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III. JURISPRUDENCE, CONTINUED

ICCPR

- *Borisenco v. Hungary* (852/1999), ICCPR, A/58/40 vol. II (14 October 2002) 119 (CCPR/C/76/D/852/1999) at paras. 2.1-2.3, 3.1 and 7.3.

...

2.1 On 29 April 1996, the author and his friend, Mr. Kuspish arrived in Budapest... Because they were late for their train, they ran to the metro station. At this point, they were stopped by three policemen in civilian clothing. The police suspected them of pick-pocketing. They ill-treated the author and his friend by "tightening handcuffs and striking our heads against metal booths when we attempted to speak". They were interrogated for three hours at the police station.

2.2 On 30 April 1996, the author and his friend were charged with theft. Although the charge was not translated from Hungarian they were provided with an interpreter. Mr. Kuspish signed the investigation report but the author refused to do so without the presence of a lawyer and without including his version of the facts of the incident. The author and his friend lodged complaints against their arrest and interrogation. On 1 May 1996, in a written decision, the public prosecutor rejected these complaints, having reviewed the legality of the arrest and detention.

2.3 On 2 May 1996 the author and his friend were brought before the Pescht Central District Court for the purpose of deciding whether they should be remanded in custody. The court decided to detain them due to the risk of flight. During the police interrogation, the hearing on detention and the detention itself, the author and his friend were not allowed to contact their Embassy, families, lawyers or sports organization. On 7 May 1996, the police authorities completed the investigation and referred the case to the public prosecutor's office.

...

3.1 The author complains that his rights were violated as he was arrested and charged without any proof of being involved in criminal activity and was ill-treated by police on arrest. He claims that he did not understand what he was being charged with and that the charge itself was not translated. He also claims a violation of the Covenant, for having been detained for over two weeks without trial.

...

7.3 With respect to the author's claim that the State party violated article 9, paragraph 2, of the Covenant as he did not understand the reasons for his arrest or the charges against him, the Committee notes the State party's argument that the author was provided with an interpreter who explained to him the reasons for his arrest and the charge against him and

finds that in the circumstances, the Committee is unable to find a violation of the Covenant in this regard. (see para. 3.1)

- *Zheludkov v. Ukraine* (726/1996), ICCPR, A/58/40 vol. II (29 October 2002) 12 (CCPR/C/76/D/726/1996) at paras. 2, 3.1, 3.2, 8.2-8.4, 9, 10 and Individual Opinion by Ms. Cecilia Medina Quiroga (concurring), 22.

...

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

3.1 The author claims that her son is a victim of a violation of articles 7 and 10 of the Covenant on the ground that, both on the date of his arrest and on other occasions before his trial, he was severely ill-treated and because of the inhuman conditions of detention. With regard to the first ground, she states, in particular, that on 4 September 1992, her son was brought to a police station to give evidence as a witness in a case concerning a theft. She states that at the police station he was taken to a room where he was severely beaten with metal objects by several policemen for many hours. Her son identifies one of the assailants as Mr. K., a police captain and father of the victim of the alleged rape. The author further claims that Mr. K. forced her son to write a confession to the alleged rape. She explains that he declined to make any complaints to a man in civilian dress who subsequently came into the interrogation room to ask him some questions, fearing that he would be beaten again if he complained. The author claims that her son has suffered serious injuries as a result of ... beatings and states that he is still in bad health. In particular, he suffered severe damage to his left eye. She supplies no medical evidence, since her son has no access to his medical records. However, she provides a report by a doctor of the institution where her son was detained, which shows that he did complain to the doctor about the state of his eye. Furthermore, she has put before the Committee an extensive series of medical records aimed at showing that he was in good health until 1992.

3.2 With regard, in particular, Mr. Zheludkov's physical condition while detained and the lack of medical attention in the institution in which he was detained, the author also alleges that her son at one time suffered from methane poisoning, but that her efforts to secure medicine for him were hindered. With regard to the conditions of detention in general, the author states that the institution is severely overcrowded and that there is an alarming shortage of food, medicaments and other "absolutely essential things".

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...

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.

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

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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.

...

Individual Opinion by Ms. Cecilia Medina Quiroga(concurring)

I concur with the Committee's decision in this case, but differ on the reasoning behind it with regard to the existence of a violation of article 10, paragraph 1, of the Covenant, as set out in paragraph 8.4 of the Committee's Views.

I consider that the Committee's reasoning excessively restricts the interpretation of article 10, paragraph 1, by linking the violation of that provision to the possible relevance which the victim's access to the medical records might have had for the medical treatment that he received in prison, in order to assess "the conditions of Mr. Zheludkov's detention, including medical treatment afforded to him".

Article 10, paragraph 1, requires States to treat all persons deprived of their liberty "with humanity and with respect for the inherent dignity of the human person". This, in my opinion, means that States have the obligation to respect and safeguard all the human rights of individuals, as they reflect the various aspects of human dignity protected by the Covenant, even in the case of persons deprived of their liberty. Thus, the provision implies an obligation of respect that includes all the human rights recognized in the Covenant. This obligation does not extend to affecting any right or rights other than the right to personal liberty when they are the absolutely necessary consequence of the deprivation of that liberty, something which it is for the State to justify.

A person's right to have access to his or her medical records forms part of the right of all individuals to have access to personal information concerning them. The State has not given any reason to justify its refusal to permit such access, and the mere denial of the victim's request for access to his medical records thus constitutes a violation of the State's obligation to respect the right of all persons to be "treated with humanity and with respect for the inherent dignity of the human person", regardless of whether or not this refusal may have had consequences for the medical treatment of the victim.

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...

For dissenting opinions in this context, see Zheludkov v. Ukraine (726/1996), ICCPR, A/58/40 vol. II (29 October 2002) 12 (CCPR/C/76/D/726/1996) at Individual Opinion by Mr. Nisuke Ando, 20, Individual Opinion by Mr. P. N. Bhagwati, 21, and Individual Opinion by Mr. Rafael Rivas Posada, 23.

- *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, 2.4, 2.5, 7.7, 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.

...

2.4 On death row, the area to which the author was confined was also used by prisoners who were mentally ill and who, on occasion, attacked fellow prisoners. The author also refers to reports of random beatings and brutal warders.1/ He complained of unsanitary conditions, in particular of waste littering the area and the constant presence of unpleasant odours. He refers to further reports of the digging of pits for excrement and overwhelming stenches.2/ Slop buckets of human waste and stagnant water were emptied only once daily in the morning. Running water was polluted with insects and excrement, and inmates were required to share dirty plastic utensils. The daily time the author was allowed out of his cell was severely limited, sometimes to less than half an hour. These conditions caused serious detriment to his health, with skin disorders and eyesight problems developing. While he had been referred to an eye specialist by the prison doctor in 1994, he had not been allowed to see such a specialist by the time of the communication. Moreover, when he sustained a chipped bone injury to his finger in an accident, he was not taken to hospital until two days after the accident, making it impossible for the finger to heal properly and affecting his ability to write.

2.5 In April or May 1995 the author's sentence of death was commuted to life imprisonment by the Governor-General.3/ The commutation was accompanied by a determination that seven years from the date of commutation had to elapse before the length of any non-parole period could be considered. He was not informed of the decision to commute his sentence until after the event and never received any formal documentation in relation to the decision. The author had no opportunity to make any representation in relation to the decision to

commute his sentence or to the decision concerning the non-parole period. He remains imprisoned at St.Catherine's District Prison.

...

7.7 As to the author's claims of a violation of articles 9, paragraph 1, and 14, paragraphs 1 and 3, subparagraphs (a), (b) and (d), arising from the commutation of his sentence and the setting of a seven-year period before parole issues might arise, the Committee refers to its previous jurisprudence that the commutation process is not one attracting the guarantees of article 14.12/ Nor does the Committee share the view that a substitution of the death penalty with life imprisonment, with a prospect of parole in the future, is a "re-sentencing" tainted with arbitrariness. It follows from this conclusion that the author continued to be legitimately detained pursuant to the original sentence, as modified by the decision of commutation, and that no issue of detention contrary to article 9 arises. Accordingly, the Committee does not find a violation of the Covenant with respect to these matters.

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.

Notes

...

1/ *Prison Conditions in Jamaica: An Americas Watch Report* (Human Rights Watch, New York, May 1990).

2/ *Ibid*. at 13 and, further, *Report of the Task Force on Correctional Services* (Ministry of Public Services, Jamaica, March 1989).

3/ The sentence of death penalty was commuted to life imprisonment pursuant to the judgement of the Privy Council in *Pratt and Morgan v. Jamaica*. It is unclear on exactly what date the decision of commutation as taken by the Governor-General...

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12/ *Kennedy v. Trinidad and Tobago* Case No. 845/1998, Views adopted on 26 March 2002.

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

...

- *Kang v. Republic of Korea* (878/1999), ICCPR, A/58/40 vol. II (15 July 2003) 152 (CCPR/C/78/D/878/1999) at paras. 2.1, 2.4, 2.5, 2.8, 7.2, 7.3, 8 and 9.

...

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

...

2.4 His appeals were successively dismissed by the 4th Criminal Panel of the Seoul High Court on 31 May 1986 and by the 1st Panel of the Supreme Court on 23 September 1986.3/ As he was convicted in 1986, he had no possibility to raise any constitutional issues before the Constitutional Court, which was only introduced by the 1987 Constitution.

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

...

2.8 Following the inauguration of a new administration in 1998, on 25 February 1999 (after submission of the communication), the author was released under the terms of a general amnesty...

...

7.2 As to the author's claim that the "ideology conversion system" violates his rights under articles 18, 19 and 26, the Committee notes the coercive nature of such a system, preserved

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

7.3 As to the author's remaining claims under article 10, the Committee considers that his detention in solitary confinement for a period as long as 13 years, of which more than eight were after the entry into force of the Optional Protocol, is a measure of such gravity, and of such fundamental impact on the individual in question, that it requires the most serious and detailed justification. The Committee considers that confinement for such a lengthy period, apparently on the sole basis of his presumed political opinion, fails to meet that such particularly high burden of justification, and constitutes at once a violation of article 10, paragraph 1, protecting the inherent dignity of the author, and of paragraph 3, requiring that the essential aim of detention be reformation and social rehabilitation.

...

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

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

Notes

....

3/ As to the crime of espionage, the Court's earlier jurisprudence had been as follows: "...even though the information is self-evident and natural common sense knowledge in the Republic of Korea, it shall be regarded as state secret [sic] under the National Security law when it might provide benefit to an anti-State organization and might cause damage to us" [emphasis added].

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

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

...

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

- *Jan Filipovich v. Lithuania* (875/1999), ICCPR, A/58/40 vol. II (4 August 2003) 145 (CCPR/C/78/D/875/1999) at para. 7.2.

...

7.2 With regard to the author's allegations that he was sentenced to a heavier penalty than the one that should have been imposed at the time the offence was committed, the Committee takes note of the author's allegations that none of the sentences against him explained which version of article 104 of the Criminal Code had been applied in imposing six years' deprivation of liberty. However, the Committee also notes that the author's sentence of six years was well within the latitude provided by the earlier law (3 to 12 years), and that the State party has referred to the existence of certain aggravating circumstances. In the circumstances of the case, the Committee cannot, on the basis of the material before it, conclude that the author's penalty was not meted out according to the law that was in force at the time when the offence was committed. Consequently, there was no violation of article 15, paragraph 1, of the Covenant.

- *Cabal and Pasini v. Australia* (1020/2002), ICCPR, A/58/40 vol. II (7 August 2003) 346 (CCPR/C/78/D/1020/2002) at paras. 2.1, 7.2-7.5, 7.7, 8.2, 8.3, 9 and 10.

...

2.1 On 11 November 1998,1/ the authors were arrested in Australia, pursuant to provisional arrest warrants issued under the Extradition Act 1988 ("Extradition Act"). They were taken before a magistrate and remanded in custody at the Melbourne Assessment Centre, Victoria, where they were segregated from convicted prisoners. On 4 January 1999, they were moved to Port Philip Prison, Victoria. They were held in a transit unit for three weeks, then placed in a unit with common prisoners, and in August 1999 were moved to the Sirius East high protection unit of Port Philip Prison. From the time the authors were detained at Port Philip Prison, they were neither segregated nor treated separately from convicted prisoners.

...

7.2 Prior to considering the admissibility of the individual claims raised, the Committee must consider whether the State party's obligations under the Covenant apply to privately-run

detention facilities, as is the case in this communication, as well as State-run facilities. While this is not an argument put forward by the State party, the Committee must consider *ex officio* whether the communication concerns a State party to the Covenant in the meaning of article 1 of the Optional Protocol. It recalls its jurisprudence in which it indicated that a State party "is not relieved of its obligations under the Covenant when some of its functions are delegated to other autonomous organs."21/ The Committee considers that the contracting out to the private commercial sector of core State activities which involve the use of force and the detention of persons does not absolve a State party of its obligations under the Covenant, notably under articles 7 and 10 which are invoked in the instant communication. Consequently, the Committee finds that the State party is accountable under the Covenant and the Optional Protocol of the treatment of inmates in the Port Philip Prison facility run by Group 4.

7.3 The Committee notes that the State party has invoked its reservation to article 10, paragraph 2 (a), of the Covenant which states that, "In relation to paragraph 2 (a) the principle of segregation is an objective to be achieved progressively". Also, the Committee notes the authors' argument that despite the reservation this part of the communication is admissible as the reservation was made twenty years ago and it would be reasonable to expect that the State party would have fulfilled its objective to comply fully with its obligations under this article at this stage. Further, the Committee notes that both parties have made reference to the Committee's general comment No. 24 on reservations.

7.4 The Committee observes that the State party's reservation in question is specific and transparent, and that its scope is clear. It refers to the *segregation* of convicted and unconvicted persons and does not extend, as argued by the authors and not contested by the State party, to cover the *separate treatment* element of article 10, paragraph 2 (a) as it refers to these two categories of persons. The Committee recognises that while 20 years have passed since the State party entered the reservation and that it intended to achieve its objective "progressively", and although it would be desirable for all States parties to withdraw reservations expeditiously, there is no rule under the Covenant on the time frame for the withdrawal of reservations. In addition, the Committee notes the State party's efforts to date to achieve this objective with the construction of the Melbourne Remand Centre in 1989, specifically for the purpose of housing remand prisoners, and its plan to construct two new prisons in Melbourne, including a remand prison, by end 2004. Consequently, although it may be considered unfortunate that the State party has not achieved its objective to *segregate* convicted and unconvicted persons in full compliance with article 10, paragraph 2 (a), the Committee cannot find that the reservation is incompatible with the object and purpose of the Covenant. This part of the authors' claim is, therefore, inadmissible under article 3 of the Optional Protocol.

7.5 As to the remaining part of the authors' claim under article 10, paragraph 2 (a) of the

Covenant that the State party failed to treat the authors *separately* in a manner appropriate to their status as unconvicted persons, the Committee notes that in many respects the authors were provided with separate treatment in relation to such privileges as the right to wear their own clothes, making telephone calls and being permitted to eat their own food. The Committee takes the view that the authors have not substantiated, for purposes of admissibility, that the matters in which they were treated similarly to convicted prisoners would either not be compatible with their status as persons detained pending extradition procedures, or raise any issues separate from the lack of *segregation,* a matter covered by the reservation by the State party. Consequently, the Committee finds this part of the authors' claim inadmissible under article 2 of the Optional Protocol.

...

7.7 With respect to the authors' claim of a violation of their right to health, the Committee shares the State party's view that there is no such right protected *specifically* by provisions of the Covenant. The Committee considers that a failure to separate detainees with communicable diseases from other detainees could raise issues primarily under articles 6, paragraph 1, and 10, paragraph 1.22/ However, in the instant case the Committee considers that the authors have failed to substantiate their claim, which is therefore inadmissible, under article 2 of the Optional Protocol.

...

8.2 With respect to the claim that the State party violated articles 7 and 10, paragraph 1, because of prison conditions and the treatment to which the authors were subjected, the Committee notes that the allegations of shackling the authors with 12 link shackles, subsequently replaced by 17 link ones during transport to and from prison, and of having stripped and subjected them to cavity searches after each visit, are factually uncontested by the State party. However, the State party has provided justification for the treatment in question, explaining that the assessment of the authors flight risk was made because they had in the past evaded arrest through the use of false travel and identity documents, that they had access to considerable financial resources; had made payments to other prisoners, and that prison intelligence had reported incidents of other prisoners offering to assist any escape in return for financial payment. Also, the State party has explained that the authors were not singled out for searches but that the searches were carried out in a manner designed to minimise the embarrassment to them, and were carried out only to ensure the safety and security of the prison. In the assessment of the Committee, there has been no violation of article 7 or article 10, paragraph 1, in these respects.

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

incident to disclose a violation of article 10, paragraph 1, of the Covenant.

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

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

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Notes

1/ According to the State party, warrants were issued for Cabal on 11 November 1998, and for Pasini on 27 November 1998.

...

21/ *B. d. B. v. The Netherlands,* Case No. 273/88, Decision of 30 March 1989, and *Lindgren et al v. Sweden,* Case No. 298-299/88, Views adopted on 9 November 1990.

22/ *Lantsova v. The Russian Federation,* Case No. 736/1997, Views adopted on 26 March 2002.

...

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For dissenting opinion in this context, see Cabal and Pasini v. Australia (1020/2002), ICCPR, A/58/40 vol. II (7 August 2003) 346 (CCPR/C/78/D/1020/2002) at Individual Opinion of Mr. Hipólito Solari-Yrigoyen,362.

- *Howell v. Jamaica* (798/1998), ICCPR, A/59/40 vol. II (21 October 2003) 21 (CCPR/C/79/D/798/1998) at paras. 2.4-2.6, 2.8, 2.9, 6.2, 6.4, 7 and 8.

...

2.4 In a letter dated 21 March 1997, the author complained to his counsel about the prison conditions at St. Catherine's District Prison, and particularly about an incident which occurred on 5 March 1997. On that day, as a reaction to an escape attempt initiated by four other inmates, some prisoners - including the author - were brutally beaten by two groups of 20 and 60 warders who punished whoever was directly or indirectly involved in the escape attempt. The author observes that "some warders started to beat me from every handle1/ while some were throwing away my personal belongings out of my cell" and that afterwards "the warders carried me into an empty bathroom where my ordeal started again".

2.5 As a result of the beatings, the author was brought to hospital where he informed the doctor that he was "feeling pain all over his body". The author was unable to contact counsel until some time later because he had suffered serious injury to one hand and was beaten to the point that "he could hardly walk". At the time of writing of his letter to the counsel - 16 days after the incident - he alleged that "various parts of [his] body is still swollen". Furthermore, his personal belongings as well as documents relating to his legal appeals were burned; in this connection, he reports that when he returned to his cell "it was almost empty and when I reach down stairs I saw a big fire on the compound with our personal belongings burning in the fire". The author adds that "as far as I understand, the warders got order to beat us and burn up our things".

2.6 The author submits that the scale of the warders' action and the apparent coordination of the respective groups of 20 and 60 warders can only be explained as deliberate and premeditated. In this connection, he alleges that the presence at the prison hospital of the Commissioner of Corrections as well as the Superintendent shortly after the incidents, taken together with the failure properly to investigate and prosecute the perpetrators of these actions, demonstrate the level at which the actions of the prison authorities were known and endorsed. He also states that he knew the names of the warders who searched his cell and beat him, but adds that he felt too threatened to denounce them.

...

2.8 On 20 March 1997, the Superintendent issued a "standing order", reportedly prohibiting all inmates to keep either papers or writing implements in their cells. It is noted that, however, the author was able to correspond in writing with his counsel on 21 March and 17 April 1997 and on 15 August 1997 with a friend, Ms. Katherine Shewell.

2.9 Two letters dated 6 January and 4 September 1997 from a friend of the author to counsel, describe the conditions of detention, such as the size of the cells, hygienic conditions, the poor diet and the lack of dental care. It is submitted that visitors under 18 were not allowed into the prison, and the author could not see his children (aged 9 and 6) since he had been imprisoned; the death row compound - where inmates can only leave cells for about 20 minutes per day - is small and dirty, with faeces everywhere. The author could touch the walls on either side when standing in the middle of the floor of his cell and had to paper the walls to cover the dirt. The entire compound smells of sewage. Hygienic and medical conditions are poor, and so is the food. Due to the poor diet and the lack of dental care, the author lost numerous teeth.

...

6.2 In relation to the claim as to the violation of articles 7 and 10 (1), the Committee observes that the author has given a detailed account of the treatment he was subjected to and that the State party has not challenged his grievances. The Committee considers that the repeated beatings inflicted on the author by warders amount to a violation of article 7 of the Covenant3/. Furthermore, taking into account the Committee's earlier views in which it has

found the conditions on death row in St. Catherine's District Prison to violate article 10 (1)4/, the Committee considers that the author's conditions of detention, taken together with the lack of medical and dental care and the incident of the burning of his personal belongings, violate the author's right to be treated with humanity and respect for the dignity of his person under article 10 (1) of the Covenant.

...

6.4 The Committee has noted the claim that the Superintendent's standing order allegedly deprived the author of writing implements and violated his right under article 19(2). It observes, however, that the author was able to communicate with counsel within one day of the issuance of this order, and thereafter with counsel and a friend. In the circumstances, the Committee is not in the position to conclude that the author's rights under article 19(2) were violated.

7. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 7 and 10(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 the author with an effective remedy, including compensation. The State party is also under an obligation to prevent similar violations in the future.

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Notes

1/ The author appears to refer to being made to run the gauntlet of a group of warders armed with sticks.

...

3/ See for example *McTaggart v. Jamaica*, No. 749/1997, para. 8.7, in which the author was beaten and had his personal belongings burnt.

4/ See particularly *McTaggart v. Jamaica*, communication No. 749/1997.

...

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- *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, 2.4-2.6, 2.8, 7.3-7.5, 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.

...

2.4 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.

...

2.8 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.

...

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 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... 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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- *Baroy v. The Philippines* (1045/2002), ICCPR, A/59/40 vol. II (31October 2003) 518 (CCPR/C/79/D/1045/2002) at paras. 2.1-2.3, 8.3 and 9.

...

LEGAL RIGHTS - CRIMINAL - Conditions of Arrest and Detention

2.1 On 2 March 1998, a woman was raped three times. The author and an (adult) co-accused were thereafter charged with three counts of rape with use of a deadly weapon contrary to article 266A(1),1/ in conjunction with article 266B(2),2/ of the Revised Penal Code. It is alleged that on the date of the offence, the author would have been 14 years, 1 month and 14 days old, by virtue of being born on 19 January 1984.

2.2 At trial, the defence introduced the issue of minority through the author, who claimed to have been born in 1982. The trial court instructed the appropriate government agencies to submit evidence on his true age. Three documents were submitted. A Certificate of Live Birth listed the date as 19 January 1984, while a Certificate of Late Registration of Birth showed the date as 19 January 1981, and an Elementary School permanent record as 19 January 1980. The trial court considered, in the light of the author's physical appearance, that the author's true date of birth was 19 January 1980, thus making him over 18 years of age at the time the offence was committed.

2.3 On 20 January 1999, the author and his (adult) co-accused were each convicted of three counts of rape with a deadly weapon and sentenced to death by lethal injection. In imposing the maximum penalty available, the Court considered that there were the aggravating circumstances of night-time and confederation, and no mitigating circumstances. By way of civil liability, each was further sentenced to pay, in respect of each count, PHP50,000 in indemnity, PHP50,000 in moral damages and PHP50,000 in civil damages. On 4 January 2002, the communication was submitted to the Committee.

...

8.3 In spite of this conclusion with respect to the claims under article 6 [finding the claim inadmissible], the Committee observes that sentencing a person to death and placing him or her on death row in circumstances where his or her minority has not been finally determined raises serious issues under articles 10 and 14, as well as potentially under article 7, of the Covenant. The Committee observes, however, with respect to the exhaustion of domestic remedies, that the author has filed a "partial motion for reconsideration", currently pending before the Supreme Court, requesting the Court to reconsider its treatment of his minority in its judgment of 9 May 2002...

9. The Committee therefore decides:

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

...

Notes

1/ This provision defines rape as committed "by a man who shall have carnal knowledge of

woman under any of the following circumstances:
a) through force, threat or intimidation; ...".

2/ This provision sets out : "Whenever the rape is committed with a use of a deadly weapon or by two or more persons, the penalty shall be *reclusion perpetua* to death."

- *Fabrikant v. Canada* (970/2001), ICCPR, A/59/40 vol. II (6 November 2003) 443 (CCPR/C/79/D/970/2001) at paras. 2.1, 5.3 and 9.3.

...
2.1 In May 1998, the author suffered a heart attack. Angiography showed that four of his arteries were blocked - two almost totally - and allegedly indicated the need for intervention. According to the author, there is no available treatment in Quebec, but there is in British Columbia.1/ He alleges that he has been in contact with a doctor there who is willing to perform the operation but that the prison authorities refuse to transfer him. He lodged a series of internal complaints which he says have been ignored.
...
5.3 In addition, the author provides an update on his situation, stating that on 12 December 2001, he was transferred to British Columbia to receive angioplasty which was performed on 7 January 2002. Angioplasty was also performed on 19 July 2002. He claims that the fact that this procedure was eventually performed proves that his complaint against Canada is valid. He adds that he would be prepared to withdraw his complaint if the State party can find a doctor to open the remaining three blocked arteries (apparently, angioplasty only managed to open one artery) or grant him access to such a doctor if he should find one, and if it accepts that prisoners themselves and not prison doctors should be permitted to decide which medical procedure they undergo.
...
9.3 The Committee notes the author's claim that he is being denied medical treatment in being refused a transfer to British Columbia to undergo surgery known as "angioplasty". It observes that, the author was transferred to British Columbia on three occasions for the purposes of undergoing angioplasty - a fact which the State party claims renders the communication moot. In his final comments to the Committee, the author claims that he needs angioplasty again and that he will require such treatment regularly in the future. Without considering the issue of whether a detainee has a right to choose or refuse a particular medical treatment, the Committee observes that at any rate the State party remains responsible for the life and well-being of its detainees, and that on at least three previous occasions the State party did transfer the author to British Columbia to undergo the requested procedure. In addition, the Committee notes that insufficient information has been provided to suggest that the authorities have ever failed to determine the most appropriate treatment

in accordance with professional medical standards. Thus, on the basis of the information provided, the Committee finds that the author has failed to substantiate for purposes of admissibility his allegation that the State party has violated any articles of the Covenant in his regard. The communication is therefore inadmissible under article 2 of the Optional Protocol.

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Notes

1/ The author provides letters from three surgeons who claim that on the basis of his medical chart they would be able to operate and a letter from another doctor with a different opinion.
...

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- *Kurbanova v. Tajikistan* (1096/2002), ICCPR, A/59/40 vol. II (6 November 2003) 354 (CCPR/C/79/D/1096/2002) at paras. 2.1, 7.2, 7.8, 8 and 9.

...
2.1 According to the author, Mr. Kurbanov went to the police on 5 May 2001 to testify as a witness. He was detained for seven days in the building of the Criminal Investigation Department of the Ministry of the Interior, where according to the author he was tortured. Only on 12 May 2001, a formal criminal charge of fraud was made against him, an arrest warrant was issued for him, and he was transferred to an investigation detention centre. He was forced to sign a declaration that he renounced the assistance of a lawyer.
...
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.
...
7.8 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.

- *Rameka v. New Zealand* (1090/2002), ICCPR, A/59/40 vol. II (6 November 2003) 330 (CCPR/C/79/D/1090/2002) at paras. 2.1-2.8, 6.2, 7.2-7.4, 8 and 9.

...
Mr. Rameka's case

2.1 On 29 March 1996, Mr. Rameka was found guilty in the High Court at Napier of two charges of sexual violation by rape, one charge of aggravated burglary, one charge of assault with intent to commit rape, and indecent assault. Pre-sentence and psychiatric reports provided to the court referred *inter alia* to the author's previous sexual offences, his propensity to commit sexual offences, his lack of remorse and his use of violence, concluding that there was a 20 per cent likelihood of further commission of sexual offences.

2.2 In respect of the first charge of rape, he was sentenced to preventive detention (that is, indefinite detention until release by the Parole Board) under section 75 of the Criminal Justice Act 1985,1/ concurrently to 14 years' imprisonment in respect of the second charge of rape, to two years' imprisonment in respect of the aggravated burglary and to 2 years' imprisonment for the assault with intent to commit rape. He was convicted and discharged in respect of the remaining indecent assault charge, as the sentencing judge viewed it as included in the other matters dealt with. He appealed against the sentence of preventive detention as being both manifestly excessive and inappropriate, and against the sentence of 14 years' imprisonment for rape as being manifestly excessive.

2.3 On 18 June 1997, the Court of Appeal dismissed the appeal, finding that the sentencing

judge was entitled to conclude, on the evidence, that there was a "substantial risk" that Mr. Rameka would offend again in an aggressive and violent manner upon release, and that there was "a high level of future dangerousness" from which the community had to be protected. The Court supported its conclusion by reference to Mr. Rameka's repeated use of a knife and violence in the context of sex-related offences, and his lengthy detention of his victim in each instance. It also found, with respect to the sentence for rape, that the 14 year term of imprisonment was "well within" the discretion of the sentencing judge.

Mr. Harris' case

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.

Mr. Tarawa's case

2.6 On 2 July 1999, Mr. Tarawa was found guilty of sexual violation by rape, two charges of sexual violation by unlawful sexual connection, indecent assault, burglary, two charges of aggravated burglary, two charges of kidnapping, being an accessory after the fact, three charges of aggravated robbery, demanding with menaces, and unlawfully entering a building.

Previously, he had committed multiple offences in three earlier incidents, involving breaking into homes and engaging in sexually-motivated violence, including two rapes. Subsequently, he committed further burglary and assault. The sentencing judge found a consistent pattern of predatory conduct, planned and executed with professionalism, exacerbated by the fact that some offences were committed while on bail. After considering the nature of the offending, its gravity and timespan, the nature of the victims, the response to previous rehabilitative efforts, the time since previous offending, the steps taken to avoid reoffending, the (non)acceptance of responsibility, the pre-sentence report, the psychological report and the psychiatric assessment of a very high risk of reoffending along with the relevant risk factors, the judge sentenced him to preventive detention in respect of the three sexual violation charges, and encouraged him to make use of the counselling and rehabilitative services available in prison. He was concurrently sentenced to 4 years' imprisonment on the aggravated burglary charge, 6 years for the kidnapping, 3 years for demanding with menaces, 3 years for aggravated burglary and aggravated robbery, 18 months for burglary and being an accessory after the fact, 6 years for a further kidnapping and 5 years for a further aggravated robbery, 6 months for indecent assault and 9 months for unlawful entry.

2.7 On 20 July 2000, the Court of Appeal, examining the appeal on the basis of the author's written submissions, considered the pattern of circumstances of each set of offences and found, on the entire background of the appellant, his unsuccessful rehabilitation efforts as well as the pre-sentence, psychiatric and psychological reports, that the conclusions of substantial risk requiring the protection of the public were open to the sentencing judge, who had properly weighed the available alternatives of finite sentences.

2.8 On 19 September 2001, the Judicial Committee of the Privy Council rejected all three authors' applications for special leave to appeal.

...

6.2 As to whether the authors can claim to be victims of a violation of the Covenant concerning preventive detention, as they have not yet served the amount of time that they would have had to have served to become eligible for release on parole under finite sentences applicable to their conduct, the Committee observes that the authors, having been sentenced to and begun to serve such sentences, will become effectively subject to the preventive detention regime after they have served 10 years of their sentence. As such, it is essentially inevitable that they will be exposed, after sufficient passage of time, to the particular regime, and they will be unable to challenge the imposition of the sentence of preventive detention upon them at that time. This situation may be contrasted with that in *A.R.S. v Canada* 23/, where the future application of the mandatory supervision regime to the prisoner in question was at least in part dependent on his behaviour up to that point, and thus speculative at an earlier point of time in the imprisonment. The Committee accordingly does not consider it inappropriate that the authors argue the compatibility of their sentence with the Covenant at an earlier point, rather than when 10 years' imprisonment have elapsed. The communication

is thus not inadmissible for want of a victim of a violation of the Covenant.

...

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.

7.3 Turning to the issue of the consistency with the Covenant of the sentences of preventive detention of both the remaining authors, Messrs. Rameka and Harris, once the non-parole period of 10 years expires, the Committee observes that after the 10-year period has elapsed, there are compulsory annual reviews by the independent Parole Board, with the power to order the prisoner's release if they are no longer a significant danger to the public, and that the decisions of the Board are subject to judicial review. The Committee considers that the remaining authors' detention for preventive purposes, that is, protection of the public, once a punitive term of imprisonment has been served, must be justified by compelling reasons, reviewable by a judicial authority, that are and remain applicable as long as detention for these purposes continues. The requirement that such continued detention be free from arbitrariness must thus be assured by regular periodic reviews of the individual case by an independent body, in order to determine the continued justification of detention for purposes of protection of the public. The Committee is of the view that the remaining authors have failed to show that the compulsory annual reviews of detention by the Parole Board, the decisions of which are subject to judicial review in the High Court and Court of Appeal, are insufficient to meet this standard. Accordingly, the remaining authors have not demonstrated, at the present time, that the future operation of the sentences they have begun to serve will amount to arbitrary detention, contrary to article 9, once the preventive aspect of their sentences commences.

7.4 Furthermore, in terms of the ability of the Parole Board to act in judicial fashion as a "court" and determine the lawfulness of continued detention under article 9, paragraph 4, of the Covenant, the Committee notes that the remaining authors have not advanced any reasons why the Board, as constituted by the State party's law, should be regarded as insufficiently independent, impartial or deficient in procedure for these purposes. The Committee notes, moreover, that the Parole Board's decision is subject to judicial review in the High Court and

Court of Appeal. In the Committee's view, it also follows from the permissibility, in principle, of preventive detention for protective purposes, always provided that the necessary safeguards are available and in fact enjoyed, that detention for this purpose does not offend the presumption of innocence, given that no charge has been laid against the remaining authors which would attract the applicability of article 14, paragraph 2, of the Covenant. 24/ As the detention in the remaining authors' cases for preventive purposes is not arbitrary, in terms of article 9, and no suffering going beyond the normal incidents of detention has been suggested, the Committee also finds that the remaining authors have not made out any additional claim under article 10, paragraph 1, that their sentence of preventive detention violates their right as prisoners to be treated with respect for their inherent dignity.

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.

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Notes

1/ Sections 75, 77 and 89 *Criminal Justice Act* 1985 provide as follows:

Sentence of preventive detention

"(1) This section shall apply to any person who is not less than 21 years of age, and who either

> (a) is convicted of an offence against section 128 (1) [sexual violation] of the Crimes Act 1961; or
>
> (b) Having been previously convicted on at least one occasion since that person attained the age of 17 years of a specified offence, is convicted of another specified offence, being an offence committed after that previous conviction.

(2) Subject to the provisions of this section, the High Court, if it is satisfied that it is expedient for the protection of the public that an offender to whom this section applies should be detained in custody for a substantial period, may pass a sentence of preventive detention…

(3A) A court shall not impose a sentence of preventive detention on an offender to whom subsection (1)(a) of this section applies unless the court

(c) Has first obtained a psychiatric report on the offender; and

(d) Having regard to that report and any other relevant report,-

Is satisfied that there is a substantial risk that the offender will commit a specified offence upon release."

Period of preventive detention indefinite

"An offender who is sentenced to preventive detention shall be detained until released on the direction of the Parole Board in accordance with this Act."

Discretionary release on parole

"(1) Subject to subsection (2) of this section, an offender who is subject to an indeterminate sentence is eligible to be released on parole after the expiry of 10 years of that sentence."

...

23/ [Case No. 91/1981, Decision adopted on 28 October 1991].

24/ See also *Wilson v. The Philippines* case No. 868/1999, Views adopted on 30 October 2003 at para. 6.5.

For dissenting opinions in this context, see Rameka v. New Zealand (1090/2002), ICCPR, A/59/40 vol. II (6 November 2003) 330 (CCPR/C/79/D/1090/2002) at Individual Opinion by Mr. Bhagwati, Ms. Chanet, Mr. Ahanhanzo and Mr. Yrigoyen, 347, Individual Opinion of Mr. Kälin, 348, Individual Opinion of Mr. Lallah, 349, Individual Opinion of Mr. Shearer and Mr. Wieruszewki, 352, and Individual Opinion of Mr. Ando,353.

- *Lobban v. Jamaica* (797/1998), ICCPR, A/59/40 vol. II (16 March 2004)15 at paras. 8.1, 8.2, 9 and 10.

...

8.1 The author has claimed a violation of articles 7 and 10, paragraph 1, on the ground of the conditions of detention to which he was subjected while detained on death row at St. Catherine's District Prison. In substantiation of his claim, the author has invoked reports of several non-governmental organizations. The Committee notes that the author refers to the inhuman and degrading prison conditions in general, such as the complete lack of mattresses

and very poor quality of food and drink, the lack of integral sanitation in the cells and open sewers and piles of refuse, as well as the absence of a doctor. In addition, he has made specific allegations, stating that he is detained 23 hours a day in a cell with no mattress, other bedding or furniture, that his cell has no natural light, that sanitation is inadequate, and that his food is poor. He is not permitted to work or to undertake education. In addition, he claims that there is a general lack of medical assistance, and that from 1996 he suffered from ulcers, gastro-enteritis, and haemorrhoids, for which he received no treatment.

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

...

9. The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by Jamaica of article 9, paragraph 3, and article 10, paragraph 1.

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

- *Arutyunyan v. Uzbekistan* (917/2000), ICCPR, A/59/40 vol. II (29 March 2004) 96 at paras. 6.2, 7 and 8.

...

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

of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary to separately consider the claims arising under article 7.

...

7. 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 (d), 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. 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. 2.1, 2.2, 10.3, 10.4 and 11.

...

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.

...

10.3 As to the alleged violation of article 9, paragraph 4, the Committee is prepared to accept that a "reasonableness" hearing in Federal Court promptly after the commencement of mandatory detention on the basis of a Ministers' security certificate is, in principle, sufficient judicial review of the justification for detention to satisfy the requirements of article 9, paragraph 4, of the Covenant. The Committee observes, however, that when judicial proceedings that include the determination of the lawfulness of detention become prolonged the issue arises whether the judicial decision is made "without delay" as required by the provision, unless the State party sees to it that interim judicial authorization is sought separately for the detention. In the author's case, no such separate authorization existed although his mandatory detention until the resolution of the "reasonableness" hearing lasted 4 years and 10 months. Although a substantial part of that delay can be attributed to the author who chose to contest the constitutionality of the security certification procedure instead of proceeding directly to the "reasonableness" hearing before the Federal Court, the latter procedure included hearings and lasted nine and half months after the final resolution of the constitutional issue on 3 July 1997. This delay alone is in the Committee's view too long in respect of the Covenant requirement of judicial determination of the lawfulness of detention without delay. Consequently, there has been a violation of the author's rights under article 9, paragraph 4, of the Covenant.

10.4 As to the author's later detention, after the issuance of a deportation order in August 1998, for a period of 120 days before becoming eligible to apply for release, the Committee is of the view that such a period of detention in the author's case was sufficiently proximate to a judicial decision of the Federal Court to be considered authorized by a court and therefore not in violation of article 9, paragraph 4.

...

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.

For dissenting opinions in this context, see Ahani v. Canada (1051/2002), ICCPR, A/59/40 vol. II (29 March 2004) 260 at Individual opinion of Mr. Nisuke Ando, 280, and Individual Opinion of Sir Nigel Rodley, Mr. Roman Wieruszewski and Mr. Ivan Shearer, 282.

- *Smirnova v. Russian Federation* (712/1996), ICCPR, A/59/40 vol. II (5 July 2004) 1 at paras. 2.3, 2.4, 2.6, 3, 10.1, 10.3, 10.5, 11 and 12.

...

2.3 According to the author, her arrest and detention were unlawful because she was taken

into custody after the expiration of the designated period for the completion of a preliminary investigation. She explains that under Russian criminal procedure, a suspect can be arrested only pursuant to an official investigation. In the author's case the investigation began on 5 February 1993 and expired on 5 April 1993, pursuant to article 133(1) of the Code of Criminal Procedure. Article 133(4) of the Code allows for a one-month extension of suspended and resumed investigations. Pursuant to this article, the preliminary investigation in the author's case was extended six times, three of which illegally, as acknowledged by the Municipal Prosecutor.

2.4 On 27 August 1995, the author submitted a complaint to the police investigator contesting the legality of her arrest and detention pursuant to article 220 (1) of the Code of Criminal Procedure. The investigator did not refer the complaint to the Tver inter-municipal Court until 1 September 1995, in violation of the requirement that such complaints be submitted to a court within one day. The author states that the Court dismissed the complaint on 13 September 1995 without having heard any argument from the parties, on the ground that it was not competent to review the legality of the arrest and detention since the investigation in the case had been completed. Yet this was the basis of the author's claim that her arrest had been unlawful. The author submits that the Court should have heard her case, because in reality the investigation had been extended and was ongoing, albeit, as the author contends, unlawfully. The author was unable to appeal against the decision of the Court, as article 331 of the Code of Criminal Procedure did not allow for an appeal against a decision in relation to a claim brought under article 220.

...

2.6 The author further submits that she suffers from a serious skin disease, haemorrhoidal vasculitis and that the conditions of the prison in which she was detained aggravated her medical condition. In this context, she states that there was no adequate food or medication in the prison, that the cells, designed for 24 persons, held 60, and that she was detained together with serious criminals. The author submits that, given she did not have any previous criminal record, and had not been charged with a serious or violent offence, she should not have been remanded in custody. With regard to the prison conditions in the Butyrskaya prison, reference is made to the report of the Special Rapporteur on torture of the Commission on Human Rights, dated 16 November 1994 2/. In March 1996, the author was transferred to a hospital ward, where she stayed until 17 May 1996, before being transferred back to her cell.

...

3. The author contends that her pre-trial detention contravened articles 9, 10 and 14 (3) of the Covenant, as she was deprived of her liberty in contravention of Russian law on criminal procedure, she was not informed promptly of the grounds of her arrest or of any of the charges against her, she was not brought promptly before a judge or judicial officer, and was detained awaiting trial despite the fact that she had no criminal record. She also alleges that the crime she was charged with was not a serious offence, and that there was no reason to

believe that she would not appear for investigation or trial. Further, she claims that she was denied the right to take proceedings before the court for a decision on the lawfulness of her arrest. She also invokes the rights contained in articles 7 and 10 of the Covenant in respect of the conditions of detention and lack of medical treatment.

...

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

10.3 With regard to the author's claim that she was not informed promptly of the charges against her, the Committee does not consider there to have been a violation by the State party of article 9(2) or 14(3) of the Covenant. Upon her arrest on 26 August 1995, it appears that she was not formally advised of the charges against her until 31 August 1995. However, it appears that she had been previously advised of the charges against her when she was interrogated in September 1994. The State party contends that the author was advised of the reasons for her arrest and why she was being placed in preventive detention. In these circumstances, the Committee considers that it is not in a position to establish any violation of the State party's obligations under articles 9(2) and 14(3)(a) of the Covenant.

...

10.5 The author's original communication raised issues under articles 7 and 10, paragraph 1, of the Covenant insofar as she claims that the physical circumstances of her detention amounted to cruel, inhuman or degrading treatment or punishment. The author has provided a detailed account of the circumstances of her detention. In response, the State party submitted that the author was provided with medical assistance during her detention. It did not provide details of the physical conditions in which the author was detained. Accordingly, the Committee cannot do otherwise than afford due weight to the author's claims. The

Committee, in accordance with its jurisprudence, considers that the burden of proof cannot rest solely with the author of the communication, considering that the author and the State party do not always have equal access to the evidence. In the circumstances, the Committee is of the view that the conditions of the author's detention as described in her complaint were incompatible with the State party's obligations under article 10, paragraph 1, of the Convention. In light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary separately to consider the claims arising under article 7 of the Covenant.

11. The Human Rights Committee...finds that the State party violated article 9, paragraphs 3 and 4, and article 10 (1) of the Covenant.

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

Notes

...

2/ E/CN.4/1995/34/Add.1, paras. 70 and 71.

- *Saidov v. Tajikistan* (964/2001), ICCPR, A/59/40 vol. II (8 July 2004) 164 at paras. 2.9, 2.10 and 6.4.

...

2.9 The author claims that her husband was detained in the Khudzhand District Police building from 25 November 1998 to 12 January 1999, although an arrested person was supposed to be kept there only for a maximum period of three days. On 12 January 1999, Mr. Saidov was transferred to the investigation centre No. 1 in Khudzhand and placed in a collective cell with 16 other detainees; the air circulation was insufficient and the cell was overcrowded. The food consisted exclusively of barley gruel; as her husband suffered from viral hepatitis before his arrest, he could not digest the food provided in the detention centre and he required a special diet, but was unable to obtain one. As a result, her husband's stomach was injured and he was obliged to consume only the food transmitted infrequently by his family.

2.10 On 24 December 1999, the Supreme Court found Mr. Saidov guilty of banditism; participation in a criminal organization; usurpation of power with use of violence; public call

for forced modification of the constitutional order; illegal acquisition and storing of fire guns and munitions, terrorism and murder, and sentenced him to death. The same day, he was transferred to death row, and placed in an individual cell measuring 1 by 2 metres, with a concrete floor with no bed but a thin mattress. The toilet consisted of a bucket in one of the corners. According to the author, her husband, a practising Muslim, was humiliated to have to pray in such conditions. On 25 June 2000, Mr. Saidov was transferred to Detention Centre SIZO No. 1 in Dushanbe, where, allegedly, conditions of detention and quality of food were identical. The author claims that her husband received only every fourth parcel she sent to him through the penitentiary authorities.

...

6.4 The Committee has taken note of the author's claims under article 10, paragraph 1, of the Covenant, relating to her husband's detention subsequent to the entry into force of the Optional Protocol during the investigation and on death row, due to the lack of medical assistance and the poor conditions of detention as exposed in paragraphs 2.9 and 2.10 above. In the absence of any State party's refutation, once again, due weight must be given to the author's allegations. Accordingly, the Committee concludes that article 10, paragraph 1, has been violated with Mr. Saidov's respect.

- *Everett v. Spain* (961/2000), A/59/40 vol. II (9 July 2004) 436 at paras. 2.1-2.3, 6.3 and 7.

...

2.1 The author arrived in Spain from the United Kingdom in 1983 and settled in Marbella with his wife. On 5 July 2000, he was arrested by the police pursuant to an extradition request from the United Kingdom based on a robbery alleged to have taken place in London in 1983, and on his alleged involvement in narcotics trafficking.

2.2 The author applied for provisional release. On 8 July 2000, Magistrates' Court No. 6 ruled that he should remain in provisional detention. The author appealed to the same court, arguing that he was a sick man and 70 years of age, and that he could not flee from justice because he had no identity documents. The court rejected his appeal in a judgement dated 20 July 2000. The author appealed to the First Criminal Division of the High Court, but his application was rejected on 10 October 2000. He also submitted an application for *amparo* to the Constitutional Court, but this was rejected on 16 November 2000.

2.3 The author's extradition was granted in a decision of the First Criminal Division dated 20 February 2001. The author submitted an appeal for reconsideration, which was rejected on 18 May 2001. The author again applied to the Constitutional Court for *amparo*, but his appeal was denied on 22 June 2001.

...

6.3 The author alleges a violation of his right under article 9, paragraph 1, on the grounds

that his provisional detention during the extradition proceedings was unwarranted, since there was no risk that he would abscond. In that regard, the State party maintains that the complaint should be found inadmissible under article 3 of the Optional Protocol, since the author was deprived of his liberty in accordance with the procedure established in the Law on Passive Extradition (No. 4/1985), and with the relevant international treaties and agreements. The State party adds that its decision was based on international detention orders 2/ arising from the author's alleged involvement in serious offences on the territory of the requesting State. It also maintains that the detention was the subject of properly reasoned judicial decisions in which it had been determined that there was a risk of flight. The Committee notes that the measures provided for under article 8, paragraph 3, of the Law on Passive Extradition may be applied at the State party's discretion, and also that, as the State party points out, the author made use of the domestic remedies available to him, in all of which his complaint received consideration. The Committee finds that this part of the communication is not duly substantiated and is therefore inadmissible under article 2 of the Optional Protocol.

...

7. Consequently, the Committee decides:

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

...

_____

Notes

...

2/ The State party appears to refer to a request for provisional arrest in accordance with relevant international treaties.

_____

- *Girjadat Siewpersaud et al. v. Trinidad and Tobago* (938/2000), ICCPR, A/59/40 vol. II (29 July 2004) 132 at paras. 2.2-2.5, 6.3, 7 and 8.

...

2.2 The authors were convicted of a murder said to have been committed between March and April 1985. The trial commenced in January 1988, approximately 34 months after arrest. The authors state that, throughout this time, they were detained in appalling conditions. From their conviction on 19 January 1988 to the commutation of their death sentences to life imprisonment on 4 January 1994, i.e. for six years they were confined to the death row section of State Prison in Port of Spain.

2.3 The authors contend that for the above period of time, they were held in solitary confinement in a cell measuring 9 by 6 feet containing a bench, a bed, a mattress and a table.

In the absence of sanitation facilities in the cell, a plastic pail was provided as a toilet. Deolal Sukhram's cell was in front of the prison officers' toilet and bath which meant that his cell was usually cold and damp, due to water leaking from the bath. A ventilation hole measuring 36 by 24 inches, provided scarce and inadequate ventilation and light to the authors' cells. The only other light provided was by a fluorescent neon light lit for 23 hours a day located outside the cell above the door. The lack of adequate light damaged Deolal Sukhram's eyesight necessitating the use of glasses. The authors were allowed out of their cells for exercise only one hour per week.

2.4 Since the commutation of their death sentences, the authors have been detained at the State Prison in similarly degrading conditions. Each author is detained in a cell together with 8 to 14 other prisoners. The cell measures 9 by 6 feet and contains one iron bed with no mattress. As a result, prisoners are forced to sleep on the concrete floor on pieces of cardboard. Cells are infested with cockroaches, rats and flies and are generally dirty. There is inadequate ventilation and the cells heat up, making it impossible to sleep. The crowded conditions and the poor ventilation result in a general lack of oxygen in the cells, causing Deolal Sukhram to feel drowsy and suffer from continuous headaches.

2.5 In the absence of integral sanitation, each cell is provided with one bucket that is emptied only every 16 hours. The bucket causes a constant stench. In the absence of toiletries or soap, it is impossible to keep any standard of hygiene or health care. Food is inadequate and virtually inedible. Prisoners are given stale bread and rotten meat or fish every day. The kitchen in which the food is prepared is only 10 feet away from the toilets and is infested with vermin. There is infrequent access to medical treatment. Jainerine Persaud suffers from migraines and has not been provided with proper medical treatment, although this was prescribed by a doctor. There are no provisions for facilitating religious worship of any kind. Writing of letters is restricted to one letter per month and Deolal Sukhram is denied access to legal consultation on a regular basis. Counsel submits the affidavit of one Mr. Lawrence Pat Sankar, who was held at the State Prison at the same time as the authors, and who confirms the conditions of detention in the prison.

...

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 as described in paragraphs 2.3, 2.4 and 2.5 violate their right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to article 10, paragraph 1, of the Covenant. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary separately to consider the claims arising under article 7 of the Covenant.

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

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

- *Khomidov v. Tajikistan* (1117/2002), ICCPR, A/59/40 vol. II (29 July 2004) 363 at paras. 6.3, 7 and 8.

...
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.
...
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.

- *Rolando v. The Philippines* (1110/2002), ICCPR, A/60/40 vol. II (3 November 2004) 161 at paras. 2.1, 2.2, 2.4, 5.4-5.6, 6 and 7.

...
2.1 In September 1996, the author was arrested and detained at a police station, without a

warrant. He was told that he was being detained after allegations made by his wife of the rape of his stepdaughter. Before, the author was employed as a police officer. He requested to see his arrest warrant and a copy of the formal complaint, but did not receive a copy of either. He claims that he was not informed of his right to remain silent or of his right to consult a lawyer, as required under article III, section 12 (1) of the Philippine Constitution of 1987. On 1 November 1996, he was released. Throughout his detention, he was not brought before any judicial authority, nor was he formally charged with an offence.

2.2 On 27 January 1997, he was arrested again and charged with the rape of his stepdaughter Lori Pagdayawon, under article 335, paragraph 3, of the Revised Penal Code, as amended. He claims that he was not informed of his right to remain silent or his right to consult a lawyer. He also claims that the first opportunity he had to engage a private lawyer was at the inquest. The same lawyer represented him throughout the proceedings. On 27 May 1997, the Regional Trial Court of Davao City found him guilty as charged and sentenced him to death, as well as to pay the sum of 50,000 pesos to the victim. 1/ According to the author, the death penalty is mandatory for the crime of rape; it is a crime against the person by virtue of Republic Act No. 8353.

...

2.4 The author describes the procedure set out in paragraph 7 (a) of EP 200, issued by the Bureau of Corrections pursuant to Republic Act 8177, for his execution. It provides that the condemned individual shall only be notified of the execution date at dawn on the date of execution and that the execution must take place within 8 hours of the accused being so informed. No provision is made for notifying the family of the condemned person. The only contact that the accused may have is with a cleric or with his lawyer. Contact can only take place through a mesh screen.

...

5.4 The Committee notes the author's claims of violations under articles 7 and 10, paragraph 1, on account of the fact that he would not be notified of the date of his execution until dawn of the day in question, whereupon he would be executed within 8 hours and would have insufficient time to bid farewell to family members and organize his personal affairs. It further notes the State party's contention that the death sentence shall be carried out "not earlier than one (1) year nor later than eighteen (18) months after the judgement has become final and executory, without prejudice to the exercise by the President of his executive clemency powers at all times". 8/ The Committee understands from the legislation that the author would have at least one year and at most 18 months, after the exhaustion of all available remedies, during which he may make arrangements to see members of his family prior to notification of the date of execution. It also notes that, under section 16 of the Republic Act No. 8177, following notification of execution he would have approximately eight hours to finalize any personal matters and meet with members of his family. The Committee reiterates its prior jurisprudence that the issue of a warrant for execution necessarily causes intense anguish to the individual concerned and is of the view that the

State party should attempt to minimise this anguish as far as possible. 9/ However, on the basis of the information provided, the Committee cannot find that the setting of the time of the execution of the author within eight hours after notification, considering that he would already have had at least one year following the exhaustion of domestic remedies and prior to notification to organize his personal affairs and meet with family members, would violate his rights under articles 7, and 10, paragraph 1.

5.5 As to the author's claims under article 9, in light of the State party's failure to contest the factual submissions of the author, the Committee concludes that, upon arrest in September 1996, 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 applicable domestic law; and that after his arrest, he was not brought promptly before a judge. Consequently, there has been a violation of article 9, paragraphs 1, 2 and 3, of the Covenant.

5.6 As to the author's uncontested claim that he did not have access to a lawyer during his initial period of detention, and that during both periods of detention, he was not informed of his right to legal assistance, the Committee finds a violation of article 14, paragraph 3 (d), of the Covenant.

6. The Human Rights Committee...is of the view that the facts as found by the Committee reveal a violation by the Philippines of articles 6, paragraphs 1, 9, paragraphs 1, 2 and 3 and 14, paragraph 3 (d) of the International Covenant on Civil and Political Rights.

7. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee concludes that the author is entitled to an appropriate remedy including commutation of his death sentence. The State party is under an obligation to avoid similar violations in the future.

Notes

1/ The judgement reads as follows: "The crime committed is statutory rape. The penalty imposable, considering the circumstances of relationship being present, is the supreme penalty of death. The court is left with no alternative but to obey the mandate of the law in the imposition of the penalty. In the language of the Supreme Court in *People v. Leo Echegaray, G.R.* No. 117472, June 25, 1996, 'The law has made it inevitable under the circumstances of this case that the accused-appellant face the supreme penalty of death.'"

...

8/ Section 1, Republic Act No. 8177.

9/ *Pratt and Morgan v. Jamaica*, case No. 210/1986 and 225/1987, Views adopted on 6 April 1989.

- *Gorji-Dinka v. Cameroon* (1134/2002), ICCPR, A/60/40 vol. II (17 March 2005) 194 at paras. 5.2, 5.3, 6 and 7.

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

5.3 The Committee notes that the author's claim that he was initially kept in a cell with 20 murder convicts at the headquarters of the *Brigade mixte mobile* has not been challenged by the State party, which has not adduced any exceptional circumstances which would have justified its failure to segregate the author from such convicts in order to emphasize his status as an unconvicted person. The Committee therefore finds that the author's rights under article 10, paragraph 2 (a), of the Covenant were breached during his detention at the BMM headquarters.
...
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
...
12/ General comment No. 21 [44] on art. 10, paras. 3 and 5.

- *Marques v. Angola* (1128/2002), ICCPR, A/60/40 vol. II (29 March 2005) 181 at paras. 2.1-

LEGAL RIGHTS - CRIMINAL - Conditions of Arrest and Detention

2.6, 6.1-6.6, 7 and 8.

...

2.1 On 3 July, 28 August and 13 October 1999, the author, a journalist and the representative of the Open Society Institute in Angola, wrote several articles critical of Angolan President *dos Santos* in an independent Angolan newspaper, the *Agora*. In these articles, he stated, *inter alia*, that the President was responsible "for the destruction of the country and the calamitous situation of State institutions" and was "accountable for the promotion of incompetence, embezzlement and corruption as political and social values."

2.2 On 13 October 1999, the author was summoned before an investigator at the National Criminal Investigation Division (DNIC) and questioned for approximately three hours before being released. In an interview later that day with the Catholic radio station, *Radio Ecclésia*, the author reiterated his criticism of the President and described his treatment by the DNIC.

2.3 On 16 October 1999, the author was arrested at gunpoint by 20 armed members of the Rapid Intervention Police and DNIC officers at his home in Luanda, without being informed about the reasons for his arrest. He was brought to the Operational Police Unit, where he was held for seven hours and questioned before being handed over to DNIC investigators, who questioned him for five hours. He was then formally arrested, though not charged, by the deputy public prosecutor of DNIC.

2.4 From 16 to 26 October 1999, the author was held *incommunicado* at the high security Central Forensic Laboratory (CFL) in Luanda, where he was denied access to his lawyer and family and was intimidated by prison officials, who asked him to sign documents disclaiming responsibility of the CFL or the Angolan Government for eventual death or any injuries sustained by him during detention, which he refused to do. He was not informed of the reasons for his arrest. On arrival at the CFL, the chief investigator merely stated that he was being held as a UNITA (National Union for the Total Independence of Angola) prisoner.

2.5 On or about 29 October 1999, the author was transferred to *Viana* prison in Luanda and granted access to his lawyer. On the same day, his lawyer filed an application for *habeas corpus* with the Supreme Court, challenging the lawfulness of the author's arrest and detention, which was neither acknowledged, nor assigned to a judge or heard by the Angolan courts.

2.6 On 25 November 1999, the author was released from prison on bail and informed of the charges against him for the first time. Together with the director, A. S., and the chief editor, A.J.F., of *Agora*, he was charged with "materially and continuously committ[ing] the crimes characteristic of defamation and slander against His Excellency the President of the Republic and the Attorney General of the Republic…by arts. 44, 46 all of Law no 22/91 of June 15

(the Press Law) with aggravating circumstances 1, 2, 10, 20, 21 and 25, all of articles 34 of the Penal Code." The terms of bail obliged the author "not to leave the country" and "not to engage in certain activities that are punishable by the offence committed and that create the risk that new violations may be perpetrated - Art 270 of the Penal Code". Several requests by the author for clarification of these terms were unsuccessful.

...

6.1 The first issue before the Committee is whether the author's arrest on 16 October 1999 and his subsequent detention until 25 November 1999 were arbitrary or otherwise in violation of article 9 of the Covenant. In accordance with the Committee's constant jurisprudence,16/ the notion of "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. No such element has been invoked in the instant case. Irrespective of the applicable rules of criminal procedure, the Committee observes that the author was arrested on, albeit undisclosed, charges of defamation which, although qualifying as a crime under Angolan law, does not justify his arrest at gunpoint by 20 armed policemen, nor the length of his detention of 40 days, including 10 days of incommunicado detention. The Committee concludes that in the circumstances, the author's arrest and detention were neither reasonable nor necessary but, at least in part, of a punitive character and thus arbitrary, in violation of article 9, paragraph 1.

6.2 The Committee notes the author's uncontested claim that he was not informed of the reasons for his arrest and that he was charged only on 25 November 1999, 40 days after his arrest on 16 October 1999. It considers that the chief investigator's statement, on 16 October 1999, that the author was held as a *UNITA* prisoner, did not meet the requirements of article 9, paragraph 2. In the circumstances, the Committee concludes that there has been a violation of article 9, paragraph 2.

6.3 As regards the author's claim that he was not brought before a judge during the 40 days of detention, the Committee recalls that the right to be brought "promptly" before a judicial authority implies that delays must not exceed a few days, and that *incommunicado* detention as such may violate article 9, paragraph 3.17/ It takes note of the author's argument that his 10-day *incommunicado* detention, without access to a lawyer, adversely affected his right to be brought before a judge, and concludes that the facts before it disclose a violation of article 9, paragraph 3. In view of this finding, the Committee need not pronounce itself on the alleged violation of article 14, paragraph 3(b).

6.4 As to the author's claim that, rather than being detained in custody for 40 days, he should have been released pending trial, in the absence of a risk of flight, the Committee

notes that the author was not charged until 25 November 1999, when he was also released from custody. He was therefore not "awaiting" trial within the meaning of article 9, paragraph 3, before that date. Moreover, he was not brought before a judicial authority before that date, which could have determined whether there was a lawful reason to extend his detention. The Committee therefore considers that the illegality of the author's 40-day detention, without access to a judge, is subsumed by the violations of article 9, paragraphs 1 and 3, first sentence, and that no issue of prolonged pretrial detention arises under article 9, paragraph 3, second sentence.

6.5 As regards the alleged violation of article 9, paragraph 4, the Committee recalls that the author had no access to counsel during his *incommunicado* detention, which prevented him from challenging the lawfulness of his detention during that period. Even though his lawyer subsequently, on 29 October 1999, applied for *habeas corpus* to the Supreme Court, this application was never adjudicated. In the absence of any information from the State party, the Committee finds that the author's right to judicial review of the lawfulness of his detention (art. 9, para. 4) has been violated.

6.6 With respect to the author's claim under article 9, paragraph 5, the Committee recalls that this provision governs the granting of compensation for arrest or detention that is "unlawful" either under domestic law or within the meaning of the Covenant.18/ It recalls that the circumstances of the author's arrest and detention gave rise to violations of article 9, paragraphs 1 to 4, of the Covenant, and notes the author's uncontested argument that the State party's failure to bring him before a judge during his 40-day detention also violated article 38 of the Angolan Constitution. Against this background, the Committee deems it appropriate to deal with the issue of compensation in the remedial paragraph.
...
7. The Human Rights Committee...is of the view that the facts before it reveal violations of article 9, paragraphs 1, 2, 3 and 4, and of articles 12 and 19 of the Covenant.

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

Notes

...

16/ See communication No. 305/1988, *Van Alphen v. The Netherlands*, Views adopted on 23 July 1990, at para. 5.8; communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, at para. 9.8; communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, at para. 9.2.

17/ Communication No. 277/1988, *Terán Jijón v. Ecuador*, Views adopted on 26 March 1992, at para. 5.3.

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

- *Khalilov v. Tajikistan* (973/2001), ICCPR, A/60/40 vol. II (30 March 2005) 74 at paras. 2.5-2.8, 2.11, 2.12, 7.2, 7.3, 7.7, 8 and 9.

...
2.5 According to the author, her son was beaten by investigators to make him confess participation in different unresolved crimes, including murder, use of violence, robberies and theft, and different other crimes that occurred between 1998 and 2000. According to her, the investigators refused to interrogate neighbours of the aunts in whose houses her son hid between December 1997 and January 2000, and who could have testified that he was innocent.

2.6 On an unspecified date, Mr. Khalilov was transferred from the Lenin District Police Department to Kaferingansky District Police Department. In the meantime, his father was taken from his workplace and brought to his son in the Kaferingansky District Police Department. The father noted that his son had been beaten and stated that he would complain to the competent authorities. The investigators began to beat him in front of his son. The author's son was threatened and told that he had to confess his guilt of two murders during a TV broadcast or otherwise his father would be killed. Mr. Khalilov confessed guilt in the two murders as requested. Notwithstanding, the investigators killed his father 1/.

2.7 On 12 February, Mr. Khalilov was shown again on national television (broadcast "Iztirob"). According to the author, he had been beaten and his nose was broken, but the cameras showed his face only from one particular angle that did not reveal these injuries.

2.8 Mr. Khalilov's case was examined by the Supreme Court jointly with the cases of other five co-accused 2/. The author's son was found guilty of the crimes under articles 104(2) (homicide), 181 (3) (hostage taking), 186 (3) (banditism), 195 (3) (illegal buying, selling, keeping, transporting of weapons, ammunitions, explosives, etc.), 244 (theft), and 249 (robbery with use of violence), of the Criminal Code of Tajikistan. He was sentenced to

death on 8 November 2000. According to the author, no victim or injured party recognized her son in court as a participant in the criminal acts, notwithstanding the fact that the witnesses had declared that they could recognize by face every participant in the crimes. The Court allegedly ignored their statements and refused to take them into account or to include them in its decision.

...

2.11 The author also explains that she does not know where her son is held. The officials of the SIZO No. 1 Detention Centre in Dushanbe allegedly had refused to accept her parcels, telling that her son was removed, without explaining further.

2.12 On 18 February 2005, the author informed the Committee that she received a letter from the Deputy Chairman of the Supreme Court, dated 2 February 2005, where it was stated that her son was executed on 2 July 2001.

...

7.2 The Committee has taken note of the author's allegations that her son, while in detention, was ill-treated and beaten by the investigators to force him to confess guilt and that in order to put additional pressure on him, his father was beaten and tortured in front of him and as a consequence died in the police premises. The author furthermore identified by name some of the individuals alleged to have been responsible for the beatings of her son and for burning her husband's hands with an iron. In the absence of any State party information, due weight must be given to the author's allegations, to the effect that they have been sufficiently substantiated. The Committee considers that the facts before it justify the conclusion that the author's son was subjected to torture and to cruel and inhuman treatment, in violation of articles 7 and 10, paragraph 1, of the Covenant.

7.3 As above-mentioned acts were inflicted by the investigators on Mr. Khalilov to make him to confess guilt in several crimes, the Committee furthermore considers that the facts before it also disclose a violation of article 14, paragraph 3 (g), 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.

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Notes

1/ The author submits a letter of her son (dated 27 December 2000), addressed to the Committee, in which M. Khalilov contends that his father was brought to the police department and was beaten, humiliated, and burned with an iron by the investigators, until he died. According to Mr. Khalilov, his father was returned home dead and was buried on 9 February 2000. Mr. Khalilov gives the names of two officials who participated in his and his father's beatings: one N., chief of a Criminal Inquiry Department, and his deputy, U. According to him, there were also 3-4 other persons.

2/ The exact dates of the proceedings are not provided.

...

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

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- *Radosevic v. Germany* (1292/2004), ICCPR, A/60/40 vol. II (22 July 2005) 438 at paras. 2.1, 2.2, 2.4, 7.2, 7.3 and 8.

...

2.1 The author served a prison term in Heimsheim prison in Germany from 10 March 1998 to 28 February 2003, when he was deported. The remainder of his prison term was suspended, provided that he would not return to Germany.

2.2 During imprisonment, the author performed work, as required under section 41 of the German Enforcement of Sentences Act. He was remunerated from April 1998 until August 1999 and again in April 2000, as well as from June until August 2001. The wages were calculated pursuant to section 200 of the Enforcement of Sentences Act, on the basis of 5 per cent of the base amount 2/ from April until August 1999 and in April 2000, and on the basis of 9 per cent of the base amount from June until August 2001. They ranged from about 180 to about 400 Deutsche Mark (DM) per month.

...

2.4 By judgement of 1 July 1998, the Federal Constitutional Court ruled that the constitutional principle of resocialization of prisoners requires adequate remuneration for their work; the Court set aside the calculation methods for the wages of prisoners laid down in section 200 of the Enforcement of Sentences Act (5 per cent of the base amount, despite the legislator's original intention progressively to raise the level of remuneration to 40 per cent of the base amount). It considered the average wages paid to prisoners under that legislation, which amounted to 1.70 DM per hour or 10 DM per day, or 200 DM per month, in 1997, to be incompatible with the German Basic Law, in the absence of any other work-related benefits apart from the employer's contribution to the prisoner's unemployment insurance. The Court argued that "in the light of the amount paid for mandatory work performed by a prisoner, he cannot be convinced that honest work is an appropriate means for earning a living" after his release. However, it allowed the legislator a transitional period, to run until 31 December 2000, to introduce an adequate raise in the remuneration of work as well as revised provisions for social insurance coverage of such work.

...

7.2 The Committee notes the author's argument that his remuneration calculated on the basis of 5 per cent of the base amount between April 1998 and August 1999 and in April 2000, and on the basis of 9 per cent of the base amount between June and August 2001, was grossly and unjustifiably disproportionate to wages paid for similar work performed by the regular workforce, thereby violating his right to equality under article 26 of the Covenant. It also notes that the State has invoked its reservation to article 5, paragraph 2 (a), of the Optional Protocol, to the extent that it precludes the Committee from examining communications "by means of which a violation of article 26 [...] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant". The Committee considers that the author has not sufficiently substantiated, for purposes of admissibility, his claim that he was a victim of discrimination based on his status as a prisoner because he received only a small part of what he would have been paid on the labour market. In particular, he has not provided any information on the type of work that he performed during his incarceration and whether it was of a kind that is available in the labour market, nor about the remuneration paid for comparable work in the labour market. Mere reference to a certain percentage of the base amount, i.e. the average amount of benefits payable under the German statutory pensions insurance scheme, does not suffice to substantiate the alleged discriminatory discrepancy between the remuneration for his work and work performed by the regular workforce. It follows that this part of the communication is inadmissible under article 2 of the Optional Protocol. The Committee therefore need not address the issue of the State party's reservation concerning article 26.

7.3 The Committee further notes the author's claims that article 26, read in conjunction with article 8, paragraph 3 (c) (i), contains a right to adequate remuneration for work performed by prisoners, and that he was discriminated against in the enjoyment of that right because of the continued application of section 200 of the Enforcement of Sentences Act for a

transitional period of two years and six months after the Constitutional Court had declared that provision incompatible with the constitutional principle of resocialization of prisoners. It considers that article 8, paragraph 3 (c) (i), read in conjunction with article 10, paragraph 3, of the Covenant requires that work performed by prisoners primarily aims at their social rehabilitation, as indicated by the word "normally" in article 8, paragraph 3 (c) (i), but does not specify whether such measures would include adequate remuneration for work performed by prisoners. While reiterating that, rather than being only retributory, penitentiary systems should seek the reformation and social rehabilitation of prisoners,13/ the Committee notes that States may themselves choose the modalities for ensuring that treatment of prisoners, including any work or service normally required of them, is essentially directed at these aims. It notes that the German Constitutional Court justified the transitional period, during which prisoners were continued to be remunerated on the basis of 5 per cent of the base amount, with the fact that the necessary amendment of section 200 of the Enforcement of Sentences Act required a reassessment by the legislator of the underlying resocialization concept. It further recalls that it is generally for the national courts, and not for the Committee, to review the interpretation or application of domestic legislation in a particular case, unless it is apparent that the courts' decisions are manifestly arbitrary or amount to a denial of justice.14/ The Committee considers that the author has not substantiated any such defects in relation to the Constitutional Court's decision to allow the legislator a transitional period until 31 December 2000 to amend section 200. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;
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2/ Section 18 of Book IV of the German Social Security Code defines the base amount as follows: "Without prejudice to the specific provisions applicable to the different insurance systems, base amount within the meaning of the provisions on social security means the average amount of benefits payable under the statutory pensions insurance during the preceding calendar year, rounded up to the next highest amount which can be divided by 420."

...

13/ General comment 21 [44], 10 April 1992, at para. 10.

14/ Communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision on admissibility adopted on 2 November 2004, at para. 7.3; communication No. 1138/2002, *Arenz et al. v. Germany*, decision on admissibility adopted on 24 March 2004, at para. 8.6.

LEGAL RIGHTS - CRIMINAL - Conditions of Arrest and Detention

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For dissenting opinion in this context generally, see:

- *Randolph v. Togo* (910/2000), ICCPR, A/59/40 vol. II (27 October 2003) 79 (CCPR/C/79/D/910/2000) at Individual Opinion by Mr. Hipolito Solari-Yrigoyen, 89.
- *Chanderballi v. Austria* (944/2000), ICCPR, A/60/40 vol. II (26 October 2004) 285 at Individual Opinion of Mr. Hipolito Solari Yrigoyen, 293.