appartient à l’Etat partie d’édicter et de faire appliquer les incompatibilités entre les différentes fonctions judiciaires.”

The second case cited by the Committee is *Karttunen v. Finland*, communication No. 387/1989, decided 23 October 1992, but it offers no greater support. In that criminal case, two lay judges sat on a panel of six, even though the judges were compromised by family relationships to two of the corporate complainants in the case. The State party forthrightly noted the impropriety of their selection as judges in this case, since they had a potential private interest. In this context, the Committee stated, in *Karttunen v. Finland*, paragraph 7.2, that “‘Impartiality’ of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.” The Committee also noted in *Karttunen* that the judges should have been disqualified under Finnish law itself, and concluded that State law on disqualification should be enforced proprio moto by a court. See *Karttunen v. Finland*, paragraph 7.2. But the Committee did not question the majority holding in *Collins v. Jamaica*. It is unclear why, in the instant case, the Committee has now dismissed its own jurisprudence.⁶⁰

⁶⁰ The author in this case has alleged that one of the judges on the Supreme Court of the Philippines had a wife who was a great-aunt of one of the victims of the crime. See Views of the Committee, para. 3.10. This would be an exceedingly troubling fact, and based on our decision in *Karttunen*, would be enough to find a violation of article 14 (1). But the State Party has asserted that the judge took no part in the proceedings “as indicated in the notation in the decision next to his name.” See Views of the Committee, para. 4.13. The Committee has not attempted to gainsay that assertion or to further clarify the record of the case.

Finally, the Committee has taken this occasion to pronounce an innovative doctrine that any procedural irregularities in a capital trial, violating article 14, will serve to transform the sentence itself into a violation of article 7. The rationale offered is that a person wrongly convicted, in a procedurally imperfect trial, must suffer greater anguish than a defendant in a procedurally sound capital trial. To be sure, there is no doubt that the prospect of a death sentence is the occasion for anguish on the part of any defendant. But the Covenant did not abolish the death penalty. Within the Covenant itself, the commitments of article 7 against “torture” or “cruel, inhuman or degrading or punishment” are profound, and should not be used as a redundant form of chastisement of States parties that have not chosen to abolish capital punishment.

The Committee’s cryptic statement that “the imposition of any death sentence that cannot be saved by article 6 would automatically entail a violation of article 7” is not supported by the cited case of *Errol Johnson v. Jamaica*, communication No. 588/1994, adopted 22 March 1996. The case of *Errol Johnson v. Jamaica* rather focuses on whether a prolonged presence on death row would itself constitute a form of inhuman treatment, and concludes that there is no set term of years to measure such an assertion.

Rather, the Committee’s abrupt holding seems to be an importation from the European Court of Human Rights, from the case of *Ocalan v. Turkey*, application No. 43221/99, 12 May 2005, paras. 167–175. But the Strasbourg court has argued that the wide consensus within the European Community on the abolition of the death penalty is itself justification for using a teleological mode of interpretation. See *Ocalan v. Turkey*, paras. 162–164. In contrast, the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, which came into force on 11 July 1991, currently is limited to 57 States parties and 7 additional signatories. This is a minority out of the 156 States parties and 6 signatories who have adhered to the Covenant itself. The conscientious views of members of the Committee concerning the death penalty do not supply a warrant for setting aside the treaty text and disregarding the consent of sovereign States. In any event, as the record of this case shows, the Philippines has now abolished capital punishment.⁶¹

[signed] Ruth Wedgwood

⁶¹ In regard to the Committee’s observations in paragraph 7.2, I would reference my separate opinion in *Carpo v. Philippines*, No. 1077/2002, 28 March 2003.

Communication No. 1454/2006

Submitted by: Wolfgang Lederbauer (represented by counsel, Alexander H. E. Morawa)

Alleged victim: The author

State party: Austria

Date of adoption of Views: 13 July 2007

Subject matter: Disciplinary dismissal of civil servant for managing private company

Substantive issues: Right to a fair and public hearing by an independent and impartial tribunal – Delay in proceedings – Right to equality before the law and equal protection of the law

Procedural issues: Admissibility *ratione personae* and *ratione materiae* – Level of substantiation of claim – State party reservation to article 5 (2) (a) of the Optional Protocol – Exhaustion of domestic remedies

Articles of the Covenant: 14, para. 1; and 26

Articles of the Optional Protocol: 1, 2, 3 and 5, paras. 2 (a) and (b)

Finding: Violation (art. 14, para. 1)

1. The author of the communication is Wolfgang Lederbauer, an Austrian national. He claims to be a victim of violations by Austria¹ of his rights under article 14, paragraph 1, read alone as well as in conjunction with article 2, paragraph 1, and article 26 of the International Covenant on Civil and Political Rights (the Covenant). He is represented by counsel, Alexander H. E. Morawa.

The facts as presented by the author

2.1 In 1981, the author joined the staff of the Austrian General Audit Office (GAO) (Rechnungshof). He was assigned to a department auditing public hospitals. In 1985, he invented a system of ecologically sound wall elements for soundproofing highways and railroad tracks which he named “Ecowall”. He informed the GAO of his invention and designated his wife to act as trustee of the patents.

¹ The Covenant and the Optional Protocol entered into force for Austria on 10 December 1978 and on 10 March 1988, respectively. Austria entered the following reservation upon ratification of the Optional Protocol: “On the understanding that, further to the provisions of article 5 (2) of the Protocol, the Committee provided for in article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms.”

2.2 In 1989, the author founded, and his wife became the sole shareholder of, a limited liability company named “Econtract”. When he and his wife divorced, the ownership of the company and the patents were transferred to the author, who appointed Mr. E.L. as chief executive officer and informed the GAO of the changed circumstances.

2.3 In 1993, when the GAO inquired into his involvement in the marketing of licences to install “Ecowall” systems, the author submitted a statement to the President of the GAO, in which he criticized the fact that innovations in the soundproofing of transportation corridors were impeded by the predominance of a few large corporations. Subsequently, “Econtract” made several bids for projects in Austria, including the construction of soundproofing of a track operated by the Federal Railroad Corporation.

2.4 In 1994, the author and E.L. each contacted the chairperson of a Parliamentary Inquiry Commission established to look into alleged irregularities related to the construction of a public motorway, Mr. W., to inform him about “Ecowall” as an alternative to the standard soundproofing systems marketed by other corporations. Unknown to E.L., a journalist of the magazine “Profil” had listened to his conversation with Mr. W. Despite the author’s assurances that he had fully informed the GAO and its President about his ownership of the “Ecowall” patents and of “Econtract”, “Profil” and other newspapers subsequently published articles criticizing the alleged incompatibility with his function as a senior staff member of the GAO.

2.5 On 30 August 1994, the President of the GAO temporarily suspended the author, as there were sufficient grounds to suspect that his private business activities, in particular his involvement in marketing the “Ecowall” project, were incompatible with his function as a civil servant and in breach of article 126 of the Federal Constitution Act, which provides that members of the GAO must not participate in the management of profit-oriented companies,² as well

² Art. 126 of the Austrian Federal Constitutional Act reads: “No member of the GAO may be a participant in the management and administration of enterprises subject to control by the GAO. Just as little may a member of the GAO participate in the management and administration of any other enterprises operating for profit.”

as Section 43 (1) and (2) of the Federal Civil Servants Act.

2.6 On 1 September 1994, without hearing the author, the President of the GAO issued a decree (“first decree”) prohibiting the author from participating in the management and administration of “Econtract” and from further engaging in the marketing of “Ecowall”. On 20 September 1994, the author appealed against the decree. The GAO did not take action until 2 June 2000, when the author filed a complaint regarding the inactivity of the GAO with the High Administrative Court, which in turn ordered the GAO to take action within three months. On 18 September 2000, the GAO issued a new decree (“second decree”) merely repeating the previous one. On 18 October 2000, the author appealed to the High Administrative Court, arguing that the GAO had not provided him with an opportunity to be heard, nor investigated to what extent it had known about his involvement with “Econtract”. On 31 October 2000, he supplemented his appeal, asking the Court to hold an oral hearing. By letter of 30 June 2005, the President of the third Senate of the High Administrative Court asked him whether he still was interested in obtaining a decision on his appeal against the decree, which could not alter the final decision taken in the disciplinary proceedings. On 14 July 2005, the author reiterated his interest in a decision by the Court, which then revoked the decree on 27 September 2005.

2.7 On 10 October 1994, the President of the GAO filed a disciplinary complaint against the author, based on article 126 of the Federal Constitution Act, Sections 43 (1) and (2) et seq. of the Federal Civil Servants Act, and the following charges: Participation in the management of “Econtract”; failure to provide medical justification for sick leave and to report for duty during regular office hours on certain days; and non-compliance with instructions received from his superiors. On 11 November 1994, the Disciplinary Commission instituted disciplinary proceedings against him. On 23 December 1994, the author complained to the Constitutional Court alleging violations of his rights to equal treatment before the law and to a lawful judge. On 6 March 1995, the Constitutional Court decided not to deal with the complaint. On 31 May 1995, the President of the GAO amended the disciplinary complaint against the author with additional charges.

2.8 On 13 October 1994, the Disciplinary Commission permanently suspended the author, based on article 126 of the Federal Constitution Act, and reduced his salary by one third. On 19 December 1994, the Disciplinary Appeals Commission rejected his appeal. On 6 February 1995, he appealed this decision to the High

Administrative Court, requesting an oral hearing and arguing that the GAO had been informed about his involvement with “Econtract” and that it took action only after the media criticized his activities, and without hearing him as a party. On 29 November 2002, the Court rejected the appeal. At the same time, it found that the issue of an oral hearing did not arise, as the matter fell outside the scope of article 6 of the European Convention on Human Rights.

2.9 On 21 December 1995 and 6 March 1996, the author asked for his suspension to be lifted, arguing that it gradually became a de facto punishment. The Disciplinary Appeals Commission rejected his requests on 25 January and 10 April 1996, respectively. On 7 June 1996, he complained to the High Administrative Court; this complaint was dismissed on 19 December 2002.

2.10 On 20 May 1997, after the author had requested the President of the National Council (the lower house of Parliament) and the leaders of the four political parties in Parliament to investigate his case, the Disciplinary Commission “hastily” issued a decision scheduling a disciplinary hearing. The Commission was chaired by Mr. P.S., who worked at the GAO as head of the department responsible for auditing the Austrian Federal Railway Administration and the public High-Speed Railway Corporation.

2.11 On 30 May 1997, the author challenged the chairman of the Disciplinary Commission, P.S., for bias, as P.S. was auditing the same agencies which routinely installed those conventional soundproofing materials which the author had criticized and sought to improve with his invention. On 3 July 1997, he filed a complaint against the decision of the Disciplinary Commission scheduling a disciplinary hearing with the Constitutional Court, alleging violations of his rights to equal treatment and to a fair trial before a lawful judge and again challenging P.S. The Constitutional Court refused to deal with the complaint, which was subsequently transferred to the High Administrative Court and dismissed by the Court on 27 June 2001.

2.12 On 6 October 1997, the author requested access to the case file before the Disciplinary Commission based on “a reasonable suspicion” that certain documents had been suppressed or ignored. On 14 October 1997, the Commission rejected his request arguing that its members were “entitled to keep their individual reasoning and voting [...] secret from the parties of the disciplinary proceedings. This is a fortiori required since [...] members of the Disciplinary Commission and the parties are members of the staff of the same Government agency and therefore presumably in constant contact with one another. Their professional contacts could be adversely affected by the parties’

knowledge about their reasoning and voting [...], which would contravene the legitimate interest of each member of the Disciplinary Commission to avoid disturbances in their work environment. [...] Alleged discrepancies of the disciplinary file or other irregularities may be raised in an appeal.” The decision of the Disciplinary Commission was not subject to appeal.

2.13 Following the media coverage of the author’s activities and the initiation of disciplinary proceedings against him, “Econtract” received no further orders for the “Ecowall” system. A freight company filed criminal charges against the author and E. L. over an unpaid bill. On 18 November 1998, the Regional Criminal Court of Vienna convicted the author of negligently causing the insolvency of a company and sentenced him to a suspended prison term of five months. On 6 July 1999, the Vienna Court of Appeals dismissed his appeal.

2.14 Based on a notification from the Vienna Regional Criminal Court that Criminal proceedings had been initiated against the author, the President of the GAO, on 9 November 1998, brought another disciplinary complaint against the author, charging him with negligently causing the insolvency of a company as well as damage to his creditors.

2.15 In the meantime, it was discovered that a memorandum from a staff member of the GAO dated 18 February 1993, on the compatibility of the author’s private business activities with his official function had been removed from his personnel file, together with accompanying documents. Among these documents were a statement of the author, received by the GAO on 16 July 1993, explaining the extent of his involvement with “Econtract” and, in particular, a draft order concluding that the author’s business activities were incompatible with article 126 of the Federal Constitutional Act.

2.16 On 27 January 1999, the author requested the Disciplinary Commission to reopen the first set of disciplinary proceedings with a view to discontinuing them, arguing that the newly discovered documents proved that the GAO had been fully informed, as early as 1993, about his involvement with “Econtract”, that he had complied with his reporting duties, and that he could reasonably expect that the fact that no order had been issued prohibiting him to continue his activities meant that the GAO did not find these activities objectionable.

2.17 On 23 February 1999, the Disciplinary Commission initiated a second set of disciplinary proceedings against the author. His appeal against this decision was dismissed by the Disciplinary Appeals Commission on 13 June 1999. On 24 August 1999, the Disciplinary Commission informed

the author that it would not hold any further oral hearings and that it would render a written decision. On 26 August 1999, the author requested an oral hearing and again challenged the chairman, P.S., who was subsequently replaced by another chairman.

2.18 On 13 December 1999, the Disciplinary Commission found the author guilty of disciplinary offences and dismissed him from civil service. It observed that it “was obliged to adhere to the legally binding findings of fact of a criminal court,” and that it had based its decision only on the charges for which the author had been found guilty by the criminal courts. It added that the author’s oral testimony would not have led to the discovery of additional facts relevant to the Commission’s decision.

2.19 The author appealed this decision on 1 and 14 January 2000, invoking due process rights, and requested an oral hearing before the Disciplinary Appeals Commission, which dismissed his appeal on 13 June 2000 without hearing him, considering that article 6 of the European Convention on Human Rights was inapplicable in disciplinary proceedings. On 21 July 2000, the author filed a complaint with the Constitutional Court, alleging breaches of his rights to equal treatment and to a fair trial and challenging as unconstitutional that the Disciplinary Commission should be bound by the findings of criminal courts. On 25 September 2001, the Constitutional Court dismissed the complaint, arguing that it had no prospect of success and since it did not raise issues of constitutional law.

2.20 Parallel to the proceedings before the Constitutional Court, the author, on 21 July 2000, appealed to the High Administrative Court, claiming that the decision confirming his dismissal from civil service was made without a fair and public hearing, including an oral hearing, as required by article 6 of the European Convention. He submitted that dismissal from service was such a severe disciplinary sanction that it came within the scope of article 6 of the European Convention and warranted a right to be heard in person. The author asked the Court to hold an oral hearing, arguing that, in the absence of such hearing, he would be deprived of an opportunity to present his defence.

2.21 On 31 January 2001, the High Administrative Court dismissed the appeal. Based on the assumption that the author’s competencies in the GAO included auditing “construction projects in the area of roads and railroads,” it concluded that his private business activities were closely related to his official duties as an auditor. By reference to the judgement of the European Court of Human Rights in *Pellegrin v. France*, the Court rejected his request for an oral hearing, observing that article 6 of the European

Convention was inapplicable, given that the author was a civil servant exercising competencies of a public-law character. On 5 June 2001, the author requested the High Administrative Court to review its judgement and challenged the members of the Senate that had decided his case for bias. On 22 January 2002, a differently constituted Court rejected the challenge.

2.22 On 31 December 2002, the author asked the High Administrative Court to reopen the proceedings concerning his suspension and dismissal, claiming procedural irregularities and a violation of his right to an oral hearing. On 27 February 2003, the Court rejected the request to reopen the proceedings concerning his suspension, arguing that the author had sufficient opportunity to submit his arguments in writing and that there was no duty to hear him as a party or to ask him for further written observations. On 27 March 2003, it rejected his request to reopen the proceedings concerning his dismissal, for the same reasons.

2.23 On 1 January 2000,³ 12 December 2000 and 13 March 2001,⁴ and 4 March 2002,⁵ the author submitted complaints to the European Court of Human Rights, alleging breaches of his rights under article 6 of the European Convention on Human Rights, in particular his right to a fair trial within a reasonable period of time. The Court joined several of these applications and rejected them as inadmissible *ratione materiae*,⁶ by reference to *Pellegrin v. France*.⁷

The complaint

3.1 The author claims that the composition and lack of independence of the Disciplinary Commission, the rejection of his repeated requests for an oral hearing before the Disciplinary Commission, the Disciplinary Appeals Commission and the High Administrative Court, the lack of publicity of the proceedings before the Disciplinary Commission and the Disciplinary Appeals Commission, and the long delays in the proceedings before the High Administrative Court, as well as between the filing of the disciplinary complaint and the initiation of disciplinary proceedings, violated his rights under article 14, paragraph 1, read alone as well as in conjunction with article 2, paragraph 1, and article 26 of the Covenant.

³ Application No. 57822/00.

⁴ Application No. 73230/01.

⁵ Application No. 13874/02.

⁶ See European Court of Human Rights, decision on admissibility (application No. 73230/01), dated 26 February 2002; decision on admissibility (application No. 13874/02), dated 27 June 2002.

⁷ European Court of Human Rights, judgement of 8 December 1999, *Pellegrin v. France* (application No. 28541/95), 1999-VIII Reports, para. 67.

3.2 The author submits that the members of the Disciplinary Commission trying his case were neither independent nor impartial. Pursuant to Section 98 (2) of the Federal Civil Servants Act, members of disciplinary commissions must belong to the same government department as the accused. Although Section 102 (2) of the Act provides that commission members are “independent, while performing their duties,” the author considers this presumption a mere fiction, since: (a) the members of the Disciplinary Commission trying his case continued to serve as civil servants under the authority of the President of the GAO and continued to be bound by his orders, save in matters related to the disciplinary proceedings; (b) they were colleagues on the same career track as the author, competed with him for promotions and regularly interacted with him professionally; (c) they were potentially exposed to the internal politics within the GAO and to pressure from the very persons who had initiated the disciplinary proceedings against him.

3.3 The author submits that the chairperson of the Disciplinary Commission was biased against him, as head of the section in the GAO that audits public railroad companies, given the author’s criticism of the practice of purchasing overpriced soundproofing walls, while ignoring alternative solutions such as his invention. One of the projects for which “Econtract” had submitted a bid, concerned the soundproofing of a rail track operated by the public railroad company that P.S. had audited. He criticizes that, although he challenged P.S. “at the very beginning of the hearings” and in his initial complaint to the Disciplinary Commission and the Constitutional Court against the order dated 20 May 1997 of the Disciplinary Commission scheduling a disciplinary hearing, P.S. was not replaced until the very end of the proceedings, after the last formal hearing had taken place.

3.4 The author argues that the appeals bodies’ failure to replace P.S. earlier in the proceedings amounts to a violation of his right to an independent and impartial tribunal, protected by article 14, paragraph 1. The fact that, unlike the general workforce, civil servants were excluded from having their case reviewed by the ordinary courts constitutes a violation of article 26.

3.5 In the author’s view, the rejection of his repeated requests for an oral hearing by the Disciplinary Commission, the Disciplinary Appeals Commission and the High Administrative Court, on the ground that article 6 of the European Convention on Human Rights is inapplicable in disciplinary proceedings, violated his right to an oral hearing under article 14, paragraph 1.⁸ Neither the

⁸ The author refers to communication No. 1015/2001, *Perterer v. Austria*, para. 9.3.

Disciplinary Appeals Commission nor the High Administrative Court qualified or acted as tribunals within the meaning of article 14 in his case. While the Disciplinary Appeals Commission rejected his appeal without a hearing, the High Administrative Court's review was limited to questions of law.

3.6 The author recalls that article 14, paragraph 1, requires a number of conditions including expeditious procedure⁹ and that unreasonable procedural delays violate that provision.¹⁰ He also recalls that it took the High Administrative Court more than seven years to decide on his complaint against the decision suspending him from office, which is unreasonable delay. No action was taken by the Court between 6 February 1995, when he filed the complaint, and 17 July 2002, when the Court held its first session. No remedy was available to challenge the Court's inactivity.

3.7 The author submits that the six and a half years it took the High Administrative Court to decide on his complaint against the Disciplinary Appeals Commission's decision of 10 April 1996 rejecting his request to lift his suspension also is unreasonable delay. No action was taken by the Court between 7 June 1996, when he filed the complaint, and 19 December 2002, when judgement was given.

3.8 For the author, the delay of two years and seven months between the filing of the disciplinary charges against him (10 October 1994) and the decision of the Disciplinary Commission scheduling a first hearing (20 May 1997) was equally unreasonable. As the accused, he was under no obligation to accelerate the proceedings against him. However, it was only after he approached members of Parliament that the Disciplinary Commission scheduled the hearing. No reasons for the delay were given during the domestic proceedings. The delay was therefore entirely attributable to the State party.

3.9 As regards his complaint against the first decree of the President of the GAO, the author recalls that it was only because, on 2 June 2000, he filed a complaint with the High Administrative Court that this decree was renewed. No procedural steps were taken by the Court between 18 October 2000, when he complained against the second decree, and 27 September 2005, when the Court repealed it.

3.10 The author claims that the overall length of disciplinary proceedings (almost 11 years) is

⁹ The author refers to communication No. 207/1986, *Yves Moraël v. France*, para. 9.3.

¹⁰ The author refers to communications No. 203/1986, *Muñoz Hermoza v. Peru*, at paras. 11.3 and 12; No. 238/1987, *Floresmilio Bolaños v. Ecuador*, para. 8.4.

unreasonable, given that he did everything possible to accelerate consideration of his appeals.¹¹

3.11 Since the proceedings before the Disciplinary Commission and the Appeals Commission were held in camera, in accordance with Section 128 (1) of the Federal Civil Servants Act, and by reference to general comment No. 13,¹² the author argues that there were no exceptional circumstances which would have justified excluding the public or to limit the hearings to only a particular category of persons, as the accusations against him had been published in newspapers and involved his private conduct, not official duties involving matters of sensitive and confidential nature. The restriction on the publicity of the disciplinary proceedings, combined with the absence of any hearings before the High Administrative and Constitutional Courts, deprived him of a possibility to defend himself by making his position known, thereby violating his right to a public hearing under article 14, paragraph 1.

3.12 On admissibility, the author submits that the same matter is not being, and has not been, examined under another procedure of international investigation or settlement. The European Court of Human Rights declared his applications inadmissible *ratione materiae* by reference to *Pellegrin v. France*, and thus without an examination of the substance of his complaints.¹³

3.13 The author claims to have exhausted all available domestic remedies. There was no remedy to challenge the composition of the Disciplinary Commission; challenging the constitutionality of Section 98 (2) of the Federal Civil Servants Act on the composition of disciplinary commissions was futile in the light of the Constitutional Court's jurisprudence on the constitutionality of the establishment and composition of disciplinary authorities at the federal, provincial and municipal levels. With regard to the delays in the proceedings before the High Administrative Court, no remedies are available for challenging the Court's inactivity.

3.14 As regards the applicability of article 14, paragraph 1, to disciplinary proceedings, the author recalls that the concept of a 'suit at law' is based on the nature of the right and obligations in question

¹¹ The author refers, *mutatis mutandis*, to communication No. 1060/2002, *Franz and Maria Deisl v. Austria*, para. 11.6 (c).

¹² Human Rights Committee, 21st session (1984), general comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (art. 14), para. 6.

¹³ The author refers to communications No. 158/1983, *O.F. v. Norway*, decision on admissibility adopted on 26 October 1984, at para. 5.2; No. 441/1990, *Casanovas v. France*, Views adopted on 19 July 1994, para. 5.1.

rather than the status of the parties.¹⁴ Accordingly, the Committee applied article 14, paragraph 1, to proceedings involving civil or public servants, whether the proceedings related to their status or not.¹⁵ He also recalls the Committee's statement, in *Perterer v. Austria*, "that whenever a judicial body is entrusted with the task of deciding on the imposition of disciplinary measures, 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."¹⁶

State party's observations on admissibility and merits

4.1 On 13 April 2006, the State party challenged the admissibility of the communication, arguing that the author did not exhaust domestic remedies, that his communication is inadmissible *ratione materiae*, and that the same matter has been examined by the European Court of Human Rights. The Austrian reservation concerning article 5, paragraph 2 (a), of the Optional Protocol thus precluded the Committee from considering the author's claims.

4.2 The State party submits that the author failed to exhaust domestic remedies, in so far as he claims unreasonable length of proceedings. Under Section 73 (1) of the Code of General Administrative Procedure, authorities, including the Disciplinary Commission, were obliged to act on his requests and appeals within six months, failing which a request for transfer of jurisdiction to the higher authority can be filed under Section 73 (2). The author never filed such a request, although he was represented by counsel. According to the State party, article 132 of the Federal Constitutional Act provided for the possibility to file a complaint regarding the inactivity of administrative authorities (hereafter "inactivity complaint") with the High Administrative Court. The author only filed one such complaint challenging the inactivity of the GAO to decide on his appeal against the decree dated 1 September 1994. The State party recalls that the European Court of Human Rights considered the above possibilities to expedite proceedings to be effective remedies.¹⁷

¹⁴ Communication No. 1060/2002, *Deisl v. Austria*, Views adopted on 27 July 2004, para. 11.1.

¹⁵ Communications No. 203/1986, *Muñoz Hermoza v. Peru*, Views adopted on 4 November 1988, at paras. 11 *et seq.*; No. 824/1998, *Nicolov v. Bulgaria*, Views adopted on 20 March 2000, at para. 8.3; No. 454/1991, *García Pons v. Spain*, Views adopted on 30 October 1995, paras. 9.3 *et seq.*; No. 468/1991, *Bahamonde v. Equatorial Guinea*, Views adopted on 20 October 1993.

¹⁶ Communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, para. 9.2

¹⁷ The State party refers to the judgements of the European Court of Human Rights on applications No. 29800/96, *Basic v. Austria*, and No. 30160/96, *Pallanich v. Austria*, both dated 30 April 2001.

4.3 By reference to the jurisprudence of the European Court of Human Rights,¹⁸ the State party argues that the disciplinary proceedings against the author fall outside the scope of article 14 of the Covenant, as they concern a dispute between an administrative authority and a member of the civil service whose function requires direct involvement in the exercise of powers and duties assigned to him under public law. Disputes concerning the recruitment, career and termination of service of civil servants only constituted a determination of one's "rights and obligations in a suit at law" within the meaning of article 14, paragraph 1, if they concerned a "purely economic right," such as payment of fees, or an "essentially economic right". This follows from the requirement in the French text of article 14, paragraph 1, that the rights and obligations to be determined must be of a civil character. The author's proceedings were not "civil" merely because they also raised an economic issue,¹⁹ i.e., the financial repercussions of his dismissal. Neither did the disciplinary proceedings constitute a determination of a criminal charge against the author, in the absence of a sufficiently severe sanction which would justify the qualification of the disciplinary measure as a criminal charge. Lastly, the author contradicted himself when denying that the disciplinary authorities and the High Administrative Court are tribunals within the meaning of article 14, and at the same time invoking *Perterer v. Austria*. The State party concludes that his claims under article 14, read alone and in conjunction with articles 2 and 26, of the Covenant are inadmissible *ratione materiae*.

4.4 The State party invokes its reservation to article 5, paragraph 2 (a), on the ground that the same matter has been examined by the European Court of Human Rights. That the Court found the author's applications incompatible with the provisions of the European Convention showed that it rejected his claims on substantive rather than purely formal grounds, after at least a cursory examination of the merits. It had based its decision on article 35 (3) of the European Convention, setting out grounds of merit, rather than on article 35 (1) and (2), which contained formal grounds of inadmissibility. The author's claims are therefore inadmissible under articles 3 and 5 of the Optional Protocol, read in combination with the Austrian reservation.

¹⁸ European Court of Human Rights, application No. 28541/95, *Pellegrin v. France*, judgement of 8 December 1999, paras. 64 *et seq.*; No. 39564/98, *G.K. v. Austria*, judgement of 14 March 2000, *passim*.

¹⁹ The State party refers to European Court of Human Rights, *Pierre-Bloch v. France*, judgement of 21 October 1997, Reports 1997-VI, para. 51.

5.1 On 16 August 2006, the State party commented on the merits and again challenged the admissibility of the communication for non-exhaustion of domestic remedies, lack of victim status, and inapplicability of article 14 of the Covenant. It argues that the author failed to raise his claims before the domestic courts, in so far as they relate to the absence of an oral hearing in the proceedings concerning his suspension, the composition of the Disciplinary Commission as such, and the length and lack of publicity of the proceedings. His argument that challenging the constitutionality of the composition of Disciplinary Commissions would have been futile in the light of the Constitutional Court's jurisprudence was incorrect, as the decisions cited by him date back to 1956 and only dealt with formal requirements for establishing disciplinary commissions. Before the domestic organs, the author never challenged the composition of the Disciplinary Commission or of the Appeals Commission as such, but criticized only the participation of the chairman of the Disciplinary Commission, P.S., in the first and second sets of disciplinary proceedings. Rather than contesting the lack of publicity of the disciplinary proceedings, in his complaints of 21 July 2000 to the Constitutional and High Administrative Courts, he explicitly acknowledged that: "Restricting public attendance to three civil servants as persons of confidence (§ 124 (3) of the Federal Civil Servants Act) still satisfies the requirements of publicity and can be logically understood in the light of the possibility of excluding the public pursuant to article 6 (1) of the European Convention on Human Rights [...]. National security is hardly ever at stake in disciplinary proceedings, as a result of which it is not admissible to exclude the public altogether. To a lesser extent, though, the interests of the State are affected, which justify a restriction [...]."

5.2 Under Section 118 (2) of the Federal Civil Servants Act, the first set of disciplinary proceedings against the author was stayed *ex lege* by virtue of his dismissal in the second set of proceedings, the effect of which was similar to an acquittal. The author's claims concerning the first set of proceedings thus became moot. Similarly, the claim about the absence of an oral hearing in the proceedings concerning the decree prohibiting him from engaging in activities related to "Econtract" became moot following the revocation of the second decree by the High Administrative Court on 27 September 2005. The author therefore lacked victim status with regard to the above claims.

5.3 The State party argues that the author has not substantiated the following claims, for purposes of admissibility or, subsidiarily, on the merits:

(a) He failed to substantiate that the High Administrative Court lacks the attributes of a

tribunal within the meaning of article 14 of the Covenant. The Court was an independent body that dealt not only with questions of law but also with questions of fact.

(b) He did not advance sufficient grounds for assuming that the members of the Disciplinary and Appeals Commissions lacked independence and impartiality. These requirements were ensured under the Federal Civil Servants Act, which has the rank of constitutional law and provides for important safeguards regarding the composition (participation of staff representatives, appointment of members for five years) and working methods (distribution of work one year in advance, confidentiality of deliberations and voting) of disciplinary commissions. That members belong to the same organization enabled them to take an informed decision and placed them in a better position than outsiders to evaluate charges. The confidentiality of deliberations and voting also applied *vis-à-vis* superiors and colleagues, thereby strengthening members' independence and impartiality.

(c) P.S. was immediately replaced by another chairperson after he was challenged by the author. The proximity between his responsibility at the GAO and the author's invention should not give rise to doubts about impartiality, as the issue before the Disciplinary Commission was not the author's invention itself, but the compatibility of his activities with article 126 of the Federal Constitutional Act.

(d) As reflected in the 1200-page verbatim record, in the first set of disciplinary proceedings, an oral hearing was conducted for 26 days with a new chairman and in the presence of the author, his lawyer and two persons of confidence nominated by him.

(e) There was no need for an oral hearing in the second set of disciplinary proceedings, as the disciplinary authorities were bound by the facts established by final judgement of the Regional Criminal Court of Vienna. It was therefore possible to decide the case merely on the basis of the file, without prejudice to the principles of a fair trial. Conducting another oral hearing would only have led to delays in the proceedings. From the author's perspective that the Disciplinary Appeals Commission and the High Administrative Court were no tribunals within the meaning of article 14, these bodies would not have been required to conduct oral hearings in the first place.

(f) The length of the different and interlocked proceedings was attributable to their complexity, as reflected by the 38-page decision dated 29 November 2002 of the High Administrative Court rejecting the author's appeal against his permanent suspension. The author filed numerous complaints against individual procedural steps of the

disciplinary authorities. The proceedings concerning his suspension from office, while lasting from February 1995 to November 2002, ceased to have any effect on the author as of 31 January 2001, when the High Administrative Court upheld his dismissal from service. The total length of the proceedings (11 years) ultimately meant that the author's position improved considerably in terms of pension entitlements.

(g) It was in the interest of official secrecy and in accordance with article 14, paragraph 1, to exclude the public from the disciplinary proceedings. Article 20 (3) of the Federal Constitutional Act requires civil servants to observe secrecy "concerning all facts that have come to their knowledge exclusively on account of their official activities." The exclusion of the public also served to protect the author against undesired publicity concerning any socially inadequate acts performed by him. In accordance with Section 124 (3) of the Federal Civil Servants Act, he was entitled to nominate a maximum of three civil servants to attend the hearings as persons of confidence. The fact that he availed himself of this possibility showed that he did not have any objections against his disciplinary proceedings being conducted exclusively by civil servants.

5.4 The State party concludes that the Committee is not a "fourth instance" and that the author has not substantiated that the alleged defects in the disciplinary proceedings were manifestly arbitrary or amounted to a denial of justice.

Author's comments on the State party's observations on admissibility and merits

6.1 On 15 December 2006, the author commented, arguing that the State party overlooks that in so far as his claims of unreasonable delay relate to the proceedings before the High Administrative Court, none of the remedies for expediting proceedings were applicable. In the proceedings concerning the first decree of the President of the GAO, he did lodge an inactivity complaint. As regards the 31-month delay between the filing of the disciplinary complaint and the initiation of the disciplinary proceedings, it would be unreasonable to expect that the author would actively participate in the conduct of disciplinary proceedings against him. He was under no duty to accelerate what amounts to his own 'indictment' after the 'prosecuting' authority had failed to act.

6.2 The author submits that Section 124 (3) of the Federal Civil Servants Act allows for challenging only one member of the senate of the disciplinary commission trying the case. Although he was restricted to only one formal challenge, which he directed against P.S., he also raised objections as to the independence and impartiality of the other

members of the Disciplinary Commission, as reflected in several transcripts of closed hearings of the Commission. He thus did everything possible to make his challenge of the entire Disciplinary Commission known.

6.3 The author denies to have consented to the absence of a public hearing in his 21 July 2000 submissions to the Constitutional and High Administrative Courts (see para. 5.2 above). The passage quoted by the State party merely recited the prevailing legal opinion under domestic law—it cannot be interpreted as a waiver of his right to a public hearing.

6.4 On admissibility *ratione materiae*, the author submits that the State party's insistence on a restrictive reading of article 14, paragraph 1, in the light of the practice under the European Convention on Human Rights is contrary to the object and purpose of the Covenant and belies that the European Court of Human Rights clearly understood the temporary and imperfect nature of the *Pellegrin* criteria, which it considered likely to evolve into a broader concept of protection.

6.5 The author argues that the reservation to article 5, paragraph 2 (a), of the Optional Protocol is inapplicable, because the European Court of Human Rights merely considered the elements necessary to identify him as a "civil servant" under the *Pellegrin* standard and did not proceed to an examination of the substance of his complaint.

6.6 On the merits, the author submits that constitutional guarantees that civil servants in a dependent and subordinate position are independent during their term as member of a disciplinary commission were purely fictitious, in the absence of an actual "culture of independence." The five-year appointment of Disciplinary Commission members falls short of the judicial guarantees in place for judges, since Commission members remained under the full authority of the agency that prosecutes a disciplinary defendant and to which they return full-time once their term has ended. The participation of staff representatives in the Disciplinary Commission was no guarantee that the Commission as a whole fulfilled the minimum requirements of independence, especially since their status did not afford them any additional safeguards of independence. The fact that members of disciplinary commissions deliberate in private was irrelevant for their independence and impartiality.

6.7 The author complains that the State party extracts artificial omissions, when it considers that his claim of partiality on the part of the chairman, P.S., refers only to the first "set" of disciplinary proceedings, which was ultimately stayed, but not to the second "set" of proceedings. There was only one set of disciplinary proceedings, during which a new

charge was introduced, and which was therefore conducted in two stages or parts. He challenged the chairman at both stages of the domestic proceedings and his claim under article 14, paragraph 1, extends to both stages, as far as the lack of independence and impartiality of the chairman and commission is concerned.

6.8 The author rejects the State party's argument that there was no need for an oral hearing because the disciplinary authorities were bound by the facts established by the criminal court. The legal issue of his criminal conviction, i.e., whether he negligently caused the insolvency of his company, was different from the issue of the disciplinary proceedings, i.e., whether he managed a company in violation of article 126 of the Federal Constitutional Act. Article 126 did not preclude staff of the GAO from holding management positions in private companies that work in areas unrelated to the auditing competencies of the GAO. The mere finding of the criminal court that the author managed "a" company was therefore insufficient to ascertain whether he managed a company within the meaning of article 126. The fact that only formal hearings were held during the first part of the disciplinary proceedings, while no hearing took place at all during the second part of the proceedings, made it impossible to evaluate the severity of the offence, the necessary level of sanction and the degree of guilt, as required by Section 93 (1) of the Federal Civil Servants Act. Similarly, the absence of an oral hearing deprived him of an opportunity to advance any mitigating circumstances, in accordance with Section 32 (2) of the Penal Code. Even assuming that the Disciplinary Commission was bound by the facts established by the criminal court, the finding of guilt and the imposition of an adequate sanction remained within its own powers, thus requiring a hearing of the author.

6.9 With respect to the length of the proceedings, the author submits that the matter was not particularly complex, nor did it require extensive investigation, as it solely related to the question of whether promoting his invention by owning and allegedly managing a company was incompatible with his function as a civil servant at the GAO. That the proceedings were complex and interlocked was a matter to be resolved by the State party by timely and effectively organizing its judicial and administrative organs. He merely defended himself against the disciplinary charges within the available procedural structure and exercised his right to appeal unfavourable decisions.

6.10 The author rejects the State party's claim that he benefited from the length of proceedings in terms of pension entitlements. Apart from the distress caused by 11 years of uncertainty about his professional status, he lost any entitlement to

retirement benefits due to his dismissal from civil service.

6.11 As regards the right to a public hearing, the author argues that the public cannot ipso facto be excluded from all disciplinary trials against all civil servants by virtue of a blanket prohibition of publicity in the "interest of official secrecy." Whether the exclusion of the public was in conflict with his interests was irrelevant because publicity was an absolute right that needed not be claimed by a defendant by reference to specific "interests". Rather, publicity must be secured unless it can be demonstrated that the exclusion of the public was justified under article 14, paragraph 1. The State party failed to provide any such justification in his case.

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2 With regard to the State party's *ratione materiae* objection, the Committee recalls that the concept of a "suit at law" under article 14, paragraph 1, of the Covenant is based on the nature of the right in question rather than the status of one of the parties.²⁰ The imposition of disciplinary measures against civil servants does not of itself necessarily constitute a determination of one's rights and obligations in a suit at law, nor does it, except in cases of sanctions that, regardless of their qualification in domestic law, are penal in nature, amount to a determination of a criminal charge within the meaning of the second sentence of article 14, paragraph 1.²¹ In *Perterer v. Austria*, which also concerned the dismissal of a civil servant by a disciplinary commission, while observing that the decision on a disciplinary dismissal need not necessarily be determined by a tribunal, the Committee considered that whenever a judicial body is entrusted with the task of deciding on the imposition of disciplinary measures, it must respect the guarantee of equality of all persons before the courts, as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee.²² In this case, the Committee notes the State party's argument that the author himself submitted that neither the Disciplinary Appeals Commission nor the High

²⁰ See communication No. 441/1990, *Robert Casanovas v. France*, Views adopted on 19 July 1994, at para. 5.2.

²¹ See communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, at para. 9.2.

²² *Ibid.*

Administrative Court “qualified or acted” as tribunals within the meaning of article 14, paragraph 1. However, the Committee does not view the author’s statement as a blanket denial of the judicial character of the Disciplinary Appeals Commission, nor of the High Administrative Court, but rather as an allegation that neither one of those bodies complied with the requirements of article 14, paragraph 1, in this case. Furthermore, it notes that the State party itself emphasized that the High Administrative Court was a tribunal within the meaning of article 14, paragraph 1. The Committee therefore declares the communication admissible *ratione materiae* in so far as the author claims to be a victim of violations of his rights under article 14, paragraph 1.

7.3 The State party invokes its reservation to article 5, paragraph 2 (a), of the Optional Protocol. The issue before the Committee is whether the “same matter” has already been “examined” by European Court of Human Rights. The Committee recalls its jurisprudence that the “same matter” within the meaning of article 5, paragraph 2 (a), must be understood as relating to the same author, the same facts and the same substantive rights.²³ As regards the length of proceedings, the author could only raise delays occurring prior to 4 March 2002, the date of submission of his last application (No. 13874/02), to the European Court of Human Rights. Any delays occurring after that date are therefore *ab initio* not covered by the State party’s reservation. In so far as his claims under article 14, paragraph 1, relate to events before 4 March 2002, the issue is whether the present communication relates to the same substantive rights as the author’s applications to the European Court. In its decisions of 26 February and 14 June 2002, the European Court declared his applications of 13 March 2001 (No. 73230/01) and 4 March 2002 (No. 13874/02) incompatible *ratione materiae* with article 6 of the European Convention. The Committee observes that, despite a considerable degree of convergence between article 6 of the Convention and article 14, paragraph 1, of the Covenant, the scope of application of both articles, as developed in the jurisprudence of the Court²⁴ and the Committee,²⁵ differs with respect to proceedings before judicial bodies entrusted with the task of deciding on the imposition of disciplinary measures. It recalls its jurisprudence 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* by the European Court has not, in the meaning of the respective reservations to article 5, paragraph 2 (a), been “examined” in such a way that the Committee is precluded from considering it.²⁶ It follows that the Austrian reservation does not bar the Committee from examining the author’s claims under article 14, paragraph 1.

7.4 With regard to the author’s claim that the absence of an oral hearing in the proceedings concerning his suspension and dismissal violated his right to a fair hearing under article 14, paragraph 1, the Committee notes his argument that only “formal” hearings were held during the first set of proceedings and that, in the second set of proceedings, the disciplinary authorities were not bound by the facts established by the Vienna Regional Criminal Court due to the different legal issues at stake in the criminal and disciplinary proceedings. In any event, he would have been given an opportunity to present any mitigating factors and his position with regard to his guilt and the sanction to be imposed on him. It notes the State party’s reference to the 26-day hearing in the presence of the author and his lawyer during the first set of proceedings and its view on the binding character of the findings of the criminal court. The Committee recalls that it is generally for the courts of States parties to the Covenant to review the facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.²⁷ The author has not substantiated, for purposes of admissibility, that the decisions of the High Administrative Court of 31 January 2001, 29 November 2002 and 27 February and 27 March 2003 suffer from any such defects. The Committee concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.5 In so far as the author claims that the absence of an oral hearing in the proceedings concerning the second decree of the President of the GAO also constitutes a violation of his right to a fair hearing under article 14, paragraph 1, the Committee recalls that the High Administrative Court revoked the decree on 27 September 2005. This claim has therefore become moot, and this part of the

²³ See, e.g., communication No. 998/2001, *Althammer v. Austria*, at para. 8.4.

²⁴ See para. 4.3 above (with reference to European Court of Human Rights, application No. 28541/95, *Pellegrin v. France*, judgement of 8 December 1999, at paras. 64 *et seq.*).

²⁵ See para. 6.2 above (with reference to communication No. 1015/2001, *Pertterer v. Austria*, Views adopted on 20 July 2004, at para. 9.2).

²⁶ See communication No. 441/1990, *Casanovas v. France*, Views adopted on 19 July 1994, at para. 5.1; communication No. 1115/2002, *Petersen v. Germany*, decision on admissibility adopted on 1 April 2004, at para. 6.6.

²⁷ Communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, at para. 7.3; No. 886/1999, *Bondarenko v. Belarus*, at para. 9.3; No. 1138/2002, *Arenz et al. v. Germany*, admissibility decision, at para. 8.6.

communication is inadmissible *ratione personae* under article 1 of the Optional Protocol.

7.6 As regards the exclusion of the public from the proceedings before the Disciplinary Commission and the Appeals Commission, the Committee notes that the author, while claiming his right to an oral hearing, did not allege violations of his right to a public hearing in his submissions to the High Administrative Court of 6 February 1995 (further appeal against suspension), 21 July 2000 (further appeal against dismissal), 18 October 2000 (appeal against the second decree of the GAO President), 31 October 2000 (request for oral hearing in the proceedings concerning the second decree) and 31 December 2002 (request to reopen the dismissal and suspension proceedings before the High Administrative Court). Nor did he do so in his complaints to the Constitutional Court. In the appeal of 21 July 2000, the author, while arguing that article 6 of the European Convention requires a public oral hearing, submitted that restricting public attendance at the oral hearing to three civil servants acting as persons of confidence of the accused still satisfies the requirements of article 6, paragraph 1, of the European Convention. While it may be that this statement reflects the predominant legal opinion in Austrian law, without constituting a waiver of the author's right to a public hearing, it is also true that the statement cannot be understood as challenging the absence of a public hearing. It follows that the author has failed to exhaust domestic remedies with regard to the alleged absence of a public hearing. This part of the communication is therefore inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.7 With regard to the claim that the chairman of the third Senate of the Disciplinary Commission, P.S., was not replaced until the end of the first set of the disciplinary proceedings, although he was challenged at their beginning, the Committee notes several documents which seem to prove the contrary. Thus, in a memorandum dated 3 June 1997, signed by P.S. and his successor as chairman of the third Senate of the Disciplinary Commission, H.A., it is stated that the author challenged P.S. in a letter of 30 May 1997 within the prescribed time limit; in accordance with the distribution of business of the Disciplinary Commission at the GAO, the President of the first Senate, H.A., was to substitute the President of the third Senate, P.S. In a note dated 3 June 1997, H.A. confirms that he contacted the author and his lawyer to inform them that due to his substituting the former chairman, P.S., an oral hearing scheduled for 12 June 1997 had to be postponed. A meeting of the third Senate of the Disciplinary Commission was held on 12 June 1997 to discuss procedural matters. The minutes of this meeting identify H.A. as chairperson. Similarly, the

minutes of the oral hearing held on 20 October 1997 indicate H.A. as chairperson. The Committee also notes that it is uncontested that, in the second set of proceedings, P.S. was replaced after he was challenged by the author on 26 August 1999. It therefore considers that the author has failed to substantiate, for purposes of admissibility, how the alleged bias of P.S. would have affected his right under article 14, paragraph 1, to an independent and impartial tribunal, and concludes that this claim is inadmissible under article 2 of the Optional Protocol.

7.8 With regard to the alleged lack of independence and impartiality of other members of the third Senate of the Disciplinary Commission, the Committee takes note of the author's arguments that Section 124 (3) of the Federal Civil Servants Act allowed him to challenge only one member of the Senate, that he sought to make his challenge of the other members known, and that it would have been futile to challenge the constitutionality of Section 98 (2) of the Federal Civil Servants Act. It also notes that the State party's argument that the Constitutional Court decisions invoked by the author in support of his futility claim are inapplicable, as they date back to 1956 and do not address the question of whether or not civil servants who belong to the same agency as the accused can be considered independent and impartial Commission members. In this regard, the Committee recalls that, in addition to ordinary judicial and administrative appeals, authors must also avail themselves of all other judicial remedies, including constitutional complaints, to meet the requirement of exhaustion of domestic remedies.²⁸ It considers that the author has not shown that the Constitutional Court's jurisprudence invoked by him would *ab initio* have precluded any prospect of success of a complaint challenging the constitutionality of Section 98 (2) or other relevant provisions of the Federal Civil Servants Act. The author has therefore failed to exhaust domestic remedies to challenge the independence and impartiality of the Disciplinary Commission as such. This part of the communication is thus inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.9 In so far as the author claims that his exclusion from any possibility to have his case reviewed by the ordinary courts, on account of his status as a civil servant, constitutes a violation of article 26 of the Covenant, the Committee notes that civil servants in many civil law jurisdictions may not have their case reviewed by ordinary courts, but by other judicial review mechanisms. This in itself

²⁸ Communication No. 1003/2001, *P.L. v. Germany*, decision on admissibility adopted on 22 October 2003, at para. 6.5; communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision on admissibility adopted on 2 November 2004, at para. 7.2.

cannot be considered to constitute unjustified differential treatment, and the Committee considers that the author has failed to substantiate this claim, for purposes of admissibility. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.10 As regards the author's claim that the delay between the filing (10 October 1994) of the disciplinary complaint and the Disciplinary Commission's decision (20 May 1997) to schedule the first disciplinary hearing violated article 14, paragraph 1, of the Covenant, the Committee notes the State party's argument that the author should have filed a complaint under article 132 of the Federal Constitutional Act to challenge the failure of the Disciplinary Commission to schedule such a hearing. It also notes the author's reply that he was not required actively to participate in the initiation of disciplinary proceedings against himself. However, the Committee recalls that the disciplinary proceedings against the author were initiated on 11 November 1994. From this date, he could have filed an inactivity complaint with the High Administrative Court without actively participating in the initiation of disciplinary proceedings against himself. In so far as the author argues that he could not reasonably be expected to accelerate his own "indictment" by lodging an inactivity complaint, the Committee considers that this circumstance is insufficient to absolve him from the requirement to exhaust all available remedies, given that disciplinary proceedings had already been initiated and that the adoption of the decision scheduling a first hearing was a formality. If the author now seeks to invoke the delay before the Committee, he should have provided the courts of the State party with an opportunity to remedy the alleged violation. The Committee concludes that the author has failed to exhaust all available domestic remedies. This part of the communication is therefore inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.11 In so far as the author alleges that delays in the proceedings before the High Administrative Court concerning the second decree of the GAO President was unreasonable, in breach of article 14, paragraph 1, the Committee observes that the prohibition ceased to have any effects on him as of 31 January 2001, when the High Administrative Court confirmed his dismissal. By the same token, the final decisions of the High Administrative Court of 31 January 2001 and 29 November 2002 upholding the dismissal and the suspension based on article 126 of the Federal Constitutional Act, removed any legal uncertainty about the compatibility of his private business activities with his function as a GAO auditor. The Committee considers that the author has failed to substantiate, for purposes of admissibility, that the High

Administrative Court's delay in revoking the second decree on 27 September 2005 had any detrimental effects on his legal position that would amount to a violation of article 14, paragraph 1. It follows that this claim is inadmissible under article 2 of the Optional Protocol.

7.12 With regard to the delays in the proceedings before the High Administrative Court concerning the author's suspension and his request to lift the suspension, the Committee has taken note of the State party's argument that these proceedings ceased to have any effect on the author from 31 January 2001, when his dismissal became final. It nevertheless considers that, even if one abstracts the duration of the proceedings following this date, the author has advanced sufficient arguments to substantiate, for purposes of admissibility, that the remaining delays were unreasonable. It also recalls that the author has argued that no remedies were available to him for challenging the inactivity of the High Administrative Court. This appears to be correct, as article 132 of the Federal Constitutional Act invoked by the State party does not apply to the High Administrative Court. The Committee concludes that the communication is admissible, in so far as the author claims that the delays in the proceedings before the High Administrative Court concerning his suspension and his request to lift the suspension, as well as the overall length of the proceedings, raise issues under article 14, paragraph 1.

Consideration of the merits

8.1 The Committee 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.²⁹ This guarantee relates to all stages of the proceedings, including the time until the final appeal judgement. Whether a delay is unreasonable must be assessed in the light of the circumstances of each case, taking into account, inter alia, the complexity of the case, the conduct of the parties, the manner in which the case was dealt with by the administrative and judicial authorities, and any detrimental effects that the delay may have had on the legal position of the complainant.³⁰

8.2 In assessing the reasonableness of the delay between 6 February 1995, when the author appealed his suspension to the High Administrative Court, and 29 November 2002, when the High Administrative Court upheld the suspension of the author, the Committee takes into consideration the author's uncontested argument that the High Administrative

²⁹ See communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, at para. 10.7.

³⁰ See communication No. 1060/2002, *Deisl v. Austria*, Views adopted on 27 July 2004, at paras. 11.3–11.6.

Court took no procedural action whatsoever during the entire period in question, during which his salary was reduced by one third. Even assuming that the thoroughness of the High Administrative Court's judgement of 29 November 2002 indicates the complexity of the case, the Committee does not consider that this circumstance justifies a delay of more than seven and a half years, during which, up to the date of his dismissal on 31 January 2001, the author was subjected to a salary reduction and to the legal uncertainty about his professional situation. The Committee concludes that the delay in the proceedings before the High Administrative Court concerning the author's suspension was unreasonable and in breach of article 14, paragraph 1, of the Covenant.

8.3 In the light of the foregoing, the Committee need not consider whether the delays in the proceedings before the High Administrative Court concerning the author's request to lift his suspension, as well as the overall length of the proceedings, reveal violations of article 14, paragraph 1.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 14, paragraph 1, of the International Covenant on Civil and Political Rights.

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

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

APPENDIX

*Individual opinion (dissenting) of Committee member
Ms. Ruth Wedgwood*

1.1 The International Covenant on Civil and Political Rights was the work product of States parties, but also of several prominent individuals. Among them was

Mrs. Eleanor Roosevelt, widely admired as a social reformer and as the widow of a wartime president. Alongside her ambition for supporting democracy and civil rights, Mrs. Roosevelt had a practical sense of what can be accomplished at an international level in the enhancement of human rights.

1.2 In its proposed reading of article 14 of the Covenant, the Human Rights Committee should not ignore Mrs. Roosevelt's words of caution. Indeed, as a matter of law, her words constitute a central part of the treaty negotiating record, and have juridical significance. In an era when administrative agencies were already beginning to assume broad tasks of governance, Mrs. Roosevelt cautioned that the Covenant and its implementing committee could not become a venue for supervising every regulatory agency and administrative decision. The language of article 14 was shaped by her to that end, and the Committee cannot neglect this negotiating history except at peril to its larger vocation of addressing serious wrongs.

1.3 In this case, an Austrian civil servant named Wolfgang Lederbauer has complained to the United Nations Human Rights Committee about the process by which he was suspended and dismissed from his post with the General Audit Office of his national Government. The cause of his suspension was the rather evident conflict between his public work as an auditor in an agency that investigated the national railway administration, and his private economic activities in seeking to sell a particular form of soundproofing for highways and railroads. Despite his public responsibility as an auditor, Mr. Lederbauer went so far as to intervene with a parliamentary leader to promote his product as an alternative for soundproofing highways. He did so despite the flat prohibition of article 126 of the Austrian Federal Constitutional Act that members of the General Audit Office could not "participate in the management and administration of any ... enterprises operating for profit."

1.4 Mr. Lederbauer was suspended from his job as an auditor on the basis of this violation of article 126. Subsequently, he was also convicted in an Austrian regional criminal court for "negligently causing the insolvency of a company" and was sentenced to a suspended prison term of five months. After his criminal appeal was denied, the Disciplinary Commission of the Austrian civil service formally dismissed him from his position as auditor, finding that it "was obliged to adhere to the legally binding findings of fact of a criminal court."

1.5 Mr. Lederbauer has since complained to the Human Rights Committee about a host of procedural issues relating to his suspension and discharge. The Committee has elaborated an intricate 22-page opinion that reviews the thrusts and parries of his quarrel with the Austrian civil service, on purely procedural grounds.

1.6 The Committee dismisses all of the author's complaints, except for one. Namely, the Committee finds that there was undue delay in resolving one of the author's five appeals to the High Administrative Court of Austria. The author appealed his order of suspension on 6 February 1995, and the final decision of the High Administrative Court was not rendered until 29 November 2002. The order of suspension was rendered moot, of course, once the author was formally dismissed as a civil servant, and

this dismissal was affirmed by the High Administrative Court on 31 January 2001. The Committee concludes that this interval was an “unreasonable” delay and that the author is to be awarded an “appropriate remedy, including appropriate compensation.” See Views of the Committee, paragraphs 8.1, 8.2, and 10.

1.7 Though the High Administrative Court did allow the case to lie upon its docket for a long interval, the finding of actionable delay is rather doubtful against a factual background in which the author was making repeated and conspicuous attempts to impede and revisit every decision reached in his suspension and discharge. At various points in time, the author filed five separate appeals to the High Administrative Court, three appeals to the Constitutional Court, and five appeals to the Disciplinary Appeals Commission. This is over and above the several proceedings before the Austrian Disciplinary Commission. If anything, the time taken and confusion engendered by overlapping proceedings may stand as an indication of the hazards of permitting the interlocutory appeal of each interim decision. In the interval before he addressed himself to the United Nations Human Rights Committee, the author and his counsel also brought four separate complaints to the European Court of Human Rights, which dismissed each complaint as falling outside the scope of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

1.8 In the particular interval said to constitute a violation of the Covenant, in the duration of the appeal before the High Administrative Court from 6 February 1995 to 29 November 2002, or more properly, 31 January 2001, it is also noteworthy that some of the time was consumed by the criminal prosecution pending against Mr. Lederbauer. An appellate court might reasonably wish to await the conclusion of a criminal case before proceeding on a related civil matter.

1.9 In assessing this interval, there is one other point of particular note. Despite an active, indeed swashbuckling, style of litigation, Mr. Lederbauer and his counsel never requested that the High Administrative Court expedite its decision, or even sent a letter of inquiry to the Court. The State party has informed the Committee that article 132 of the Federal Constitutional Act would have been available as a formal legal remedy to demand a speedy decision from the High Administrative Court. This representation by the State party is discounted by the Committee without reference to any written authority on Austrian administrative law. But regardless of the applicability of article 132, there is no persuasive ground to find “unreasonable” delay under the Covenant when neither the author nor his counsel ever lifted a pen or pencil to write a letter to the clerk of the High Administrative Court to request delivery of an expedited decision.³¹ Especially in the confusion of their many overlapping proceedings, some burden properly rests on the litigants to untangle the web.

2. There is, however, a far more important set of issues that needs to be soberly assessed by the Human Rights Committee, if not in this case, then in the future.

³¹ Compare *Casanovas v. France*, No. 441/1990, 19 July 1994, at para. 2.2 (six requests to Administrative Tribunal for expedited proceedings).

This includes the intended scope of the Covenant and its problematic application to administrative agencies and administrative processes, where a matter has not been brought to court. In addition, there is the unavoidable issue of how to allocate the limited material resources of this Committee in the face of serious situations of human rights abuse around the world. It is doubtful that the framers of the Covenant intended that the Committee should sit in review of the thousands, indeed hundreds of thousands, of routine administrative law decisions taken annually around the globe, especially where the meeting time of the Committee permits the consideration of perhaps 100 communications per year. The Committee has not yet approached how it could adapt its methods of work to accommodate a flood of administrative law cases, in a way that would not divert scarce resources from its most important work. At a minimum, it might require crafting a means to decide communications in a fashion that takes account of the relative importance of the issue at stake. The Committee has not yet seen a plethora of administrative law appeals, but it has embarked down a path in a scattered series of cases that may lead to that result, perhaps without taking full account of the problems inherent in the jurisprudence, and indeed the tension that exists in both the language and negotiating history of the Covenant.

3.1 One should, for initial instruction, revert to the language of the Covenant. The wording of the Covenant varies in its several treaty languages, and each is an authentic text, thus posing a particular challenge. The variations signal not only the problems of translation, but the differences in how legal systems conceptualize civil and private rights. In the English language text of the Covenant, article 14 (1) states in its first sentence that “All persons shall be equal before the courts and tribunals.” Article 14 (1) thereafter states in its second sentence that “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” (Emphasis added). There is an evident and important difference between the textual provisions applied in article 14 to criminal charges and to “suits at law”. Only in criminal cases, is there any explicit language that regulates the issue of delay and prompt adjudication. Article 14 (3) (c) directly guarantees the right of a criminal defendant “To be tried without undue delay.” In civil cases, to deduce a similar rule requires finding that time limits are implicit in the idea of a ‘fair’ hearing or ‘competent’ tribunal. This difference in language may have consequences, certainly as to the egregiousness of delay required before a matter is actionable.

3.2 In addition, there is the question of what constitutes a “suit at law”. This is a phrase missing from the French text, which speaks instead of “*contestations sur ses droits et obligations de caractère civil*.”³² The French text, like the Spanish, may seem to turn more directly upon the nature of the right rather than the forum of its adjudication, though one should also recall that the forms

³² The Spanish text of the International Covenant on Civil and Political Rights speaks similarly of “la determinación de sus derechos u obligaciones de carácter civil.”

of action at English common law were not endless in their variation. It is noteworthy that the phrase “contestations sur ses droits et obligations de caractère civil” was also adopted in the European Convention for the Protection of Human Rights and Fundamental Freedoms. In that setting, in the well-known case of *Pellegrin v. France*, the European Court of Human Rights has ruled that the phrase “caractère civil” does not include issues of employment law pertaining to public servants who exercise a portion of the State’s sovereign power, as for example, the police. See *Pellegrin v. France*, Cour européenne des Droits de l’Homme, 8 décembre 1999, Rec. 1999-VIII, No. 28541/95.

3.3 Though the Human Rights Committee has not adverted to the Pellegrin case in its recent decisions, it is noteworthy that in the seminal case of *Y.L. v. Canada*, No. 112/1981, 8 April 1986, the Committee sounded a similar note. In *Y.L. v. Canada*, the Committee suggested that the application of article 14 (1) in non-criminal cases would depend either on the nature of the right or on the particular forum. The scope of article 14 (1) in non-criminal matters was arguably limited to civil law issues, rather than public law, and matters heard in a “court” or “tribunal.”³³ The Committee often quotes the test from *Y.L. v. Canada* in a more abbreviated form, noting that it is the nature of the right, rather than the status of the parties, that is important. But it is well to remember that the nature of the right was not seen as a trivial question in the original formulation. Rather, in the formulation of *Y.L. v. Canada*, there may be governmental decisions not amenable to review under article 14 (1) of the Covenant, because of that article’s limited scope.³⁴

³³ See *Y.L. v. Canada*, No. 112/1981, 8 April 1986, at para. 5 (“The Working Group of the Human Rights Committee ... considered that the decision [on admissibility] might require a finding as to whether the claim which the author pursued, in the last instance before the Pension Review Board was a ‘suit at law’ within the meaning of article 14 paragraph 1, of the Covenant. The Working Group of the Committee therefore requested the author and the State party to respond to the best of their abilities, to the following questions: (a) How does Canadian domestic law classify the relationship between a member of the Army and the Canadian State? Are the rights and obligations deriving from such a relationship considered to be civil rights and obligations *or* rights and obligations under public law? (b) Are there different categories of civil servants? Does Canada make a distinction between a statutory regime (under public law) and a contractual regime (under civil law)?” (Emphasis added).

³⁴ See *Y.L. v. Canada*, No. 112/1981, 8 April 1986, at para. 9.2 (“The travaux préparatoires do not resolve the apparent discrepancy in the various language texts. In the view of the Committee, the concept of a ‘suit at law’ or its equivalent in the other language texts is based on the nature of the right in question rather than on the status of one of the parties (government, parastatal or autonomous statutory entities), or else on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon, especially in common law systems where there is no inherent difference between public law and private law, and where the courts normally exercise control over the proceedings either at first instance or on appeal specifically provided by statute or else by way of judicial review.”).

4.1 In considering that there may be issues of administrative law not amenable to review in this Committee, the negotiating history of article 14 is especially telling.³⁵ The original treaty text proposed in the Human Rights Commission in 1947 in a Secretariat draft would have guaranteed individuals in non-criminal cases “access to independent and impartial tribunals for the determination of rights and duties under the law” with a “right to consult with and to be represented by counsel.” See E/CN.4/21 annex A (Secretariat), art. 27.

4.2 The United States representative initially offered a proposal that was similar—to guarantee that “Every person has the right to have any civil claims or liabilities determined without undue delay by a competent and impartial tribunal, before which he has the opportunity for a fair hearing, and has the right to consult with and to be represented by counsel.” See E/CN.4/21 annex C, art. 10, and E/CN.4/AC.1/8 (referring to Secretariat text article 27).

4.3 In its second session, the drafting group of the Human Rights Commission considered a third text that spoke of a Covenant right of access to a tribunal, for the resolution of civil law matters. It read: “In the determination of his rights and obligations, everyone is entitled to a fair hearing before an independent and impartial tribunal and to the aid of counsel.” See E/CN.4/37 (United States of America), art.10.

4.4 But then, on June 1, 1949, the American representative Mrs. Eleanor Roosevelt warned that the Covenant guarantee of a hearing before an independent and impartial tribunal might be too broad, if it were applied to all “rights or obligations”. Mrs. Roosevelt recast and limited the text to refer only to “civil suits” instead of “rights and obligations.” See E/CN.4/253. Mrs. Roosevelt explained the reason for the change in stark terms:

“The reason for that was that many civil rights and obligations, such as those connected with military service and taxation, were generally determined by administrative officers rather than by courts; the original text, on the other hand, appeared to suggest that all such rights and obligations must necessarily be determined by an independent and impartial tribunal. The United States amendment would obviate such an interpretation.” (E/CN.4/SR.107, pp. 2–3)

Mrs. Roosevelt’s change was apparently intended to preserve the role of administrative processes in which the decision maker might be part of an executive branch and not meet strict requirements of independence and impartiality.

4.5 In response, the French representative, the distinguished statesman René Cassin, proposed striking

³⁵ For an introduction to the negotiating history of the Covenant, see Marc J. Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers, 1987). It is striking, however, that in a setting of active jurisprudence, there has been no publication of the full *travaux*.

the word “civil” from the phrase “civil rights and obligations”—on a ground that would have *broadened* the guarantee in its substantive coverage—for the word “civil” did “not include fiscal, administrative and military questions, in which matters it was possible to appeal, in the final instance, to court.” E/CN.4/SR.107, p. 6.

4.6 The Egyptian representative, Mr. Omar Loutfi, agreed that “civil” was “too narrow in that it did not include matters dealing with taxation or military service, for instance.” E/CN.4/SR.107, p. 7. Mr. Karim Azkoul of Lebanon also offered the same view. See E/CN.4/SR.107, p. 8.

4.7 In subsequent deliberations, on June 2, 1949, the Danish representative Dr. Max Sorensen expressed the concern that the proposal that “everyone should have the right to have a tribunal determine his rights and obligations” was “much too broad in scope; it would tend to submit to judicial decision any action taken by administrative organs exercising discretionary power conferred on them by law. He appreciated that the individual should be ensured protection against any abuse of power by administrative organs but the question was extremely delicate and it was doubtful whether the Commission could settle it there and then.” See E/CN.4/SR.109, at p. 3.

4.8 The Guatemalan representative, Mr. Carlos Garcia Bauer, echoed the concern adverted to by France, Egypt, and Lebanon “that civil suits did not cover all the cases contemplated ... for example, commercial and labour questions.” See E/CN.4/SR.109, at p. 7.

4.9 Mrs. Roosevelt entered the colloquy again, and did not express any opposition to striking the word “civil.” In seeming response to the concern that all administrative actions would be automatically regulated by the strictures of the Covenant, or that administrative discretion would be lost, she noted that the insertion of the words “in a suit at law” was “to emphasize the fact that appealing to a tribunal was an act of a judicial nature.” See E/CN.4/SR.109, at 8. In other words, it was the appeal to a tribunal, not the underlying matter, which constituted a suit at law. The coverage of the Covenant was limited to cases where a right or obligation was tried or reviewed in a court or tribunal.

4.10 Finally, on June 2, 1949, the French representative René Cassin offered a change that built on Mrs. Roosevelt’s language, stating that:

“The Danish representative’s statement had convinced him that it was very difficult to settle in that article all questions concerning the exercise of justice in the relationships between individuals and Governments. He was therefore prepared to let the words “or of his rights and obligations” ... be replaced by the expression “or of his rights and obligations in a suit at law.” (See E/CN.4/SR.109, p. 9.)

4.11 Thus, the word “civil” was dropped in the English language version, and the reach of article 14 (1) in administrative matters was seemingly limited to the ultimate stage of appeal to a judicial tribunal. This was

incorporated in the text offered and approved on 2 June 1949 (see E/CN.4/286, and E/CN.4/SR.110, p. 5).

4.12 The Yugoslav representative Mr. Jeremovic later reiterated the view that there should be no implication that all civil matters had to be heard by an independent tribunal. Issues such as “infringement of traffic regulations” were “usually considered within the jurisdiction of the police or similar authorities and were dealt with as matters of administrative procedure.” See E/CN.4/SR.155 Part II, p. 5. A later Philippines proposal for deletion of the phrase “suit at law” was defeated by 11 votes to 1, with one abstention. See E/CN.4/SR.155 Part II, p. 8.

4.13 This preliminary survey of a complicated negotiating history is offered on the premise that the Committee, in its construction of the meaning of article 14, should have reference not merely to its own view of desirable practice, but also to what the States parties at the time thought they were enacting. This does not deny the possibility of a ‘progressive development’ of the law and it is not a simplistic ‘founder’s syndrome.’ But it does mark the claim that the Committee may wish to pay heed to the negotiating history of a complicated text, as an important starting place in its construction of the Covenant. The expectations of States parties when they ratify a Covenant certainly deserve some weight.

4.14 In the context of the present case, the negotiating history of the Covenant offers little support to the view that there is any strict time limit on an overall administrative process, or that any stage other than the appeal to a court is covered within the ambit of article 14 (1).³⁶ In using factually specific grounds as the basis for dismissing a variety of claims advanced by Mr. Lederbauer, one assumes that the Committee does not mean to alter this important distinction.³⁷ In addition, one also hesitates to permit the inference that every time a State party seeks to assure independence and impartiality in an administrative organ, that this automatically converts the organ into a court or tribunal within the meaning of the Covenant.³⁸

5.1 Finally, it may be worthwhile to review several nuances of the Committee’s decisions under article 14 in administrative law settings. This halting and occasional line of cases cautions against any facile belief that the Committee can sit as a fourth instance body in reviewing innumerable matters of administrative process.

5.2 The first major case, *Y.L. v. Canada*, No. 112/1981, submitted on 7 December 1981 and decided on 8 April 1986, *supra*, concerned the challenge mounted by a Canadian soldier dismissed from the army for alleged mental disorders. His appeal was heard and denied in proceedings before the Canadian Pension Commission, Entitlement Board, and Pension Review Board. The complainant argued that the Canadian Pension Review Board was not independent and impartial and lacked fair process. The State party defended on the claim

³⁶ Compare Bernhard Graefrath, *Menschenrechte und internationale Kooperation, 10 Jahre Praxis des Internationalen Menschenrechtskomitees*, Berlin 1998, p. 202.

³⁷ See Views of the Committee, paras. 7.4, 7.5 and 7.6.

³⁸ See Views of the Committee, paras. 5.2, 7.3, and 7.7.

that the proceedings before the Pension Review Board were not a “suit at law” within the meaning of the Covenant and that, in any event, the soldier could have challenged the results before the Federal Court of Appeal.

5.3 As noted above, the working group of the Committee concluded in its discussion of admissibility that it might be important to determine whether the service member’s rights and obligations were considered to be “civil rights and obligations” or instead as “rights and obligations under public law”. See Views of the Committee, *Y.L. v. Canada*, No. 112/1981, at paragraph 5. This is the distinction that the European Court of Human Rights later found to be central under article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in the Pellegrin case. The majority of the United Nations Human Rights Committee further observed that “it is correct to state” that the guarantees of the second sentence of article 14 (1) “are limited to criminal proceedings and to any ‘suit at law.’” Views of the Committee, *Y.L. v. Canada*, at paragraph 9.1 (emphasis added).

5.4 Ultimately, the majority of the Committee disposed of the case by observing that the author had had a further review available to him in the Canadian Federal Court of Appeal. In its characterization of the scope of article 14 (1), the Committee adopted a two-part test that draws upon the equal authentic texts of the several languages of the Covenant. We ought not to forget its second part.

5.5 The Committee stated:

“In the view of the Committee, the concept of a ‘suit at law’ or its equivalent in the other language texts is based on the nature of the right in question rather than on the status of one of the parties (governmental, parastatal or autonomous statutory entities), or else on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon, especially in common law systems where there is no inherent difference between public law and private law, and where the courts normally exercise control over the proceedings either at first instance or on appeal specifically provided by statute or else by way of judicial review.”

See Views of the Committee, *Y.L. v. Canada*, No. 112/1981, at paragraph, 9.2 (emphasis added).

5.6 The first prong seemingly adverts to a distinction between private rights and public rights. The second prong seems to permit (as well as limit) the Covenant’s further extension to adjudications in judicial forums where a particular State system may allow review of a broader portfolio of rights. The majority ultimately concluded that the author’s failure to take an appeal to the Canadian Federal Court of Appeal precluded any violation.

5.7 Three members of the Human Rights Committee went further and stated in *Y.L. v. Canada* that the Covenant did not apply to the dispute of the soldier, for two reasons. These reasons are the nature of the right, and the forum of the decision. First, in Canada, “the relationship between a soldier, whether in active service or

retired, and the Crown has many specific features differing essentially from a labour contract under Canadian law.” Individual Opinion of Bernhard Graefrath, Fausto Pocar, and Christian Tomuschat, concerning the admissibility of communication No. 112/1981, *Y.L. v. Canada*, at paragraph 3. Second, the Pension Review Board, said the concurring members, “is an administrative body functioning within the executive branch of the Government of Canada, lacking the quality of a court.” Thus, said the concurring members, “[n]either of the two criteria which would appear to determine conjunctively the scope of article 14, paragraph 1, of the Covenant is met.”

5.8 In the next major case, *Casanovas v. France*, No. 41/1990, decided 7 July 1993, a complaint was brought by the former head of the fire brigade of the city of Nancy, France, who had been dismissed for alleged incompetence. The *Tribunal Administratif* granted the fire chief’s appeal and reinstated him. However, a second proceeding against the fire chief led again to his dismissal. This time, the *Tribunal Administratif* closed a preliminary inquiry and declined to move the matter up on the calendar, citing other cases that dated from four years prior. The European Commission of Human Rights in the meantime ruled the fire chief’s complaint to be inadmissible under the European Convention for the Protection of Human Rights and Fundamental Freedoms because the Convention “does not cover procedures governing the dismissal of civil servants.” See Views of the Committee, *Casanovas v. France*, at para. 2.5.

5.9 In the proceeding before the United Nations Human Rights Committee, France noted that the European Commission had been faced with identical treaty language under the European Convention, and argued that the Committee should construe the Covenant’s category of “caractère civile” in a parallel way. France also argued that article 14 (1) had no provision imposing time limits in non-criminal matters.

5.10 Curiously, the Committee examined only the first prong of the test from *Y.L. v. Canada*, finding that the appropriate measure was “the nature of the right in question rather than on the status of one of the parties.” Views of the Committee, *Casanovas v. France*, No. 441/1990, 7 July 1993, para. 5.3. In its review of admissibility, the Committee offered no reason for its conclusion that the employment relationship of a French fire chief to a municipality should be construed in a different fashion than the relationship of a Canadian soldier to his national Government. The Committee later concluded, in a separate ruling on the merits, that the French Administrative Tribunal’s delay of two years and nine months in deciding the case was not a violation of article 14 (1), in part because the “Tribunal did consider whether the author’s case should have priority over other cases.” Views of the Committee, *Casanovas v. France*, No. 441/1990, 19 July 1994, at paragraph 7.4.

5.11 Subsequently, the Human Rights Committee again examined the application of article 14 in *Nicolov v. Bulgaria*, No. 824/1998, filed 14 January 1997, and decided 24 March 2000. The Committee found to be unsubstantiated the claim of a district attorney that he had been forced out of office in violation of the Covenant. The High Judicial Council of Bulgaria ordered the dismissal,

and the action was affirmed by the Bulgarian Supreme Court. The UN Human Rights Committee found that the High Judicial Council was a mere “administrative body”, see Views at paragraph 2.1, footnote 1, and the author’s claim that Council members were biased against him was dismissed as “not... substantiated”, without any explanation as to whether an administrative body as such could be bound by the requirements of article 14 (1). The basis for challenging the dismissal might have rested on a claim that the review procedure of the Supreme Court of Bulgaria was itself amenable to Committee scrutiny, since the court was indisputably a judicial body covered by article 14.

5.12 One should also note a fourth case of *Franz and Maria Deisl v. Austria*, No. 1060/2002, submitted on 17 September 2001 and decided 27 July 2004. Represented by counsel Alexander H.E. Morawa, the complainants presented an exceedingly complicated set of facts dealing with zoning law in a municipality near Salzburg, including the conversion of a granary into a weekend house, and an appeal against a demolition order concerning a granary that was to be converted into a shed. The authors complained of an administrative process that “took more than 30 years”, and was met at the end by decisions of the Administrative Court and Constitutional Court delayed as long as two years and nine months. See Views of the Committee, *Deisl v. Austria*, at paragraph 3.4. Austria invoked its reservation to article 14 of the Covenant that sought to maintain “the Austrian organization of administrative authorities under the judicial control of the Administrative Court and the Constitutional Court.” See Views of the Committee, *id.*, at paragraph 6.4. In regard to the delays before those two courts, Austria noted that the Constitutional Court had also been faced with some 5,000 cases in regard to alien law, stemming from the conflict in the Balkans, and 11,000 complaints about minimum corporate tax.

5.13 The authors claimed that the range of rights covered by article 14 of the International Covenant was broader than article 6 (1) of the European Convention, in particular, because the word “civil” did not appear in the Covenant. Relying upon the “nature of the right” language adduced in the earlier *Y.L. v. Canada* case, but in this rather different context, the Committee opined that “the ... 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.” See Views of the Committee, *Deisl v. Austria*, at paragraph 11.1 (emphasis added). This broader phrase might seem to suggest that preliminary administrative decisions are also covered by the Covenant.

5.14 In addressing admissibility and the merits, the Committee noted in the *Deisl* case that article 14 (1) “does not require ... that decisions are issued by [independent and impartial] tribunals at all appellate stages.” See Views of the Committee, at paragraph 10.7. But the Committee then seemingly considered tests for unreasonable delay in relation to municipal and provincial administrative authorities that were not themselves “courts” or “tribunals” under article 14, even though there were reviewing courts in Austria that would, ultimately, review these same proceedings. The Committee also referred to “delays of the proceedings as a whole”, not restricting its

gaze to the two particular judicial tribunals. See Views of the Committee, at paragraph 10.11.

5.15 Although I joined in the majority at the time, these tests widely applied would mean that the Human Rights Committee sitting in Geneva could become the arbiter of the calendar delays of all administrative agencies within 160 States parties. It is doubtful that this is what the Committee intended in *Y.L. v. Canada*, or indeed, what the drafters intended in 1949. Though no violation was sustained on the facts of *Deisl v. Austria*, the dicta of the decision potentially could open a Pandora’s box. Though not fully comprehended at the time, similar scrutiny could bring thousands of decisions each year before the Committee. One may note, as well, that the disposition of this particular petition to the Human Rights Committee entailed a 19-page opinion and substantial deliberative time, in a matter that does not approach the moral or legal seriousness of so many other petitions presented under the Optional Protocol to the Human Rights Committee.³⁹

5.16 And then, there is the case of *Perterer v. Austria*, No. 1015/2001, filed on 31 July 2001, and decided on 20 July 2004, in which the complainant was again a municipal official, robustly represented by counsel Alexander H.E. Morawa. As with Lederbauer, the complainant in *Perterer* was accused of using public resources for private purposes, and failing to attend scheduled job-related hearings on building projects. He was suspended by the Austrian Disciplinary Commission, and as in the *Lederbauer* case, challenged the qualifications of the chairman of the Disciplinary Commission senate, even seeking to bring criminal charges against him. The complainant engaged in another series of challenges that delayed the proceedings. He argued he was unfit to stand trial for medical reasons. When a new senate chairman was appointed, he newly challenged the two ordinary senate members nominated by the municipality, claiming they also lacked independence. After a remand of the matter affirmed his right to challenge those members, he launched another challenge to disqualify the new senate chairman. The initial chairman returned to conduct the proceeding, was again challenged by Perterer, and the second senate chairman then returned to conduct the proceeding. The Appeals Commission finally dismissed Perterer’s complaint that the second chairman’s brief prior service had prejudiced him. Perterer also had challenged, one might add, the composition of the Disciplinary Appeals Commission, seeking to disqualify its chairman and two members. The Austrian Administrative Court rejected Perterer’s challenge to the composition and decision of the Appeals Commission. His complaint to the European Court of Human Rights was also rejected on the ground that the European Convention did not cover the matter of

³⁹ There are certainly cases where a substantive Covenant guarantee may have procedural implications. E.g., *Pashtukhov v. Belarus*, No. 814/1998 (arbitrary dismissal of constitutional court judge by presidential decree implicates articles 14 and 25); *Munoz v. Peru*, No. 203/1986 (articles 14 and 25 violated where police officer dismissed without required statutory hearing). Cf. Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, 2d rev. ed., 2005, p. 67 (relationship between article 2 and substantive rights under the Covenant).

the discharge of civil service employees, Peterer then complained to the UN Human Rights Committee, arguing with no apparent irony that the Austrian proceedings had lasted too long. The State party argued that article 14 (1) of the International Covenant on Civil and Political Rights did not apply to disputes between administrative authorities and civil servants who exercise public powers. Upon the rationale of *Y.L. v. Canada*, the State party also noted that Disciplinary Commission decisions could be appealed to the Austrian Civil Service Appeals Commission and Administrative Court, and thus, that the undisputed independence and impartiality of the latter fully met the standards of article 14.⁴⁰

5.17 The Human Rights Committee concluded, however, that the State party had “conceded that the trial senate of the Disciplinary Commission was a tribunal within the meaning of article 14, paragraph 1, of the Covenant”, see Views of the Committee, *Perterer v. Austria*, at paragraph 9.2, though it is open to argument whether the State party merely meant that the Commission was impartial and independent even while not constituting a tribunal. The Committee also concluded that the renewed service of the second chairman of the trial senate “raises doubts about the partial character of the trial senate,” even though the Administrative Court dismissed this complaint as unfounded. The Committee acknowledged that the Administrative Court had “examined this question, [but] it only did so summarily.” See Views of the Committee, *Perterer v. Austria*, at paragraph 10.4. And finally, the Human Rights Committee found that the 57 months consumed in the administrative proceedings was excessive, because part of the time was taken in the appeal of decisions that were later reversed. See Views of the Committee, *Perterer v. Austria*, at paragraph 10.7. Although these Views occasioned no dissents, one may question in retrospect, with a longer view of the case law, whether this type of detailed reproof of the national administrative law of a particular State system can constitute the kind of violation that the drafters of article 14 meant to reach. Certainly, the substantial delay of 57 months seems less surprising against a background in which the complainant tried to disqualify every reviewing official involved in his case. It would also be surprising to conclude, as a general matter, that the reversal of a good faith error in a lower body necessarily means that unreasonable time has been taken. In setting standards for acceptable delay, this Committee has a responsibility to take account of the challenges faced by national reviewing bodies in light of their calendars. Standard setters may wish to recall the unavoidable and

⁴⁰ *Accord I.P. v. Finland*, No. 450/1991, decided 26 July 1993, at para. 6.2 (inadmissibility of article 14 challenge to administrative procedure of tax authorities, noting that “whether matters relating to the imposition of taxes are or are not ‘rights or obligations in a suit at law’ does not have to be determined, because in any case the author was not denied the right to have his claims concerning the decision by the Tax Office heard before an independent tribunal.”). The Human Rights Committee’s reversion in this later case to the test of *Y.L. v. Canada* case may have important lessons for our jurisprudence, suggesting that the availability within national law of an appeal to an impartial tribunal is sufficient, in general, to satisfy the requirements of article 14 in regard to administrative proceedings.

lengthy delays that even this Committee has occasionally faced in its own work.

6.1 Thus, these sorts of cases may properly demand a reflection upon the drafting history and preparatory record of the Covenant—if only to ascertain whether this extrusion of article 14 (1) and the accompanying use of scarce Committee time in order to govern the intricate detail of national administrative processes is in fact consistent with the profoundly important vocation of the Covenant.

6.2 The Human Rights Committee is properly protective of its jurisdiction. But this new example of a genre of routine and fact-specific administrative cases again warrants asking whether we have done justice to the treaty reservation taken by many European States in joining the Optional Protocol. Under Austria’s reservation to the Optional Protocol, the Committee is precluded from reexamining a communication that presents the same “matter” previously examined by the European Court of Human Rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁴¹ The French language text of article 14 (1) of the International Covenant is a close replica of the French language text of article 6 (1) of the European Convention in its reference to “contestations sur ses droits et obligations de caractère civil.”⁴² It is certainly ambitious to say that a “matter” is not covered by the reservation simply because the Committee prefers to take a different view of the merits, in contrast to the European Court. It is also worth recalling that the deliberate usage of the phrase “droits et obligations de caractère civil” in the language of the International Covenant was noticeably narrower than the language of the Universal Declaration of Human

⁴¹ The English text of the Austrian reservation to the Optional Protocol reads as follows:

“On the understanding that, further to the provisions of article 5 (2) of the Protocol, the Committee provided for in article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms.”

Since the date of the Austrian reservation, the work of the European Commission on Human Right has been taken up by the European Court of Human Rights. The reservation is appropriately read to apply to this successor body as well.

⁴² The first sentence of article 6 (1) of the European Convention reads, in its French text, as follows: “Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi, qui décidera, soit des *contestations sur ses droits et obligations de caractère civil*, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle.” (Emphasis added).

Compare article 14 (1), second sentence, in the French text of le Pacte international relatif aux droits civils et politiques: “Toute personne a droit à ce que sa cause soit entendue équitablement et publiquement par un tribunal compétent, indépendant et impartial, établi par la loi, qui décidera soit du bien-fondé de toute accusation en matière pénale dirigée contre elle, soit des *contestations sur ses droits et obligations de caractère civil*.” (Emphasis added).

Rights voted by the General Assembly in 1948, which referred generally to “*droits et obligations*.”⁴³ The accession of States parties to the optional protocol of the International Covenant on Civil and Political Rights is not irreversible, and some caution in the exercise of our jurisdiction may be more faithful to the purpose of the reservation.

6.3 This caution in interpretation is also warranted by the need to preserve the Committee’s ability to provide effective and prompt adjudication of serious complaints, within a United Nations human rights system that has

competing demands. In a concurring opinion in *Pellegrin v. France*, Judge Ferrari Bravo cautioned that the European Court of Human Rights faced “an avalanche of applications concerning the economic treatment of public servants.” Professor Manfred Nowak has noted the “*problematique* of detailed procedural guarantees in international human rights treaties.”⁴⁴ The backlog of 180,000 cases in the European Court stands as a warning to any international system that hopes to treat the serious human rights crises that arise in countries around the world.

⁴³ See article 10 of la Declaration universelle des droits de l’homme, adopted by the General Assembly on 10 December 1948, which reads as follows: “Toute personne a droit, en pleine égalité, à ce que sa cause soit entendue équitablement et publiquement par un tribunal indépendant et impartial, qui décidera, *soit de ses droits et obligations*, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle.” (Emphasis added). So, too, the English text differs significantly between the two instruments. Article 10 of the Universal Declaration of Human Rights reads: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” In contrast, article 14 (1), second sentence, of the International Covenant on Civil and Political Rights reads in its English text: “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

⁴⁴ See Manfred Nowak, *supra* note 39, at p. 306.

ANNEX

SUMMARY OF STATES PARTIES' REPLIES PURSUANT TO THE ADOPTION OF VIEWS BY THE HUMAN RIGHTS COMMITTEE

NOTE: The replies are not reproduced in full. However, they are on file with the Committee's secretariat and references to follow-up on Views are regularly made in the Committee's annual reports. Pertinent references are indicated wherever possible.

Communication No. 1222/2003

Submitted by: Jonny Rubin Byahuranga [represented by counsel]

Alleged victim: The author

State party: Denmark

Declared admissible: 1 November 2004 (eighty-second session)

Date of the adoption of Views: 1 November 2004 (eighty-second session)

Follow-up information received from the State party*

By note verbale of 24 March 2006 the State party attached the Danish Refugee Board Decision of 10 November 2005 in which it was decided that, although the author may be deported from Denmark, he cannot be forcibly returned to Uganda or deported to another country in which he is not protected against being sent back to Uganda, pursuant to section 31 (1) of the Aliens Act.

Committee's decision

At its eighty-seventh session, the Committee considered that this matter should not be considered any further under the follow-up procedure, as the State party had complied with the Views.

Communication No. 1155/2003

Submitted by: Mr. and Mrs. Unn and Ben Leirvåg et al. [represented by counsel]]

Alleged victim: The authors

State party: Norway

Declared admissible: 3 November 2004 (eighty-second session)

Date of the adoption of Views: 3 November 2004 (eighty-second session)

Follow-up information received from the State party**

During the discussion of the fifth periodic report, the State party confirmed that the proposed amendments to the Education Act, set out in the State party response to the Committee of 4 February 2005, had been adopted and entered into force on 17 June 2005. The new exemption rules provide as follows: on the basis of written notification from parents, pupils can be exempted from attending teaching which they, on the basis of their own religion or philosophy of life, consider to constitute the practice of another religion or expression of adherence to another philosophy of life or which they find offensive or objectionable.

Committee's decision

The Committee considered the State party's response satisfactory and decided not to consider this case any further under the follow-up procedure.

* For the Committee's Views, see *Selected Decisions*, vol. 8, p. 406. For information on follow-up, see the Committee's Annual Report (A/61/40, vol. II)

** For the Committee's Views, see *Selected Decisions*, vol. 8, p. 385. For information on follow-up, see the Committee's Annual Report (A/61/40, vol. II)

Communication No. 1077/2002^{***}

Submitted by: Jaime Carpo et al. [represented by counsel]

Alleged victim: The authors

State party: The Philippines

Declared admissible: 28 March 2003

Date of the adoption of Views: 28 March 2003

Follow-up information received from the State party

On 31 May 2006, the State party submitted that the author was granted executive clemency. His death sentence was reduced to *reclusion perpetua*, a lengthy form of imprisonment. However, the Philippine Revised Penal Code provides that any person sentenced to *reclusion perpetua* shall be pardoned after 30 years.

Committee's decision

In the light of the commutation of the author's sentence, the Committee does not intend to consider this matter any further under the follow-up procedure unless the situation changes.

Communication No. 1159/2003

Submitted by: Mariam Sankara et al. [represented by counsel]

Alleged victim: The authors

State party: Burkina Faso

Declared admissible: 9 March 2004

Date of the adoption of Views: 28 March 2006

Follow-up information received from the State party

The State party provided its response on the follow-up to this case on 30 June 2006. It stated that it was ready to officially acknowledge Mr. Sankara's grave at Dagnoin, 29 Ouagadougou, to his family and reiterates its submission prior to the decision that he has been declared a national hero and that a monument is being erected in his honour. It submitted that on 7 March 2006, the Tribunal of Baskuy in the commune of Ouagadougou ordered a death certificate of Mr. Sankara, deceased on 15 October 1987 (it does not mention the cause of death). Mr. Sankara's military pension has been liquidated for the benefit of his family.

On 29 June 2006, and pursuant to the Committee's Views to provide compensation, the Government had assessed and liquidated the amount of compensation due to Ms. Sankara and her children as CFA 434 450 000 (around US\$ 843,326.95). The State party submitted that the Views are accessible on various governmental websites, as well as distributed to the media.

Communication No. 1061/2002

Submitted by: Bozena Magdalena Fijalkowska [not represented by counsel]

Alleged victim: The author

State party: Poland

Declared admissible: 9 March 2004

Date of the adoption of Views: 26 July 2005

Follow-up information received from the State party

On 26 October 2006, the State party provided a copy of a letter from the author, dated 22 August 2006, in which she accepted the sum of PLN 20,000 (\$6,696) as a remedy in this case.

Committee's decision

During its 89th session, the Committee considered the remedy to be satisfactory and decided not to consider this matter any further under the follow-up procedure.

^{***} For the Committee's Views, see *Selected Decisions*, vol. 8, p. 316. For information on follow-up, see the Committee's Annual Report (A/61/40, vol. II).

INDEXES

INDEX BY ARTICLE OF THE COVENANT

<i>Article</i>	<i>Communication</i>	<i>Page</i>	<i>Article</i>	<i>Communication</i>	<i>Page</i>
1	1424/2005	35	7	1126/2002	102
2	1036/2001	68		1153/2003	108
	1126/2002	102		1159/2003	120
	1153/2003	108		1173/2003	143
	1298/2004	188		1184/2003	154
	1315/2004	15		1297/2004	182
	1416/2005	243		1315/2004	15
	1434/2005	45		1327/2004	229
2 (1)	1219/2003	10		1341/2005	20
	1223/2003	164		1355/2005	29
	1249/2004	172	8	1416/2005	243
	1314/2004	205		1421/2005	266
	1355/2005	29	9	1036/2001	68
	1361/2005	237		915/2000	53
	1424/2005	35		1100/2002	84
2 (3)	915/2000	53		1108 and 1121/2002	92
	992/2001	59		1126/2002	102
	1184/2003	154		1172/2003	134
	1219/2003	10		1173/2003	143
	1314/2004	205		1327/2004	229
	1327/2004	229		1421/2005	266
	1355/2005	29	9 (1)	992/2001	59
2 (3) (a)	1320/2004	215		1078/2002	3
3	1153/2003	108		1159/2003	120
	1361/2005	237		1297/2004	182
5	1078/2002	3		1314/2004	205
	1361/2005	237		1341/2005	20
	1424/2005	35	9 (2)	1078/2002	3
6	812/1998	51		1297/2004	182
	915/2000	53	9 (3)	992/2001	59
	1108 and 1121/2002	92		1078/2002	3
	1153/2003	108		1297/2004	182
	1315/2004	15		1341/2005	20
	1421/2005	266	9 (4)	992/2001	59
6 (1)	992/2001	59		1078/2002	3
	1078/2002	3	10	1100/2002	84
6 (3)	1078/2002	3		1108 and 1121/2002	92
7	812/1998	51		1126/2002	102
	915/2000	53		1173/2003	143
	992/2001	59		1184/2003	154
	1078/2002	3		1341/2005	20
	1108 and 1121/2002	92	10 (1)	915/2000	53
				992/2001	59
				1078/2002	3

<i>Article</i>	<i>Communication</i>	<i>Page</i>
10 (1)	1297/2004	182
10 (2)	1078/2002	3
12	1172/2003	134
	1173/2003	143
	1424/2005	35
12 (2)	1223/2003	164
12 (4)	1078/2002	3
	1223/2003	164
13	1078/2002	3
	1315/2004	15
	1416/2005	243
14	1100/2002	84
	1102/2002	7
	1108 and 1121/2002	92
	1126/2002	102
	1172/2003	134
	1173/2003	143
	1298/2004	188
	1315/2004	15
	1416/2005	243
	1421/2005	266
14 (1)	915/2000	53
	1052/2002	74
	1078/2002	3
	1159/2003	120
	1296/2004	177
	1314/2004	205
	1320/2004	215
	1341/2005	20
	1361/2005	237
	1454/2006	280
14 (2)	915/2000	53
	1078/2002	3
	1341/2005	20
14 (3)	992/2001	59
	1078/2002	3
	1341/2005	20
14 (3) (a)	1297/2004	182
14 (3) (b)	915/2000	53
14 (3) (c)	1297/2004	182
14 (3) (d)	915/2000	53
	1123/2002	98

<i>Article</i>	<i>Communication</i>	<i>Page</i>
14 (3) (e)	915/2000	53
	1297/2004	182
14 (3) (g)	915/2000	53
14 (5)	1078/2002	3
	1156/2003	113
	1325/2004	226
15	1126/2002	102
16	1078/2002	3
	1102/2002	7
	1327/2004	229
17	915/2000	53
	1052/2002	74
	1153/2003	108
	1219/2003	10
	1355/2005	29
	1361/2005	237
	1424/2005	35
17 (1)	1078/2002	3
17 (2)	1078/2002	3
18	1341/2005	20
18 (1)	1078/2002	3
	1249/2004	172
	1321 and 1322/2004	218
18 (3)	1321 and 1322/2004	218
19	1100/2002	84
	1172/2003	134
	1173/2003	143
	1180/2003	151
	1341/2005	20
19 (1)	1249/2004	172
22 (1)	1296/2004	177
22 (2)	1296/2004	177
23	1052/2002	74
24	1052/2002	74
	1153/2003	108
24 (1)	1184/2003	154
	1355/2005	29
25	1223/2003	164

<i>Article</i>	<i>Communication</i>	<i>Page</i>		<i>Article</i>	<i>Communication</i>	<i>Page</i>	
25 (c)	1016/2001	65		26	1314/2004	205	
	1219/2003	10			1341/2005	20	
	1434/2005	45			1361/2005	237	
26	1078/2002	3			1424/2005	35	
	1153/2003	108			1434/2005	45	
	1159/2003	120			1452/2006	47	
	1223/2003	164			1454/2006	280	
	1249/2004	172			27	1249/2004	172
	1296/2004	177				1424/2005	35
1306/2004	192						

INDEX BY ARTICLE OF THE OPTIONAL PROTOCOL

<i>Article</i>	<i>Communication</i>	<i>Page</i>	<i>Article</i>	<i>Communication</i>	<i>Page</i>	
1	915/2000	53	3	1416/2005	243	
	1078/2002	3		1424/2005	35	
	1306/2004	192		1434/2005	45	
	1315/2004	15		1452/2006	47	
	1355/2005	29		1454/2006	280	
	1416/2005	243		4 (2)	812/1998	51
	1424/2005	35			5 (1)	1159/2003
	1454/2006	280		5 (2) (a)		915/2000
2	812/1998	51	992/2001		59	
	915/2000	53	1100/2002		84	
	992/2001	59	1123/2002		98	
	1052/2002	74	1219/2003		10	
	1100/2002	84	1416/2005		243	
	1102/2002	7	1434/2005		45	
	1108 and 1121/2002	92	1454/2006		280	
	1126/2002	102	5 (2) (b)		915/2000	53
	1153/2003	108			1036/2001	68
	1184/2003	154			1078/2002	3
	1219/2003	10			1126/2002	102
	1249/2004	172			1184/2003	154
	1296/2004	177			1219/2003	10
	1298/2004	188			1223/2003	164
	1315/2004	15			1249/2004	172
	1325/2004	226		1298/2004	188	
1361/2005	237	1306/2004		192		
1416/2005	243	1320/2004		215		
1454/2006	280	1327/2004		229		
3	1184/2003	154		1341/2005	20	
	1219/2003	10		1454/2006	280	
	1223/2003	164				
	1341/2005	20				
	1361/2005	237				

SUBJECT INDEX

A

Abortion	
1153/2002	108
Abuse of the right of submission	
1123/2002	98
1223/2003	164
1341/2005	20
1434/2005	45
1452/2006	47
Amnesty	
1123/2002	98
Arbitrary deprivation of life	
812/1998	51
1421/2005	266
Arbitrary/illegal arrest or detention	
915/2000	53
992/2001	59
1100/2002	84
1159/2003	120
1172/2003	134
1173/2003	143
1297/2004	182
1314/2004	205
1327/2004	229
1341/2005	20

C

Conditions of detention	
1100/2002	84
1108 and 1121/2002	92
1126/2002	102
1173/2003	143
1184/2003	154
1341/2005	20
Cruel, inhuman or degrading treatment or punishment	
915/2000	53
992/2001	59
1153/2003	108
1159/2003	120

1173/2003	143
1184/2003	154
1297/2004	182
1327/2004	229
1355/2005	29
1416/2005	243
1421/2005	266

D

Death penalty	
1421/2005	266
Death row phenomenon	
812/1998	51
Denial of justice	
1078/2002	3
1159/2003	120
Discrimination	
1306/2004	192
1314/2004	205
1341/2005	20
1454/2006	280
Discrimination on ethnic grounds	
1223/2003	164
Discrimination on ground of age	
1016/2001	65
Discrimination on ground of citizenship	
1424/2005	35
1452/2006	47
Discrimination on ground of political opinion	
1159/2003	120
1296/2004	177
1341/2005	20
Discrimination on ground of religion	
1249/2003	172
Discrimination on ground of sexual orientation	
1361/2005	237

E

Effective remedy	
1153/2003	108
1159/2003	120
1184/2003	154
1219/2003	10
1298/2004	188
1314/2004	205
1315/2004	15
1320/2004	215
1327/2004	229
Enforced disappearance	
992/2001	59
1327/2004	229
Equal access to public service	
1016/2001	65
1219/2003	10
1434/2005	45
Equal rights of men and women	
1361/2005	237
Equality before the courts	
1296/2004	177
1320/2004	215
1361/2005	237
Equality before the law	
1102/2002	7
1153/2003	108
1249/2003	172
1296/2004	177
1314/2004	205
1361/2005	237
1452/2006	47
Equality of arms	
1159/2003	120
1421/2005	266
Evaluation of facts and evidence	
1108 and 1121/2002	92
Exhaustion of domestic remedies	
992/2001	59
1036/2001	68
1078/2002	3
1100/2002	84
1123/2003	98

1126/2002	102
1159/2003	120
1184/2003	154
1219/2003	10
1249/2003	172
1298/2004	188
1320/2004	215
1325/2004	226
1327/2004	229
1341/2005	20
1454/2006	280

Expulsion of alien for reasons of national security	
1416/2005	243

F

“Faceless” judges	
1126/2002	102
1298/2004	188

Fair trial	
915/2000	53
1052/2002	74
1100/2002	84
1102/2002	7
1108 and 1121/2002	92
1126/2002	102
1172/2003	134
1173/2003	143
1297/2004	182
1298/2004	188
1314/2004	105
1315/2004	15
1341/2005	20
1416/2005	243
1421/2005	266

Family life	
1052/2002	74
1078/2002	3

Forced or compulsory labour	
1036/2001	68

Freedom of association	
1296/2004	177

Freedom of expression	
1172/2003	134
1173/2003	143

1180/2003	151
1249/2003	172
1341/2005	20

Freedom of movement

1172/2003	134
1223/2003	164

Freedom of opinion

1100/2002	84
1341/2005	20

Freedom of thought, conscience and religion

1249/2004	172
1321 and 1322/2004	218

I

Inadmissibility *ratione materiae*

1184/2003	154
1219/2003	10
1297/2004	182
1341/2005	20
1361/2004	237
1424/2005	35
1454/2006	280

Inadmissibility *ratione personae*

1454/2006	280
-----------------	-----

Inadmissibility *ratione temporis*

1078/2002	3
1159/2003	120
1424/2005	35

Interim measures of protection

915/2000	53
1315/2004	15

L

Liberty and security of person

992/2001	59
1078/2002	3
1126/2002	102
1172/2003	134
1297/2004	182

Litis pendens

1123/2002	98
1159/2003	120
1454/2006	280

Locus standi

915/2000	53
1172/2003	134
1173/2003	143
1355/2005	29

M

Minority rights (*see* Protection of minorities)

Military courts

1172/2003	134
1173/2003	143

P

Presumption of innocence

1341/2005	20
1421/2005	266

Protection of children

1052/2002	74
1153/2003	108
1184/2003	154
1355/2005	29

Protection of minorities

1424/2005	35
-----------------	----

R

Reservation

812/1998	51
1434/2005	45

Residence, freedom of choice of

1424/2005	35
-----------------	----

Review of expulsion order

1315/2004	15
-----------------	----

Right of peoples to dispose freely of their natural wealth and resources

1424/2005	35
-----------------	----

Right of suffrage

1223/2003	164
-----------------	-----

Right to be brought promptly before a judge

915/2000	53
992/2001	59
1159/2003	120
1172/2003	134

1297/2004	182	1327/2004	229
Right to be informed of charges		1421/2005	266
1297/2004	182	Right to petition	
Right to be tried by a competent, independent and impartial tribunal		1416/2005	243
1172/2003	134	Right to privacy	
1173/2003	143	915/2000	53
1296/2004	177	1153/2003	108
1298/2004	188	1355/2005	29
1416/2005	243	1361/2005	237
1421/2005	266	1424/2005	35
1454/2006	280	Right to recognition as a person	
Right to communicate with counsel		1327/2004	229
915/2000	53	Right to review of conviction and sentence by higher tribunal	
1421/2005	266	1102/2002	7
Right to counsel of one's own choice		1156/2003	113
915/2000	53		
992/2001	59	S	
Right to defend oneself		"Same matter"	
1123/2002	98	1454/2006	280
1298/2004	188	Scope of the Covenant	
1421/2005	266	1036/2001	68
Right to examine witnesses		Standing (<i>see Locus standi</i>)	
915/2000	53	State party, failure to cooperate	
1298/2004	188	812/1998	51
1421/2005	266	915/2000	53
Right to hearing		1126/2002	102
1454/2006	280	1153/2003	108
Right to judicial review of the lawfulness of an arrest or detention		Substantiation of claim	
1172/2003	134	1036/2001	68
1173/2003	143	1052/2002	74
1325/2004	226	1100/2002	84
1327/2004	229	1102/2002	7
Right to life		1108 and 1121/2002	92
915/2000	53	1153/2003	108
992/2001	59	1184/2003	154
1078/2002	3	1219/2003	10
1108 and 1121/2002	92	1298/2004	188
1153/2003	108	1315/2004	15
1159/2003	120	1325/2004	226
1315/2004	15	1361/2005	237
		1454/2006	280

“Suit at law”	
1320/2004	215
1341/2005	20
1454/2006	280

T

Torture	
915/2000	53
1108 and 1121/2002	92
1126/2002	102
1297/2004	182
1315/2004	15
1327/2004	229
1416/2005	243

Trial in absentia	
992/2001	59
1298/2004	188
1421/2005	266

U

Undue delay	
1052/2002	74
1297/2004	182
1320/2004	215
1341/2005	20
1454/2006	280

V

Victim status	
1123/2002	98

AUTHOR AND VICTIM INDEX

	<i>A = author V = victim A, V = author's name as victim</i>	<i>State party</i>	<i>Communication number</i>	<i>Page</i>
A				
Alzery, Mohammed	A, V	Sweden	1416/2005	243
Anton, Armand	A, V	Algeria	1424/2005	35
Askarov, Saidabrор	V	Tajikistan	1108 and 1121/2002	92
B				
Bandajevsky, Yuri	A, V	Belarus	1100/2002	84
Becerra Barney, Manuel Francisco	A, V	Colombia	1298/2004	188
Belyatsky, Aleksander et al.	A, V	Belarus	1296/2004	177
Benhadj, Abdelhamid	A	Algeria	1173/2003	143
Benhadj, Ali	V	Algeria	1173/2003	143
Bodrozic, Zeljko	A, V	Serbia and Montenegro	1180/2003	151
Bousroual, Louisa	A	Algeria	992/2001	59
Brough, Corey	A, V	Australia	1184/2003	154
C				
Carranza Alegre, Marlem	A, V	Peru	1126/2002	102
Conde Conde, Mario	A, V	Spain	1325/2004	226
Correia de Matos, Carlos	A, V	Portugal	1123/2002	98
Choi, Myung-Jin	A, V	Republic of Korea	1321 and 1322/2004	218
Chytil, Renatus J.	A, V	Czech Republic	1452/2006	47
D				
Davlatov, Adbumadzhid	V	Tajikistan	1108 and 1121/2002	92
Davlatov, Nazar	V	Tajikistan	1108 and 1121/2002	92
Drouilly Yurich, Jacqueline	V	Chile	1078/2002	3
F				
Faure, Bernadette	A, V	Australia	1036/2001	68
Fillacier, Claude	A, V	France	1434/2005	45
G				
Grioua, Messaouda, née Atamna	A, V	Algeria	1327/2004	229
Grioua, Mohamed	V	Algeria	1327/2004	229
H				
Haraldsson, Erlingur Sveinn	A, V	Iceland	1306/2004	192
Hinostroza Solis, Rubén Santiago	A, V	Peru	1016/2001	65

J				
Joseph, Sister Immaculate et al.	A, V	Sri Lanka	1249/2003	172
J.T.	V	Canada	1052/2002	74
K				
K.N.L.H.	A, V	Peru	1153/2003	108
Karimov, Aidamir	V	Tajikistan	1108 and 1121/2002	92
Karimov, Makhmadim	A	Tajikistan	1108 and 1121/2002	92
L				
Larrañaga, Francisco Juan	A, V	Philippines	1421/2005	266
Lederbauer, Wolfgang	A, V	Austria	1454/2006	280
M				
Madani, Abbassi	V	Algeria	1172/2003	134
Medjnoune, Ali	A	Algeria	1297/2003	182
Medjnoune, Malik	V	Algeria	1297/2003	182
N				
Narcisco, Hilda	A, V	Philippines	1320/2004	215
N.T.	A, V	Canada	1052/2002	74
Nursatov, Amon	A	Tajikistan	1108 and 1121/2002	92
O				
O'Neill, Michael	A, V	Ireland	1314/2004	205
P				
Pérez Escolar, Rafael	A, V	Spain	1156/2003	113
Persaud, Raymond	A, V	Guyana	812/1998	51
Pimentel, Mariano	A, V	Philippines	1320/2004	215
Q				
Quinn, John	A, V	Ireland	1314/2004	205
R				
Rampersaud	A, V	Guyana	812/1998	51
Resus, Ruben	A, V	Philippines	1320/2004	215
Roasaljevic, Vladimir	A, V	Bosnia and Herzegovina	1219/2003	10
Ruzmetov, Oibek	V	Uzbekistan	915/2000	53
Ruzmetov, Sobir	V	Uzbekistan	915/2000	53
Ruzmetov, Uigun	V	Uzbekistan	915/2000	53
S				
Saker, Salak	V	Algeria	992/2001	59
Sankara, Auguste	A, V	Burkina Faso	1159/2003	120
Sankara, Mariam	A, V	Burkina Faso	1159/2003	120
Sankara, Philippe	A, V	Burkina Faso	1159/2003	120

Sankara, Thomas	V	Burkina Faso	1159/2003	120
Semey, Joe Johnson	A, V	Spain	1102/2002	7
Singh, Daljit	A, V	Canada	1315/2004	15
Sultanova, Darmon	A, V	Uzbekistan	915/2000	53
Sveinsson, Örn Snævar	A, V	Iceland	1306/2004	192
T				
Tsarjov, Vjatseslav	A, V	Estonia	1223/2003	164
X				
X	V	Serbia	1355/2005	29
X	A, V	Colombia	1361/2005	237
Y				
Yoon, Yeo-Bum	A, V	Republic of Korea	1321 and 1322/2004	218
Yurich, Norma	A, V	Chile	1078/2002	3
Z				
Zundel, Ernst	A, V	Canada	1341/2005	20