EFFECTIVE REMEDIES - GENERAL

III. JURISPRUDENCE, CONTINUED

CERD

- *Sadic v. Denmark* (25/2002), CERD, A/58/18 (21 March 2003) 132 (CERD/C/62/D/25/2002) at paras. 2.1, 6.2-6.4 and 6.7.

...

2.1 On 25 July 2000, the petitioner was working on a construction site in a public housing area in Randers, Denmark, for the company "Assentoft Painters and Decorators" owned by Jesper Christensen. When the petitioner approached Mr. Christensen to claim overdue payments, their conversation developed into an argument during which Mr. Christensen reportedly made the following comments to the petitioner: "Push off home, you Arab pig", "Immigrant pig", "Both you and all Arabs smell", "Disappear from here, God damned idiots and psychopaths." The argument between the complainant and Mr. Christensen was overheard by at least two other workers, Mr. Carsten Thomassen and Mr. Frank Lasse Hendriksen.

...

6.2 The Committee notes that the petitioner brought a complaint under section 266 (b) of the Criminal Code before the police and the Regional Public Prosecutor and that these authorities, after having interviewed two witnesses and the petitioner's former employer, decided to discontinue criminal proceedings under section 266 (b), as they considered that the requirements of this provision were not satisfied. It has taken note of the State party's argument that, despite the discontinuation of proceedings under section 266 (b) of the Criminal Code, the petitioner could have requested the institution of criminal proceedings against his former employer under the general provision on defamatory statements (section 267 of the Criminal Code). The petitioner does not deny the availability of this remedy, but questions its effectiveness in relation to incidents of racial discrimination.

6.3 The Committee observes that the notion of "effective remedy", within the meaning of article 6 of the Convention, is not limited to criminal proceedings based on provisions which specifically, expressly and exclusively penalize acts of racial discrimination. In particular, the Committee does not consider it contrary to articles 2, paragraph 1 (d), and 6 of the Convention if, as in the State party's case, the provisions of criminal law specifically adopted to outlaw acts of racial discrimination are supplemented by a general provision criminalizing defamatory statements which is applicable to racist statements even if they are not covered by specific legislation.

6.4 As to the petitioner's argument that criminal proceedings against his former employer under section 267 would have been without prospect because the authorities had already rejected his complaint under section 266 (b) of the Criminal Code, the Committee notes, on

the basis of the material before it, that the requirements for prosecution under section 266 (b) are not identical to those for prosecution under section 267 of the Criminal Code. It therefore does not appear that the Danish authorities' decision to discontinue proceedings under section 266 (b) on the ground of lack of evidence as to whether the employer's statements were made publicly or with the intention of wider dissemination have prejudiced a request by the petitioner to institute criminal proceedings under section 267 (together with section 275) of the Criminal Code. The Committee therefore considers that the institution of such proceedings can be regarded as an effective remedy which the petitioner failed to exhaust.

...

6.7 The Committee on the Elimination of Racial Discrimination therefore decides:

(a) That the communication is inadmissible...

- *Kamal Quereshi v. Denmark* (27/2002), CERD, A/58/18 (19 August 2003) 149 (CERD/C/63/D/27/2002) at paras. 2.1-2.7 and 7.2-7.5.

...

2.1 On 26 April 2001, Pia Andersen, a member of the Executive Board of the Progressive Party, faxed a party press release to media, with the headline "No to more Mohammedan rapes!". It included the following statements:

> "Cultural enrichments taking place in the shape of negative expressions and rapes against us Danish women, to which we are exposed every day. … Now it's too much, we will not accept more violations from our foreign citizens, can the Mohammedans not show some respect for us Danish women, and behave like the guests they are in our country, then the politicians in the parliament have to change course and expel all of them."

2.2 On 15 May 2001, Ms. Andersen faxed another press release, in relation to neighbourhood disturbances in Odense, which included the following:

> "Engage the military against the Mohammedan terror! ...Dear fellow citizen, it is that war-like culture these foreigners enrich our country with...Disrespect for this country's laws, mass-rapes, violence, abuse of Danish women by shouting things like 'horse', 'Danish pigs', etc. And now this civil war-like situation."

2.3 For these two actions, the Odense police charged Ms. Andersen with a violation of section 266 (b) of the Danish Criminal Code.a/ She was later convicted... On 5 September 2001, the Progressive Party placed in the newspaper an invitation to a lecture by the former party leader, Mogens Glistrup, which read that: "The Bible of the Muhamedans requires:

the infidel shall be killed and slaughtered, until all infidelity has been removed."

2.4 From 20 to 22 October 2001, the Progressive Party held its annual meeting. This meeting, of a party running for Parliament, was required by law to be broadcast on public television. A number of speakers presented the following views:

> Margit Guul (member of the party): "I'm glad to be a racist. We shall free Denmark of Mohammedans", "the Black breed like rats", "they shall have a hand cut off if they steal".
>
> Bo Warming (member of the party): "The only difference between Mohammedans and rats is that the rats do not receive social benefits."
>
> Mogens Glistrup (former party leader): "Mohammedans are going to exterminate the populations in those countries they have forced themselves into."
> Peter Rindal (member of the party): "Regarding Muslim graveyards, that is a brilliant idea, and preferably of such size that they all fit in them, and preferably at once."
>
> Erik Hammer Sørensen (member of the party): "Fifth columnists are walking around among us. The ones we have received commit violence, murder and rape."
>
> Vagn Andersen (member of the party): "The State has given these foreigners/strangers jobs. They work in our slaughterhouses, where they without problems can poison our food, and endanger our agricultural export. Another form of terrorism is to break into our water supply facilities and poison the water."

2.5 After witnessing this meeting, the petitioner requested the Documentation and Advisory Centre on Racial Discrimination (DRC) to file a criminal complaint against the Progressive Party for a violation of section 266 (b). The DRC filed a complaint with the Chief Constable of the Thisted police, the city of residence of the Progressive Party leader. On 31 October 2001, the complaint was rejected on the basis that section 266 (b) did not apply to legal persons such as a political party. On 3 December 2001, the Aalborg Regional Public Prosecutor upheld this decision.

2.6 Thereupon, the petitioner requested the DRC to file a criminal complaint against each member of the executive board of the Progressive Party, for violation of sections 23 and 266 (b) of the Criminal Code. On 11 December 2001, the DRC complained that Ms. Andersen, as a member of the party's executive board, had participated in a violation of section 266 (b), as a result of the press releases, newspaper invitation and comments made at the annual meeting, all described above. The DRC considered it relevant that the Progressive Party had

allegedly set up courses allegedly teaching members how to avoid violations of section 266 (b), by avoiding the use of certain phrases.

2.7 On 7 January 2002, the Chief Constable of the Odense police rejected the petitioner's complaint, considering that there was no reasonable evidence to support the allegation that an unlawful act had been committed.b/ The Chief Constable considered that membership of a political party's executive does not of itself create a basis for criminal participation in relation to possible criminal statements made during the party's annual meeting by other persons.

...

7.2 The Committee notes that the present case involves two different sets of acts by different actors: on the one hand, Ms. Andersen herself transmitted press releases by facsimile, in respect of which she was subsequently convicted; on the other hand, speakers at the party conference (of which Ms. Andersen was not one) made the series of racist statements, contrary to article 4 (b) of the Convention, described in paragraph 2.4, concerning which criminal complaints were lodged

7.3 Against this background, the Committee considers that given the complaint against Ms. Andersen in connection with the party conference was not accompanied by any evidence suggesting that she was an accomplice soliciting, directing, or otherwise procuring the speakers at the party meeting to engage in the impugned conduct, it is reasonable to conclude, as did the State party's authorities, that the complaint did not make out a case that Ms. Andersen, as opposed to the speakers themselves, had engaged in any act of racial discrimination; indeed, as a matter of criminal law, liability of a member of a party's executive board could not attach, without additional evidence, in respect of statements made by third parties.

7.4 In the Committee's view, this case may accordingly be distinguished from previous cases where, on the facts, the Committee has on occasion considered that an investigation into the alleged acts of racial discrimination that had taken place was insufficient for the purposes of article 6.d/ In each of those cases, in fact, the investigation was in respect of the individual(s) directly committing the alleged act of racial discrimination, rather than a third party, with the result that *no* person was held criminally responsible for the acts in question; in the present case, on the other hand, criminal complaints *were* lodged against those directly responsible. It cannot therefore be considered that there was no effective action taken in response to the acts in question.

7.5 As to the review of the decisions not to prosecute in the present case, the Committee refers to its jurisprudence that "the terms of article 6 do not impose upon States parties the duty to institute a mechanism of sequential remedies" in cases of alleged racial discrimination.e/ Accordingly, even if article 6 might be interpreted to require the possibility

of judicial review of a decision not to bring a criminal prosecution in a particular case alleging racial discrimination, the Committee refers to the State party's statement that it is open, under national law, judicially to challenge a prosecutor's decision.

Notes:

a/ Section 266 (b) of the Criminal Code provides as follows:

> "(1) Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding two years.
>
> (2) When the sentence is meted out, the fact that the offence is in the nature of propaganda activities shall be considered an aggravating circumstance."

B/ The relevant sections of the Administration of Justice Act regulating the investigation of criminal complaints provide as follows:

> 742 (2): "The police shall institute investigations upon a [criminal] report lodged or on its own initiative, when it may reasonably be presumed that a criminal offence subject to prosecution has been committed."
>
> 743: "The purpose of the investigation is to clarify whether the conditions for imposing criminal liability or other legal consequences under criminal law are fulfilled, and to provide information for use in the determination of the case and prepare the conduct of the case before the court."

...

d/ See for example, Case No. 16/1999, *Ahmad v. Denmark,* Opinion adopted on 13 March 2000 and *Habassi* [Case No. 10/1997, Opinion adopted on 17 March 1999].

e/ Case No. 1/1984, *Dogan v. The Netherlands,* Opinion adopted on 10 August 1988, paragraph 9.4 (finding no violation of article 6).

EFFECTIVE REMEDIES - GENERAL

- *L. R. et al. v. Slovakia* (31/2003), CERD, A/60/18 (7 March 2005) 119 at paras. 2.1-2.3, 10.5-10.7, 10.9, 10.10, 11 and 12.

...

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

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

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

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

2.3 On 16 September 2002, in the light of the relevant law,d/ the petitioners' counsel requested the Rožňava District Prosecutor to investigate and prosecute the authors of the discriminatory petition, and to reverse the council's second resolution as it was based on a discriminatory petition. On 7 November 2002, the District Prosecutor rejected the request on the basis of purported absence of jurisdiction over the matter. The Prosecutor found that "...the resolution in question was passed by the Dobšiná Town Council exercising its self-governing powers; it does not constitute an administrative act performed by public administration and, as a result, the prosecution office does not have the competence to review the legality of this act or to take prosecutorial supervision measures in non-penal area".

...

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

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

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

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

...

10.9 Accordingly, the Committee finds that the State party is in breach of its obligation under article 2, paragraph 1 (a), of the Convention to engage in no act of racial discrimination and to ensure that all public authorities act in conformity with this obligation. The Committee also finds that the State party is in breach of its obligation to guarantee the right of everyone to equality before the law in the enjoyment of the right to housing, contrary to article 5, paragraph (e) (iii), of the Convention.

10.10 With respect to the claim under article 6, the Committee observes that, at a minimum, this obligation requires the State party's legal system to afford a remedy in cases where an act of racial discrimination within the meaning of the Convention has been made out,

whether before the national courts or, in this case, the Committee. The Committee having established the existence of an act of racial discrimination, it must follow that the failure of the State party's courts to provide an effective remedy discloses a consequential violation of article 6 of the Convention.

...

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

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

Notes

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

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

b/ Petitioners' translation, which reflects exactly the text of the petition set out in the translated judgement of the Constitutional Court provided by the State party annexed to its submissions on the merits. The State party suggests in its submissions on the merits that a more appropriate translation would be: "I do not agree with the construction of flats for the

citizens of Gypsy nationality (ethnicity) within the territory of the town of Dobšiná, as there is a danger of influx of citizens of Gypsy nationality from surrounding area [sic] and even from other districts and regions."

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

> "RESOLUTION 288/5/VIII-2002-MsZ
>
> I. After discussing the petition of 30 July 2002 and after determining the facts, the Town Council of Dobšiná, through the Resolution of the Town Council is in compliance with the law, on the basis of the citizens' petition
>
> Cancels
>
> Resolution 251-20/III-2002-MsZ approving the low-cost housing - family houses or apartment houses - development policy.
>
> II. Tasks
>
> The Town Council commissions with elaborating a proposal for solving the existence of inadaptable citizens in the town of Dobšiná and then to discuss it in the bodies of the town and at a public meeting of the citizens.
>
> Deadline: November 2002
> Responsible: Chairpersons of commissions."

d/ The petitioners refer to:

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

(ii) Article 12 of the Constitution, which provides:
> (1) All human beings are free and equal in dignity and in rights. Their fundamental rights and freedoms are sanctioned; inalienable, imprescriptible and irreversible.
> (2) Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favoured on any of these grounds.

(3) Everyone has the right to decide freely which national group he or she is a member of. Any influence and all manners of pressure that may affect or lead to a denial of a person's original nationality shall be prohibited.
(4) No injury may be inflicted on anyone, because of exercising his or her fundamental rights and freedoms;

(iii) Article 33 of the Constitution, which provides:
"Membership in any national minority or ethnic group may not be used to the detriment of any individual"; and

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

_____

ICCPR

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

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

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

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

7.4 With regard to the issues raised under articles 9 (3) and 14 (3) of the Covenant, the Committee notes that, at the time of the submission of the communication, the authors had

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

...

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

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

- *Äärelä and Näkkäläjärui v. Finland* (779/1997) ICCPR, A/57/40 vol. II (24 October 2001) 117 (CCPR/C/73/D/779/1997) at paras. 2.1- 2.5, 7.2, 7.4, 8.1, 8.2 and Individual Opinion by Prafullachandra N. Bhagwati (concurring).

...

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

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

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

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

EFFECTIVE REMEDIES - GENERAL

2.5 On 15 December 1997, the Ombudsman decided that the municipality of Inari and its mayor had exerted inappropriate pressure on the authors by formally asking them to withdraw from their legal proceedings, but did not find that the Forestry Service had acted unlawfully or otherwise wrongly. 6/ The Ombudsman limited his remedy to bringing this conclusion to the attention of the parties. On 1 June 1998, a decision of the Ministry of Agriculture and Forestry (of 13 November 1997) entered into effect reducing the permissible size of the Sallivaara herd by 500 head from 9,000 to 8,500 animals. On 3 and 11 November 1998, the Forestry Service required a total sum of over 20,000 Finnish marks from the authors towards meeting the costs judgement. 7/ This sum distrained by the Forestry Service corresponds to a major share of the authors' taxable income.

...

7.2 As to the authors' argument that the imposition of a substantial award of costs against them at the appellate level violated their rights under article 14, paragraph 1, to equal access to the courts, the Committee considers that a rigid duty under law to award costs to a winning party may have a deterrent effect on the ability of persons who allege their rights under the Covenant have been violated to pursue a remedy before the courts. In the particular case, the Committee notes that the authors were private individuals bringing a case alleging breaches of their rights under article 27 of the Covenant. In the circumstances, the Committee considers that the imposition by the Court of Appeal of substantial costs award, without the discretion to consider its implications for the particular authors, or its effect on access to court of other similarly situated claimants, constitutes a violation of the authors' rights under article 14, paragraph 1, in conjunction with article 2 of the Covenant. The Committee notes that, in the light of the relevant amendments to the law governing judicial procedure in 1999, the State party's courts now possess the discretion to consider these elements on a case by case basis.

...

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

...

EFFECTIVE REMEDIES - GENERAL

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

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

Notes

...

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

...

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

...

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

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

...

Individual Opinion by Prafullachandra N. Bhagwati (concurring)

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

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

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

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

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

...

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

...

4.8 As to counsel's contention that the State party has violated article 14, paragraph 3 (c), as the author's trial was not held within a reasonable time after he was charged, the Committee notes that the author waited for a period of seven years and nine months from the time of his arrest to the date of his trial. The State party has provided no justification for this delay. In the circumstances, the Committee considers that this is an excessive period of time

and, therefore, that the State party has violated article 14, paragraph 3 (c), of the Covenant.

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

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

...

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

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

Notes

...

6/ Communication No. 759/97.

7/ In the following cases, the Committee decided that the withdrawal of an appeal without consultation, would amount to a violation of article 14, paragraph 3 (d) of the Covenant: *Collins v. Jamaica* (356/89), *Steadman v. Jamaica* (528/93), *Smith and Stewart v. Jamaica* (668/95), *Morrison and Graham v. Jamaica* (461/91), *Morrison v. Jamaica* (663/95), *McLeod v. Jamaica* (734/97), *Jones v. Jamaica* (585/94).

EFFECTIVE REMEDIES - GENERAL

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

...

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

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

2.3 On 15 April 1992, Law 243/1992 came into force. The law provides for restitution of agricultural and forest property confiscated under Decree 12/1945. To be eligible for restitution, a claimant had to have Czech citizenship under Decree 33/1945 (or under Law 245/1948, 194/1949 or 34/1953), permanent residence in the Czech Republic, having been loyal to the Czechoslovak Republic during the period of German occupation, and to have Czech citizenship at the time of submitting a claim for restitution. The author filed a claim for restitution of the Hruby Rohozec estate within the prescribed time limit and on 24 November 1992 concluded a restitution contract with the then owners, which was approved by the Land Office on 10 March 1993 (PU-R 806/93). The appeal by the town of Turnov was rejected by the Central Land Office by decision 1391/93-50 of 30 July 1993. Consequently, on 29 September 1993 the author took possession of his lands.

...

EFFECTIVE REMEDIES - GENERAL

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

...

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

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

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

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

EFFECTIVE REMEDIES - GENERAL

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

...

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

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

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

2.4 After the end of communist rule in Czechoslovakia, the author lodged a complaint to the General procurator, on 18 December 1990, for denial of justice with regard to her claim for restitution. Her complaint was dismissed on 21 August 1991 for being out of time, having been lodged more than five years after the confiscation. The author states that under Communist rule it was not possible to lodge a complaint within the time limit of five years as prescribed by law.

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

...

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

EFFECTIVE REMEDIES - GENERAL

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

...

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

...

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

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

EFFECTIVE REMEDIES - GENERAL

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

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

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Notes

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

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

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

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

...

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

...

2.6 Since his conviction, the author has been confined in a cell alone for periods of up to 22 hours each day, most of his waking time is spent in darkness making it impossible for him to keep occupied. Slop buckets are used, filled with human waste and stagnant water, and only emptied once per day. There is also no running water provided in the author's cell.

Consequently, the author has to wait until he is released to get running water which he then stores in a bottle. It is also stated that the author slept on cardboard and newspapers on concrete until October 1994 when he was provided with an old mattress.

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

...

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

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

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

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the

author is entitled to an appropriate remedy, including adequate compensation, an improvement in the present conditions of detention and due consideration of early release.

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Notes

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

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

...

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

2.2 After the end of the war, on 19 May 1945, President Benes' Decree No. 5/1945, followed up later by Act 128/1946, declared null and void all property transactions effected under pressure of the occupation regime on the basis of racial or political persecution. National administration was imposed on all enemy assets. This included the author's parents' property pursuant to a decision taken by the Ministry of Industry on 2 August 1945. However, in February 1946, the Ministry of Industry annulled that decision. It also annulled the prior property confiscation and transfers, and the author's parents were reinstated as the rightful owners, in accordance with Benes Decree No. 5/1945.

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

2.4 Following the change to a democratic government at the adoption of restitution legislation, the author applied for restitution under Act No. 87/1991 as amended by Act No.

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

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

2.6 The Constitutional Court concluded that since the first and second instances had decided that the author was not the owner of the property, there were no property rights that could have been violated. In its decision, the Constitutional Court invoked the question of fair trial on its own motion and concluded that "the legal proceedings were conducted correctly and all the legal regulations have been safeguarded". Accordingly, the Constitutional Court rejected the author's constitutional complaint on 12 September 1996.

...

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

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

7.4 The Committee notes that Act No. 87/1991 as amended by Act No. 116/1994 gave rise

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

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

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

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

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

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

EFFECTIVE REMEDIES - GENERAL

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

...

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

11. The Committee is of the view that Mr. Sahadeo is entitled, under article 2, paragraph 3 (a), to an effective remedy, in view of the prolonged pretrial detention in violation of article 9, paragraph 3, and the delay in the subsequent trial, in violation of article 14, paragraph 3 (c), entailing a commutation of the sentence of death and compensation under article 9, paragraph 5, of the Covenant. The State party is under an obligation to take appropriate measures to ensure that similar violations do not occur in the future.

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

...

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

3.2 The combined rule 86/rule 91 request was handed to the Permanent Mission of Trinidad

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

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

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

...

10.9 With regard to Mr. Ashby's execution, the Committee recalls its jurisprudence that apart from any violation of the rights under the Covenant, the State party commits a serious breach of its obligations under the Optional Protocol if it engages in any acts which have the effect of preventing or frustrating consideration by the Committee of a communication alleging any violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile.8/ The behaviour of the State party represents a shocking failure to demonstrate even the most elementary good faith required of a State party to the Covenant and of the Optional Protocol.

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

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

12. Under article 2, paragraph 3, of the Covenant, Mr. Ashby would have been entitled to

an effective remedy including, first and foremost, the preservation of his life. Adequate compensation must be granted to his surviving family.

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Notes

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

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

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

7.2 In the case in question, Mr. Jiménez Vaca had an objective need for the State to take steps to ensure his safety, given the threats made against him. The Committee takes note of the State party's observations, set out in paragraph 5.1, but notes that the State party does not refer to the complaint which the author claims to have filed with the regional procurator's office in Turbo or before the regional office of the administrative security department of Turbo, nor does it offer any argument to show that the so-called "extortion" did not begin as a result of the complaint concerning death threats which the author filed with the Turbo second criminal circuit court. The Committee must also consider the fact that the State party does not deny the author's allegations that there was no reply to his request that the threats should be investigated and his protection guaranteed. The attempt on the author's life subsequent to the threats confirms that the State party did not take, or was unable to take, adequate measures to guarantee Mr. Asdrúbal Jiménez's right to security of person as provided for in article 9, paragraph 1.

7.3 With regard to the author's claim that article 6, paragraph 1, was violated insofar as the very fact that an attempt was made on his life is a violation of the right to life and the right not to be arbitrarily deprived of life, the Committee points out that article 6 of the Covenant implies an obligation on the part of the State party to protect the right to life of every person within its territory and under its jurisdiction. In the case in question, the State party has not denied the author's claims that the threats and harassment which led to an attempt on his life

were carried out by agents of the State, nor has it investigated who was responsible. In the light of the circumstances of the case, the Committee considers that there has been a violation of article 6, paragraph 1, of the Covenant.

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

...

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

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

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- *Wanza v. Trinidad and Tobago* (683/1996), ICCPR, A/57/40 vol. II (26 March 2002) 55 (CCPR/C/74/D/683/1996) at paras. 9.2, 9.4, 10 and 11.

...

9.2 With regard to the author's claim that his conditions of detention amounted to a violation of articles 7 and 10(1) of the Covenant, the Committee notes that the information provided by counsel and the author contradicts itself in respect to the light in the cell. However, the remaining specific allegations on the poor conditions of detention, in particular, that the cell is small and does not contain a window but a ventilation hole of 18 by 8 inches, that the author was kept in this cell for 22 to 23 hours a day, and that on weekends and holidays he was not allowed to leave the cell because of lack of prison staff, have not been contested by

the State party, except in a very general way. According to the Committee's prior jurisprudence, such conditions sustain the finding of a violation of article 10(1) in the instant case. 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.

...

9.4 With regard to the delay of almost five years between the author's conviction and the determination of his appeal, the Committee has noted the State party's explanations in particular its statement that it has taken steps to remedy the situation. Nevertheless, the Committee wishes to emphasize that the rights set forth in the Covenant constitute minimum standards which all States parties have agreed to observe.5/ Article 14, paragraph 3(c), states that all accused shall be entitled to be tried without delay, and this requirement applies equally to the right of review of conviction and sentence guaranteed by article 14, paragraph 5. The Committee considers that the period of almost five years between the author's conviction in February 1989 and the judgement of the Court of Appeal, dismissing his appeal, in January 1994, is incompatible with the requirements of article 14, paragraph 3(c) juncto article 14, paragraph 5 of the Covenant.

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

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Wanza with an effective remedy, which includes consideration of early release.

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5/ See the Committee's Views in *Lubuto v. Zambia*, CCPR/C/55/D/390/1990, adopted on 31 October 1995, para. 7.3. See also the Committee's Views in *Sextus v. Trinidad & Tobago*, CCPR/C/72/D/818/1998, Views adopted on 16 July 2001, para. 7.3.

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

...

9.1 Regarding the conditions of detention, the Committee notes that the State party concedes that prison conditions were bad and that detention centres at the time of the events held twice the intended number of inmates. The Committee also notes the specific information received

from the author, in particular that the prison population was, in fact, five times the allowed capacity and that the conditions in Matrosskaya Tishina prison were inhuman, because of poor ventilation, inadequate food and hygiene. The Committee finds that holding the author's son in the conditions prevailing at this prison during that time entailed a violation of his rights under article 10, paragraph 1 of the Covenant.

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

...

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

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

EFFECTIVE REMEDIES - GENERAL

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

...

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

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

7.7 The Committee has noted the author's allegations of beatings sustained after arrest in police custody. It notes that the State party has not challenged these allegations; that the author has provided a detailed description of the treatment he was subjected to, further identifying the police officers allegedly involved; and that the magistrate before whom he was brought on 10 February 1987 ordered him to be taken to hospital for treatment. The Committee considers that the treatment Mr. Kennedy was subjected to in police custody amounted to a violation of article 7 of the Covenant.

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

Committee considers that these - uncontested - conditions of detention amount to a violation of article 10, paragraph 1, of the Covenant.

...

7.10 The author finally claims that the absence of legal aid for the purpose of filing a constitutional motion amounts to a violation of article 14, paragraph 1, read together with article 2, paragraph 3. The Committee notes that the Covenant does not contain an express obligation as such for any State party to provide legal aid to individuals in all cases but only in the determination of a criminal charge where the interests of justice so require (article 14(3)(d)). It is further aware that the role of the Constitutional Court is not to determine the criminal charge itself, but to ensure that applicants receive a fair trial. The State party has an obligation, under article 2, paragraph 3, of the Covenant, to make the remedies in the Constitutional Court, provided for under Section 14(1) of the Trinidadian Constitution, available and effective in relation to claims of violations of Covenant rights. As no legal aid was available to the author before the Constitutional Court, in relation to his claim of a violation of his right to a fair trial, the Committee considers that the denial of legal aid constituted a violation of article 14, paragraph 1, in conjunction with article 2, paragraph 3.

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

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

- *Müller and Engelhard v. Namibia* (919/2000), ICCPR, A/57/40 vol. II (26 March 2002) 243 (CCPR/C/74/D/919/2000) at paras. 6.7, 6.8, 7 and 8.

...

6.7 With regard to the authors' claim under article 26 of the Covenant, the Committee notes the fact, undisputed by the parties to the case; that section 9, paragraph 1, of the Aliens Act differentiates on the basis of sex, in relation to the right of male or female persons to assume the surname of the other spouse on marriage. The Committee reiterates its constant jurisprudence that the right to equality before the law and to the equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.8/ A different treatment based on one of the specific grounds enumerated in article 26, clause 2 of the Covenant, however, places a heavy

burden on the State party to explain the reason for the differentiation. The Committee, therefore, has to consider whether the reasons underlying the differentiation on the basis of gender, as embodied in section 9, paragraph 1, remove this provision from the verdict of being discriminatory.

6.8 The Committee notes the State party's argument that the purpose of Aliens Act section 9, paragraph 1, is to fulfil legitimate social and legal aims, in particular to create legal security. The Committee further notes the States party's submission that the distinction made in section 9 of the Aliens Act is based on a long-standing tradition for women in Namibia to assume their husbands' surname, while in practice men so far never have wished to assume their wives' surname; thus the law, dealing with the normal state of affairs, is merely reflecting a generally accepted situation in Namibian society. The unusual wish of a couple to assume as family name the surname of the wife could easily be taken into account by applying for a change of surname in accordance with the procedures set out in the Aliens Act. The Committee, however, fails to see why the sex-based approach taken by section 9, paragraph 1, of the Aliens Act may serve the purpose of creating legal security, since the choice of the wife's surname can be registered as well as the choice of the husband's surname. In view of the importance of the principle of equality between men and women, the argument of a long-standing tradition cannot be maintained as a general justification for different treatment of men and women, which is contrary to the Covenant. To subject the possibility of choosing the wife's surname as family name to stricter and much more cumbersome conditions than the alternative (choice of husband's surname) cannot be judged to be reasonable; at any rate the reason for the distinction has no sufficient importance in order to outweigh the generally excluded gender-based approach. Accordingly, the Committee finds that the authors have been the victims of discrimination and violation of article 26 of the Covenant.

...

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

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, avoiding any discrimination in the choice of their common surname. The State party should further abstain from enforcing the cost order of the Supreme Court or, in case it is already enforced, to refund the respective amount of money.

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8/ See Views *Danning v. The Netherlands*, Case No. 180/1984.

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EFFECTIVE REMEDIES - GENERAL

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

...
2.1 On 19 May 1995, the author was convicted of illegal possession of a firearm, rape and robbery with aggravation by the High Court Division Gun Court, Kingston, Jamaica, and sentenced to respectively 5, 10 and 7 years imprisonment with hard labour, to run concurrently, and in addition to receive 6 strokes of the tamarind switch.
...
4.6 ...The author has claimed that the use of the tamarind switch constitutes cruel, inhuman and degrading punishment, and that the imposition of the sentence violated his rights under article 7 of the Covenant. The State party has not contested the claim. Irrespective of the nature of the crime that is to be punished or the permissibility of corporal punishment under domestic law, it is the consistent opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant. The Committee finds that the imposition or the execution of a sentence of whipping with the tamarind switch constitutes a violation of the author's rights under article 7.

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

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

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

...
9.1 With regard to the conditions of the author's detention at State Prison, Port-of-Spain, both before and after conviction, the Committee notes that in his different submissions the author made specific allegations, in respect of the deplorable conditions of detention...The Committee recalls its earlier jurisprudence that certain minimum standards regarding the conditions of detention must be observed and that it appears from the author's submissions that these requirements were not met during the author's detention since 28 May 1988. In the absence of any response from the State party, the Committee must give due weight to the allegations of the author. Consequently, the Committee finds that the circumstances

described by the author disclose a violation of articles 10, paragraph 1, of the Covenant. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, is not necessary to consider separately the claims arising under article 7.

...

9.3 With regard to the delays in bringing the author to trial, the Committee notes that the author was detained on 28 May 1988 and formally charged with murder on 2 June 1988. His trial began on 6 October 1989 and he was sentenced to death on 2 November 1989. Under article 9, paragraph 3, of the Covenant anyone arrested or detained on a criminal charge shall be entitled to trial within a reasonable time. It appears from the transcript of the trial before the San Fernando Assize Court that all evidence for the case of the prosecution was gathered by 1 June 1988 and no further investigations were carried out. The Committee is of the view that in the context of article 9, paragraph 3, in the specific circumstances of the present case and in the absence of any explanation for the delay by the State party, the length of time that the author was in pre-trial detention is unreasonable and, therefore, constitutes a violation of this provision.

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

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

...

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

11. Under article 2, paragraph 3, of the Covenant, Mr. Teesdale is entitled to an effective remedy, including compensation and consideration by the appropriate authorities of a reduction in sentence. The State party is under an obligation to ensure that similar violations

do not occur in the future.

- *Sahadath v. Trinidad and Tobago* (684/1996), ICCPR, A/57/40 vol. II (2 April 2002) 61 (CCPR/C/74/D/684/1996) at paras. 7.2, 7.3, 8 and 9.

...

7.2 As to the author's claim that issuing of a warrant for the execution of a mentally incompetent person constitutes a violation of articles 6 and 7 of the Covenant, the Committee notes that the author's counsel does not claim that his client was mentally incompetent at the time of imposition of the death penalty and his claim focuses on the time when the warrant for execution was issued. Counsel has provided information that shows that the author's mental state at the time of the reading of the death warrant was obvious to those around him and should have been apparent to the prison authorities. This information has not been contested by the State party. The Committee is of the opinion that in these circumstances issuing a warrant for the execution of the author constituted a violation of article 7 of the Covenant. As the Committee has no further information regarding the author's state of mental health at earlier stages of the proceedings, it is not in a position to decide whether the author's rights under article 6 were also violated.

7.3 As to the author's claims that the conditions of detention in the various phases of his imprisonment violated articles 7 and 10, paragraph 1, in the absence of a responses by the State party to the conditions of detention as described by the author, the Committee notes that author's counsel has provided a detailed description of the conditions in the prison in which the author was detained and has also claimed that no psychiatric treatment was available in the prison. As the State party has made no attempt to challenge the detailed allegations made by author's counsel, nor to contest that these conditions applied to the author himself, the Committee must give due credence to the counsel's allegations. As to whether the conditions as described violate the Covenant, the Committee considers, as it has repeatedly found in respect of similar substantiated allegations,d/ that the author's conditions of detention as described violate his right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to article 10, paragraph 1...

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 7 and 10, paragraph 1 of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including appropriate medical and psychiatric care. The State party is also under an obligation to improve the present conditions of detention so as to ensure that the author is detained in conditions that are compatible with

article 10 of the Covenant, or to release him, and to prevent similar violations in the future.

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Notes

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d/ See, for example, *Kelly v. Jamaica* (Communication 253/1987) and *Taylor v. Jamaica* (Communication 707/1996).

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- *Dergachev v. Belarus* (921/2000) ICCPR, A/57/40 vol. II (2 April 2002) 252 (CCPR/C/74/D/2000) at paras. 2.1, 2.2, 7.2 and 8.

...

2.1 On 21 March 1999, the author, a member of Belarus People's Front, a political party in Belarus Republic, carried a poster during a picket he had organized. The poster carried an inscription to the effect that: "Followers of the present regime! You have led the people to poverty for five years. Stop listening to lies. Join the struggle led by the Belarus People's Front for you."

2.2 On 29 March 1999, the author was tried in the Smorgon district court. The court considered the inscription on the poster as amounting to a call for insubordination against the existing government and/or to the destruction of the constitutional order of the Byelorussian Republic. It ruled accordingly that the poster constituted an administrative offence under the Belarus Code of Administrative Offences (art. 167, para. 2). Accordingly, the author was convicted and fined five million Belarussian roubles. It also ordered confiscation of the poster. Militia officers who were present on duty during the picket were summoned to the court as witnesses.

...

7.2 The Committee is of the view that the particular expression of political opinion expressed by the author in carrying the poster in question falls within the scope of freedom of expression protected under article 19 of the Covenant. The State party has not advanced that any of the restrictions set out in article 19, paragraph 3, of the Covenant are applicable. The Committee therefore considers that the conviction of the author for expression of his views amounted to a violation of his rights under article 19 of the Covenant, and notes that his conviction had not been annulled when the communication was submitted to the Committee.

...

8. The Human Rights Committee...is of the view that the facts before it disclose violation of article 19 of the Covenant. However, with reference to article 4, paragraph 2, of the Optional Protocol, the Committee considers that the State party, by the annulment of the

decisions against the author, subsequent to the submission of the communication, has rectified the situation by a remedy that the Committee deems appropriate within the meaning of article 2 of the Covenant. The State party is requested to publish the Committee's Views.

- *Rogerson v. Australia* (802/1998), ICCPR, A/57/40 vol. II (3 April 2002) 150 (CCPR/C/74/D/805/1998) at paras. 9.3 and 11.

...

9.3 The Committee notes the author's claim that the procedure at the Northern Territory Court of Appeals on contempt of court violated his right to a fair hearing provided for in article 14, paragraph 3 (c), of the Covenant, because it delivered its decision with delay. The Committee notes that the Court heard the appeal of the author from 22 to 24 March 1993. The Committee notes further that the two puisne judges delivered their draft decisions on 28 April and 27 July 1993, respectively; on 17 March 1995, the Court dismissed the author's case. The State party has not explained what happened in the author's case between these dates, notwithstanding the existence of a case management system. The Committee finds that in the circumstances of the present case a delay of almost two years to deliver the final decision violates the right of the author to be tried without undue delay as provided for in article 14, paragraph 3 (c), of the Covenant.

...

11. The Committee considers that its finding of a violation of the rights of the author under article 14, paragraph 3 (c), of the Covenant constitutes sufficient remedy.

- *Karakurt v. Austria* (965/2000), ICCPR, A/57/40 vol. II (4 April 2002) 304 (CCPR/C/74/D/965/2000) at paras. 8.4, 9 and 10.

...

8.4 In the present case, the State party has granted the author, a non-Austrian/EEA national, the right to work in its territory for an open-ended period. The question therefore is whether there are reasonable and objective grounds justifying exclusion of the author from a close and natural incident of employment in the State party otherwise available to EEA nationals, namely the right to stand for election to the relevant work-council, on the basis of his citizenship alone. Although the Committee had found in one case (No. 658/1995, *Van Oord v. The Netherlands*) that an international agreement that confers preferential treatment to nationals of a State party to that agreement might constitute an objective and reasonable ground for differentiation, no general rule can be drawn therefrom to the effect that such an agreement in itself constitutes a sufficient ground with regard to the requirements of article 26 of the Covenant. Rather, it is necessary to judge every case on its own facts. With regard to the case at hand, the Committee has to take into account the function of a member of a

work council, i.e., to promote staff interests and to supervise compliance with work conditions...In view of this, it is not reasonable to base a distinction between aliens concerning their capacity to stand for election for a work council solely on their different nationality. Accordingly, the Committee finds that the author has been the subject of discrimination in violation of article 26.

9. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 26 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 author with an effective remedy, consisting of modifying the applicable law so that no improper differentiation is made between persons in the author's situation and EEA nationals.

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

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

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

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

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

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

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

...

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

read in conjunction with article 2 of the Covenant.

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

...

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

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

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Notes

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

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

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

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

...

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

EFFECTIVE REMEDIES - GENERAL

...

2.7 On 30 January 1995, the author submitted an application for *amparo* to the Trujillo Third Special Civil Court, requesting that the Supreme Decision relieving him of his duties should be declared unenforceable. In its judgement of 2 March 1995, the Court declared the decision unenforceable and ordered the reinstatement of the author to active service in the National Police with the rank of commander. The judgement was appealed by the Public Prosecutor of the Ministry of the Interior in the Trujillo First Civil Division which, on 20 June 1995, upheld the order for the author's reinstatement. The Public Prosecutor then appealed to the Constitutional Division of the Supreme Court, which, in its decision of 6 December 1995, declared itself incompetent to hear the appeal. On 27 December 1995, the appeal was declared inadmissible by the Trujillo First Civil Division.

...

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

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

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

Notes

...

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

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

- *Mátyus v. Slovakia* (923/2000) ICCPR, A/57/40 vol. II (22 July 2002) 257 (CCPR/C/75/D/923/2000) at paras. 2.1, 2.2, 3.1, 3.2, 9.2, 10 and 11.

...

2.1 The author states that, on 5 November 1998, the Roñ Áava Town Council passed Resolution 193/98 establishing five voting districts in the region and 21 representatives in total, for the elections to the Roñ Áava Town Council, due to take place on 18 and 19 of December 1998. Each voting district was to have the following number of representatives: five in voting district number one; five in voting district number two; seven in voting district number three; two in voting district number four; two in voting district number five. In accordance with paragraph 9 section 1 of Law no. 346/1990 Coll. on elections to municipal bodies, "in every town, multi-mandate voting districts shall be established in which representatives shall be elected to the village or town council proportional to the number of inhabitants in the town, and at most 12 representatives in one electoral district".

2.2 According to the author, when comparing the number of residents per representative in the individual voting districts in the town of Roñ Áava, he came up with the following figures; one representative per 1,000 residents in district number one; one per 800 residents in district number two; one per 1,400 residents in district number three; one per 200 residents in district number four; and one per 200 residents in district number five. The number of representatives in each district was not therefore proportional to the number of inhabitants therein. The author was a candidate in voting district number three but failed to secure a seat as he came number eighth and only seven deputies were elected for this district.

...

3.1 The author contends that the rights of the "citizens of Roñ Áava", under article 25(a) and (c) of the Covenant, were violated as they were not given an equal opportunity to influence the results of the elections, in exercising their right to take part in the conduct of public affairs, through the election of representatives. In addition, the author states that their rights were violated as they were not given an equal opportunity to exercise their right to be elected to posts in the town council.

3.2 The author contends that his rights, under article 25(a) and (c), were violated, as he would have needed substantially more votes to be elected to the town council than candidates in other districts, due to the fact that the number of representatives in each district was not proportional to the number of inhabitants therein. The author claims that this resulted in his

loss of the election.

...

9.2 As regards the question whether article 25 of the Covenant was violated, the Committee notes that the Constitutional Court of the State party held that by drawing election districts for the same municipal council with substantial differences between the number of inhabitants per elected representative, despite the election law which required those voting districts to be proportional to the number of inhabitants, the equality of election rights required by the State party's constitution was violated. In the light of this pronouncement, based on a constitutional clause similar to the requirement of equality in article 25 of the Covenant, and in the absence of any reference by the State party to factors that might explain the differences in the number of inhabitants or registered voters per elected representative in different parts of Roň Áava, the Committee is of the opinion that the State party violated the author's rights under article 25 of the Covenant.

10. The Human Rights Committee...is of the view that the facts as found by the Committee reveal a violation by Slovakia of article 25 paragraphs (a) and (c) of the Covenant.

11. The Committee acknowledges that cancelling elections after they have already taken place may not always be the appropriate remedy in the case of an inequality in the elections, especially when the inequality was inherent in the laws and regulations laid down before the elections, rather than irregularities in the elections themselves. Furthermore, in the specific circumstances of the case, given the time lapse since the elections in December 1998, the Committee is of the opinion that its finding of a violation is of itself a sufficient remedy. The State party is under an obligation to prevent similar violations in the future.

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

...

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

2.2 After a period of four years and three months for Messrs. Francis and Glaude, and of three years and five months for Mr. George, the authors were tried between 6 and 30 November 1990, convicted by unanimous jury verdict and sentenced to death for the murder charged. From their conviction on 30 November 1990 until the commutation of their

sentences on 3 March 1997, the authors were confined on death row at Port of Spain Prison, Trinidad. They were detained in solitary confinement in a cell measuring 9 feet by 6 feet, containing an iron bed, mattress, bench and table.1/

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

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

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

...

5.6 As to the authors' claims that the conditions of detention in each phase of their imprisonment violated articles 7 and 10, paragraph 1, in the absence of any responses by the State party to the allegations concerning the conditions of detention as described by the authors, the Committee must give due consideration to the authors' allegations since they

have not been properly refuted. The Committee considers that the authors' conditions of detention as described violate their right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to article 10, paragraph 1, of the Covenant. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary separately to consider the claims arising under article 7 of the Covenant.

...

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

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

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Notes

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

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

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

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

...

EFFECTIVE REMEDIES - GENERAL

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

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

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

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

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

...

7.2 As to the alleged violation of article 17, the Committee notes the State party's contention that there is no documentation of arbitrary or unlawful interference by the State party with the author's family, that the decisions of courts of all instances have complied with the rules of procedure set by law, and that the delay in the resolution of the divorce and custody

proceedings is due to the numerous petitions submitted by the author. However, the current communication is not based only on article 17, paragraph 1, of the Covenant, but also on paragraph 2 of the said provision, according to which everyone has the right to the protection of the law against interference or attacks on one's privacy and family life.

7.3 The Committee considers that article 17 generally includes effective protection to the right of a parent to regular contact with his or her minor children. While there may be exceptional circumstances in which denying contact is required in the interests of the child and cannot be deemed unlawful or arbitrary, in the present case the domestic courts of the State party have ruled that such contact should be maintained. Consequently, the issue before the Committee is whether the State party has afforded effective protection to the author's right to meet his son in accordance with the court decisions of the State party.

7.4 Although the courts repeatedly fined the author's wife for failure to respect their preliminary orders regulating the author's access to his son, these fines were neither fully enforced nor replaced with other measures aimed at ensuring the author's rights. In these circumstances and taking into account the considerable delays at various stages of the proceedings, the Committee takes the view that the author's rights under article 17 of the Covenant, in conjunction with article 2, paragraphs 1 and 2 of the Covenant, did not receive effective protection. Consequently, the Committee is of the view that the facts before it disclose a violation of article 17, in conjunction with article 2 of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, which should include measures to ensure prompt implementation of the court's orders regarding contact between the author and his son. The State party is also under an obligation to prevent similar violations in the future.

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2/ This point of the submission is unclear.

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

EFFECTIVE REMEDIES - GENERAL

- *Coronel et al. v. Colombia* (778/1997), ICCPR, A/58/40 vol. II (24 October 2002) 40 (CCPR/C/76/D/778/1997) at paras. 2.1-2.4, 2.8, 2.10-2.15, 3.5, 3.6, 9.3-9.5, 9.7, 9.8 and 10.

...

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

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

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

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

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

...

2.8 The military criminal jurisdiction undertook various preliminary investigations into the facts as described. Judge No. 47 of the Military Criminal Investigation Unit, attached to the Second Mobile Brigade, opened preliminary inquiries Nos. 27, 30 and 28, 2/ the findings of which are contained in file No. 979, throughout which the incidents are referred to as "deaths in combat".

...

2.10 The authors state that the Special Investigations Unit in the National Office of the Attorney-General opened a file (No. 2291-93/DH) on the incidents in question following complaints submitted by the relatives to the Provincial Office of the Attorney-General in Ocaña, and officials were appointed to conduct the investigation. On 22 February 1993, a preliminary report from the officials in charge of the investigation drew attention to contradictions between the versions of the relatives and those of the military, and also to the way in which the judge in charge of Court No. 47 in the Military Criminal Investigation Department had hampered and obstructed them in their task. They suggested that further evidence should be sought and that disciplinary investigation proceedings should be instituted against Judge No. 47 of the Military Criminal Investigation Department.

2.11 The director of the Special Investigations Unit ordered a new investigation, including an investigation into the conduct of Judge No. 47 of the Military Criminal Investigation Department. The investigating officials submitted several reports to the director; one of them, relating to Luis Honorio Quintero Ropero, Ramón Emilio Ropero Quintero, Nahún Elías Sánchez Vegas and Ramón Emilio Sánchez, stated that "it is fully demonstrated that material responsibility lies with anti-guerrilla section C of battalion 17 ('Motilones') of the Second Mobile Brigade under the command of Captain Serna Arbelaez Mauricio".

2.12 On 29 June 1994, in their final report, the officials confirmed that it was fully proved that the peasants had been detained by members of anti-guerrilla battalion No. 17 ("Motilones") of the Second Mobile Brigade, on the occasion of a military operation carried out in compliance with operation order No. 10 issued by the commander of that military unit;

that the peasants were last seen alive when in the hands of the soldiers and appeared to have died later in the course of two alleged clashes with units of the military. They also established that Luis Ernesto Ascanio Ascanio, a minor, was last seen alive heading home some 15 minutes' walk from home and that the boy was found dead after another alleged clash with the military. The officials identified the commanders, officers, non-commissioned officers and privates who formed part of the patrols that captured the peasants and occupied the dwelling of the Ascanio family. The report concluded that, "on the basis of the evidence advanced, the allegation of combats in which the victims could have taken part is discredited, since they were already being held by troops of the National Army, in a manner which was, moreover, irregular; some of them bear marks on the skin that demonstrate even more clearly the defenceless condition they were in …". The report recommended that the case should be referred to the Armed Forces Division in the Procurator's Office.

2.13 On 25 October 1994, the Armed Forces Division in the Attorney-General's Office referred the file to the Human Rights Division of the same office on jurisdictional grounds. The transmission document indicates that "the following has been established … the state of complete defencelessness of the victims …, the close range at which the bullets that killed them were fired and the fact that they had been detained before they died; the foregoing, together with other evidence, disproves the existence of an alleged combat that allegedly was the central circumstance causing the deaths recorded".

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

2.15 On 13 January 1995, the families of the victims lodged a claim against Colombia in the administrative court for the deaths of Luis Honorio Quintero Ropero, Ramón Emilio Quintero Ropero, Ramón Emilio Sánchez, Luis Ernesto Ascanio Ascanio, Nahún Elías Sánchez Vega and Ramón Villegas Téllez; the claims were declared admissible between 31 January and 24 February 1995.

...

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

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

criminal military cases is the commander of the Second Mobile Brigade, who is precisely the person responsible for the military operation that gave rise to the incidents forming the subject of the complaint.

...

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

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

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

...

9.7 With regard to the claim under article 17 of the Covenant, the Committee must determine whether the specific conditions in which the raid on the homes of the victims and their families took place constitute a violation of that article. The Committee takes note of the authors' allegations that both the raids and the detentions were carried out illegally, since the soldiers did not have search or arrest warrants. It also takes note of the corroborating testimony gathered from witnesses by the Attorney-General's Office showing that the

procedures were carried out illegally in the private houses where the victims were staying. In addition, the Committee considers that the State party has not provided any explanation in this regard to justify the action described. Consequently, the Committee concludes that there has been a violation of article 17, paragraph 1, inasmuch as there was unlawful interference in the homes of the victims and their families or in the houses where the victims were present, including the home of the minor Luis Ernesto Ascanio Ascanio, even though he was not there at the time.

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

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

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Notes

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

...

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

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

...

2.1 Mrs. Pezoldova was born on 1 October 1947 in Vienna as the daughter and lawful heiress of Dr. Jindrich Schwarzenberg. The author states that the Nazi German Government had confiscated all of her family's properties in Austria, Germany, and Czechoslovakia, including an estate in Czechoslovakia known as "the Stekl" in 1940. She states that the property was confiscated because her adoptive grandfather Dr. Adolph Schwarzenberg was an opponent of Nazi policies. He left Czechoslovakia in September 1939 and died in Italy

in 1950. The author's father, Jindrich, was arrested by the Germans in 1943 and imprisoned in Buchenwald from where he was released in 1944. He went into exile in the United States and did not return to Czechoslovakia after the war.

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

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

2.4 According to the author, the transfer of the property was not automatic upon the coming into force of Law No. 143/1947, but subject to the intabulation (writing into the register) in the public register of the transfer of the relevant rights of ownership. In this context, the author states that National Administration (see paragraph 2.2) remained in force until June 1948, and that intabulation of the properties by land offices and Courts shows that, at the time, Law No. 143/1947 was not considered as having immediately transferred title.

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

2.6 The Prague City Court, by decisions of 27 June 1994 4/ and 28 February 1995,5/ refused the author's appeal and decided that the ownership of the properties had been lawfully and

automatically transferred to the State by operation of Law No. 143/1947, on 13 August 1947. Since according to restitution Law No. 229/1991 the qualifying period for claims of restitution started on 25 February 1948, the Prague City Court decided that the author was not entitled to claim restitution.6/ The Court refused the author's request to suspend the proceedings in order to request the Constitutional Court to rule on the alleged unconstitutionality and invalidity of Law No. 143/1947.

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

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

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

there was no remedy available for anybody deemed to be of German or Hungarian stock.
...
11.2 The question before the Committee is whether the author was excluded from access to an effective remedy in a discriminatory manner. According to article 26 of the Covenant, all persons are equal before the law and every person has the right to equal protection of the law.

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

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

11.5 In this context, the Committee also notes that by decision of 29 November 2001, the Regional Court of Ceske Budejovice recognized that the taking of Dr. Adolph Schwarzenberg's property had been effected pursuant to Benes' Decree 12/1945. The Committee further notes that on 30 January 1948 the confiscation of the Schwarzenberg agricultural lands under Benes' Decrees Nos. 12 and 108/1945 was revoked, apparently in order to give way for the application of Law 143/1947. The point in time when the revocation became effective seems not to have been clarified, because the courts proceeded from the premise that Law No. 143 was the only applicable legal basis.

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

EFFECTIVE REMEDIES - GENERAL

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

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

...

Individual Opinion by Justice Prafullachandra Natwarlal Bhagwati (concurring)

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

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

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2/ The law reads:

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

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

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

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

4/ Concerning the "Stekl" property.

5/ Concerning properties in Krumlov and Klatovy.

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

recognized that until 1 January 1951 intabulation had been necessary for the transfer of property.

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

- *Hendricks v. Guyana* (838/1998), ICCPR, A/58/40 vol. II (28 October 2002) 113 (CCPR/C/76/D/838/1998) at paras. 6.3, 6.4, 7 and 8.

...

6.3 With regard to the issues raised under articles 9, paragraph 3, and 14, paragraph 3 (c) of the Covenant, the Committee notes that the author was tried more than three years after he was arrested. Recalling its General Comment 8, according to which "pre-trial detention should be an exception and as short as possible", and noting that the State party has not provided any explanation justifying such a long delay, the Committee considers that the period of pre-trial detention constitutes in the present case an unreasonable delay. The Committee therefore concludes that the facts before it reveal a violation of article 9, paragraph 3, of the Covenant. Furthermore, recalling the State party's obligation to ensure that an accused person be tried without undue delay, the Committee finds that the facts before it also reveal a violation of article 14, paragraph 3 (c), of the Covenant.

6.4 As to the allegations according to which his lawyer was absent on one day at the "small" court, and that as a consequence he was denied the right to cross-examine one witness, the Committee notes from the information before it, that the author in fact refers to the preliminary hearing where his counsel was apparently absent at one stage and that this was not disputed by the State party. The Committee recalls its prior jurisprudence that, in capital cases, it is axiomatic that legal assistance be available at all stages of criminal proceedings.3/ It also recalls its decision in communication No. 775/1997 (*Brown v. Jamaica*), adopted on 23 March 1999, in which it decided that a magistrate should not proceed with the deposition of witnesses during a preliminary hearing without allowing the author an opportunity to ensure the presence of his lawyer. Accordingly, the Committee finds that the facts before it disclose a violation of article 14, paragraph 3 (d) and (e) and, consequently, of article 6 of the Covenant.

...

7. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 9, paragraph 3 and 14, paragraph 3 (c), (d) and (e) and consequently of article 6 of the International Covenant on Civil and Political Rights.

EFFECTIVE REMEDIES - GENERAL

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

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3/ See *inter alia*, the Committee's Views in respect of communication No. 695/1996, *Devon Simpson v. Jamaica*, adopted on 31 October 2001, communication No. 730/1996 *Clarence Marshall v. Jamaica*, adopted on 3 November 1998, communication No. 459/1991, *Osbourne Wright and Eric Harvey v. Jamaica*, adopted on 27 October 1995, and communication No. 223/1987, *Frank Robinson v. Jamaica*, adopted on 30 March 1989.

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For dissenting opinion in this context, see Hendricks v. Guyana (838/1998), ICCPR, A/58/40 vol. II (28 October 2002) 113 (CCPR/C/76/D/838/1998) at Individual Opinion by Mr. Hipólito Solari Yrigoyen, 118.

- *C. v. Australia* (900/1999), ICCPR, A/58/40 vol. II (28 October 2002) 188 (CCPR/C/76/D/900/1999) at paras. 7.4, 8.2-8.5, 9 and 10.

...

7.4 As to the claims relating to the first period of detention, the Committee notes that the legislation pursuant to which the author was detained provides for mandatory detention until either a permit is granted or a person is removed. As confirmed by the courts, there remained no discretion for release in the particular case. The Committee observes that the sole review capacity for the courts is to make the formal determination that the individual is in fact an "unlawful non-citizen" to which the section applies, which is uncontested in this case, rather than to make a substantive assessment of whether there are substantive grounds justifying detention in the circumstances of the case. Thus, by direct operation of statute, substantive judicial review which could provide a remedy is extinguished. This conclusion is not altered by the exceptional provision in s.11 of the Act providing for alternative restraint and custody (in the author's case his family's), while remaining formally in detention. Moreover, the Committee notes that the High Court has confirmed the constitutionality of mandatory regimes on the basis of the policy factors advanced by the State party.68/ It follows that the State party has failed to demonstrate that there were available domestic remedies that the author could have exhausted with respect to his claims concerning the initial period of detention, and these claims are admissible.

...

8.2 As to the claims relating to the first period of detention, in terms of article 9, paragraph

EFFECTIVE REMEDIES - GENERAL

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

8.3 As to the author's further claim of a violation of article 9, paragraph 4, related to this period of detention, the Committee refers to its discussion of admissibility above and observes that the court review available to the author was confined purely to a formal assessment of the question whether the person in question was a "non-citizen" without an entry permit. The Committee observes that there was no discretion for a court, as indeed held by the Full Court itself in its judgement of 15 June 1994, to review the author's detention in substantive terms for its continued justification. The Committee considers that an inability judicially to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4.

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

constituted a violation of his rights under article 7 of the Covenant.

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

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

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

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

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

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- *Zheludkov v. Ukraine* (726/1996), ICCPR, A/58/40 vol. II (29 October 2002) 12 (CCPR/C/76/D/726/1996) at paras. 8.2, 8.3, 9 and 10.

...

8.2 The Committee must decide whether the State party violated Mr. Zheludkov's rights under articles 9, paragraphs 2 and 3, and article 10, paragraph 1 of the Covenant. The

Committee notes the author's claim that her son was held for more than 50 days without being informed of the charges against him and that he was not brought before a competent judicial authority during this period, and further, that medical attention was insufficient, and that he was allegedly denied access to the information in his medical records.

8.3 The Committee notes the information provided by the State party to the effect that, after Mr. Zheludkov's arrest on 4 September 1992 on suspicion of having participated in a rape, his detention was extended by approval of the competent prosecutor in the Novoazosk district on 7 September 1992, and that he was charged on 14 September 1992 - within the legally prescribed 10-days period. It also notes the author's allegations that her son was not informed of the precise charges against him until he had been in detention for 50 days and that he was not brought before a judge or any other official empowered by law to exercise judicial functions during this period. The State party has not contested that Mr. Zheludkov was not brought promptly before a judge after he was arrested on a criminal charge, but has stated that he was placed in pre-trial detention by decision of the procurator (*prokuror*). The State party has not provided sufficient information, showing that the procurator has the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3 of the Covenant. The Committee therefore concludes that the State party violated the author's rights under paragraph 3 of article 9 of the Covenant.

...

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

10. The Committee is of the view that Mr. Zheludkov is entitled, under article 2, paragraph 3 (a) of the Covenant, to an effective remedy, entailing compensation. The State party should take effective measures to ensure that similar violations do not recur in the future, especially by taking immediate steps to ensure that the decisions concerning the extension of custody are taken by an authority, 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 of the Covenant.

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

...

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

equal number of real loans, were transacted in the office of the Cehegín bank. In other words, there were bank customers who signed blank loan forms that were later completed in duplicate.

...

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

...

9.1 The Human Rights Committee has considered the present communication in the light of all written information made available to it by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol. The Committee notes that the State party has expressly confirmed that the trial of Alfonso Ruiz Agudo was excessively long, and that this was stated in the domestic legal remedies; however, the State party has given no explanation to justify such a delay. The Committee recalls its position as reflected in its General Comment on article 14, which provides that all stages of judicial proceedings must take place without undue delay and that, to make this right effective, a procedure must be available to ensure that this applies in all instances. The Committee considers that, in the present case, a delay of 11 years in the judicial process at first instance and of more than 13 years until the rejection of the appeal violates the author's right under article 14, paragraph 3 (c), of the Covenant, to be tried without undue delay. 2/ The Committee further considers that the mere possibility of obtaining compensation after, and independently of, a trial that was unduly prolonged does not constitute an effective remedy.

...

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

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

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Notes

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

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EFFECTIVE REMEDIES - GENERAL

- *Gelazauskas v. Lithuania* (836/1998), ICCPR, A/58/40 vol. II (17 March 2003) 104 (CCPR/C/77/D/836/1998) at paras. 2.2, 3.1, 4.3, 4.4, 7.1-7.6, 8 and 9.

...

2.2 Applications for cassation motions were made on behalf of the author on four occasions but a review of his case was always denied. On 28 September 1995, the author's mother made an application for cassation motion1/. On the same day, the author's counsel made a similar application for cassation motion, which was rejected by the chairman of the Division of Criminal Cases of the Supreme Court on 8 December 1995. On 2 April 1996, the author's counsel made another application for cassation motion, which was also rejected by the chairman of the Supreme Court. Finally, on 15 April 1996, the author's counsel made a last application for cassation motion which was rejected on 12 June 1996.

...

3.1 The author first alleges a violation of article 14, paragraph 5, of the Covenant on the grounds that he had no possibility to make an appeal against the judgement of 4 May 1994. In this case, the court of first instance was the Supreme Court and, under the State party's legislation, its judgments are not subject to appeal. Such a judgement may be reviewed by an application for cassation motion to the Supreme Court but a review of the judgment is dependent on the discretion of the chairman of the Supreme Court or of the Division of Criminal Cases of the Supreme Court. All attempts to bring such an application have failed.

...

4.3 At the time of the sentence, a two-tier court system - local courts and the Supreme Court - was in force in the State party. Both courts could function as first instance courts and, in accordance with the Code of Criminal Procedure valid at that time, there were two types of appeal possible:

- Court sentences that were not yet in force could be appealed in cassation to the Supreme Court within 7 days after the announcement of the sentence. Nevertheless, sentences of the Supreme Court taken in first instance were final and not susceptible to appeal in cassation.

- Sentences of local courts and of the Supreme Court could, after having come into force, be challenged by "supervisory protest" within one year of the coming into force. Only the Chairperson of the Supreme Court, the Prosecutor-General and their deputies had a right of submission of this "supervisory protest". A sentenced person or his counsel only had the right to address these persons with a request that they submit a "supervisory protest". If such a request was made, the "Presidium" of the Supreme Court would hear the case and decide whether to dismiss the protest, dismiss the criminal case and acquit the person, return the case to the first instance, or take another decision.

4.4 This procedure was applicable until 1 January 1995. Nevertheless, in the present case, neither the author, nor his counsel made a request for the submission of a "supervisory protest" after the sentence came into force for the author.

...

7.1 Regarding the submission of a "supervisory protest", the Committee notes the State party's contention that the author had, between 4 May 1994 and 1 January 1995, a "right to address the Chairperson of the Supreme Court of Lithuania, the Prosecutor-General and their deputies with a request to submit a supervisory protest", that this possibility constitutes a right to review in the sense of article 14, paragraph 5, of the Covenant, and that the author did not use this right. The Committee also notes the author's contention that the decision to submit a "supervisory protest" is an exceptional right depending on the discretion of the authority who receives the request and does therefore not constitute an obligation to review a case decided by the Supreme Court in first instance.

7.2 In the present case, the Committee notes that, according to the wording of the last sentence of the judgment of 4 May 1994, "[t]he verdict is final and could not be protested or cassation appealed". It also notes that it is not contested by the State party that the submission of a "supervisory protest" constitutes an extraordinary remedy depending on the discretionary powers of the Chairperson of the Supreme Court, the Prosecutor-General or their deputies. The Committee is therefore of the opinion that, in the circumstances, such a possibility is not a remedy that has to be exhausted for purposes of article 5, paragraph 2 (b), of the Covenant. Moreover, recalling its decision in case No. 701/19964/, the Committee observes that article 14, paragraph 5, implies the right to a review of law and facts by a higher tribunal. The Committee considers that the request for the submission of a "supervisory protest" does not constitute a right to have one's sentence and conviction reviewed by a higher tribunal under article 14, paragraph 5, of the Covenant.

7.3 Regarding the submission of a cassation motion, the Committee notes the State party's contention that, between 1 July 1994 and 4 May 1995, it was possible for the Chairperson of the Supreme Court, the Chairpersons of the county courts or the chairpersons of the division of criminal cases of the above courts to entertain a cassation motion at the request of the author, that this possibility constitutes a right to review in the sense of article 14, paragraph 5 of the Covenant, and that the author did not use this right within the time limit of one year from the date the judgement entered into force, that is before 4 May 1995, in accordance with article 419 of the State party's Code of Criminal Procedure. The Committee on the other hand also notes the author's contention that the decision to submit a cassation motion, similarly to that of submitting a "supervisory protest", is an extraordinary right at the discretion of the authority who receives the request and does therefore not constitute an obligation to review a case decided by the Supreme Court at first instance. The Committee further notes the author's contention that the delay of one year referred to by the State party only concerns cassation motions aiming at worsening the situation of the accused.

7.4 The Committee notes that the State party has not provided any comment on the author's arguments related to the prerogatives of the Chairperson of the Supreme Court, the Chairpersons of the county courts or the chairpersons of the division of criminal cases of the above courts on the submission of a cassation motion and the time limit to submit an application for a cassation motion. In this regard, the Committee refers to two letters, transmitted by the author, dated 28 December 1998 (from the Chairman of the Division of the Criminal Cases of the Supreme Court) and 5 April 1996 (from the Chairman of the Supreme Court), both rejecting the application for a cassation motion on the grounds, respectively, that "the motives of [the] cassation complaint [...] are denied by evidence, [which] were examined in court and considered in the verdict" and that "[the State party's legislation] does not provide [that the Supreme Court] is a cassation instance for verdicts [...] adopted by itself. Verdicts of [the Supreme Court] are final and are not appealable." The Committee notes that these letters do not refer to a time limit.

7.5 The Committee, taking into account the author's observations with regard to the extraordinary character and the discretionary nature of the submission of a cassation motion, the absence of response from the State party thereupon, and the form and content of the letters rejecting the applications for a cassation motion, considers that the material before it sufficiently demonstrates that, in the circumstances of the case, the applications made by the author for a cassation motion, even if they had been made before 4 May 1995 as argued by the State party, do not constitute a remedy that has to be exhausted for purposes of article 5, paragraph 2 (b), of the Covenant.

7.6 Moreover, the Committee, recalling its reasoning under paragraph 7.2 above, is of the opinion that this remedy does not constitute a right of review in the sense of article 14, paragraph 5, of the Covenant because the cassation motion cannot be submitted to a higher tribunal as it is required under the said provision.

...

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

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author(s) with an effective remedy, including the opportunity to lodge a new appeal, or should this no longer be possible, to give due consideration of granting him release. The State party is also under an obligation to prevent similar violations in the future.

...

Notes

1/ The author claims that he has not received any answer on this application.

EFFECTIVE REMEDIES - GENERAL

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4/ *Cesario Gómez Vásquez v. Spain*, Case No. 701/1996, Views adopted on 20 July 2000.

- *Evans v. Trinidad and Tobago* (908/2000), ICCPR, A/58/40 vol. II (21 March 2003) 216 (CCPR/C/77/D/908/2000) at paras. 6.2, 6.3, 6.4 and 8.

...

6.2 ...[T]he Committee considers that a delay of 2 years and 3 months between the author's arrest and his trial, which has remained unexplained by the State party, constitutes a violation of the author's right under article 9, paragraph 3, of the Covenant to be tried within a reasonable time or to release, subject however to conditions, and equally of the author's right under article 14, paragraph 3(c), of the Covenant to be tried without undue delay.

6.3 As to the claim of a delay of five years and nine months between conviction and the dismissal of his appeal by the Court of Appeal of the Republic of Trinidad and Tobago, which has also remained unexplained by the State party, the Committee recalls its jurisprudence that the rights contained in article 14, paragraphs 3 (c), and 5, read together, confer a right to review of a decision at trial without delay.9/ In *Johnson v. Jamaica*,10/ the Committee considered that, barring exceptional circumstances, a delay of four years and three months was unreasonably prolonged. As a result of these considerations, the Committee finds a violation of article 14, paragraphs 3 (c), and 5, of the Covenant.

6.4 As to the claim that the conditions of detention to which the author was subjected during his period on death row violated articles 7, and 10, paragraph 1, the Committee notes that, in the absence of any explanation from the State party, it must give due weight to the author's allegations. The Committee notes that the author was detained in solitary confinement on death row for a period of five years in a cell measuring 6 by 9 feet, with no sanitation except for a slop pail, no natural light, being allowed out of his cell only once or twice a week during which he was restrained in handcuffs, and with wholly inadequate food that did not take into account his particular dietary requirements. The Committee considers that these - uncontested - conditions of detention, taken together, amount to a violation of article 10, paragraph 1, of the Covenant. In light of this finding, in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary separately to consider the claims arising under article 7 of the Covenant.

...

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including consideration of early release. As long as the author is in prison he should be treated with humanity and not

subjected to cruel, inhuman or degrading treatment. The State party is also under an obligation to ensure that similar violations do not occur in the future.

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Notes

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9/ *Lubuto v. Zambia*, Case No. 390/1990, Views adopted on 31 October 1995 and *Neptune v. Trinidad and Tobago*, [Case No. 523/1992, Views adopted on 16 July 1996].

10/ Case No. 588/1994, Views adopted on 22 March 1996.

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- *Carpo et al. v. Philippines* (1077/2002), ICCPR, A/58/40 vol. II (28 March 2003) 363 (CCPR/C/77/D/1077/2002) at paras. 8.3 and 10.

...

8.3 The Committee notes that the offence of murder in the State party's law entails a very broad definition, requiring simply the killing of another individual. In the present case, the Committee observes that the Supreme Court considered the case to be governed by article 48 of the Revised Penal Code, according to which, if a single act constitutes at once two crimes, the maximum penalty for the more serious crime must be applied. The crimes committed by a single act being three murders and an attempted murder, the maximum possible penalty for murder - the death penalty - was imposed automatically by operation of the provisions of article 48. The Committee refers to its jurisprudence that mandatory imposition of the death penalty constitutes 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.5/ It follows that the automatic imposition of the death penalty upon the authors by virtue of article 48 of the Revised Penal Code violated their rights under article 6, 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 and appropriate remedy, including commutation. The State party is under an obligation to avoid similar violations in the future.

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Notes

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5/ *Thompson v. St. Vincent and The Grenadines* Case No. 806/1998, Views adopted on 18 October 2000; and *Kennedy v. Trinidad and Tobago* Case No. 845/1998, Views adopted on 26 March 2002.

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EFFECTIVE REMEDIES - GENERAL

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

  ...
  2.1 Mr. Bondarenko was accused of murder and several other crimes, found guilty as charged and sentenced by the Minsk Regional Court on 22 June 1998 to death by firing squad. The decision was confirmed by the Supreme Court on 21 August 1998...
  ...
  10.2 The Committee notes that the author's claim that her family was informed of neither the date, nor the hour, nor the place of her son's execution, nor of the exact place of her son's subsequent burial, has remained unchallenged. In the absence of any challenge to this claim by the State party, and any other pertinent information from the State party on the practice of execution of capital sentences, due weight must be given to the author's allegation. The Committee understands the continued anguish and mental stress caused to the author, as the mother of a condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his gravesite. The Committee considers that complete secrecy surrounding the date of execution, and the place of burial and the refusal to hand over the body for burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee considers that the authorities' initial failure to notify the author of the scheduled date for the execution of her son, and their subsequent persistent failure to notify her of the location of her son's grave amounts to inhuman treatment of the author, in violation of article 7 of the Covenant.
  ...
  12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including information on the location where her son is buried, and compensation for the anguish suffered. The State party is also under an obligation to prevent similar violations in the future.

See also:

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

- *Weiss v. Austria* (1086/2002), ICCPR, A/58/40 vol. II (3 April 2003) 375 (CCPR/C/77/D/1086/2003) at paras. 1.1, 1.2, 2.1, 2.3, 2.8, 2.11-2.14, 2.16, 3.1, 7.1, 7.2, 9.6, 10.1 and 11.1.

  1.1 The author of the communication, initially dated 24 May 2002, is Sholam Weiss, a citizen of the United States of America and Israel, born on 1 April 1954. At the time of

submission, he was detained in Austria pending extradition to the United States of America ("the United States")...

1.2 On 24 May 2002, the Committee, acting through its Special Rapporteur for new communications, pursuant to Rule 86 of the Committee's rules of procedure, requested the State party not to extradite the author until the Committee had received and addressed the State party's submission on whether there was a risk of irreparable harm to the author, as alleged by counsel. On 9 June 2002, the State party, without having made any submissions to the Committee, extradited the author to the United States.

...

2.1 In a trial beginning on 1 November 1998 in the District Court of Florida, the author was tried on numerous charges of fraud, racketeering and money laundering. He was represented throughout the trial by counsel of his choice. On 29 October 1999, as jury deliberations were about to begin, the author fled the courtroom and escaped. On 1 November 1999, the author was found guilty on all charges...

2.3 On 24 October 2000, the author was arrested in Vienna, Austria, pursuant to an international arrest warrant, and on 27 October 2000 transferred to extradition detention. On 18 December 2000 the United States submitted a request to the Austrian authorities for the author's extradition. On 2 February 2001, the investigating judge of the Vienna Regional Criminal Court...recommended that the Vienna Upper Regional Court...being the court of first and last instance concerning the admissibility of an extradition request, hold the author's extradition admissible.

...

2.8 On 8 May 2002, the Upper Regional Court, upon reconsideration, found that the author's extradition was admissible on all counts except that of "perjury while a defendant" (for which the author had been sentenced to 10 years imprisonment). In conformity with the Supreme Court's decision, the Court concluded that the author had enjoyed a fair trial and that his sentence would not be cruel, inhuman or degrading. It did not address the issue of the author's right to an appeal. On 10 May 2002, the Minister of Justice allowed the author's extradition to the United States, without reference to any issues as to the author's human rights.3/

...

2.11 On 24 May, the author...petitioned the Administrative Court, challenging the Minister's decision to extradite him and seeking an injunction to stay the author's extradition, pending decision on the substantive challenge. The stay was granted and referred to the Ministry of Justice and the Vienna Regional Criminal Court.

2.12 On 26 May, an attempt was made to surrender the author. After a telephone call by the ranking officer of the airport police to the president of the Administrative Court, the author was returned to a detention facility in light of the stay issued by the Administrative

Court and the author's poor health. On 6 June 2002, the investigating judge of the Vienna Regional Criminal Court considered the Administrative Court to be "incompetent" to entertain any proceedings or to bar implementation of the extradition, and directed that the author be surrendered. On 9 June 2002, the author was transferred by officials of the author's prison and of the Ministries of Justice and the Interior, to the jurisdiction of United States military authorities at Vienna airport, and returned to the United States.

2.13 At the time the author was extradited, two sets of proceedings remained pending before the Constitutional Court, neither of which had suspensive effect under the State party's law. Firstly, on 25 April 2002, the author had lodged a constitutional motion attacking the constitutionality of various provisions of the State party's extradition law, as well as of the extradition treaty with the United States, in particular its treatment of judgment *in absentia*. Secondly, on 17 May 2002, he had lodged a "negative competence challenge" ('*Antrag auf Entscheidung eines negativen Kompetenzkonfliktes*') to resolve the question whether the issue of a right to an appeal must be resolved by administrative decision or by the courts, as both the Upper Regional Court as well as the Minister of Justice had declined to deal with the issue.

2.14 On 13 June 2002, the Administrative Court decided, given that the author had been removed in violation of the Court's stay on execution, that the proceedings had been deprived of any object and suspended them. The Court observed that the purpose of its order to stay extradition was to preserve the rights of the author pending the main proceedings, and that as a result no action could be taken to the author's detriment on the basis of the Minister's challenged decision. As a consequence, the author's surrender had no sufficient legal basis.
...
2.16 On 12 December 2002, the Constitutional Court decided in the author's favour, holding that the Upper Regional Court should examine all admissibility issues concerning the author's human rights, including issues of a right to an appeal. Thereafter, the Minister's formal decision to extradite should consider any other issues of human dignity that might arise. The Court also found that the author's inability, under the State party's extradition law, further to challenge a decision of the Upper Regional Court finding his extradition admissible was contrary to rule of law principles and unconstitutional.

3.1 In his original communication (preceding extradition), the author claims that extradition to the United States would deprive him of the ability to be present in the State party for the vindication of his claims in that jurisdiction. In particular, he would be unable to enjoy the benefits of the remedies flowing from the Constitutional Court's determination of the "negative competence" challenge as to which court or administrative authority should consider his argument of a denial of a right to a fair trial/appeal, as well as the consideration thereafter by the competent authority of this issue, as required by articles 14, paragraph 5, and 2, paragraph 3, read together. Extradition would prevent him enjoying remedies such

as barring of extradition altogether, extradition for a sentence equivalent to that which would be imposed in the State party, or extradition subject to full rights of appeal. He argues that neither the State party's courts nor administrative authorities have ever substantively addressed the issue of his alleged denial, in the United States, of a right to a fair trial/appeal.
...
7.1 The Committee finds, in the circumstances of the case, that the State party breached its obligations under the Protocol, by extraditing the author before the Committee could address the author's allegation of irreparable harm to his Covenant rights. In particular, the Committee is concerned by the sequence of events in this case in that, rather than requesting interim measures of protection directly upon an assumption that irreversible harm could follow the author's extradition, it first sought, under rule 86 of its rules of procedure, the State party's views on the irreparability of harm. In so doing, the State party could have demonstrated to the Committee that extradition would not result in irreparable harm.

7.2 Interim measures pursuant to rule 86 of the Committee's rules adopted in conformity with article 39 of the Covenant, 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 victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol.
...
9.6 Concerning the author's claim that, in the proceedings before the State party's courts, he was denied the right to equality before the law, the Committee observes that the author obtained, after submission of the case to the Committee, a stay from the Administrative Court to prevent his extradition until the Court had resolved the author's challenge to the Minister's decision directing his extradition. The Committee observes that although the order to stay was duly communicated to the relevant officials, the author was transferred to United States jurisdiction after several attempts, in violation of the Court's stay. The Court itself, after the event, observed that the author had been removed from the country in violation of the Court's stay on execution and that there was no legal foundation for the extradition; accordingly, the proceedings had become moot and deprived of object in the light of the author's extradition, and would not be further pursued. The Committee further notes that the Constitutional Court found that the author's inability to appeal an adverse judgment of the Upper Regional Court, in circumstances where the Prosecutor could, and did, appeal an earlier judgment of the Upper Regional Court finding the author's extradition inadmissible, was unconstitutional. The Committee considers that the author's extradition in breach of a stay issued by the Administrative Court and his inability to appeal an adverse decision of the Upper Regional Court, while the Prosecutor was so able, amount to a violation of the author's right under article 14, paragraph 1, to equality before the courts, taken together with the right to an effective and enforceable remedy under article 2, paragraph 3, of the Covenant.

10.1 The Human Rights Committee...is of the view that the facts as found by the Committee

reveal violations by Austria of article 14, paragraph 1 (first sentence), taken together with article 2, paragraph 3, of the Covenant. The Committee reiterates its conclusion that the State party breached its obligations under the Optional Protocol by extraditing the author before allowing the Committee to address whether he would thereby suffer irreparable harm, as alleged.

11.1 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. In the light of the circumstances of the case, the State party is under an obligation to make such representations to the United States' authorities as may be required to ensure that the author does not suffer any consequential breaches of his rights under the Covenant, which would flow from the State party's extradition of the author in violation of its obligations under the Covenant and the Optional Protocol. The State party is also under an obligation to avoid similar violations in the future, including by taking appropriate steps to ensure that the Committee's requests for interim measures of protection will be respected.

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Notes

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3/ The author provides the terms of the Treaty which provide: "Convictions in absentia.

> "If the person sought has been found guilty in absentia, the executive authority of the Requested State may refuse extradition unless the Requesting State provides it with such information or assurances as the Requested State considers sufficient to demonstrate that the person was afforded an adequate opportunity to present a defence or that there are adequate remedies or additional proceedings available to the person after surrender."

...

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- *Reece v. Jamaica* (796/1998), ICCPR, A/58/40 vol. II (14 July 2003) 61 CCPR/C/78/D/796/1998 at paras. 2.1, 7.8 and 9.

...

2.1 The author was arrested on 13 January 1983, and charged with two counts of murder with respect to events that occurred on 11 January 1983. At the preliminary hearing, he was assigned a legal aid trial lawyer. At trial before the Clarendon Circuit Court, from 20 to 27 September 1983, the author pleaded not guilty to both counts but admitted to having been at the scene of the murders when they took place. He was convicted by jury on both counts and sentenced to death.

...

7.8 As to the author's claims under articles 7 and 10, paragraph 1, concerning the specific conditions and length of his detention on death row, the Committee must, in the absence of any responses by the State party, give due credence to the author's allegations as not having been properly refuted. The Committee considers, as it has repeatedly found in respect of similar substantiated allegations,13/ that the author's conditions of detention as described violate his right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to article 10, paragraph 1. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary to separately consider the claims arising under article 7.

...

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

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Notes

...

13/ See, for example, *Sextus v. Trinidad and Tobago* Case No. 818/1998, Views adopted on 16 July 2001.

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

...

2.1 The author alleges that, on 23 June 1990, at about 8.30 a.m., during a military operation, his son, himself and three others were removed by army members from their family residence in Anpuvalipuram, in the presence of the author's wife and others. The group was then handed over to other members of the military, including one Corporal Sarath, at another location (Ananda Stores Compound Army Camp). The author's son was apparently suspected of being a member of the LTTE (Liberation Tigers of Tamil Eelam) and was beaten and tortured. He was thereafter taken into military custody at Kalaimagal School allegedly after transiting through a number of other locations. There, he was allegedly tortured, hooded and forced to identify other suspects.

2.2 In the meantime, the author and other persons arrested were also transferred to Kalaimagal School, where they were forced to parade before the author's hooded son. Later that day, at about 12.45 p.m., the author's son was taken to Plaintain Point Army Camp, while the author and others were released. The author informed the Police, the International

Committee of the Red Cross (ICRC) and human rights groups of what had happened.

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

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

...

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

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author's son, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the violations suffered by the author's son, the author and his family. The Committee considers that the State party is also under an obligation to expedite the current criminal proceedings and ensure the prompt trial of all persons responsible for the abduction of the author's son under section 356 of the Sri Lankan Penal Code and to bring to justice any other person who has been implicated in the disappearance. The State party is also under an obligation to prevent similar violations in the future.

- *Semey v. Spain* (986/2001), ICCPR, A/58/40 vol. II (30 July 2003) 303 (CCPR/C/78/D/986/2001) at paras. 2.7, 9.1 and 9.2.

...

2.7 The author applied to the Supreme Court for judicial review of his case, but the Court limited itself to pronouncing on the grounds for review and upheld the sentence of the lower Court; at no time did it review the evidence on which the Provincial Court said it had based its guilty verdict. He also submitted an appeal to the Constitutional Court which was not entertained because it had been submitted too late, i.e. not when the Supreme Court handed down its decision.

...

EFFECTIVE REMEDIES - GENERAL

9.1 The Committee takes note of the author's arguments regarding a possible violation of article 14, paragraph 5, of the Covenant in that the Supreme Court did not re-evaluate the circumstances which led the Provincial Court to convict him. The Committee also notes that, according to the State party, the Supreme Court did review the sentencing court's weighing-up of the evidence. Despite the State party's position to the effect that the evidence was re-evaluated in the context of the judicial review, and on the basis of the information and papers which the Committee has received, the Committee reiterates its Views expressed in the *Cesáreo Gómez Vázquez* case and considers that the review was incomplete for the purposes of article 14, paragraph 5, of the Covenant. The Committee... is of the view that the facts as found by the Committee reveal a violation of article 14, paragraph 5, of the Covenant in respect of Joseph Semey.

9.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. The author should be entitled to have his conviction reviewed in conformity with the requirements of article 14, paragraph 5, of the Covenant. The State party is under an obligation to prevent similar violations in the future.

- *Adrien Mundyo Buyso, Thomas Osthudi Wongodi, René Sibu Matubuka et al. v. Democratic Republic of the Congo* (933/2000), ICCPR, A/58/40 vol. II (31 July 2003) 224 (CCPR/C/78/D/933/2000) at paras. 2.1-2.3, 6.1 and 6.2.

...

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

> "The President of the Republic;
>
> Having regard to Constitutional Decree-Law No. 003 of 27 May 1997 on the organization and exercise of power in the Democratic Republic of Congo, as subsequently amended and completed;
>
> Having regard to articles 37, 41 and 42 of Ordinance-Law No. 88-056 of 29 September 1988 on the status of judges;
>
> Given that the reports by the various commissions which were set up by the Ministry of Justice and covered the whole country show that the above-mentioned judges are immoral, corrupt, deserters or recognized to be incompetent, contrary to their obligations as judges and to the honour and dignity of their functions;

Considering that the conduct in question has discredited the judiciary, tarnished the image of the system of justice and hampered its functioning;

Having regard to urgency, necessity and appropriateness;

On the proposals of the Minister of Justice;

Hereby decrees:

Article 1:

The following individuals are dismissed from their functions as judges...".

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

2.3 On 27 and 29 January 1999, the authors, who formed an organization called the "Group of the 315 illegally dismissed judges", known as the "G.315", submitted their application to the Minister for Human Rights, without results.

...

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

6.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee is of the view that the authors are entitled to an appropriate remedy, which should include, inter alia: (a) in the absence of a properly established disciplinary procedure against the authors, reinstatement

in the public service and in their posts, with all the consequences that that implies, or, if necessary, in similar posts;7/ and (b) compensation calculated on the basis of an amount equivalent to the salary they would have received during the period of non-reinstatement.8/ The State party is also under an obligation to ensure that similar violations do not occur in future and, in particular, that a dismissal measure can be taken only in accordance with the provisions of the Covenant.

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Notes

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

...

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

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

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- *Pastukhov v. Belarus* (814/1998), ICCPR, A/58/40 vol. II (5 August 2003) 69 (CCPR/C/78/D/814/1998) at paras. 2.1-2.5, 7.2, 7.3, 9 and Individual Opinion of Mrs. Ruth Wedgwood and Mr. Walter Kaelin (concurring), 75.

...

2.1 On 28 April 1994, the Supreme Council (Parliament), acting according to the relevant legal procedure and, in particular, the Constitution of 15 March 1994, elected the author a

judge of the Constitutional Court for a period of 11 years.

2.2 By a presidential decree of 24 January 1997, the author lost his post on the ground that his term of office had expired following the entry into force of the new Constitution of 25 November 19961/.

2.3 On 11 February 1997, the author applied to a district court for reinstatement. On 21 February 1997, the court refused to admit the application.

2.4 On 31 March 1997, the author appealed that decision to the Minsk Municipal Court, which rejected his appeal on 10 April 1997 on the ground that the courts were not competent to consider disputes over the reinstatement of persons, such as Constitutional Court judges, who had been appointed by the Supreme Council of the Republic of Belarus.

2.5 On 2 June 1997, the author applied for judicial review to the Supreme Court. On 13 June 1997, the Supreme Court dismissed the application on the above ground.

...

7.2 In reaching its Views, the Committee has taken into account, first, the fact that the State party did not provide it with sufficiently well supported arguments concerning the effective remedies available in the present case and, second, that it did not respond to the author's allegations concerning either the termination of his service on the bench or the independence of the courts in that regard. The Committee draws attention to the fact that article 4, paragraph 2, of the Optional Protocol requires States parties to submit to it written explanations or statements clarifying the matter and the remedies, if any, that they may have taken. That being so, the allegations in question must be recognized as carrying full weight, since they were adequately supported.

7.3 The Committee takes note of the author's claim that he could not be removed from the bench since he had, in accordance with the law in force at the time, been elected a judge on 28 April 1994 for a term of office of 11 years. The Committee also notes that presidential decree of 24 January 1997 No. 106 was not based on the replacement of the Constitutional Court with a new court but that the decree referred to the author in person and the sole reason given in the presidential decree for the dismissal of the author was stated as the expiry of his term as Constitutional Court judge, which was manifestly not the case. Furthermore, no effective judicial protections were available to the author to contest his dismissal by the executive. In these circumstances, the Committee considers that the author's dismissal from his position as a judge of the Constitutional Court, several years before the expiry of the term for which he had been appointed, constituted an attack on the independence of the judiciary and failed to respect the author's right of access, on general terms of equality, to public service in his country. Consequently, there has been a violation of article 25 (c) of the Covenant, read in conjunction with article 14, paragraph 1, on the independence of the

judiciary and the provisions of article 2.

...

9. By virtue of article 2, paragraph 3, of the Covenant, the author has a right to an effective remedy including compensation. It is incumbent on the State party to ensure that there is no recurrence of such violations.

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Notes

1/ "Presidential decree No. 106 of 24 January 1997 dismissing Mr. Mikhail Pastukhov from his duties as judge of the Constitutional Court: In conformity with article 146 of the Belarus Constitution, Mr. Pastukhov is dismissed from his duties as judge of the Constitutional Court upon expiry of his term of office."

...

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Individual Opinion of Mrs. Ruth Wedgwood and Mr. Walter Kaelin (concurring)

The dismissal of Judge Mikhail Ivanovich Pastukhov from his position as a judge of the Belarus Constitutional Court was part of an attempt to diminish the independence of the judiciary. While the organization of a national court system may be changed by legitimate democratic means, the change here was part of an attempt to consolidate power in a single branch of government through the pretense of a constitutional referendum. It has interrupted the state party's fledgling progress towards an independent judiciary. As such, the presidential decree dismissing Judge Pastukhov from his office as judge of the Constitutional Court violated the rights guaranteed to him and to the people of Belarus under Articles 14 and 25 of the Covenant.

- *Judge v. Canada* (829/1998), ICCPR, A/58/40 vol. II (5 August 2003) 76 (CCPR/C/78/D/829/1998) at paras. 2.1-2.8, 10.2-10.9, 11, 12 and Individual Opinion by Mr. Rajsoomer Lallah, 103.

...

2.1 On 15 April 1987, the author was convicted on two counts of first-degree murder and possession of an instrument of crime, by the Court of Common Pleas of Philadelphia, Pennsylvania. On 12 June 987, he was sentenced to death, by electric chair. He escaped from prison on 14 June 1987 and fled to Canada.1/

2.2 On 13 July 1988, the author was convicted of two robberies committed in Vancouver, Canada. On 8 August 1988, he was sentenced to 10 years' imprisonment. The author appealed his convictions, but on 1 March 1991, his appeal was dismissed.

EFFECTIVE REMEDIES - GENERAL

2.3 On 15 June 1993, the author was ordered deported from Canada. The order was conditional as he had announced his intention to claim refugee status. On 8 June 1994, he withdrew his claim for refugee status, at which point the deportation order became effective.

2.4 On 26 January 1995, on recommendation of the Correctional Services of Canada, his case was reviewed by the National Parole Board which ordered him detained until expiry of his sentence, i.e. 8 August 1998.2/

2.5 On 10 November 1997, the author wrote to the Minister of Citizenship and Immigration requesting ministerial intervention with a view to staying the deportation order against him, until such time as a request for extradition from the United States authorities might be sought and received in his case. If removed under the Extradition Treaty, Canada could have asked for assurances from the United States that he not be executed. In a letter, dated 18 February 1998, the Minister refused his request.3/

2.6 The author applied to the Federal Court of Canada for leave to commence an application for judicial review of the Minister's refusal. In this application, the author requested a stay of the implementation of the deportation order until such time as he would be surrendered for extradition, and a declaration that his detention in Canada and deportation to the United States violated his rights under the Canadian Charter. The author's application for leave was denied on 23 June 1998. No reasons were provided and no appeal is possible from the refusal to grant leave.

2.7 The author then petitioned the Superior Court of Quebec, whose jurisdiction is concurrent with that of the Federal Court of Canada, for relief identical to that sought before the Federal Court. On 6 August 1998, the Superior Court declined jurisdiction given that proceedings had already been undertaken in the Federal Court, albeit unsuccessfully.

2.8 The author contends that, although the ruling of the Superior Court of Quebec could be appealed to the Court of Appeal, it cannot be considered an effective remedy, as the issue would be limited to the jurisdiction of the court rather than the merits of the case.

...

Question 1. As Canada has abolished the death penalty, did it violate the author's right to life under article 6, his right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment under article 7, or his right to an effective remedy under article 2, paragraph 3, of the Covenant by deporting him to a State in which he was under sentence of death without ensuring that that sentence would not be carried out?

10.2 In considering Canada's obligations, as a State party which has abolished the death penalty, in removing persons to another country where they are under sentence of death, the Committee recalls its previous jurisprudence in *Kindler v. Canada,*35/ that it does not

consider that the deportation of a person from a country which has abolished the death penalty to a country where he/she is under sentence of death amounts *per se* to a violation of article 6 of the Covenant. The Committee's rationale in this decision was based on an interpretation of the Covenant which read article 6, paragraph 1, together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. It considered that as Canada itself had not imposed the death penalty but had extradited the author to the United States to face capital punishment, a State which had not abolished the death penalty, the extradition itself would not amount to a violation by Canada unless there was a real risk that the author's rights under the Covenant would be violated in the United States. On the issue of assurances, the Committee found that the terms of article 6 did not necessarily require Canada to refuse to extradite or to seek assurances but that such a request should at least be considered by the removing State.

10.3 While recognizing that the Committee should ensure both consistency and coherence of its jurisprudence, it notes that there may be exceptional situations in which a review of the scope of application of the rights protected in the Covenant is required, such as where an alleged violation involves that most fundamental of rights - the right to life - and in particular if there have been notable factual and legal developments and changes in international opinion in respect of the issue raised. The Committee is mindful of the fact that the above-mentioned jurisprudence was established some 10 years ago, and that since that time there has been a broadening international consensus in favour of abolition of the death penalty, and in States which have retained the death penalty, a broadening consensus not to carry it out. Significantly, the Committee notes that since *Kindler* the State party itself has recognized the need to amend its own domestic law to secure the protection of those extradited from Canada under sentence of death in the receiving State, in the case of *United States v. Burns.* There, the Supreme Court of Canada held that the government *must* seek assurances, in all but exceptional cases, that the death penalty will not be applied prior to extraditing an individual to a state where he/she faces capital punishment. It is pertinent to note that under the terms of this judgement, "Other abolitionist countries do not, in general, extradite without assurances."36/ The Committee considers that the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions.

10.4 In reviewing its application of article 6, the Committee notes that, as required by the Vienna Convention on the Law of Treaties, a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Paragraph 1 of article 6, which states that "Every human being has the inherent right to life…", is a general rule: its purpose is to protect life. States parties that have abolished the death penalty have an obligation under this paragraph to so protect in all circumstances. Paragraphs 2 to 6 of article 6 are evidently included to avoid a reading of the first paragraph of article 6, according to which that paragraph could

be understood as abolishing the death penalty as such. This construction of the article is reinforced by the opening words of paragraph 2 ("In countries which have not abolished the death penalty…") and by paragraph 6 ("Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."). In effect, paragraphs 2 to 6 have the dual function of creating an exception to the right to life in respect of the death penalty and laying down limits on the scope of that exception. Only the death penalty pronounced when certain elements are present can benefit from the exception. Among these limitations are that found in the opening words of paragraph 2, namely, that only States parties that "have not abolished the death penalty" can avail themselves of the exceptions created in paragraphs 2 to 6. For countries that *have* abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.

10.5 The Committee acknowledges that by interpreting paragraphs 1 and 2 of article 6 in this way, abolitionist and retentionist States parties are treated differently. But it considers that this is an inevitable consequence of the wording of the provision itself, which, as becomes clear from the *Travaux Préparatoires*, sought to appease very divergent views on the issue of the death penalty, in an effort at compromise among the drafters of the provision. The Committee notes that it was expressed in the *Travaux* that, on the one hand, one of the main principles of the Covenant should be abolition, but on the other, it was pointed out that capital punishment existed in certain countries and that abolition would create difficulties for such countries. The death penalty was seen by many delegates and bodies participating in the drafting process as an "anomaly" or a "necessary evil". It would appear logical, therefore, to interpret the rule in article 6, paragraph 1, in a wide sense, whereas paragraph 2, which addresses the death penalty, should be interpreted narrowly.

10.6 For these reasons, the Committee considers that Canada, as a State party which has abolished the death penalty, irrespective of whether it has not yet ratified the Second Optional Protocol to the Covenant Aiming at the Abolition of the Death Penalty, violated the author's right to life under article 6, paragraph 1, by deporting him to the United States, where he is under sentence of death, without ensuring that the death penalty would not be carried out. The Committee recognizes that Canada did not itself impose the death penalty on the author. But by deporting him to a country where he was under sentence of death, Canada established the crucial link in the causal chain that would make possible the execution of the author.

10.7 As to the State party's claim that its conduct must be assessed in the light of the law applicable at the time when the alleged treaty violation took place, the Committee considers that the protection of human rights evolves and that the meaning of Covenant rights should

in principle be interpreted by reference to the time of examination and not, as the State party has submitted, by reference to the time the alleged violation took place. The Committee also notes that prior to the author's deportation to the United States the Committee's position was evolving in respect of a State party that had abolished capital punishment (and was a State party to the Second Optional Protocol to the International Covenant on Human Rights, aiming at the abolition of the death penalty), from whether capital punishment would subsequent to removal to another State be applied in violation of the Covenant to whether there was a real risk of capital punishment as such (communication No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997 and communication No. 706/1996, *G.T. v. Australia*, Views adopted on 4 November 1997). Furthermore, the State party's concern regarding possible retroactivity involved in the present approach has no bearing on the separate issues to be addressed under question 2 below.

Question 2. The State party had conceded that the author was deported to the United States before he could exercise his right to appeal the rejection of his application for a stay of his deportation before the Québec Court of Appeal. As a consequence the author was not able to pursue any further remedies that might be available. By deporting the author to a State in which he was under sentence of death before he could exercise all his rights to challenge that deportation, did the State party violate his rights under articles 6, 7 and 2, paragraph 3 of the Covenant?

10.8 As to whether the State party violated the author's rights under articles 6, and 2, paragraph 3, by deporting him to the United States where he is under sentence of death, before he could exercise his right to appeal the rejection of his application for a stay of deportation before the Quebec Court of Appeal and, accordingly, could not pursue further available remedies, the Committee notes that the State party removed the author from its jurisdiction within hours after the decision of the Superior Court of Quebec, in what appears to have been an attempt to prevent him from exercising his right of appeal to the Court of Appeal. It is unclear from the submissions before the Committee to what extent the Court of Appeal could have examined the author's case, but the State party itself concedes that as the author's petition was dismissed by the Superior Court for procedural and substantive reasons...the Court of Appeal could have reviewed the judgment on the merits.

10.9 The Committee recalls its decision in *A. R. J. v. Australia*37/, a deportation case where it did not find a violation of article 6 by the returning state as it was not foreseeable that he would be sentenced to death and "because the judicial and immigration instances seized of the case heard extensive arguments" as to a possible violation of article 6. In the instant case, the Committee finds that, by preventing the author from exercising an appeal available to him under domestic law, the State party failed to demonstrate that the author's contention that his deportation to a country where he faces execution would violate his right to life, was sufficiently considered. The State party makes available an appellate system designed to

safeguard any petitioner's, including the author's, rights and in particular the most fundamental of rights - the right to life. Bearing in mind that the State party has abolished capital punishment, the decision to deport the author to a State where he is under sentence of death without affording him the opportunity to avail himself of an available appeal, was taken arbitrarily and in violation of article 6, together with article 2, paragraph 3, of the Covenant.

...

11. The Human Rights Committee...is of the view that the facts as found by the Committee reveal a violation by Canada of articles 6, paragraph 1 alone and, read together with 2, paragraph 3, of the International Covenant on Civil and Political Rights.

12. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee concludes that the author is entitled to an appropriate remedy which would include making such representations as are possible to the receiving state to prevent the carrying out of the death penalty on the author.

Notes

1/ The author states that the mode of execution was subsequently changed to execution by lethal injection.

2/ As later explained by the State party, pursuant to the Corrections and Conditional Release Act, a prisoner in Canada is entitled to be released after having served two thirds of his sentence (i.e. the statutory release date). However, the Correctional Services of Canada reviews each case, through the National Parole Board, to determine whether, if released on the statutory release date, there are reasonable grounds to believe that the released prisoner would commit an offence causing death or serious harm. Correctional Services of Canada did so find with respect to the author.

3/ As later explained by the State party and evidenced in the documentation provided, the Minister informed the author that there was no provision under sections 49 and 50 of the Immigration Act to defer removal pending receipt of an extradition request or order. However, in the event that an extradition request was received by the Minister of Justice, the removal order would be deferred pursuant to paragraph 50(1)(a) of the Immigration Act. An extradition request was never received.

...

35/ [*Kindler v. Canada*, Communication No. 470/1990, Views adopted on 30 July 1993].

36/ [*United States v. Burns*, [2001] S.C.J. No. 8].

37/ [*A. R. J. v. Australia*, Communication No. 692/1996, Views adopted on 28 July 1997].

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...

Individual Opinion of Mr. Rajsoomer Lallah (concurring)

I entirely agree with the Committee's revision of the approach which it had adopted in *Kindler v. Canada* in relation to the correct interpretation to be given to the "inherent right to life" guaranteed under article 6 (1) of the Covenant. This revised interpretation is well explicated in paragraphs 10.4 and 10.5 of the present Views of the Committee. I wish, however, to add three observations.

First, while it is encouraging to note, as the Committee does in paragraph 10.3 of the present Views, that there is a broadening international consensus in favour of the abolition of the death penalty, it is appropriate to recall that, even at the time when the Committee was considering its views in *Kindler* some 10 years ago, the Committee was quite divided as to the obligations which a State party undertakes under article 6 (1) of the Covenant, when faced with a decision as to whether to remove an individual from its territory to another State where that individual had been sentenced to death. No less than five members of the Committee dissented from the Committee's Views, precisely on the nature, operation and interpretation of article 6(1) of the Covenant. The reasons which led those five members to dissent were individually expressed in separate individual opinions...

My second observation is that other provisions of the Covenant, in particular, articles 5 (2) and 26, may be relevant in interpreting article 6 (1), as noted in some of the individual opinions.

It is also encouraging that the Supreme Court of Canada has held that in similar cases assurances must, as the Committee notes, be obtained, subject to exceptions. I wonder to what extent these exceptions could conceptually be envisaged given the autonomy of article 6(1) and the possible impact of article 5(2) and also article 26 which governs the legislative, executive and judicial behaviour of States parties. That, however, is a bridge to be crossed by the Committee in an appropriate case.

For dissenting opinions in this context, see Judge v. Canada (829/1998), ICCPR, A/58/40 vol. II (5 August 2003) 76 (CCPR/C/78/D/829/1998) at Individual Opinion of Mrs. Christine Chanet, 99 and Individual Opinion of Mr. Hipóito Solari-Yrigoyen, 101.

- *Young v. Australia* (941/2000), ICCPR, A/58/40 vol. II (6 August 2003) 231 (CCPR/C/78/D/941/2000) at paras. 3.1, 11 and 12.

EFFECTIVE REMEDIES - GENERAL

...

3.1 The author complains that the State party's refusal, on the basis of him being of the same sex as his partner, that is, due to his sexual orientation, to provide him with a pension benefit violates his right to equal treatment before the law and is contrary to article 26. He concedes that article 26 does not compel a State party to enact particular legislation, but argues that where it does, the legislation must comply with article 26...

...

11. The Human Rights Committee...is of the view that the facts as found by the Committee reveal a violation by Australia of article 26 of the Covenant.

12. Pursuant to article 2, paragraph 3(a), of the Covenant, the Committee concludes that the author, as a victim of a violation of article 26 is entitled to an effective remedy, including the reconsideration of his pension application without discrimination based on his sex or sexual orientation, if necessary through an amendment of the law. The State party is under an obligation to ensure that similar violations of the Covenant do not occur in the future.

- *Aliev v. Ukraine* (781/1997), ICCPR, A/58/40 vol. II (7 August 2003) 52 (CCPR/C/78/D/781/1997) at paras. 7.4, 8 and 9.

...

7.4 The Committee is of the view3/ 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 if no further appeal against the death sentence is possible. In the author's case, the final sentence of death was passed without having met the requirements for a fair trial as set out in article 14 of the Covenant and thus in breach of article 6. However, this breach was remedied by the commutation of the death sentence by the Donetsk regional court's decision of 26 June 2000.

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 14, paragraphs 1 and 3 (d) of the Covenant.

9. Under article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. The Committee is of the view that, since the author was not duly represented by a lawyer during the first months of his arrest and during part of his trial, even though he risked being sentenced to death, consideration should be given to his early release. The State party is under an obligation to take measures to prevent similar violations in the future.

Notes

...

3/ See *Levy v. Jamaica*, [communication No. 719/1996]; *Marshall v. Jamaica*,

[communication No. 730/1996].

- *Kazantzis v. Cyprus* (972/2001), ICCPR, A/58/40 vol. II (7 August 2003) 499 (CCPR/C/78/D/972/2001) at paras. 2.1, 2.3, 2.4, 6.5 and 6.6.

...

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

...

2.3 On 21 October 1997, the Council evaluated the candidates, taking into account the reports on the abilities of each, by the President of the District Court in which the candidate was practicing as a lawyer, and decided to appoint the six candidates considered the most suitable for the post of District Judge. The author was not among those selected for appointment. Notice of the appointments decided by the Council was published in the Official Gazette of the Republic on 14 November 1997. The author was not personally notified of his non-appointment, nor the reasons therefor.

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

...

6.5 As to the author's claim under article 14, paragraph 1, the Committee observes that, in contrast to the situation in Casanovas v. France6/ and *Chira Vargas v. Peru*7/ concerning removal from public employment, the issue in dispute concerns the denial by a body exercising a non-judicial task of an application for employment in the judiciary. The Committee recalls that the concept of "suit at law" under article 14, paragraph 1, is based on the nature of the right in question rather than the status of one of the parties.8/ It considers that the procedure of appointing judges, albeit subject to the right in article 25(c) to access to public service on general terms of equality as well as the right in article 2, paragraph 3, to an effective remedy, does not additionally come within the purview of a determination of rights and obligations in a suit at law, within the meaning of article 14, paragraph 1, of the Covenant. This part of the communication is therefore inadmissible *ratione materiae*, under

EFFECTIVE REMEDIES - GENERAL

Article 3 of the Optional Protocol.

6.6 The author has invoked article 2 of the Covenant together with articles 17, 25(c) and 26. This raises the question as to whether the fact that the author had no possibility to challenge his non-appointment as a judge amounted to a violation of the right to an effective remedy as provided for by article 2, paragraphs 3 (a) and (b), of the Covenant. 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. The Committee recalls that article 2 can only be invoked by individuals in conjunction with other articles of the Covenant,9/ and observes that article 2, paragraph 3(a), stipulates that each State party undertakes "to ensure that any person whose rights or freedoms are violated shall have an effective remedy". 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 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. Considering that the author of the present communication has failed to substantiate, for purposes of admissibility, his claims under articles 17, 25 and 26, his allegation of a violation of article 2 of the Covenant is also inadmissible under article 2 of the Optional Protocol.

Notes

1/ (1972) 3 CLR 390.

...

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

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

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

9/ *S. E. v. Argentina* Case No. 275/88, Decision adopted on 26 March 1990, at paragraph 5.3.

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- *Bakhtiyari v. Australia* (1069/2002), ICCPR, A/59/40 vol. II (29 October 2003) 301 (CCPR/C/79/D/1069/2002) at paras. 9.3, 9.5-9.7, 10 and 11.

...

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

...

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

9.6 As to the claim under articles 17 and 23, paragraph 1, the Committee observes that to separate a spouse and children arriving in a State from a spouse validly resident in a State may give rise to issues under articles 17 and 23 of the Covenant. In the present case, however, the State party contends that, at the time Mrs. Bakhtiyari made her application to the Minister under section 417 of the *Migration* Act, there was already information on Mr. Bakhtiyari's alleged visa fraud before it. As it remains unclear whether the attention of the State party's authorities was drawn to the existence of the relationship prior to that point, the Committee cannot regard it as arbitrary that the State party considered it inappropriate to unite the family at that stage. The Committee observes, however, that the State party intends at present to remove Mrs. Bakhtiyari and her children as soon as "reasonably practicable", while it has no current plans to do so in respect of Mr. Bakhtyari, who is currently pursuing

domestic proceedings. Taking into account the specific circumstances of the case, namely the number and age of the children, including a newborn, the traumatic experiences of Mrs. Bakhtiyari and the children in long-term immigration detention in breach of article 9 of the Covenant, the difficulties that Mrs. Bakhtiyari and her children would face if returned to Pakistan without Mr. Bakhtiyari and the absence of arguments by the State party to justify removal in these circumstances, the Committee takes the view that removing Mrs. Bakhtiyari and her children without awaiting the final determination of Mr. Bakhtiyari's proceedings would constitute arbitrary interference in the family of the authors, in violation of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

9.7 Concerning the claim under article 24, the Committee considers that the principle that in all decisions affecting a child, its best interests shall be a primary consideration, forms an integral part of every child's right to such measures of protection as required by his or her status as a minor, on the part of his or her family, society and the State, as required by article 24, paragraph 1, of the Covenant. The Committee observes that in this case children have suffered demonstrable, documented and on-going adverse effects of detention suffered by the children, and in particular the two eldest sons, up until the point of release on 25 August 2003, in circumstances where that detention was arbitrary and in violation of article 9, paragraph 1, of the Covenant. As a result, the Committee considers that the measures taken by the State party had not, until the Full Bench of the Family Court determined it had welfare jurisdiction with respect to the children, been guided by the best interests of the children, and thus revealed a violation of article 24, paragraph 1, of the Covenant, that is, of the children's right to such measures of protection as required by their status as minors up that point in time.

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

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. As to the violation of article 9, paragraphs 1 and 4, continuing up to the present time with respect to Mrs. Bakhtiyari, the State party should release her and pay her appropriate compensation. So far as concerns the violations of articles 9 and 24 suffered in the past by the children, which came to an end with their release on 25 August 2003, the State party is under an obligation to pay appropriate compensation to the children. The State party should also refrain from deporting Mrs. Bakhtiyari and her children while Mr. Bakhtiyari is pursuing domestic proceedings, as any such action on the part of the State party would result in violations of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

EFFECTIVE REMEDIES - GENERAL

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

...

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

...

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

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

2.5 The author was forced to pay for the 8 x 8 ft area in which he slept and financially to support the eight others with him. He was forced to sleep alongside drug-deranged

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

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

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

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

2.9 On 9 August 2001, after applying for a tourist visa to visit his family, the author was informed that as a result of having overstayed his tourist visa and having been convicted of a crime involving moral turpitude, he had been placed on a Bureau of Immigration watchlist.

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

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

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

7.4 As to the claims concerning the author's mental suffering and anguish as a consequence of being sentenced to death, the Committee observes that the authors' mental condition was exacerbated by his treatment in, as well as the conditions of, his detention, and resulted in documented long-term psychological damage to him. In view of these aggravating factors constituting further compelling circumstances beyond the mere length of time spent by the author in imprisonment under a sentence of death,13/ the Committee concludes that the

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

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

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

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

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Notes

...

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

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EFFECTIVE REMEDIES - GENERAL

- *Kurbanova v. Tajikistan* (1096/2002), ICCPR, A/59/40 vol. II (6 November 2003) 354 (CCPR/C/79/D/1096/2002) at paras. 7.2-7.4, 7.6-7.8, 8 and 9.

...

7.2 The Committee has taken note of the author's claim that her son was detained on a Saturday (5 May 2001), and detained for seven days without a charge. To support her claim, she provides a copy of the police register which displays a record entered on 7 May 2001 relating to her son's arrest, allegedly for fraud. She filed a complaint about the allegedly illegal detention of her son with the Office of the Procurator General on the same day. Furthermore, the Committee notes that according to the judgement of 2 November 2001 by the Military Chamber of the Supreme Court, the author was detained on 5 May 2001. This information is not refuted by the State party's contention that an arrest warrant was issued on 12 May 2001. In the absence of any further explanations from the State party, the Committee concludes that Mr. Kurbanov was detained for seven days without an arrest warrant and without being brought before a judge. The Committee concludes that his rights under article 9, paragraphs 2 and 3, of the Covenant have been violated.

7.3. Furthermore, the documents submitted by the State party show that Mr. Kurbanov was, after being detained since 5 May 2001 on other grounds, informed on 11 June 2001 that he was suspected of the killings of 29 April 2001 but charged with these crimes only on 30 July 2001. During his detention from 5 May 2001 onwards, he was, except for the last week starting on 23 July 2001, without the assistance of a lawyer. The Committee takes the view that the delay in presenting the charges to the detained author and in securing him legal assistance affected the possibilities of Mr. Kurbanov to defend himself, in a manner that constitutes a violation of article 14, paragraph 3 (a), of the Covenant.

7.4 The Committee has noted the author's fairly detailed description of beatings and other ill-treatment that her son was subjected to. She has furthermore identified by name some of the individuals alleged to have been responsible for her son's ill-treatment. In reply, the State party has confined itself to stating that these allegations were neither raised during the investigation nor in court. The Committee recalls,4/ with regard to the burden of proof, that this cannot rest alone with the author of a communication, especially considering that the author and the State party do not always have equal access to evidence and that frequently the State party alone has access to relevant information. Further, the mere fact that no allegation of torture was made in the domestic appeal proceedings cannot as such be held against the alleged victim if it is proposed, as in the present case, that such an allegation was in fact made during the actual trial but was neither recorded nor acted upon. In the light of the details given by the author on the alleged ill-treatment, the unavailability of a trial transcript and the absence of any further explanations from the State party, due weight must be given to the author's allegations. Noting in particular that the State party has failed to investigate the author's allegations, which were brought to the State party's authorities'

attention, the Committee considers that the facts as submitted disclose a violation of article 7 of the Covenant.

...

7.6 As to the author's claim that her son's rights under article14, paragraph 1 were violated through a death sentence pronounced by an incompetent tribunal, the Committee notes that the State party has neither addressed this claim nor provided any explanation as to why the trial was conducted, at first instance, by the Military Chamber of the Supreme Court. In the absence of any information by the State party to justify a trial before a military court, the Committee considers that the trial and death sentence against the author's son, who is a civilian, did not meet the requirements of article 14, paragraph 1.

7.7 The Committee recalls5/ 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 current case, the sentence of death was passed in violation of the right to a fair trial as set out in article 14 of the Covenant, and thus also in breach of article 6.

7.8 The State party has not provided any explanations in response to the author's fairly detailed allegations of the author's son's condition of detention after conviction being in breach of article 10 of the Covenant. In the absence of any explanation from the State party, due weight must be given to the author's allegations according to which her son's cell has no water, is very cold in the winter and hot in the summer, has inadequate ventilation and is infested with insects, and that the author's son is allowed to leave his cell only for half an hour a day. With reference to the United Nations Standard Minimum Rules for the Treatment of Prisoners, the Committee finds, that the conditions as described amount to a violation of article 10, paragraph 1, in respect of the author's son.

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

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

Notes

...

4/ See, for example, communication No. 161/1983, *Rubio v. Colombia*.

5/ See *Conroy Levy v. Jamaica*, communication No. 719/1996, and *Clarence Marshall v.*

Jamaica, communication No. 730/1996.

- *Rameka v. New Zealand* (1090/2002), ICCPR, A/59/40 vol. II (6 November 2003) 330 (CCPR/C/79/D/1090/2002) at paras. 2.4, 2.5, 7.2, 8 and 9.

...

2.4 On 12 May 2000, Mr. Harris was found guilty by the High Court at Auckland, following pleas of guilty, of 11 counts of sexual offences occurring over a period of three months against a boy who turned 12 during the period in question. They comprised two charges of sexual violation involving oral genital contact and nine charges of indecent assault or inducing indecent acts in respect of a boy under 12. He had previously been convicted of two charges of unlawful sexual connection with a male under 16 and one of indecently assaulting a male under 12, all in respect of an 11 year old boy. On the two unlawful sexual connection counts, he was sentenced to six years' imprisonment, and concurrently to four years' on the remaining counts.

2.5 The Solicitor-General, for the Crown, sought leave to appeal on the basis that preventive detention, or at least a longer finite sentence, should have been imposed. On 27 June 2000, the Court of Appeal agreed, and substituted a sentence of preventive detention in respect of each count. The Court referred to the warning of serious consequences given by the court sentencing the author for his previous offences, his failure to amend his behaviour following a sexual offenders' course in prison, the features of breach of a child's trust in offending, the failure to heed police warnings provided to the author against illicit contact with the child victim, as well as the comprehensive psychiatric report defining him as a homosexual paedophile attracted to pre-pubescent boys and the risk factors analysed in the report. While observing that the case would warrant a finite sentence of "not less" than seven and a half years, the Court however concluded, in the circumstances, that no appropriate finite sentence would adequately protect the public, and that preventive detention, with its features of continuing supervision after release and amenability to recall, was the appropriate sentence.

...

7.2 The Committee observes at the outset that Mr. Harris would have been subjected, according to the Court of Appeal, to a finite sentence of "not less than" seven and a half years with respect to his offences. Accordingly, Mr. Harris will serve two and a half years of detention, for preventive purposes, before the non-parole period arising under his sentence of preventive detention expires. Given that the State party has demonstrated no case where the Parole Board has acted under its exceptional powers to review *proprio motu* a prisoner's continued detention prior to the expiry of the non-parole period, the Committee finds that, while Mr. Harris' detention for this period of two and a half years is based on the State party's law and is not arbitrary, his inability for that period to challenge the existence, at that time,

of substantive justification of his continued detention for preventive reasons is in violation of his right under article 9, paragraph 4, of the Covenant to approach a "court" for a determination of the “lawfulness” of his detention over this period.

...

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 9, paragraph 4, of the Covenant with respect to Mr. Harris.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Harris with an effective remedy, including the ability to challenge the justification of his continued detention for preventive purposes once the seven and a half year period of punitive sentence has been served. The State party is under an obligation to avoid similar violations in the future.

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

...

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

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

fully-ripened grains and a fruitful year and either sitting around a table or dancing, and children with an insect net leaping about."

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

...

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

...

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

...

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

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

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

...

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

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

...

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

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

...

6.2 The Committee notes the allegation that Mr. Arutyunyan was kept *incommunicado* for two weeks after his transfer to Tashkent. In substantiation, the author claims that the family tried, unsuccessfully, to obtain information in this regard from the Office of the Attorney-General. In these circumstances, and taking into account the particular nature of the case and the fact that no information was provided by the State party on this issue, the Committee concludes that Mr. Arutyunyan's rights under article 10, paragraph 1, of the Covenant have been violated...

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

...

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an

obligation to provide Mr. Arutyunyan with an effective remedy, which could include consideration of a further reduction of his sentence and compensation. The State party is also under an obligation to prevent similar violations in the future.

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

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

...

2.1 On 14 October 1991, the author arrived in Canada from Iran and claimed protection under the Convention on the Status of Refugees and its Protocol, based on his political opinion and membership in a particular social group. He contended, on various occasions, (i) that he had been beaten by members of the Islamic Revolutionary Committee in Iran for being intoxicated, (ii) that his return to Iran would endanger his life due to his knowledge of Iranian covert operations and personnel, knowledge which he had acquired as a forced conscript in the foreign assassins branch of the Iranian Foreign Ministry, (iii) that he had been jailed for four years as a result of refusing to carry out a drug raid which was in fact a raid on the home of an Iranian dissident, with women and children, in Pakistan, and (iv) that he had been released after pretending to repent. On 1 April 1992, the Immigration and Refugee Board determined that the author was a Convention refugee based on his political opinion and membership in a particular social group.

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

...

11. The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by Canada of article 9, paragraph 4, and article 13, in conjunction with

article 7, of the Covenant. The Committee reiterates its conclusion that the State party breached its obligations under the Optional Protocol by deporting the author before the Committee's determination of his claim.

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

- *Derksen v. The Netherlands* (976/2001), ICCPR, A/59/40 vol. II (1 April 2004) 173 at paras. 2.1, 2.2, 9.3, 10 and 11.

...
2.1 The author shared a household with her partner Marcel Bakker from August 1991 to 22 February 1995. It is stated that Mr. Bakker was the breadwinner, whereas Ms. Derksen took care of the household and had a part-time job. They had signed a cohabitation contract and when Ms. Derksen became pregnant, Mr. Bakker recognized the child as his. The author states that they intended to marry. On 22 February 1995, Mr. Bakker died in an accident.

2.2 On 6 July 1995, the author requested benefits under the General Widows and Orphans Law (AWW, Algemene Weduwen en Wezen Wet). On 1 August 1995, her request was rejected because she had not been married to Mr. Bakker and therefore could not be recognized as widow under the AWW. Under the AWW, benefits for half-orphans were included in the widows' benefits.
...
9.3 The second question before the Committee is whether the refusal of benefits for the author's daughter constitutes prohibited discrimination under article 26 of the Covenant. The State party has explained that it is not the status of the child that determines the allowance of benefits, but the status of the surviving parent of the child, and that the benefits are not granted to the child but to the parent. The author, however, has argued that, even if the distinction between married and unmarried couples does not constitute discrimination because different legal regimes apply and the choice lies entirely with the partners whether to marry or not, the decision not to marry cannot affect the parents' obligations towards the

child and the child has no influence on the parents' decision. The Committee recalls that article 26 prohibits both direct and indirect discrimination, the latter notion being related to a rule or measure that may be neutral on its face without any intent to discriminate but which nevertheless results in discrimination because of its exclusive or disproportionate adverse effect on a certain category of persons. Yet, a distinction only constitutes prohibited discrimination in the meaning of article 26 of the Covenant if it is not based on objective and reasonable criteria. In the circumstances of the present case, the Committee observes that under the earlier AWW the children's benefits depended on the status of the parents, so that if the parents were unmarried, the children were not eligible for the benefits. However, under the new ANW, benefits are being denied to children born to unmarried parents before 1 July 1996 while granted in respect of similarly situated children born after that date. The Committee considers that the distinction between children born, on the one hand, either in wedlock or after 1 July 1996 out of wedlock, and, on the other hand, out of wedlock prior to 1 July 1996, is not based on reasonable grounds. In making this conclusion the Committee emphasizes that the authorities were well aware of the discriminatory effect of the AWW when they decided to enact the new law aimed at remedying the situation, and that they could have easily terminated the discrimination in respect of children born out of wedlock prior to 1 July 1996 by extending the application of the new law to them. The termination of ongoing discrimination in respect of children who had had no say in whether their parents chose to marry or not, could have taken place with or without retroactive effect. However, as the communication has been declared admissible only in respect of the period after 1 July 1996, the Committee merely addresses the failure of the State party to terminate the discrimination from that day onwards which, in the Committee's view, constitutes a violation of article 26 with regard to Kaya Marcelle Bakker in respect of whom half-orphans' benefits through her mother was denied under the ANW.

...

10. The Human Rights Committee...is of the view that the facts before it relating to Kaya Marcelle Bakker disclose a violation of article 26 of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide half-orphans' benefits in respect of Kaya Marcelle Bakker or an equivalent remedy. The State party is also under an obligation to prevent similar violations.

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

...

9.3 The author claims that his rights under article 14 were violated because he did not have the opportunity to cross-examine Chikin on his evidence, summon the expert and call

additional witnesses. While efforts to locate Chikin proved to be ineffective for reasons not explained by the State party, very considerable weight was given to his statement, although the author was unable to cross-examine this witness. Furthermore, the Orlov Court did not give any reasons as to why it refused the author's request to summon the expert and call additional witnesses. These factors, taken together, lead the Committee to the conclusion that the courts did not respect the requirement of equality between prosecution and defence in producing evidence and that this amounted to a denial of justice. Consequently, the Committee concludes that the author's rights under article 14 have been violated.

...

11. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee considers that the author is entitled to an appropriate remedy, including compensation and his immediate release.

- *Smartt v. Guyana* (867/1999), ICCPR, A/59/40 vol. II (6 July 2004) 41 at paras. 6.3 and 8.

...

6.3 The Committee recalls its jurisprudence that legal representation must be available at all stages of criminal proceedings, particularly in cases involving capital punishment.6/ The pre-trial hearings, having taken place before the Georgetown Magisterial Court between 16 November 1993 and 6 May 1994, that is after the author's son had been charged with murder on 31 October 1993, formed part of the criminal proceedings. Furthermore, the fact that most witnesses of the prosecution were examined at this stage of the proceedings for the first time, and were subject to cross-examination by the author's son, shows that the interests of justice would have required securing legal representation to the author's son through legal aid or otherwise. In the absence of any submission by the State party on the substance of the matter under consideration, the Committee finds that the facts before it disclose a violation of article 14, paragraph 3 (d), of the Covenant.

...

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

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6/ See e.g. communication No. 1096/2002, *Kurbanova v. Tajikistan*, Views adopted on 6 November 2003, at para. 6.5; communication No. 781/1997, *Aliev v. Ukraine*, Views adopted on 7 August 2003, at para. 7.3; communication No. 775/1997, *Brown v. Jamaica*, Views adopted on 23 March 1999, at para. 6.6.

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EFFECTIVE REMEDIES - GENERAL

- *Nazarov v. Uzbekistan* (911/2000), ICCPR, A/59/40 vol. II (6 July 2004) 91 at paras. 6.2, 6.3 and 8.

...

6.2 In relation to article 9 (3), the author notes that his arrest was confirmed by the relevant authority on 31 December 1997, five days after his detention, however it does not appear that the confirmation of the arrest involved the author being brought before a judge or other authorized judicial officer. In any event, the Committee does not consider that a period of five days could be considered "prompt" for the purpose of article 9 (3) 2/. Accordingly, in the absence of an explanation from the State party, the Committee considers that the communication discloses a violation of article 9 (3) by the State party.

6.3 The author further alleges that the State party violated article 14, and points to a number of circumstances which he claims, as a matter of evidence, point clearly to the author's innocence. The Committee recalls its jurisprudence and notes that it is generally not for itself, but for the courts of States parties, to review or to evaluate facts and evidence, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence was manifestly arbitrary or amounted to a denial of justice. However in the current case the author claims that the State party violated article 14 of the Covenant, in that the Court denied the author's request for the appointment of an expert to determine the geographical origin of the hemp, which may have constituted crucial evidence for the trial. In this respect, the Committee has noted that in the court decision submitted before it, the court when denying this request gave no justification. In the absence of any explanation from the State party, the Committee considers that this denial did not respect the requirement of equality between the prosecution and defence in producing evidence, and amounted to a denial of justice. The Committee therefore decides that the facts before it reveal a violation of article 14 of the Covenant.

...

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

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2/ See for example communication No. 852/1999, *Borisenko v. Hungary*, 14 October 2002, where the Committee considered that a three-day period was not "prompt".

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EFFECTIVE REMEDIES - GENERAL

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

...

5.2 With regard to the complaint of a violation of article 9, paragraphs 1, 2 and 4, of the Covenant, the Committee notes the author's statement that no warrant was issued for his arrest and that he was taken to the Gemena military camp under false pretences. Mr. Mulezi also maintains that he was arbitrarily detained without charge from 27 December 1997 onwards, first at Gemena, for two weeks, and then at the Mbandaka military camp, for 16 months. It is clear from the author's statements that he was unable to appeal to a court for a prompt determination of the lawfulness of his detention. The Committee considers that these statements, which the State party has not contested and which the author has sufficiently substantiated, warrant the finding that there has been a violation of article 9, paragraphs 1, 2 and 4, of the Covenant. On the same basis, the Committee concludes, however, that there has been no violation of article 9, paragraph 5, as it does not appear that the author has in fact claimed compensation for unlawful arrest or detention.

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

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

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

7. Under article 2, paragraph 3 (a), of the Covenant, the State party has an obligation to

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

- *Saidov v. Tajikistan* (964/2001), ICCPR, A/59/40 vol. II (8 July 2004) 164 at paras. 4.1-4.4.

...

4.1 The author has alleged that the State party breached its obligations under the Optional Protocol by executing her husband despite the fact that a communication had been registered before the Human Rights Committee under the Optional Protocol and a request for interim measures of protection had been addressed to the State party in this respect. The Committee recalls 4/ 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 (1), (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.

4.2 Apart from any violation of the Covenant found against a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In the present communication, the author alleges that her husband was denied rights under articles 6, 7, 9, 10 and 14 of the Covenant. Having been notified of the communication, the State party has breached its obligations under the Protocol, by executing the alleged victim before the Committee concluded its consideration and examination and the formulation and communication of its Views. It is particularly inexcusable for the State to have done so after the Committee has acted under rule 86 of its rules of procedure, requesting that the State party refrains from doing so.

4.3 The Committee also expresses great concern about the lack of the State party's explanation for its action, in spite of several requests made in this relation by the Committee, acting through its Chairman and its Special Rapporteur on new communications.

EFFECTIVE REMEDIES - GENERAL

4.4 The Committee recalls that interim measures pursuant to rule 86 of the Committee's rules of procedure adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the rule, especially by irreversible measures such as, as in the present case, the execution of the author's husband undermines the protection of Covenant rights through the Optional Protocol.

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4/ See *Piandong v. The Philippines*, communication No. 869/1999, Views adopted on 19 October 2000.

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- *Mulai v. Guyana* (811/1998), ICCPR, A/59/40 vol. II (20 July 2004) 29 at paras. 6.2 and 8.

...

6.2 In the present case, the author submits that the foreman of the jury at the retrial informed the police and the Chief Justice, on 26 February 1996, that someone had sought to influence him. The author claims that it was the duty of the judge to conduct an inquiry into this matter to ascertain whether any injustice could have been caused to Bharatraj and Lallman Mulai, thus depriving them of a fair trial. In addition, the author complains that the incident was not disclosed to the defence although both the judge and the prosecution were made aware of it by the foreman of the jury, and that unlike in some other trials the trial against the two brothers was not aborted as a consequence of the incident. The Committee notes that although it is not in the position to establish that the performance and the conclusions reached by the jury and the foreman in fact reflected partiality and bias against Bharatraj and Lallman Mulai, and although it appears from the material before it that the Court of Appeal dealt with the issue of possible bias, it did not address that part of the grounds of appeal that related to the right of Bharatraj and Lallman Mulai to equality before the courts, as enshrined in article 14, paragraph 1, of the Covenant and on the strength of which the defence might have moved for the trial to be aborted. Consequently, the Committee finds that there was a violation of article 14, paragraph 1, of the Covenant.

...

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Bharatraj and Lallman Mulai with an effective remedy, including commutation of their death sentences. The State party is also under an obligation to avoid similar violations in the future.

EFFECTIVE REMEDIES - GENERAL

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

...

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

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

7.4 On the claim of a violation of the author's rights under article 14, paragraph 3 (g), in that he was forced to sign a confession and subsequently had to assume the burden of proof that it was extracted under duress and was not voluntary... The Committee concludes that by placing the burden of proof that his confession was made under duress on the author, the State party violated article 14, paragraphs 2, and 3 (g), read together with article 2, paragraph 3, and 7 of the Covenant.

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

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

EFFECTIVE REMEDIES - GENERAL

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

16/ *Lubuto v. Zambia*, case No. 390/1990, Views adopted on 31 October 1995; *Neptune v. Trinidad and Tobago*, case No. 523/1992, Views adopted on 16 July 1996; *Sam Thomas v. Jamaica*, case No. 614/95, Views adopted on 31 March 1999; *Clifford McLawrence v. Jamaica*, case No. 702/96, Views adopted on 18 July 1997; *Johnson v. Jamaica*, case No. 588/1994, Views adopted on 22 March 1996.

- *Ramil Rayos v. The Philippines* (1167/2003), ICCPR, A/59/40 vol. II (27 July 2004) 389 at paras. 7.2, 7.3 and 9.

...

7.2 Regarding the claim under article 6, paragraph 2, of the Covenant, the Committee observes that, in response to the State party's argument that the Committee's function is not to assess the constitutionality of a State party's law, its task is rather to determine the consistency with the Covenant of the particular claims brought before it 9/. The Committee notes from the judgements of both the Regional Trial Court and the Supreme Court, that the author was convicted of the complex crime of rape with homicide under article 335 of the Revised Penal Code, as amended by RA No. 7659, which provides that "When by reason or on the occasion of the rape, a homicide is committed, the penalty shall be death." Thus, the death penalty was imposed automatically by operation of article 335 of the Revised Penal Code, as amended. 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 10/. It follows that the automatic imposition of the death penalty in the author's case, by virtue of article 335 of the Revised Penal Code, as amended, violated his rights under article 6, paragraph 1, of the Covenant.

7.3 With respect to the claim of a violation of article 14, paragraph 3 (b), as the author was not granted sufficient time to prepare his defence and communicate with counsel, the Committee notes that the State party does not contest this claim. Since the author was only granted a few moments each day during the trial to communicate with counsel, the Committee finds a violation of article 14, paragraph 3 (b), of the Covenant. As the author's death sentence was affirmed after the conclusion of proceedings in which the requirements

for a fair trial set out in article 14 of the Covenant were not met, it must be concluded that the author's right protected under article 6 has also been violated.

...

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy, including commutation of his death sentence. The State party is under an obligation to avoid similar violations in the future.

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9/ *Carpo v. The Philippines*, case No. 1077/2002, Views adopted on 28 March 2003.

10/ *Thompson v. St. Vincent and The Grenadines*, case No. 806/1998, Views adopted on 18 October 2000; and *Kennedy v. Trinidad and Tobago*, case No. 845/1998, Views adopted on 26 March 2002.

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- *Madafferi v. Australia* (1011/2001), ICCPR, A/59/40 vol. II (28 July 2004) 208 at paras. 9.8, 10 and 11.

...

9.8 In the present case, the Committee considers that a decision by the State party to deport the father of a family with four minor children and to compel the family to choose whether they should accompany him or stay in the State party is to be considered "interference" with the family, at least in circumstances where, as here, substantial changes to long-settled family life would follow in either case... [T]he Committee considers that the removal by the State party of Mr. Madafferi would, if implemented, constitute arbitrary interference with the family, contrary to article 17, paragraph 1, in conjunction with article 23, of the Covenant in respect of all of the authors, and additionally, a violation of article 24, paragraph 1, in relation to the four minor children due to a failure to provide them with the necessary measures of protection as minors.

...

10. The Human Rights Committee...is of the view that the State party has violated the rights of Mr. Francesco Madafferi under articles 10, paragraph 1, of the Covenant. Moreover, the Committee considers that the removal by the State party of Mr. Madafferi would, if implemented, constitute arbitrary interference with the family, contrary to article 17, paragraph 1, in conjunction with article 23, of the Covenant in respect of all of the authors, and additionally, a violation of article 24, paragraph 1, in relation to the four minor children due to a failure to provide them with the necessary measures of protection as minors.

EFFECTIVE REMEDIES - GENERAL

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy, including refraining from removing Mr. Madafferi from Australia before he has had the opportunity to have his spouse visa examined with due consideration given to the protection required by the children's status as minors. The State party is under an obligation to avoid similar violations in the future.

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

...

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

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

6.3 As to the authors' claim that their conditions during each stage of their imprisonment violated articles 7 and 10, paragraph 1, the Committee must give due consideration to them in the absence of any pertinent State party observation in this respect. The Committee considers that the authors' conditions of detention...violate their right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to article 10, paragraph 1, of the Covenant...

EFFECTIVE REMEDIES - GENERAL

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

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

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

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

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

6.4 The Committee has noted the author's claims that her son was legally represented only one month after being charged with several crimes and all meetings between him and the lawyer subsequently assigned by the investigation were held in investigators' presence, in violation of article 14, paragraph 3 (b). The Committee considers that the author's submissions concerning the time and conditions in which her son was assisted by a lawyer before the trial adversely affected the possibilities of the author's son to prepare his defence. In the absence of any explanations by the State party, the Committee is of the view that the facts before it reveal a violation of Mr. Khomidov's rights under article 14, paragraph 3 (b), of the Covenant.

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

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

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

- *Ganga v. Guyana* (912/2000), ICCPR, A/60/40 vol. II (1 November 2004) 40 at paras. 5.2, 5.3 and 7.

...

5.2 The Committee maintains its position that it is generally not in the position to evaluate facts and evidence presented before a domestic court. In the current case, however, the Committee takes the view that the instructions to the jury raise an issue under article 14 of the Covenant, as the defendant had managed to present *prima facie* evidence of being mistreated, and the Court did not alert the jury that that the prosecution must prove that the confession was made without duress. This error constituted a violation of Mr. Deolall's right to a fair trial as required by the Covenant, as well as his right not to be compelled to testify against himself or confess guilt, which violations were not remedied upon appeal. Therefore, the Committee concludes that the State party has violated article 14, paragraphs 1, and 3 (g), of the Covenant in respect of Mr. Deolall.

5.3 The Committee recalls its jurisprudence 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, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant 4/. In the present case, since the final sentence of death was passed without having observed the requirement for a fair trial set out in article 14, it must be concluded that the right protected by article 6 of the Covenant has also been violated.

EFFECTIVE REMEDIES - GENERAL

7. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Deolall with an effective remedy, including release or commutation.

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Notes

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4/ *Taylor v. Jamaica*, communication No. 705/1996, *Levy v. Jamaica*, 719/1996.

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- *Alba Cabriada v. Spain* (1101/2002), ICCPR, A/60/40 vol. II (1 November 2004) 144 at paras. 7.3 and 9.

...

7.3 The Committee notes the comments made by the State party about the nature of the Spanish remedy of judicial review, in particular that the court of second instance is limited to an examination as to whether the findings of the trial court amount to arbitrariness or denial of justice. As the Committee has determined in previous cases [701/1996; 986/2001; 1007/2001], such limited review by a higher tribunal is not in accordance with the requirements of article 14, paragraph 5. Therefore, in the light of the limited scope of review applied by the Supreme Court in the author's case, the Committee concludes that the author is a victim of a violation of article 14, paragraph 5, of the Covenant.

...

9. Under article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. The author's conviction must be reviewed in accordance with article 14, paragraph 5, of the Covenant. The State party is under an obligation to take the necessary measures to ensure that similar violations do not occur in future.

- *Byahuranga v. Denmark* (1222/2003), ICCPR, A/60/40 vol. II (1 November 2004) 247 at paras. 11.2, 11.4, 12 and 13.

...

11.2 The first issue before the Committee is whether the author's expulsion to Uganda would expose him to a real and foreseeable risk of being subjected to treatment contrary to article 7. The Committee recalls that, under article 7 of the Covenant, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement* 10/ It takes note of the author's detailed account as to why he fears to be subjected to ill-treatment at the hands of the Ugandan authorities, and concludes that he has made out a *prima facie* case of such a risk.

EFFECTIVE REMEDIES - GENERAL

...

11.4 In the light of the State party's failure to provide substantive arguments upon which the State party relies to rebut the author's allegations, the Committee finds that due weight must be given to his detailed account of the existence of a risk of treatment contrary to article 7. Consequently, the Committee is of the view that the expulsion order against the author would, if implemented by returning him to Uganda, constitute a violation of article 7 of the Covenant.

...

12. The Human Rights Committee...is of the view that the author's expulsion to Uganda would, if implemented, violate his rights under article 7 of the Covenant.

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 revocation and full re-examination of the expulsion order against him. The State party is also under an obligation to prevent similar violations in the future.

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Notes

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10/ General comment 20 [44], at para. 9.

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

...

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

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

...

EFFECTIVE REMEDIES - GENERAL

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

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

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

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

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

EFFECTIVE REMEDIES - GENERAL

5.3 The Committee notes that the author's claim that he was initially kept in a cell with 20 murder convicts at the headquarters of the *Brigade mixte mobile* has not been challenged by the State party, which has not adduced any exceptional circumstances which would have justified its failure to segregate the author from such convicts in order to emphasize his status as an unconvicted person. The Committee therefore finds that the author's rights under article 10, paragraph 2 (a), of the Covenant were breached during his detention at the BMM headquarters.

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

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

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

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

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

Notes

...

10/ See communication No. 305/1988, *Van Alphen v. The Netherlands*, Views adopted on 23 July 1990, para. 5.8; communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.8.

11/ See *ibid*.

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

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

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

...

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

2.2 On 13 November 1945, Eugen and Josefa Czernin applied for retention of Czechoslovak citizenship, in accordance with Presidential Decree No. 33/1945, and within the stipulated time frame. A "Committee of Inquiry" in the District National Committee of Jindřichův Hradec, which examined their application, found that Eugen Czernin had proven his "anti-Nazi attitude". The Committee then forwarded the application to the Ministry of the Interior for a final decision. In December 1945, after being released from prison where he was subjected to forced labour and interrogated by the Soviet secret services NKVD and GPÚ, he moved to Austria with his wife. The Ministry did not decide on their applications, nor did it reply to a letter sent by Eugen Czernin on 19 March 1946, urging the authorities to rule on his application. A note in each of their files from 1947 states that the application was to be regarded as irrelevant as the applicants had voluntarily left for Austria, and their files were closed.

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

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

2.5 On 22 February 1996, the Minister of Interior wrote to the author stating that "the decision on [his] application was not favourable to [him]". On 8 March 1996, the author appealed the Minister's letter to the Ministry of Interior. In a reply from the Ministry dated 24 April 1996, the author was informed that the Minister's letter was not a decision within the meaning of section 47 of Act No. 71/1967 on administrative proceedings and that it was not possible to appeal against a non-existent decision. On the same day, the author appealed the letter of the Minister to the Supreme Court which on 16 July 1996 ruled that the letter was not a decision by an administrative body, that the absence of such a decision was an insurmountable procedural obstacle, and that domestic administrative law did not give the courts any power to intervene against any failure to act by an official body.

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

communication before the Human Rights Committee.

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

....

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

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

7.4 The Committee recalls its jurisprudence that the interpretation and application of domestic law is essentially a matter for the courts and authorities of the State party concerned. However, in the pursuit of a claim under domestic law, the individual must have access to effective remedies, which implies that the administrative authorities must act in conformity with the binding decisions of national courts, as admitted by the State party itself. The Committee notes that the decision of the Ministry of Interior of 31 May 2002, as well as its confirmation by the Minister on 1 January 2003, were both quashed by the Prague Town Court on 5 May 2004. According to the authors, the Town Court ruled that the authorities had taken these decisions without the required reasoning and arbitrarily, and that they had ignored substantive evidence provided by the applicants, including the author's father, Eugen Czernin. The Committee notes that the State party has not contested this part of the authors' account.

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

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 14, paragraph 1, of the Covenant. With regard to the above finding, the Committee considers that it not necessary to examine the claim under article 26 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including the requirement that its administrative authorities act in conformity with the decisions of the courts.

Notes

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

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

Individual Opinion of Ms. Ruth Wedgwood

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

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

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

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

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

In one sense, this case is simpler than the previous cases, since the issue is process, rather than the limits of permissible substantive grounds. Nonetheless, one should note that the courts of the Czech Republic have, ultimately, sought to provide an effective remedy to the authors, in the consideration of their claims. Many democracies have seen administrative agencies that are reluctant to reach certain results, and the question is whether there is a remedy within the system for a subordinate agency's failure to impartially handle a claim. One could not adopt any *per se* rule that three rounds of appellate litigation amounts to proof that an applicant has been deprived of a right to a fair hearing by a competent, independent and impartial tribunal, especially since here the appellate courts have acted to restrain the administrative agency in question on its various grounds of denial of the author's claims. The Committee has not held that administrative proceedings fall within the full compass of article 14.

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

- *Khalilov v. Tajikistan* (973/2001), ICCPR, A/60/40 vol. II (30 March 2005) 74 at paras. 4.1-4.4, 7.6, 7.7, 8 and 9.

...

4.1 The Committee notes that the State party had executed the author's son despite the fact that a communication had been registered before the Human Rights Committee under the Optional Protocol and a request for interim measures of protection had been addressed to the State party in this respect. The Committee recalls 3/ 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 (1), (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.

4.2 Apart from any violation of the Covenant found against a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In the present communication, the author alleges that her son was denied rights under articles 6, 10 and 14 of the Covenant. She further makes claims that could be subsumed under article 7, even though this article is not specifically invoked. Having been notified of the communication, the State party has breached its obligations under the Protocol, by executing the alleged victim before the

Committee concluded its consideration and examination and the formulation and communication of its Views. It is particularly inexcusable for the State to having done so after the Committee has acted under rule 92 (old 86) of its rules of procedure, requesting that the State party refrains from doing so.

4.3 The Committee also expresses great concern about the lack of State party's explanation for its action, in spite of several requests made in this relation by the Committee.

4.4 The Committee recalls 4/ that interim measures pursuant to rule 92 (old 86) of the Committee's rules of procedure adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the Rule, especially by irreversible measures such as, as in the present case, the execution of the author's son undermines the protection of Covenant rights through the Optional Protocol.

...

7.6 With regard to the author's claim under article 6, paragraph 1, of the Covenant, the Committee recalls that 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.9/ In the current case, the sentence of death of the author's son was passed, and subsequently carried out, in violation of the right to a fair trial as set out in article 14 of the Covenant, and therefore also in violation of article 6 of the Covenant.

7.7 The Committee has noted the author's claim that the Tajik authorities, including the Supreme Court, have consistently ignored her requests for information and systematically refused to reveal any detail about her son's situation or whereabouts. The Committee understands the continued anguish and mental stress caused to the author, as the mother of a condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his gravesite. The secrecy surrounding the date of execution, and the place of burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee considers that the authorities' initial failure to notify the author of the execution of her son amounts to inhuman treatment of the author, in violation of article 7 of the Covenant.10/

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

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

EFFECTIVE REMEDIES - GENERAL

Notes

...

3/ See *Piandong v. The Philippines*, communication No. 869/1999, Views adopted on 19 October 2000.

4/ See *Saidova v. Tajikistan*, communication No. 964/2001, Views adopted on 8 July 2004.

...

9/ See *Conroy Levy v. Jamaica*, communication No. 719/1996, Views adopted on 3 November 1998, *Clarence Marshall v. Jamaica*, communication No. 730/1996, Views adopted on 3 November 1998, *Kurbanov v. Tajikistan*, communication No. 1096/2002, Views adopted on 6 November 2003, and *Saidova v. Tajikistan*, communication No. 964/2001, Views adopted on 8 July 2004.

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

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

...

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

7.3 The author's conviction was based on article 7, paragraphs 1 and 3, of the National Security Law. The decisive question which must therefore be considered is whether this

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

...

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

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

- *Gomariz v. Spain* (1095/2002), ICCPR, A/60/40 vol. II (22 July 2005) 134 at paras. 2.1-2.3, 7.1, 8 and 9.

...

2.1 The author worked in sales promotion for the company Coloniales Pellicer S.A. in Murcia. On 20 January 1989, the author signed a private document acknowledging a debt to the company. Having signed the document, the author continued working for the company until May 1990, when he was dismissed. The author and the company signed a conciliation agreement before labour court No. 4 in Murcia, terminating the employment contract, and the money owed to the author in terms of salary and redundancy pay was deducted from the total debt he had acknowledged in January 1989.

2.2 The company lodged a complaint against the author for misappropriation. On 16 May

1996, the judge of criminal court No. 2 in Murcia acquitted the author. The company lodged an appeal. On 16 September 1996, the Provincial High Court sentenced the author to five months' imprisonment for misappropriation, disqualified him from public employment or office, suspended his right to vote and ordered him to pay costs.

2.3 The author lodged an *amparo* application before the Constitutional Court, which was rejected on 29 January 1997. In the application, the author alleged both violation of his right not to be compelled to testify against himself, given that the only evidence on which he was convicted was his acknowledgement of a debt to the company, and violation of his right to be tried without undue delay. Although the author had made this last claim at the beginning of the oral proceedings, in accordance with the rules governing criminal procedure, the Constitutional Court ruled that the author's claim had been lodged out of time, when the delays had ended. As to the alleged violation of the right not to confess guilt, it is clear from the Constitutional Court ruling submitted by the author that the Court concluded that the probative force of the acknowledgement of the debt had in no way affected his right not to confess guilt, given that the acknowledgment had taken place prior to the trial, and that the author did not claim to have been coerced in any way into acknowledging the debt.

...

7.1 Article 14, paragraph 5, of the Covenant stipulates that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. The Committee points out that that expression "according to law" is not intended to leave the very existence of a right of review to the discretion of the States parties. On the contrary, what must be understood by "according to law" is the modalities by which the review by a higher tribunal is to be carried out.6/ Article 14, paragraph 5, not only guarantees that the judgement will be placed before a higher court, as happened in the author's case, but also that the conviction will undergo a second review, which was not the case for the author. Although a person acquitted at first instance may be convicted on appeal by the higher court, this circumstance alone cannot impair the defendant's right to review of his conviction and sentence by a higher court, in the absence of a reservation by the State party. The Committee accordingly concludes that there has been a violation of article 14, paragraph 5, of the Covenant with regard to the facts submitted in the communication.

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

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy, including the review of his conviction by a higher tribunal.

Notes

...

6/ Communication No. 1073/2002, *Terrón v. Spain*, decision of 5 November 2004, para. 7.4; communication No. 64/1979, *Salgar de Montejo v. Colombia*, decision of 24 March 1982, para. 10.4.

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For dissenting opinions in this context, see Gomariz v. Spain (1095/2002), ICCPR, A/60/40 vol. II (22 July 2005) 134 at Individual Opinion of Ms. Elisabeth Palm, Mr. Nisuke Ando and Mr. Michael O'Flaherty, 141, and Individual Opinion of Ms. Ruth Wedgwood, 142-143.

- *Malakhovsky v. Belarus* (1207/2003), ICCPR, A/60/40 vol. II (26 July 2005) 237 at paras. 7.4-7.6, 8 and 9.

...

7.4 In the present case, the limitations placed on the authors' right to manifest their belief consist of several conditions which attach to the registration of a religious association. One of the criteria which the authors' application for registration did not meet was the requirement to have an approved legal address, which satisfied certain health and fire safety standards necessary for premises used for purposes such as religious ceremonies. These limitations must be assessed in the light of the consequences which arise for the authors and their religious association.

7.5 The Committee considers that the precondition, whereby a religious association's right to carry out its religious activities is predicated on it having the use of premises which satisfy relevant public health and safety standards, is a limitation which is necessary for public safety, and proportionate to this need.

7.6 The Committee notes, however, that the State party has not advanced any argument as to why it is necessary for the purposes of article 18, paragraph 3, for a religious association, in order to be registered, to have an approved legal address which not only meets the standards required for the administrative seat of the association but also those necessary for premises used for purposes of religious ceremonies, rituals, and other group undertakings. Appropriate premises for such use could be obtained subsequent to registration. The Committee also notes that the argument of the State party in its comments on the communication that the authors' community sought to monopolize representation of Vishnuism in Belarus did not form part of the domestic proceedings. Also taking into account the consequences of refusal of registration, namely the impossibility of carrying out such activities as establishing educational institutions and inviting foreign religious dignitaries to visit the country, the Committee concludes that the refusal to register amounts to a limitation of the authors' right to manifest their religion under article 18, paragraph 1 that is disproportionate and so does not meet the requirements of article 18, paragraph 3. The

authors' rights under article 18, paragraph 1 have therefore been violated.

...

8. The Human Rights Committee...is of the view that the facts before it disclose violations of article 18, paragraphs 1 and 3, of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the authors are entitled to an appropriate remedy, including a reconsideration of the authors' application in accordance with the principles, rules and practice in force at the time of the authors' request, and duly taking into account of the provisions of the Covenant.

CEDAW

- *A. T. v. Hungary* (2/2003), CEDAW, A/60/38 part I (26 January 2005) 80 at paras. 2.1-2.7, 3.1 and 9.2-9.6.

...

2.1 The author states that for the past four years she has been subjected to regular severe domestic violence and serious threats by her common law husband, L. F., father of her two children, one of whom is severely brain-damaged. Although L. F. allegedly possesses a firearm and has threatened to kill the author and rape the children, the author has not gone to a shelter, reportedly because no shelter in the country is equipped to take in a fully disabled child together with his mother and sister. The author also states that there are currently no protection orders or restraining orders available under Hungarian law.

2.2 In March 1999, L. F. moved out of the family apartment. His subsequent visits allegedly typically included battering and/or loud shouting, aggravated by his being in a drunken state. In March 2000, L. F. reportedly moved in with a new female partner and left the family home, taking most of the furniture and household items with him. The author claims that he did not pay child support for three years, which forced her to claim the support by going to the court and to the police, and that he has used this form of financial abuse as a violent tactic in addition to continuing to threaten her physically. Hoping to protect herself and the children, the author states that she changed the lock on the door of the family's apartment on 11 March 2000. On 14 and 26 March 2000, L. F. filled the lock with glue and on 28 March 2000, he kicked in a part of the door when the author refused to allow him to enter the apartment. The author further states that, on 27 July 2001, L. F. broke into the apartment using violence.

2.3 L. F. is said to have battered the author severely on several occasions, beginning in March 1998. Since then, 10 medical certificates have been issued in connection with separate incidents of severe physical violence, even after L. F. left the family residence, which, the

author submits, constitute a continuum of violence. The most recent incident took place on 27 July 2001 when L. F. broke into the apartment and subjected the author to a severe beating, which necessitated her hospitalization.

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

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

2.6 The author states that there have been two ongoing criminal procedures against L. F., one that began in 1999 at the Pest Central District Court (*Pesti Központi Kerületi Bíróság*) concerning two incidents of battery and assault causing her bodily harm and the second that began in July 2001 concerning an incident of battery and assault that resulted in her being hospitalized for a week with a serious kidney injury. In her submission of 2 January 2004, the author states that there would be a trial on 9 January 2004. Reportedly, the latter procedure was initiated by the hospital *ex officio*. The author further states that L. F. has not been detained at any time in this connection and that no action has been taken by the Hungarian authorities to protect the author from him...

2.7 The author also submits that she has requested assistance in writing, in person and by phone, from the local child protection authorities, but that her requests have been to no avail since the authorities allegedly feel unable to do anything in such situations.

The Claim

EFFECTIVE REMEDIES - GENERAL

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

...

9.2 The Committee recalls its general recommendation No. 19 on violence against women, which states that "...[T]he definition of discrimination includes gender-based violence" and that "[G]ender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence". Furthermore, the general recommendation addresses the question of whether States parties can be held accountable for the conduct of non-State actors in stating that "...discrimination under the Convention is not restricted to action by or on behalf of Governments..." and "[U]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation". Against this backdrop, the immediate issue facing the Committee is whether the author of the communication is the victim of a violation of articles 2 (a), (b) and (e), 5 (a) and 16 of the Convention because, as she alleges, for the past four years the State party has failed in its duty to provide her with effective protection from the serious risk to her physical integrity, physical and mental health and her life from her former common law husband.

9.3 With regard to article 2 (a), (b), and (e), the Committee notes that the State party has admitted that the remedies pursued by the author were not capable of providing immediate protection to her against ill-treatment by her former partner and, furthermore, that legal and institutional arrangements in the State party are not yet ready to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence. While appreciating the State party's efforts at instituting a comprehensive action programme against domestic violence and the legal and other measures envisioned, the Committee believes that these have yet to benefit the author and address her persistent situation of insecurity. The Committee further notes the State party's general assessment that domestic violence cases as such do not enjoy high priority in court proceedings. The Committee is of the opinion that the description provided of the proceedings resorted to in the present case, both the civil and criminal proceedings, coincides with this general assessment. Women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy. The Committee also takes note that the State party does not offer information as to the existence of alternative avenues that the author might have pursued that would have provided sufficient protection or security from the danger of continued violence. In this connection, the Committee recalls its concluding comments from August 2002 on the State party's combined fourth and fifth periodic report, which state "...[T]he Committee is

concerned about the prevalence of violence against women and girls, including domestic violence. It is particularly concerned that no specific legislation has been enacted to combat domestic violence and sexual harassment and that no protection or exclusion orders or shelters exist for the immediate protection of women victims of domestic violence". Bearing this in mind, the Committee concludes that the obligations of the State party set out in article 2 (a), (b) and (e) of the Convention extend to the prevention of and protection from violence against women, which obligations in the present case, remain unfulfilled and constitute a violation of the author's human rights and fundamental freedoms, particularly her right to security of person.

9.4 The Committee addressed articles 5 and 16 together in its general recommendation No. 19 in dealing with family violence. In its general recommendation No. 21, the Committee stressed that "the provisions of general recommendation 19...concerning violence against women have great significance for women's abilities to enjoy rights and freedoms on an equal basis with men". It has stated on many occasions that traditional attitudes by which women are regarded as subordinate to men contribute to violence against them. The Committee recognized those very attitudes when it considered the combined fourth and fifth periodic report of Hungary in 2002. At that time it was concerned about the "persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family...". In respect of the case now before the Committee, the facts of the communication reveal aspects of the relationships between the sexes and attitudes towards women that the Committee recognized *vis-à-vis* the country as a whole. For four years and continuing to the present day, the author has felt threatened by her former common law husband, the father of her two children. The author has been battered by this same man, her former common law husband. She has been unsuccessful, either through civil or criminal proceedings, to temporarily or permanently bar L. F. from the apartment where she and her children have continued to reside. The author could not have asked for a restraining or protection order since neither option currently exists in the State party. She has been unable to flee to a shelter because none are equipped to accept her together with her children, one of whom is fully disabled. None of these facts have been disputed by the State party and, considered together, they indicate that the rights of the author under articles 5 (a) and 16 of the Convention have been violated.

9.5 The Committee also notes that the lack of effective legal and other measures prevented the State party from dealing in a satisfactory manner with the Committee's request for interim measures.

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

Convention on the Elimination of All Forms of Discrimination against Women, and makes the following recommendations to the State party:

I. Concerning the author of the communication

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

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

II. General

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

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

(c) Take all necessary measures to ensure that the national strategy for the prevention and effective treatment of violence within the family is promptly implemented and evaluated;
...
(e) Implement expeditiously and without delay the Committee's concluding comments of August 2002 on the combined fourth and fifth periodic report of Hungary in respect of violence against women and girls, in particular the Committee's recommendation that a specific law be introduced prohibiting domestic violence against women, which would provide for protection and exclusion orders as well as support services, including shelters;

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

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

EFFECTIVE REMEDIES - GENERAL

CAT

- *R. S. v. Austria* (111/1998), CAT, A/57/44 (30 April 2002) 105 at paras. 2.1-2.3, 9.2 and 10.

...

2.1 On 30 July 1996, the complainant was questioned by police officers at the Leopoldstadt District Police station of the Vienna Federal Police Directorate. While the complainant was questioned by officers of one investigation team, three officers entered the room and brought the complainant into the office of one of them. The officers of the investigation team protested against the complainant's transfer, because they had not yet finished their interrogation. Shortly after the complainant had been brought into the other office, he was found outside the office with three bleeding injuries on his right lower leg. The complainant was examined by a medical officer of the police and photos of the injuries were taken. On 1 August 1996, the complainant was transferred by his private doctor to hospital for further examinations that were undertaken on 2 August 1996. The complainant was released immediately. The report of the hospital, submitted by the complainant, documented injuries of the right lower leg and a slightly swollen nose.

2.2 On 9 August 1996, the Vienna Federal Police Directorate sent a report on the facts of the case and the allegations of the complainant that he had been ill-treated to the Public Prosecutor's Office. On 20 August 1996, the Public Prosecutor instituted court proceedings against the three police officers charging them with mistreatment of a prisoner and attempted coercion.

2.3 The first court hearing took place on 7 October 1996. On 6 November 1996, the complainant's trial attorney proposed to the court and to the prosecutor that an examining judge be assigned, in accordance with a decree by the Federal Ministry of Justice, to complete the preliminary investigation carried out by the Federal Police Directorate. This proposal was rejected by the court and the prosecutor. On 25 November 1996, the three police officers were acquitted. On 10 March 1997, the prosecutor withdrew his appeal. It is submitted that, therefore, the decision of the court is final.

...

9.2 The Committee notes the complainant's claim that the State party was in breach of article 13 of the Convention, because the Regional Criminal Court failed to open a judicial investigation into his allegations of torture. He contends that only a judicial investigation could be considered impartial. In this connection the Committee observes that the decision of the Regional Criminal Court of 25 November 1996 reveals that the court took into account all evidence presented by the complainant and the prosecutor when deciding to acquit the three policemen. The Committee finds that the complainant has failed to substantiate in what way the investigations conducted by the State party were not impartial within the meaning of article 13 of the Convention.

10. The Committee against Torture concludes that the State party did not violate the rule laid down in article 13 of the Convention and that, in the light of the information submitted to it, no finding of any violation of any other provisions of the Convention can be made.

- *Hajrizi Dzemajl et al. v. Serbia and Montenegro* (161/2000), CAT, A/58/44 (21 November 2002) 85 (CAT/C/29/D/161/2000) at paras. 3.10, 9.2, 9.4-9.6, 10 and 11.

...

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

...

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

...

9.4 Concerning the alleged violation of article 12 of the Convention, the Committee, as it has underlined in previous cases (see *inter alia*, *Encarnacion Blanco Abad v. Spain*, Case No. 59/1996, decided on 14 May 1998), is of the opinion that a criminal investigation must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any person who might have been involved therein. In the present case, the Committee notes that, despite the participation of at least several hundred non-Roma in the events of 15 April 1995 and the presence of a number of police officers both at the time and

at the scene of those events, no person nor any member of the police forces has been tried by the courts of the State party. In these circumstances, the Committee is of the view that the investigation conducted by the authorities of the State party did not satisfy the requirements of article 12 of the Convention.

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

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

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

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

EFFECTIVE REMEDIES - GENERAL

- *Dhaou Belgacem Thabti v. Tunisia* (187/2001), CAT, A/59/44(14 November 2003) 167 (CAT/C/31/D/187/2001) at paras. 2.1-2.3, 10.4-10.8, 11 and 12.

...

2.1 The complainant states that he was an active member of the Islamist organization ENNAHDA (formerly MTI). Following a wave of arrests in Tunisia, which commenced in 1990 and was targeted in particular against members of this organization, he went into hiding from 27 February 1991. On 6 April 1991, at 1 a.m., he was arrested and severely beaten by the police, who kicked, slapped and punched him and struck him with truncheons.

2.2 Incarcerated in the basement cells in the Interior Ministry (DST) building in Tunis and deprived of sleep, the complainant was taken, the following morning, to the office of the Director of State Security, Ezzedine Jneyeh. According to the complainant, this official personally ordered his interrogation under torture.

2.3 The complainant provides a detailed description, accompanied by sketches, of the different types of torture to which he was subjected until 4 June 1991 in the premises of the Interior Ministry (DST).

...

10.4 The Committee notes that article 12 of the Convention places an obligation on the authorities to proceed automatically to a prompt and impartial investigation whenever there is reasonable ground to believe that an act of torture or ill-treatment has been committed, no special importance being attached to the grounds for the suspicion.o/

10.5 The Committee notes that the complainant complained of acts of torture committed against him to the Bouchoucha military court at his trial from 9 July 1992 onwards, in the presence of the national press and international human rights observers. It also notes that the State party acknowledges that the complainant reiterated his allegations of ill-treatment several times before the court, in order, according to the State party, to focus the attention of the observers attending the hearing. The Committee also takes note of the detailed and substantiated information provided by the complainant regarding his hunger strikes in the 9 April prison over 12 days in July 1992 in Tunis, and in Mahdia over 8 days in October 1995 and 10 days in March 1996, as a protest against the conditions in which he was being held and the ill-treatment to which he was subjected. The Committee notes that the State party did not comment on this information, and considers that these elements, taken together, should have been enough to trigger an investigation, which was not held, in breach of the obligation to proceed to a prompt and impartial investigation under article 12 of the Convention.

10.6 The Committee observes that article 13 of the Convention does not require either the formal lodging of a complaint of torture under the procedure laid down in national law or an

express statement of intent to institute and sustain a criminal action arising from the offence, and that it is enough for the victim simply to bring the facts to the attention of an authority of the State for the latter to be obliged to consider it as a tacit but unequivocal expression of the victim's wish that the facts should be promptly and impartially investigated, as prescribed by this provision of the Convention.p/

10.7 The Committee notes, as already indicated, that the complainant did complain of ill-treatment to the Bouchoucha military court, and resorted to hunger strikes in protest at the conditions imposed on him. Yet notwithstanding the jurisprudence under article 13 of the Convention, the Committee notes the State party's position maintaining that the complainant should have made formal use of domestic remedies in order to lodge his complaint, for example by presenting to the court a certificate proving that a complaint had been lodged with the office of the public prosecutor, or displaying obvious traces of torture or ill-treatment, or submitting a medical report. On this latter point, to which the Committee wishes to draw its attention, it is clear that the complainant maintains that the president of the Bouchoucha court ignored his complaints of torture on the grounds that he had no medical report in his possession, that the complainant was informed only during his trial of the medical checks carried out on a portion of the accused during remand, and that the president of the court ignored his demands for his right to a medical report to be respected. On the other hand, the State party maintains that the complainant voluntarily opted not to request a medical examination although the court had ordered such examinations for all prisoners who wished to undergo one. The Committee refers to its consideration of the report submitted by Tunisia in 1997, at which time it recommended that the State party should ensure that medical examinations are provided automatically following allegations of abuse, and thus without any need for the alleged victim to make a formal request to that effect.

10.8 In the light of its practice relating to article 13 and the observations set out above, the Committee considers that the breaches enumerated are incompatible with the obligation stipulated in article 13 to proceed to a prompt investigation.

...

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

12. Pursuant to rule 112, paragraph 5 of its rules of procedure, the Committee urges the State party to conduct an investigation into the complainant's allegations of torture and ill-treatment, and to inform it, within 90 days from the date of the transmittal of this decision, of the steps it has taken in response to the views expressed above.

Notes

EFFECTIVE REMEDIES - GENERAL

...

o/ Communication No. 59/1996 (*Encarnación Blanco Abad v. Spain*).

p/ Communications No. 6/1990 (*Henri Unai Parot v. Spain*) and No. 59/1996 (*Encarnación Blanco Abad v. Spain*).

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See also:

- *Imed Abdelli v. Tunisia* (188/2001), CAT, A/59/44 (14 November 2003) 187 (CAT/C/31/D/188/2001) at paras. 10.4-10.9.
- *Bouabdallah Ltaief v. Tunisia* (189/2001), CAT, A/59/44 (14 November 2003) 207 (CAT/C/31/D/189/2001) at paras. 10.4-10.9.

- *Dimitrijevic v. Serbia and Montenegro* (207/2002), CAT, A/60/44 (24 November 2004) 142 at paras. 2.1-2.5, 5.3-5.5 and 6.

...

2.1 The complainant was arrested on 27 October 1999 at around 11 a.m. at his home in Kragujevac, Serbia, in connection with the investigation of a crime. He was taken to the local police station located in Svetozara Markovica Street. Upon arrival he was handcuffed to a radiator and beaten up by several police officers, some of whom the complainant knew by their first names or their nicknames. The police officers kicked and punched him all over his body while insulting his ethnic origins and cursing his "Gypsy mother". One of the officers struck the complainant with a large metal bar. Some time later the officers unfastened the complainant from the radiator and handcuffed him to a bicycle. Then they continued punching and beating him with their nightsticks and the metal bar. Although the complainant began to bleed from his ears, the beating continued until he was released at about 4.30 p.m.

2.2 As a result of the ill-treatment the complainant had to stay in bed for several days. He sustained injuries on both arms and legs, an open wound on the back of his head and numerous injuries all over his back. For several days following the incident he bled from his left ear, and his eyes and lips remained swollen. Fearing reprisals by the police, the complainant did not go to hospital for treatment. Consequently, there is no official medical certificate documenting the injuries. The complainant, however, has provided the Committee with written statements from his mother, his sister and a cousin indicating that he was in good health when he was arrested and severely injured at the time of his release.

2.3 On 31 January 2000, the complainant, through counsel, filed a criminal complaint with the Kragujevac Municipal Public Prosecutor's Office alleging that he had been the victim of

the crimes of slight bodily harm and civil injury, as provided for under articles 54 (2) and 66 of the Serbian Criminal Code, respectively. As there was no response for almost six months following the submission of the complaint, the complainant wrote a letter to the Public Prosecutor's Office on 26 July 2000 requesting an update on the status of the case and invoking, in particular, article 12 of the Convention. At the time the complainant submitted his case to the Committee, i.e. more than 23 months after the submission of the criminal complaint, no response had been received from the Public Prosecutor.

2.4 The complainant claims that he has exhausted available domestic criminal remedies and refers to international jurisprudence according to which only a criminal remedy can be considered effective and sufficient in addressing violations of the kind at issue in the instant case. He also refers to the relevant provisions of the State party's Criminal Procedure Code (CPC) setting forth the obligation of the Public Prosecutor to undertake measures necessary for the investigation of crimes and the identification of the alleged perpetrators.

2.5 Furthermore, under article 153 (1) of CPC, if the Public Prosecutor decides that there is no basis for the institution of a formal judicial investigation he must inform the complainant, who can then exercise his prerogative to take over the prosecution in the capacity of a "private prosecutor". However, CPC sets no time limit within which the Public Prosecutor must decide whether to request a formal judicial investigation. In the absence of such a decision the victim cannot take over the prosecution of the case on his own behalf. Prosecutorial inaction following a complaint filed by the victim therefore amounts to an insurmountable impediment in the exercise of the victim's right to act as a private prosecutor and to have his case heard before a court. Finally, even if there were a legal possibility for the victim himself to file for a formal judicial investigation because of the inaction of the Public Prosecutor, it would in effect be unfeasible if the police and the Public Prosecutor had failed to identify all of the alleged perpetrators beforehand, as in the instant case. Article 158 (3) of CPC provides that the person against whom a formal judicial investigation is requested must be identified by name, address and other relevant personal data. *A contrario*, such a request cannot be filed if the alleged perpetrator is unknown.

...

5.3 The complainant alleges violations by the State party of article 2, paragraph 1, in connection with article 1, and of article 16, paragraph 1, of the Convention. The Committee notes in this respect the description made by the complainant of the treatment he was subjected to while in detention, which can be characterized as severe pain or suffering intentionally inflicted by public officials in the context of the investigation of a crime, and the written testimonies of witnesses to his arrest and release that the complainant has provided. The Committee also notes that the State party has not contested the facts as presented by the complainant, which took place more than five years ago. In the circumstances, the Committee concludes that due weight must be given to the complainant's allegations and that the facts, as submitted, constitute torture within the meaning of article

1 of the Convention.

5.4 Concerning the alleged violation of articles 12 and 13 of the Convention, the Committee notes that the Public Prosecutor never informed the complainant about whether an investigation was being or had been conducted after the criminal complaint was filed on 31 January 2000. It also notes that the failure to inform the complainant of the results of such investigation, if any, effectively prevented him from pursuing "private prosecution" of his case before a judge. In these circumstances the Committee considers that the State party has failed to comply with its obligation, under article 12 of the Convention, to carry out a prompt and impartial investigation wherever there is reasonable ground to believe that an act of torture has been committed. The State party also failed to comply with its obligation, under article 13, to ensure the complainant's right to complain and to have his case promptly and impartially examined by the competent authorities.

5.5 As for the alleged violation of article 14 of the Convention, the Committee notes the complainant's allegations that the absence of criminal proceedings deprived him of the possibility of filing a civil suit for compensation. In view of the fact that the State party has not contested this allegation and given the passage of time since the complainant initiated legal proceedings at the domestic level, the Committee concludes that the State party has also violated its obligations under article 14 of the Convention in the present case.

6. The Committee...is of the view that the facts before it disclose a violation of articles 2, paragraph 1, in connection with article 1, and articles 12, 13 and 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

- *Dimitrov v. Serbia and Montenegro* (171/2000), CAT, A/60/44 (3 May 2005) 112 at paras. 2.1-2.5, 7.1-7.3, 8 and 9.

...
2.1 In the early hours of 5 February 1996, the complainant was arrested at his home in Novi Sad, in the Serbian Province of Vojvodina, and taken to the police station in Kraljevica Marka Street. The arresting officer presented no arrest warrant nor did he inform the complainant why he was being taken into custody. The complainant himself made no attempt to resist arrest. During the ensuing interrogation, the arresting officer struck the complainant repeatedly with a baseball bat and a steel cable, and kicked and punched him all over his body. The complainant lost consciousness on several occasions. Apart from brief breaks, the ill-treatment lasted from 6.30 a.m. to 7.30 p.m., leaving the complainant with numerous injuries on his buttocks and left shoulder. After 7.30 p.m., the complainant was released, again without being shown an arrest warrant or a release order, nor was he told the reason for his arrest and detention. According to the complainant, this was in

contravention of articles 192 (3), 195 and 196 (3) of the Criminal Procedure Code (CPC), which deals with police powers of arrest and detention.

2.2 Following his release, the complainant returned home and spent the next 10 days in bed, being nursed by his sister. On 9 February 1996, he went to see a doctor who examined him and ordered continued bed rest. He prepared a report describing his injuries as follows: "Left upper arm: livid-red and brown discoloration 10 x 8 cm with slightly raised red edges; right shoulder blade and shoulder: livid-red discolorations in the form of stripes 3 x 11 cm, and 4 x 6 cm on the shoulders; gluteal part of the body: blue-livid discolorations of the size of a man's palm on both sides; outside of the left mid-thigh: distinct red stripe 3x5 cm; inside of right knee: light blue swelling 5x5 cm; area around ankle and soles (both legs): slight, light blue swelling." The conclusions and opinion was that the "patient should be referred to a neurologist and a laboratory for tests". The complainant also provides a statement from his sister, who states that he was arrested at 6.30 in the morning on 5 February, held in detention until 7.30 p.m., and that upon return his face was swollen, and he had bruises on his shoulders, back, legs and over his kidneys. There was clotted blood on his legs and his backside was dark blue all over. He had to stay in bed for 10 days and put on compresses, and take pills for the pain. He told her that he had been beaten with a steel wire and baseball bats and had fainted from the beating.

2.3 Fearing possible reprisals by police and not fully aware of his legal rights, the complainant did not file a criminal complaint with the Novi Sad Municipal Public Prosecutor's Office until 7 November 1996. In the complaint he alleged that an unidentified police officer had committed the crime of extracting a statement by force in violation of 65 of the Serbian Criminal Code (SCC). According to the complainant, he had been arrested several times prior to the incident in question and had been interrogated about several unrelated criminal offences. The complainant considers that the ill-treatment to which he was subjected was intended to obtain his confession for one or more of these crimes.

2.4 The complaint was immediately registered by the Public Prosecutor's Office. But only on 17 September 1999 (more than 3½ years after the incident and 34 months since the complainant had filed the criminal complaint) did the Public Prosecutor's Office request the investigating judge of the Novi Sad Municipal Court to undertake preliminary "investigatory actions". Such an investigation precedes the possible institution of formal judicial investigations, for which the identity of the suspect must be ascertained. The investigating judge of the Novi Sad Municipal Court accepted the Public Prosecutor's request and opened a case file. Since that date, the prosecuting authorities have taken no concrete steps with a view to identifying the police officer concerned. According to the complainant, if the intent of the investigating judge was really to identify the police officer in question, he could have heard other police officers present at the police station at the time of the abuse, and especially the on-duty shift commander, who must have known the names of all officers working that

particular shift. Finally, the complainant indicated in his criminal complaint that during his detention in the police station he was taken to the Homicide Division, which in and of itself could have served as one of the starting points for an official investigation into the incident at issue. No investigation has been undertaken.

2.5 According to the complainant, under article 153 (1) of CPC, if the Public Prosecutor finds on the basis of the evidence that there is reasonable suspicion that a certain person has committed a criminal offence, he should request the investigating judge to institute a formal judicial investigation further to articles 157 and 158 of CPC. If he decides that there is no bases for the institution of a formal judicial investigation, he should so inform the complainant, who can then exercise his prerogative to take over the prosecution of the case on his own behalf - i.e. in his capacity of a "private prosecutor". As the Public Prosecutor failed formally to dismiss his complaint, the complainant concludes that he was denied the right personally to take over the prosecution of the case. As CPC sets no time limit in which the Public Prosecutor must decide whether to request a formal judicial investigation into the incident, this legal provision is open to abuse.

...

7.1 The complainant alleges violations by the State party of article 2, paragraph 1, in connection with article 1, and of article 16, paragraph 1, of the Convention. The Committee notes the complainant's description of the treatment to which he was subjected during his detention, which can be characterized as severe pain or suffering intentionally inflicted by public officials in the context of the investigation of a crime, as well as his sister's statement and the medical report. It also notes the State party's failure to adequately address this claim and respond to the complainant's allegations. In the circumstances, the Committee concludes that due weight must be given to the complainant's allegations and that the facts, as submitted, constitute torture within the meaning of article 1 of the Convention.

7.2 Concerning the alleged violation of articles 12 and 13 of the Convention, the Committee notes that the Public Prosecutor did not request the judge to initiate a preliminary investigation until 34 months after the criminal complaint was filed on 7 November 1996, and that no further action was taken by the State party to investigate the complainant's allegations. The State party has not contested this claim. The Committee also notes that the failure to inform the complainant of the results of any investigation effectively prevented him from pursuing a "private prosecution" of his case before a judge. In these circumstances, the Committee considers that the State party has failed to comply with its obligation, under article 12 of the Convention, to carry out a prompt and impartial investigation wherever there is reasonable ground to believe that an act of torture has been committed. In the same vein, it also disregarded its obligation, under article 13, to ensure the complainant's right to complain and to have his case promptly and impartially examined by the competent authorities.

7.3 As for the alleged violation of article 14 of the Convention, the Committee notes the complainant's allegations that the absence of criminal proceedings deprived him of the possibility of filing a civil suit for compensation. In view of the fact that the State party has not contested this allegation, and given the passage of time since the complainant initiated legal proceedings at the domestic level, the Committee concludes that the State party has also violated its obligations under article 14 of the Convention in the present case.

8. The Committee...is of the view that the facts before it disclose a violation of articles 2, paragraph 1, in connection with articles 1, 12, 13 and 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

9. The Committee urges the State party to conduct a proper investigation into the facts alleged by the complainant...

- *Brada v. France* (195/2002), CAT, A/60/44 (17 May 2005) 127 at paras. 13.3, 13.4, 14 and 15.

...
13.3 At the outset, the Committee observes that at the time of his expulsion on 30 September 2002, an appeal lodged by the complainant with the Bordeaux Administrative Court of Appeal on 4 January 2002 was still pending. This appeal contained additional arguments against his deportation that had not been available to the Prefect of Indre when the decision of expulsion was taken and of which the State party's authorities were, or should have, been aware still required judicial resolution at the time he was in fact expelled. Even more decisively, on 19 December 2001, the Committee had indicated interim measures to stay the complainant's expulsion until it had had an opportunity to examine the merits of the case, the Committee having established, through its Special Rapporteur on interim measures, that in the present case the complainant had established an arguable risk of irreparable harm. This interim measure, upon which the complainant was entitled to rely, was renewed and repeated on 26 September 2002.

13.4 The Committee observes that the State party, in ratifying the Convention and voluntarily accepting the Committee's competence under article 22, undertook to cooperate with it in good faith in applying and giving full effect to the procedure of individual complaint established thereunder. The State party's action in expelling the complainant in the face of the Committee's request for interim measures nullified the effective exercise of the right to complaint conferred by article 22, and has rendered the Committee's final decision on the merits futile and devoid of object. The Committee thus concludes that in expelling the complainant in the circumstances that it did the State party breached its obligations under article 22 of the Convention.

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

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

- *Guridi v. Spain* (212/2002), CAT, A/60/44 (17 May 2005) 147 at paras. 2.1-2.6, 6.6-6.8, 7 and 8.

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

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

2.3 The complainant filed suit with the Vizcaya Provincial Court alleging that he had been tortured, and on 7 November 1997 the Court found three Civil Guards guilty of torture. Each officer received a prison sentence of four years, two months and one day, was disqualified from serving in State security agencies and units for six years and one day, and suspended from duty for the duration of his prison sentence. Under the terms of the sentence, the Civil Guards were ordered to pay compensation of 500,000 pesetas to the complainant. The Court held that the injuries sustained by the complainant had been caused by the Civil Guards in the area of open country where he was taken following his arrest.

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

2.5 While the appeal was pending before the Supreme Court, one of the Civil Guards continued to work in French territory as an anti-terrorism coordinator with the French security forces, and with the authorization of the Ministry of the Interior embarked on studies with a view to promotion to the grade of Civil Guard commander.

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

...

6.6 As to the alleged violation of article 2 of the Convention, the Committee notes the complainant's argument that the obligation to take effective measures to prevent torture has not been honoured because the pardons granted to the Civil Guards have the practical effect of allowing torture to go unpunished and encouraging its repetition. The Committee is of the view that, in the circumstances of the present case, the measures taken by the State party are contrary to the obligation established in article 2 of the Convention, according to which the State party must take effective measures to prevent acts of torture. Consequently, the Committee concludes that such acts constitute a violation of article 2, paragraph 1, of the Convention. The Committee also concludes that the absence of appropriate punishment is incompatible with the duty to prevent acts of torture.

6.7 With regard to the alleged violation of article 4, the Committee recalls its previous jurisprudence to the effect that one of the purposes of the Convention is to avoid allowing persons who have committed acts of torture to escape unpunished. The Committee also recalls that article 4 sets out a duty for States parties to impose appropriate penalties against those held responsible for committing acts of torture, taking into account the grave nature of those acts. The Committee considers that, in the circumstances of the present case, the imposition of lighter penalties and the granting of pardons to the Civil Guards are

incompatible with the duty to impose appropriate punishment. The Committee further notes that the Civil Guards were not subject to disciplinary proceedings while criminal proceedings were in progress, though the seriousness of the charges against them merited a disciplinary investigation. Consequently, the Committee considers that there has been a violation of article 4, paragraph 2, of the Convention.

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

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

8. In pursuance of rule 112, paragraph 5, of its rules of procedure, the Committee urges the State party to ensure in practice that persons responsible for acts of torture are appropriately punished, to ensure that the complainant receives full redress and to inform it, within 90 days from the date of the transmittal of this decision, of all steps taken in response to the views expressed above.

- *Agiza v. Sweden* (233/2003), CAT, A/60/44 (20 May 2005) 197 at paras. 13.6-13.10 and 14

...

13.6 The Committee observes that the right to an effective remedy for a breach of the Convention underpins the entire Convention, for otherwise the protections afforded by the Convention would be rendered largely illusory. In some cases, the Convention itself sets out a remedy for particular breaches of the Convention,v/ while in other cases the Committee has interpreted a substantive provision to contain within it a remedy for its breach.w/ In the Committee's view, in order consistently to reinforce the protection of the norm in question and the understanding of the Convention, the prohibition on *refoulement* contained in article 3 should be interpreted as encompassing a remedy for its breach, even though it may not contain on its face such a right to remedy for a breach thereof.

13.7 The Committee observes that in the case of an allegation of torture or cruel, inhuman or degrading treatment having occurred, the right to remedy requires, after the event, an effective, independent and impartial investigation of such allegations. The nature of *refoulement* is such, however, that an allegation of breach of that article relates to a future expulsion or removal; accordingly, the right to an effective remedy contained in article 3 requires, in this context, an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise. The Committee's previous jurisprudence has been consistent with this view of the requirements of article 3, having found an inability to contest an expulsion decision before an independent authority, in that case the courts, to be relevant to a finding of a violation of article 3.x/

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 satisfying the requirements of article 3 of an effective, independent and impartial review of a decision to expel. In the present case, however, owing 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 the requirements of article 3 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 constitutes a failure to meet the procedural obligation to provide for effective, independent and impartial review required by article 3 of the Convention.

Frustration of the right under article 22 to exercise the right of complaint to the Committee

13.9 The Committee observes, moreover, that by making the declaration under article 22 of the Convention, the State party undertook to confer upon persons within its jurisdiction the right to invoke the complaints jurisdiction of the Committee. That jurisdiction includes the power to indicate interim measures, if necessary, to stay the removal and preserve the subject matter of the case pending final decision. In order for this exercise of the right of complaint to be meaningful rather than illusory, however, an individual must have a reasonable period of time before execution of a final decision to consider whether, and if so to in fact, seize the Committee under its article 22 jurisdiction. In the present case, however, the Committee observes that the complainant was arrested and removed by the State party immediately upon

the Government's decision of expulsion being taken; indeed, the formal notice of decision was only served upon the complainant's counsel the following day. As a result, it was impossible for the complainant to consider the possibility of invoking article 22, let alone seize the Committee. As a result, the Committee concludes that the State party was in breach of its obligations under article 22 of the Convention to respect the effective right of individual communication conferred thereunder.

The State party's failure to cooperate fully with the Committee

13.10 Having addressed the merits of the complaint, the Committee must address the failure of the State party to cooperate fully with the Committee in the resolution of the current complaint. The Committee observes that, by making the declaration provided for in article 22 extending to individual complainants the right to complain to the Committee alleging a breach of a State party's obligations under the Convention, a State party assumes an obligation to cooperate fully with the Committee, through the procedures set forth in article 22 and in the Committee's rules of procedure. In particular, article 22, paragraph 4, requires a State party to make available to the Committee all information relevant and necessary for the Committee appropriately to resolve the complaint presented to it. The Committee observes that its procedures are sufficiently flexible and its powers sufficiently broad to prevent an abuse of process in a particular case. It follows that the State party committed a breach of its obligations under article 22 of the Convention by neither disclosing to the Committee relevant information, nor presenting its concerns to the Committee for an appropriate procedural decision.

14. The Committee against Torture...decides that the facts before it constitute breaches by the State party of articles 3 and 22 of the Convention.

Notes

...

v/ See articles 12-14 in relation to an allegation of torture.

w/ See *Dzemajl v. Yugoslavia*, communication No. 161/2000, decision adopted on 21 November 2002, para. 9.6: "The positive obligations that flow from the first sentence of article 16 of the Convention include an obligation to grant redress and compensate the victims of an act in breach of that provision. The Committee is therefore of the view that the State party has failed to observe its obligations under article 16 of the Convention by failing to enable the complainants to obtain redress and to provide them with fair and adequate compensation."

x/ *Arkauz Arana v. France*, communication No. 63/1997, decision adopted on 9 November 1999, paras. 11.5 and 12.

For dissenting opinion in this context, see *Agiza v. Sweden* (233/2003), CAT, A/60/44 (20 May 2005) 197 at Individual Opinion of Mr. Alexander Yakovlev (partly dissenting), 232.